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Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant:	Ms Alison Sandy
Agency:	SA Police
Ombudsman reference:	2020/05319
Agency reference:	FOI21/0099
Determination:	The determination of the agency is confirmed.
Date of determination:	22 March 2021
Issues considered:	Definition of personal affairs Whether disclosure constitutes an offence
Exemption clauses relied upon:	Clause 6(1) Clause 12(1)
Legislation considered:	<i>Freedom of Information Act 1991</i> <i>Emergency Management Act 2004</i> <i>Emergency Management Regulations 2009</i>

Terms of the original application:

Documents, specifically reports and AV material such as CCTV/video footage and photos, of offences committed relating to COVID-19 since 1 March 2020 to the date of this application. I'm specifically seeking access to documents, containing the following information: - The number and amount in \$ of COVID-19 related fines issued; - A breakdown of the types of offences and where and when they occurred; - Of those, how many were paid and how many are overdue. If a summary documents, please limit my application to that and related AV material. Please exclude duplicates, documents that have already been publicly released, media reports/articles/releases and correspondence with media. Please note, I do not consent to documents being deemed irrelevant without consultation and I do consent to edited copies of documents with exempt material redacted or blurred/pixelated.

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REASONS

Application for access

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* the applicant requested access from the agency to:

Documents, specifically reports and AV material such as CCTV/video footage and photos, of offences committed relating to COVID-19 since 1 March 2020 to the date of this application. I'm specifically seeking access to documents, containing the following information: - The number and amount in \$ of COVID-19 related fines issued; - A breakdown of the types of offences and where and when they occurred; - Of those, how many were paid and how many are overdue. If a summary documents, please limit my application to that and related AV material. Please exclude duplicates, documents that have already been publicly released, media reports/articles/releases and correspondence with media. Please note, I do not consent to documents being deemed irrelevant without consultation and I do consent to edited copies of documents with exempt material redacted or blurred/pixelated.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 1 March 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. The agency indicated that it had no further submissions to make.
6. The applicant contacted my Office for advice regarding my provisional determination. My Legal Officer informed the applicant that her request for advice was outside the scope of this external review.
7. I have not received any further submissions, and accordingly my views are the same as those expressed in my provisional determination.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access. The following clause is relevant to this external review:

¹ *Freedom of Information Act 1991*, section 12.

6–Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.
- (3a) A document is an exempt document if it contains matter—
 - (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and
 - (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

12–Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
 11. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

12. The agency refused access to part of the application for access pursuant to section 20(1)(b) on the basis that the information was available from another source.
13. With respect to the other part of the application for access, the agency identified four documents within the scope of the application.
14. The applicant has indicated that she only contests the determination in relation to the documents found within scope.
15. Two documents are expiation notices and two documents are body camera footage.
16. The agency released the four documents in part, redacting information pursuant to clauses 6(1) and 12(1).

Issues in this review

17. It is for me to consider whether the agency has justified its determination to refuse access to the documents in part and to determine whether to confirm, vary or reverse the agency's determination in regard to the documents.

Consideration

18. The agency submits that the material in documents 1 to 4 is exempt pursuant to clause 12(1).
19. In order for clause 12(1) to apply to a document, the document must contain matter the disclosure of which would constitute an offence against an Act.
20. The agency submits that disclosure of the information would be an offence under section 31A of the *Emergency Management Act 2004* (the **EM Act**) and regulation 5 of the *Emergency Management Regulations 2009* (the **EM Regulations**).
21. Section 31A of the EM Act provides:
 - 31A—Confidentiality
 - If a person, in the course of the administration or enforcement of this Act, obtains—
 - (a) medical information relating to another; or
 - (b) information the disclosure of which would involve the disclosure of information relating to the personal affairs of another,the person must not intentionally disclose that information unless—
 - (c) the disclosure is made in the course of the administration or enforcement of this Act; or
 - (d) the disclosure is made with the consent of the other person; or
 - (e) the disclosure is required by a court or tribunal constituted by law.Maximum penalty: \$5 000.
22. The above section is mirrored in the section 5 of the EM Regulations.
23. In order for the confidentiality provision to apply, the information must have been obtained in the administration or enforcement of the EM Act.
24. Section 25 of the EM Act sets out powers that the State Co-ordinator and authorised officers may exercise when responding to a declared emergency.
25. Pursuant to section 23(1) of the EM Act, a major emergency was declared on 22 March 2020 to address ‘the outbreak of the Human Disease’ named COVID-19 within South Australia’.
26. This declaration has been extended and was in effect during the time in which the documents were created, as evidenced at the following web address:
<https://www.covid-19.sa.gov.au/emergency-declarations/emergency-declaration>
27. Accordingly, the powers granted under section 25 of the EM Act have been enlivened from 22 March 2020 and continue to be in operation.
28. Section 25(2)(o) of the EM Act provides that an authorised officer of the EM Act may do or cause a number of actions to occur, one of which is ‘exercise any prescribed power’.
29. Prescribed powers are defined in regulation 4 of the EM Regulations. Under regulation 4(d), an authorised officer may direct a person to remain isolated or segregated from

- other persons or to take other measures to prevent the transmission of a disease or condition to other persons.
30. The documents came into existence following police officers issuing expiation notices for failure to comply with directions to prevent the spread of COVID-19. Given this, I am satisfied that the information in the documents were obtained in the course of the administration or enforcement of the EM Act.
 31. Having been satisfied that the information in the documents were obtained in the course of the administration or enforcement of the EM Act, I now turn to whether disclosure would be an offence against the Act.
 32. I note that the confidentiality provisions of the EM Act and EM Regulations are narrower than the scope of clause 6 of the FOI Act, as there is no requirement that disclosure must be unreasonable. Instead, an offence occurs simply if disclosure would involve the disclosure of information relating to the personal affairs of another.
 33. The term 'personal affairs' is not defined in the EM Act or the EM Regulations. In the absence of an alternative definition, I consider it appropriate to afford the term with the same meaning as within the FOI Act.
 34. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. Among other things, it provides that 'personal qualities or attributes' are a person's personal affairs. The term has also been held to involve 'matters of private concern to an individual'² and the 'composite collection of activities personal to the individual concerned'.³
 35. On my viewing of the documents, I consider that the redacted information, if further disclosed, would involve the disclosure of information relating to the personal affairs of another.
 36. The footage of the videos and the comments of the expiation notices directly relate to police interactions with persons other than the police. I consider that the interaction of individuals with the police where there are implications of wrongdoing would be matters of private concern to the individuals involved. There is little of substance in the footage and documents that do not reveal the personal affairs of another person.
 37. Even if the footage were redacted to a lesser extent, I would still consider disclosure to be disclosure of information relating to the personal affairs of another. I would still consider the footage to be information relating to that person's personal affairs in so far as the footage reveals anything to do with the subjects of the footage, even if they are not identifiable. This is also the case of the information contained in the expiation notices.
 38. This consideration differs from the application of clause 6(1) of the FOI Act. Redactions of identifying information lessens the likelihood that disclosure of the information would be unreasonable, however in those circumstances the information remains as information concerning the personal affairs of an individual.
 39. Accordingly, I consider the further release of any information contained in the documents would be an offence against the EM Act and EM Regulations, and therefore the information is exempt pursuant to clause 12(1).

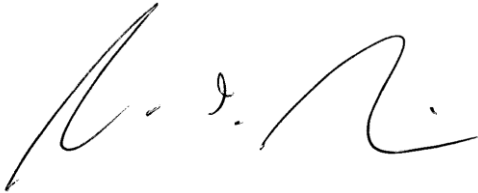
² *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625 citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

³ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

40. As I am satisfied that the information is exempt pursuant to clause 12(1) I do not consider it necessary to consider the application of clause 6.

Determination

41. In light of my views above, I confirm the agency's determination.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

22 March 2021

APPENDIX**Procedural steps**

Date	Event
16 July 2020	The agency received the FOI application dated 16 July 2020.
23 September 2020	The agency determined the application.
11 October 2020	The agency received the internal review application dated 11 October 2020.
16 October 2020	The agency confirmed determination.
28 October 2020	The Ombudsman received the applicant's request for external review dated 28 October 2020.
30 October 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
3 December 2020	The agency provided the Ombudsman with its submissions and documentation.
1 March 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.