



**Determination**

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

<b>Applicant:</b>	Dr Mike Zyphur
<b>Agency:</b>	University of Adelaide
<b>Ombudsman reference:</b>	2021/02707
<b>Agency reference:</b>	2021/2706
<b>Determination:</b>	The determination of the agency is reversed.
<b>Date of Deputy Ombudsman's determination:</b>	24 November 2021
<b>Issues considered:</b>	Definition of personal affairs Unreasonableness (personal affairs) Public interest Diminished commercial value Adverse effect on business affairs
<b>Exemption clauses relied upon:</b>	6(1) 7(1)(b) 7(1)(c) 13(1)(a)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i>

**Terms of the original application:**

The data provided to the ATO which facilitates the payment summaries for those employees who have the top 50 payment summary values - ie the top 50 payment summary values in terms of the total amount of compensation provided to university employees annually, across all work focus categories, roles and forms of compensation (eg salary, loading, bonuses, and the like), for the two financial years 2018-2019 and 2019-2020

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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:

The data provided to the ATO which facilitates the payment summaries for those employees who have the top 50 payment summary values - ie the top 50 payment summary values in terms of the total amount of compensation provided to university employees annually, across all work focus categories, roles and forms of compensation (eg salary, loading, bonuses, and the like), for the two financial years 2018-2019 and 2019-2020.

### Background

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

### 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 10 September 2021, in my role as the Acting Deputy Ombudsman.
5. I am issuing my determination in this matter in my role as the Deputy Ombudsman.
6. I informed the parties that, subject to my receipt and consideration of submissions from the parties, I proposed to reverse the agency's determination.
7. I have received further submissions from both parties, and I have addressed them as necessary in the body of my 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.<sup>1</sup>
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 clauses are relevant to this external review:

#### 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).

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<sup>1</sup> *Freedom of Information Act 1991*, section 12.

- (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.

### 7—Documents affecting business affairs

- (1) A document is an exempt document—
  - (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
  - (b) if it contains matter—
    - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
    - (ii) the disclosure of which—
      - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
      - (B) would, on balance, be contrary to the public interest; or
  - (c) if it contains matter—
    - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
    - (ii) the disclosure of which—
      - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
      - (B) would, on balance, be contrary to the public interest.

### 13—Documents containing confidential material

- (1) A document is an exempt document—
  - (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
  - (b) if it contains matter obtained in confidence the disclosure of which—
    - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
    - (ii) would, on balance, be contrary to the public interest.

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 identified one document (**the document**) within the scope of the application.
13. The agency determined that the document is exempt in full pursuant to clauses 6(1), 7(1)(b) and 13(1)(a).

### Issues in this review

14. Having regard to the agency's submissions and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regard to the document in issue in this external review.

### Consideration

15. While I will address specific submissions in respect to individual clauses throughout my determination, there is a procedural point that was raised by the agency which I consider it appropriate to address first.
16. In my provisional determination, I made certain observations that the information in issue presumably existed in contracts and without evidence to the contrary, I was not satisfied disclosure of the document would have an adverse effect under clause 7.
17. Further, I also indicated that I would not be satisfied that the information in issue was exempt by virtue of clause 13(1) unless I was provided with evidence that a contractual agreement existed between the agency and its staff that met the confidentiality provisions of clause 13(2).
18. In response to my provisional determination, the agency stated that it considered it was not open for me to make determinations based on assumptions that gave regard to material that did not form part of the external review.
19. I informed the agency, by letter dated 29 September 2021, that I was proceeding based on principles that were established in the matter of *Department of the Premier & Cabinet v Redford*<sup>2</sup> and on that basis I may have regard to extrinsic material that is relevant to the review.

I requested that the agency provide:

- confirmation whether there are contractual agreements that include the information in issue (also including any examples of any contractual agreements you consider indicate that the relevant information has the necessary quality of confidence for the purpose of clause 13(1)(a)).
  - any other supporting documents or submissions that would evince that employees of the agency have a reasonable expectation of confidentiality over their remuneration (noting the agency's status as a prescribed body within the meaning of the FOI Act).
20. I informed the agency that if it was not inclined to provide me with the documents and information I considered relevant to this review, I would proceed to consider my

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<sup>2</sup> *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171.

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determination based on the absence of all information necessary to establish that the information in issue is exempt.

21. It was open for the agency to provide me with evidence that would refute my inference and also support a finding that the information in issue attracted an equitable obligation of confidence.
22. In support of this approach, I note that under section 48 of the FOI Act, the agency bears the onus of justifying its determination, in any proceedings.
23. The onus borne by the agency in justifying its determination under the FOI Act was addressed by the Supreme Court in the matter of *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor (APY Lands)*.<sup>3</sup> In that matter, Hinton J made the following observation:

Something more should be said about s 48 of the FOI Act. In my view, an external review is a proceeding for the purposes of s 48. Implicitly, the burden in s 48 is not simply persuasive but evidential; accepting this, it is for the agency to put all information necessary to justifying a determination before the Ombudsman. Failure to do so does not necessarily frustrate an external review or mean that the Ombudsman must resort to the powers contained in the *Royal Commissions Act 1917* (SA). But it will impact upon the discharge of the burden. That is to say, if an agency fails to put all information necessary to justify a determination before the Ombudsman then it risks the review being determined on the basis of what was before the Ombudsman. If the determination is adverse to the agency, it cannot complain.<sup>4</sup>
24. I consider the view put forward by Hinton J establishes a clear expectation that in an external review, it is for the agency to place all information before me, both evidential and persuasive, that would justify its determination.
25. The agency declined to provide the evidence sought by my letter dated 29 September 2021, stating that it would not be practicable nor reasonable to provide 50 contracts with confidentiality provisions that satisfied clause 13(2).
26. On 28 October 2021, the Ombudsman's Manager of Information and Audit sent an email to the agency clarifying my position, and that I would be satisfied by an example of one contract that had the relevant confidentiality provisions.
27. On 3 November 2021 the agency again declined to provide any examples of a completed contract with the relevant confidentiality provisions. The agency did however provide excerpts of an incomplete contract, and I have discussed those excerpts at paragraphs 158 onwards.
28. I note that the purpose of my provisional determination was to inform the agency of my preliminary views and that those views would be subject to the receipt and consideration of further submissions, which included supporting evidence. My request to the agency by letter and the request made by the Manager of Information and Audit sought further evidence from the agency to assist me in evaluating whether the determination of the agency was justified.
29. With the exception of sections 39(9) and 39(10) of the FOI Act, the manner in which this Office chooses to conduct an external review is a matter for this Office's discretion.<sup>5</sup>

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<sup>3</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162.

<sup>4</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [162].

<sup>5</sup> *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [157]

30. Noting the onus under section 48 and with reference to *APY Lands*, I consider it is reasonably open for me to draw the inferences that I have and proceed in conducting this external review in the manner that I have chosen, and the agency has been provided with multiple opportunities to respond to my inferences.
31. I also note that in the concluding paragraphs of the agency's submissions, it made the following statement:
- Parliament has struck a balance between disclosure and restriction, reflected in the terms of exemption. There is no presumption of disclosure under the Act. Exemptions are not to be restrictively construed to limit their potential application or to 'lean' towards disclosure.
32. In making the above statement the agency referred to the matter of *Attorney-General v Seven Network (Operations) Ltd.*<sup>6</sup>
33. Having regard to the reasoning in *Attorney-General v Seven Network (Operations) Ltd.*, I have not made reference to a presumption in favour of disclosure in my determination, nor have I disregarded any authority on the proper construction of the exemption clauses in this matter.
34. I will now turn to consider the application of the relevant exemption clauses.

#### Clause 6 - Documents affecting personal affairs

35. For a document to be exempt pursuant to clause 6(1):
- it must contain information concerning the personal affairs of any person (not including the applicant); and
  - the disclosure of that information would be unreasonable.
36. 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'<sup>7</sup> and the 'composite collection of activities personal to the individual concerned'.<sup>8</sup>
37. The agency submits that the document contains salary information which constitutes the personal affairs of individuals other than the applicant.
38. Whilst the information is de-identified, I am nevertheless satisfied that the information concerns the personal affairs of individuals other than the applicant and that the first element of clause 6(1) has been established.
39. The second step in ascertaining whether clause 6(1) applies is whether disclosure would be unreasonable.
40. In the matter of *Hall v SA Police*<sup>9</sup> the District Court considered the following factors as relevant in determining whether disclosure of information concerning the personal affairs of any person would be unreasonable:<sup>10</sup>
- the sensitivity (past or present) of the personal information
  - any view about the disclosure expressed by the person to whom the personal information relates

<sup>6</sup> *Attorney-General v Seven Network (Operations) Ltd* [2019] SASCFC 36.

<sup>7</sup> *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.

<sup>8</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

<sup>9</sup> *Hall v SA Police* [2019] SADC 5.

<sup>10</sup> *Hall v SA Police* [2019] SADC 5 [166].

- the relationship between the personal information and any other information in the documents
  - how the personal information was obtained by the agency (whether voluntarily or involuntarily and whether or not in confidence)
  - whether and to what extent the personal information was already known to the applicant
  - the nature of any interest which the applicant can demonstrate in
    - i. the information in the document other than the personal information; or
    - ii. the personal information.
41. The following dicta from *Page v Metropolitan Transit Authority*<sup>11</sup> was referred to by the District Court in support of the above factors:<sup>12</sup>
- ... a balancing of interests: the right to personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the information and the object of the Act to extend as far as possible the right of the community to have access to information in the possession of the Government or Agencies. More particularly, this balancing exercise requires a consideration of all the circumstances, including the interest that the applicant has in the information in question, the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance.
42. From the above factors it is clear that a number of considerations need to be taken into account when determining whether disclosure would be unreasonable.
43. In considering the information in issue, I do not consider disclosure of the information would be unreasonable.
44. In response to my provisional determination, the agency made a number of submissions disagreeing with my provisional view, with particular reference to some of the above factors.
45. The agency submits that the document consists solely of personal information and that there is no other information in the document.
46. I do not agree with this position. Whilst noting that the information relates to the personal affairs of individuals, the document also reveals the agency's expenditure in paying the salaries of its highest-earning staff members. The document, and information in issue, has a value outside of what it reveals about a person's personal affairs.
47. The agency also submits that the applicant has no interest in the information.
48. Whilst I do not consider the question of whether the applicant has a special interest in the information is a substantial factor in determining this matter, I consider that the applicant has shown that he does have an interest in the information.
49. This Office sought further information from the applicant to clarify his interest in the information. The applicant made the following statement:

As an Associate Professor of Human Resources Management and someone who studies income inequality, I maintain an active interest in top incomes generally. Specific to the higher education sector, my request of Uni Adelaide is part of a broader inquiry into

<sup>11</sup> *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

<sup>12</sup> *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 [246] quoted in *Hall v SA Police* [2019] SADC 5 [167].

university top incomes, and for this I've requested the top 50 incomes of all G8 universities. ... I am also a local member and delegate of the National Tertiary Education Union as well as being on its National Council, and so my interest in top incomes is also industrial in nature, being a matter of what I consider to be ethics and equity. Because Uni Adelaide - like other Australian universities - is publicly funded, we must be able to assess the extent to which it is distributing funds in ways that are consistent with public values or expectations.

... to be clear, I am not interested in the top 50 incomes at Uni Adelaide in order to identify or in any way critique specific individuals. ... the public debate [that information of this type] can and should generate, is in my view precisely why we have FOI legislation. The public has a right to know.

50. In the circumstance of this case, I consider that the applicant has a legitimate interest in the information beyond what it reveals about the personal affairs of individuals.
51. I note that whilst the stated purpose by an applicant is not binding in a matter, it may be a relevant consideration of a review body.
52. Further, it may be the case that it is open for a review body to consider the probability of certain events occurring following disclosure of information to an individual, as was found to be the case in relation to an applicant's assertion that they would not disseminate information to the world at large.<sup>13</sup>
53. Whilst it may be open for the applicant to attempt to decipher the identities of the individuals in the document, there is nothing to suggest that he intends to do so.
54. The agency has made a further assertion that there is no public interest involved in assessing unreasonableness with respect to clause 6(1). I note this assertion is contrary to case law, which has established that considerations about unreasonableness with respect to information concerning personal affairs has 'at its core, public interest considerations'.<sup>14</sup>
55. This is further supported by *Bradshaw*, where the District Court stated that a balancing exercise is required, one which weighs a person's legal right to information against a third party's right to protection of privacy,<sup>15</sup> which is, in essence, a public interest balancing exercise.
56. With respect to the sensitivity of the information, the agency also made the following submission:

... it is the nature rather than the volume of information which is to be disclosed which is significant. There can be no serious contention that the disclosure of an individual's employment remuneration is not disclosure of one of the most sensitive pieces of information regarding their personal affairs and represents a substantial disclosure.
57. I do not find the agency's position to be persuasive, noting that the agency has not provided any further information in support of its position.
58. Having regard to existing authority, I do not consider it clear that information of such nature is generally regarded as highly sensitive within the meaning of clause 6(1).
59. Following on from this point, in my provisional determination I expressed a view that as the information in question relates to the remuneration of individuals employed in the

<sup>13</sup> *Treglown v SA Police* [2011] SADC 139 at [101].

<sup>14</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhard J at [438].

<sup>15</sup> *Bradshaw v SA Police* [2012] SADC 184, [53]-[55].



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public sector, then the information is less sensitive and it should be considered to be liable for disclosure under the FOI Act.

60. In response the agency made the following statement:

The Deputy Ombudsman also seems to take the position that the information is less sensitive because it relates to salaries of persons who are “employed in the public sector”. Once again, there is no basis in the FOI Act for applying such a test. Any determination based on that position is misconceived and cannot stand.

61. The agency did not elaborate any further upon this position. Having carefully considered relevant case law, I do not accept the agency’s position.

62. The following observation from the matter of *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council (Burdekin)*<sup>16</sup>, which referred to an equivalent provision of clause 6(1), is particularly relevant to this discussion:

Information about the gross salary paid to an employee of a government agency has a dual character. It is both information about the income of an identifiable individual (and hence information concerning that individual’s personal affairs) and information about the cost of having the duties of the relevant position performed for the benefit of the public. Governments fund their operations by imposts on the public. ... The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny on whether funds raised by the government are expended efficiently and effectively in furtherance of the wider public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which a government has decided to allocate funding. This public interest is even strong in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.

I consider that there is a strong public interest consideration favouring disclosure to any interested member of the public, of information as to the total cost in salary and related expenses of any job for which a government decides to allocate funding, and that it is even stronger in the case of senior management positions of the kind under consideration in the present case. The same public interest considerations would apply in favour of informing the public of the total costs of having services performed for the public by private sector service-providers.

63. I find the above observations by the Queensland Information Commissioner to be persuasive in this matter.

64. Whilst acknowledging that the information concerns the personal affairs of individuals, the information also concerns the agency’s expenditure of public funding and it is a relevant factor to consider in favour of disclosure.

65. Further, noting that the information in issue relates to the agency’s 50 highest paid staff, it would be reasonable to conclude that the information relates to senior management positions, in which case, having regard to the above observations by the Queensland Information Commissioner, it becomes a more significant factor in determining whether disclosure is reasonable.

66. The above observation from *Burdekin* is also relevant to another assertion made by the agency, which was that its funding is more akin to a private commercial enterprise than a publicly funded body. The agency made the following statement:

the University operates in a highly competitive market, which enables staff and the University to privately negotiate salaries, with the expectation that this information is

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<sup>16</sup> *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2004] QICmr 2.

maintained as confidential. There can be no valid comparison with public sector employees.

This raises an important issue in the assessment of FOI requests directed to the commercial activities of universities. While the University is an agency for the purposes of the FOI Act, it cannot be treated in the same way as a Government department. The University is a significant commercial enterprise, financed primarily through sources other than the public purse. The nature of its operations is far closer to those of a private corporation than a public body.

67. The agency did not provide a basis under the FOI Act or refer to any supporting material that demonstrates why it should be treated differently to other agencies, noting that despite the agency's view, it is an agency for the purposes of the FOI Act.
68. Further, the agency has not raised any substantive arguments that would lead me to accept that the remuneration of its senior staff is related solely to its private commercial activities and should not be subject to disclosure under the FOI Act.
69. However, even if I were to accept that the senior management of the agency are engaged for commercial purposes, the observation from *Burdekin* also includes a finding that disclosure of the total costs of having services performed for the public by private sector service providers is also captured by the same considerations.
70. Noting that the agency has suggested it should be treated in accordance with its status as a university rather than a standard agency, I have given regard to a decision by the New South Wales Administrative Decisions Tribunal in the matter of *McLennan v University of New England (McLennan)*.<sup>17</sup> I note that *McLennan* referred to *Burdekin* with approval.
71. The matter of *McLennan* bears particular relevance to the matter at hand, as that matter considered an application for access to the "salaries, KPIs and bonuses of [the University of New England's] Senior Executive Staff, Directors and Heads of School".
72. In the matter of *McLennan*, the University of New England conceded the disclosure of salaries, however an issue remained over whether it would be unreasonable to disclose information about the bonuses paid to executive staff members. Relevantly, the Tribunal made the following observations:

I consider that the disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds. Knowledge of the actual bonuses paid to senior staff of the University would enhance the accountability of the University for the expenditure of public funds, the transparency of its operations, and enable consideration of the value obtained by the University for the expenditure of public money.

... the public interest in remuneration paid to public officers (especially those at a senior level) as a cost to government was recognised, despite the fact that the same information related to an individual's personal affairs.<sup>18</sup>

73. In the matter of *McLennan*, the Administrative Decisions Tribunal concluded that the decision by the University of New England to refuse access to the information should be set aside.<sup>19</sup>
74. Whilst acknowledging that case law from other jurisdictions need to be read with caution as provisions may not be identical, I consider the above cases to be of

<sup>17</sup> *McLennan v University of New England* [2013] NSWADT 113.

<sup>18</sup> *McLennan v University of New England* [2013] NSWADT 113 [30 - 31].

<sup>19</sup> *McLennan v University of New England* [2013] NSWADT 113 [50].

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persuasive value. In particular, I consider the observations made in *McLennan* about the University of New England are relevant to the agency in this matter.

75. I note that the agency has stated its view that whilst the information is de-identified, it may be possible with reference to extrinsic material for a person to identify who the salaries belong to, and that those individuals would not wish to have their salaries disclosed.
76. I note that whether or not the person to whom the information relates can be identified is not a determinative factor in assessing unreasonableness, referring to the above passage from *Burdekin* that concerns identifiable information.
77. Whilst I acknowledge that some of the highest earning individuals listed in the document could be identified with a degree of certainty, I am not convinced that all of the salaries contained in the document could be attributed to specific individuals with accuracy.
78. Where the information relates to the highest paid staff of the agency, while noting that it may lead to a higher degree of probability that the specific staff member could be identified, I consider that both the applicant, and the public in general would have a genuine interest in knowledge of the highest paid salaries
79. Where the information relates to the lower paid individuals, while there may be less interest in knowing those staff members' salaries, this is counterbalanced by the fact that divorced from any other identifying information, there is a lower likelihood of identifying the individuals involved.
80. As a result I am not satisfied that all of the information could be linked to specific individuals, but even if I were satisfied that all the information would be able to be linked to individuals, with reference to *Burdekin* I do not accept that disclosure of the remuneration of known individuals would be unreasonable, noting that the remuneration relates to senior staff members employed in the public sector.
81. On a final point in response to the agency's submissions, I refer to the following statement:

The Deputy Ombudsman applies a standard which requires a "substantial degree" of a person's personal affairs to be disclosed. The University submits that there is no test under clause 6(1), or the FOI Act generally, which establishes a threshold of a "substantial degree" of personal affairs. The test is whether there would be an unreasonable disclosure of information concerning the personal affairs.

82. I accept that the first element of clause 6(1), that the information relates to a person's personal affairs, requires no finding of whether the information is substantial, nor does it require a finding of whether the information reveals something significant about the character of the person to whom the information relates.
83. However, I do consider that the substance of the information holds relevance in ascertaining whether disclosure of the information would be unreasonable.
84. I have given regard to the District Court's reasoning in the matter of *Bradshaw v SA Police (Bradshaw)*.<sup>20</sup> In that matter, the District Court stated that 'in determining whether disclosure would be unreasonable a decision-maker may take into account any matter considered "relevant, logical and probative" to the question'.<sup>21</sup>

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<sup>20</sup> *Bradshaw v SA Police* [2012] SADC 184.

<sup>21</sup> *Bradshaw v SA Police* [2012] SADC 184, [56].

85. I consider that the substance of the information, and how much that information may reveal about an individual, and the likelihood that the information may or may not be identifiable, are all relevant and logical factors to consider when taking into account unreasonableness.
86. In light of the above factors, I am not satisfied that disclosure of the information would be unreasonable.
87. I note that under section 39(10) of the FOI Act, if I were to form the view that information referred to in Division 2 of Part 3 is not exempt, I must take steps as are reasonably practicable to obtain the views of interested parties as to whether or not the document is exempt.
88. Division 2 of Part 3 of the FOI Act includes documents relating to personal affairs.
89. Given that the document relates to 50 individuals, and those individuals are not identified in the document, I do not consider that it is reasonably practicable to obtain the views of all the parties, and I consider my onus under section 39(10) has been discharged in this matter.
90. Whilst not having the views of the individuals involved, I would nonetheless be inclined to presume that the individuals would not consent to the information in the document being disclosed.
91. However, again I note that a party's objection to information being disclosed is not determinative of whether disclosure of information would be unreasonable.
92. In the circumstances of this matter, I do not consider that any presumption that the individuals would not consent to the disclosure of their salary information is in and of itself of sufficient weight to conclude disclosure to be unreasonable.
93. While noting the agency's view that the information could have a detrimental impact on the agency's ability to retain staff or to negotiate salaries in future, I am not of the view that this aspect of the agency's submissions is relevant to a consideration of clause 6(1).
94. For the reasons stated above, I am not satisfied that disclosure of the information would be unreasonable.
95. Accordingly I do not consider the information is exempt pursuant to clause 6(1).

#### **Clause 7 - Documents affecting business affairs**

96. The agency submits that the document is exempt in full pursuant to clause 7(1)(b).
97. In order for a document to be exempt pursuant to clause 7(1)(b), each of the following criteria must apply:
  - the document contains matter consisting of information that has a commercial value to any agency or any other person, and
  - disclosure of the information could reasonably be expected to destroy or diminish the commercial value of the information, and
  - disclosure of the information would, on the balance, be contrary to the public interest.

98. The terms 'commercial' and 'value' are not defined in the FOI Act, and should be afforded their ordinary meaning.
99. Whether or not the information has a commercial value is a question of fact. The Queensland Information Commissioner has considered the phrase and noted that there are two possible interpretations of the phrase:

The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, 'one-off' commercial transaction ...

The second interpretation of 'commercial value' which is reasonably open is that information has commercial value to an agency or another person if a genuine, arm's length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act, ...<sup>22</sup>

100. I generally agree with this view and consider it applicable to clause 7(1)(b) of the FOI Act.
101. In viewing the information in the document, I am not satisfied that the information has commercial value.
102. The agency is a publicly funded educational and research institution. While acknowledging that the agency receives supplementary funding from sources that are commercial in nature, and that the agency may carry out research that has commercial purposes, I would hesitate to describe the agency overall as an institution which engages in activities of a for-profit nature.
103. Similarly, the information relates to the remuneration of the highest paid staff members of the agency, who would be in receipt of public funding, and receive such public funding for the purpose of the agency's educational and research functions. I do not consider the information in issue is for-profit in nature.
104. Additionally, I note that some information related to the remuneration of the agency's senior management has been made available publicly. This information may be found on page 96 of the agency's 2019 Annual Report, which is available at the following web address: <https://www.adelaide.edu.au/publications/ua/media/12/2019-annual-report.pdf>
105. Given that some of the information is available, it is difficult to conclude that a genuine, arm's length buyer would be prepared to pay to obtain the further information contained in the document.
106. As a result, I am not satisfied that the document contains information that has commercial value to the agency, or any other person.
107. In response to my provisional determination the agency made the following statement:

The University submits that the Deputy Ombudsman erred in his finding ... that the information cannot be of commercial value as the University cannot be classified as a "for-profit" institution. This is not the test in determining whether the Document is exempt

<sup>22</sup> *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [54] - [55], Interpreting section 45(1)(b)(i) of the *Freedom of Information Act 1992* which is similar to section 7(1)(b).

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for the purposes of clause 7(1)(b). If it were the test, the exemption would largely be meaningless for agencies under the FOI Act as such agencies are generally not “for-profit” institutions. That was plainly not the intention of legislature.

As outlined at paragraph 39 of the Provisional Determination, the test which should be applied in determining whether the information in question is valuable for carrying on a commercial activity.

108. Whilst acknowledging the agency’s submissions, the agency has not persuaded me to depart from the interpretation of commercial value as set out by the Queensland Information Commissioner.
109. I am not satisfied the agency’s further submissions that the information in issue has commercial value.
110. Further, even if I were satisfied that the information possessed commercial value, I am not satisfied that disclosure of the information would diminish or destroy the commercial value of the information itself.
111. However I acknowledge that the agency has raised, in the alternative to clause 7(1)(b), that the document is exempt pursuant to clause 7(1)(c).
112. For a document to be exempt pursuant to clause 7(1)(c) each of the following criteria must apply:
- the document contains information concerning the business, professional, commercial or financial affairs of any agency or any other person
  - the disclosure of that information could reasonably be expected to have an adverse effect on those affairs, or to prejudice the future supply of such information to the Government or to an agency, and
  - the disclosure of that information would, on balance, be contrary to the public interest.
113. The phrase ‘business, professional, commercial or financial affairs’ is not defined in the FOI Act. Similar to commercial value, ‘business affairs’ has been held to mean activities carried out with the view to make a profit, and not just affairs derived from or to do with business. The Queensland Information Commissioner has commented that:
- For a matter to relate to ‘business affairs’ in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried in an organised way (whether full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).<sup>23</sup>
114. The courts in Victoria have also held that for the ‘business affairs’ exemption to apply, the information at hand must relate to matters of business, commercial or financial nature and ‘not merely be derived from a business or concerning it or have some connection with it’.<sup>24</sup>
115. I agree with this view in considering the meaning of ‘business affairs’ under clause 7(1)(c).
116. Whilst I do not consider the information to have commercial value, and having regard to the above definition I would also hesitate to conclude that the information concerns the

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<sup>23</sup> *Stewart and Department of Transport* (1993) 1 QAR 227, [103].

<sup>24</sup> *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441; The President’s view regarding the interpretation of ‘business affairs’ was upheld on appeal to the Full Court of the Supreme Court (*Accident Compensation Commission v Croom* [1991] 2 VR 322).

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business affairs of the agency, I accept that the information in issue concerns the financial affairs of the agency.

117. The agency made numerous submissions as to why disclosure of the information could reasonably be expected to have an adverse effect on its financial affairs, and I am willing to accept the agency's position in that regard.
118. The question of whether the information is exempt pursuant to clause 7(1)(c) then turns on whether disclosure of the information would, on balance, be contrary to the public interest.
119. In the agency's initial determination, it identified the following factors in favour of disclosure:
- the public interest in fulfilling the objects of the FOI Act
  - the public interest in promoting openness and accountability.
120. The agency also identified the following factors as opposing disclosure:
- the nature of the information in that it was never intended to be made publicly known
  - disclosure could jeopardise the University's future recruitment strategies
  - disclosure could be detrimental to the University's ability to retain its top paid staff
  - disclosure would cause the University to be in breach of its own policy which would compromise the University's commitment institutionally to compliance [sic] with laws and policies and undermine the University's relationship with its staff, students and other parties by divulging confidential information; and
  - disclosure may negatively impact on current University staff and their relationship with the University and potentially with their colleagues.
121. In addition to the factors identified by the agency in favour of disclosure, I consider the following to also be relevant:
- providing transparency in how public funding is allocated, particularly with respect to senior level staff
  - enhancing transparency over the agency's senior operations
  - enable consideration of the value obtained by the agency for the expenditure of public money
  - providing members of the public with access to information of special interest to them.
122. To avoid repetition, I consider the public interest as identified in the matters of *Burdekin* and *McLennan* suggests that disclosure of the information in issue would not, on balance, be contrary to the public interest, noting that the reasoning in *McLennan* also applied to a University.
123. I do not consider that the agency has persuaded me that the potential adverse effect on its functions would be to such a degree that it would outweigh the benefits of disclosure.
124. In light of the above, I am not satisfied that disclosure would, on balance, be contrary to the public interest.
125. In my provisional determination, I noted that I was mindful of the operation of clause 7(3).

126. In response to my provisional determination, the agency submitted that it was not reasonably open for me to speculate about whether the information existed in contracts.
127. I have reconsidered my position and no longer consider it a relevant factor to this external review, noting that the agency has indicated that not all of the information can be found in individual contracts.
128. However, whilst I am no longer drawing any conclusions with respect to clause 7(3), having regard to the other factors in favour of disclosure, I am still of the view that disclosure of the information would not, on balance, be contrary to the public interest.
129. In light of all of the above, I am not satisfied that the document is exempt pursuant to clauses 7(1)(b) or (c).

### Clause 13 - Documents containing confidential material

130. The agency determined that the document is exempt pursuant to clause 13(1)(a).
131. A document is exempt pursuant to clause 13(1)(a) if it contains matter the disclosure of which would found an action for breach of confidence.
132. The Administrative Appeals Tribunal (AAT) has had cause to consider section 45 of the *Freedom of Information Act 1982* (Cth),<sup>25</sup> which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can only mean an action for equitable breach of confidence.<sup>26</sup> In my view, the AAT decision has persuasive value.
133. An equitable obligation of confidence arises where the information was given and received in circumstances that would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:<sup>27</sup>
  - the information must be capable of being identified with specificity
  - the information must have the necessary quality of confidence
  - the information must have been received in circumstances which import an obligation of confidence
  - there must be actual or threatened misuse of the information.
134. The agency has asserted that staff members have an expectation of confidentiality with respect to salary information as a result of the agency's 'Remuneration and Employment Benefits Policy', which is available at the follow web address:  
<https://www.adelaide.edu.au/policies/3543?dsn=policy.document;field=data;id=6142;m=view>
135. Principle 5 of the policy provides:

Remuneration practices are transparent and remuneration information is maintained confidentially and in accordance with privacy requirements.
136. The agency submits:

<sup>25</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.

<sup>26</sup> *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].

<sup>27</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38], affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 443. The test was also endorsed in *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [165].



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To disregard the preservation of confidential information in these circumstances would cause the University to be in breach of its own policy. Breaching its own policy would not only compromise the University's commitment institutionally to compliance [sic] with laws and policies but it would further undermine the University's relationship with its staff, students and other parties by divulging information which was agreed to be kept confidential.

137. To my mind, the agency has not provided sufficient evidence to show that the information has either the necessary quality of confidence or that it was received in circumstances which import an equitable obligation of confidence.
138. While the agency has a policy stating that remuneration is maintained confidentially, it does not on its own necessarily give rise to the information having the necessary quality of confidence to create an equitable obligation of confidence, noting that the mere fact that a document is marked as confidential will not be definitive.<sup>28</sup>
139. Whether or not disclosure of information would breach the agency's own policy is not determinative to a finding of whether the information is exempt pursuant to the FOI Act, or whether its disclosure would found an action for breach of confidence.
140. In response to my provisional determination, and in response to two subsequent requests for further information, the agency submitted a significant number of submissions in support of its views. In summarising its submissions on the subject of clause 13(1)(a), the agency made the following statement:

In all of the circumstances, there can be no serious suggestion that the information regarding remuneration is not treated as confidential by the parties. Every relevant factual matter supports the confidential nature of the information. Further, all of the legal criteria for the creation of an obligation of confidentiality are manifestly present and satisfied. There is no evidence of any kind to the contrary. It is submitted that the only finding reasonably open to the Deputy Ombudsman is that the remuneration information is confidential.

141. In my view, there is a compelling argument to be made that the information regarding the agency's remuneration of its staff does not have the necessary quality of confidence that, if disclosed, would found an action for breach of confidence.
142. I note that the agency has stated that all of the legal criteria for the creation of an obligation of confidentiality are manifestly present and satisfied. The agency did not refer to any legal principles or case law in making its submissions, rather, it referred to my reference at paragraph 133 to accepted criteria in establishing an equitable obligation of confidence and for the circumstances in which a breach would arise.
143. Further, the agency made the following statement:
- It is apparent from the Provisional Determination that the absence of confidentiality is being treated as the default position in respect of the person remuneration details. ... it is submitted that this is neither reasonable nor appropriate.
144. I have not operated on the assumption that an absence of confidentiality is the default position for person remuneration. Rather, having considered the relevant information in this case, I have formed the view that it is not confidential, noting that confidential in this context means that disclosure would constitute an action for breach of confidence.

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<sup>28</sup> *Re B and Brisbane North Regional Health Authority* [1994] 1 QAR 271 [70].

145. In my view, the agency has not provided sufficient evidence to establish that two of the criteria at paragraph 133 are met. In reaching this view, I consider it appropriate to further expand upon the proper construction of the criteria.
146. The finding required for exemption under clause 13(1)(a) is not merely whether the information might be considered confidential by the agency, but whether it would *found an action for breach of confidence*.
147. The criteria set out at paragraph 133 were referred to by the District Court in the matter of *Ekaton Corporation Pty Ltd v Chapman & Department of Health*.<sup>29</sup> The four criteria were accepted by the District Court with reference to the following statement by Gummow J, as a member of the Federal Court, in *Coors Pavey Whiting & Byrne v Collector of Customs (Vic)*.<sup>30</sup>

It is now well settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidence (and is not for example, **common** or public knowledge); (iii) the information was **received by the defendant in such circumstances to import an obligation of confidence**; and (iv) there is actual or threatened misuse of this information...<sup>31</sup>

[Emphasis mine]

148. I emphasise the point that the information must have the necessary quality of confidence, and that it must have been received by a potential defendant, or in this case by the agency, in circumstances that imported an obligation of confidence.
149. I am also mindful that as information in issue is de-identified, there is a question as to whether the information has been identified with specificity, and not merely in global terms. However I consider it more apt to turn my mind to the application of the second and third criteria in the circumstances of this matter.
150. To expand upon the requirement that the information has the necessary quality of confidence, I refer to the following statement by Debelle J in *Coulthard v South Australia*.<sup>32</sup>

The first question is whether the information conveyed in the statements was confidential. There can be no breach of confidence in revealing to others something which is already common knowledge: *Coco v A N Clark (Engineers) Ltd* (at 47). Confidential information is that which is not public property or public knowledge or otherwise in the public domain: *Saltman Engineering Co v Campbell Engineering Co* (at 215); *Woodward v Hutchins* [1971] 1 WLR 760; [1977] 2 All ER 751. It is a question of degree whether information previously disclosed to a limited public has been made generally available: *Attorney-General v Guardian Newspapers Ltd (No 2)* (at 177) per Simon John Donaldson MR. Equity will intervene only to protect a confidence if the circumstances are of sufficient gravity; it will not intervene merely to protect trivial tittle-tattle, however confidential: *Coco v A N Clark (Engineers) Ltd* (at 48); nor “pernicious nonsense”: *Church of Scientology of California v Kaufman* [1973] RPC 635 at 638. In other words, a duty of confidence will only be imposed where the information is “a proper subject for protection”: *Hubbard v Vosper* [1972] 2 QB 84 at 95.<sup>33</sup>

<sup>29</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38]

<sup>30</sup> *Coors Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428

<sup>31</sup> *Coors Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428 at 437.

<sup>32</sup> *Courthard v South Australia* (1995) 63 SASR 531.

<sup>33</sup> *Courthard v South Australia* (1995) 63 SASR 531 at 547

151. I acknowledge that the agency has emphatically stated its view that the information has the necessary quality of confidence. However, in making its arguments, the agency has not referred to any supporting case law; rather the agency has made broad claims that a person's salary is ordinarily considered to be sensitive and confidential and referred to its general policies.
152. Given the emphasis, that in order for information to have the necessary quality of confidence to found an action for a breach of confidence, then that the information must not be common and must be information that is "a proper subject for protection", on the information before me I do not accept that the information in issue attracts the necessary quality of confidence to be protected under equity.
153. Further, on the information before me, I do not consider that the information in issue was *received* by the agency, nor would it have been received in circumstances that imported an obligation of confidence upon the agency.
154. Whilst having regard to the policies that the agency referred to, the agency declined to provide me with any evidence that individuals in their contractual agreements with the agency were given a legitimate expectation that their salary information attracted the necessary quality of confidence, and that it would be a misuse by the agency for the agency to disclose it.
155. I asked the agency to provide me with examples of any contractual agreements that contained sufficient confidentiality provisions. The agency declined to provide me with the contracts related to the information in issue, stating that providing 50 contracts would be an onerous undertaking.
156. The Ombudsman's Manager of Information and Audit clarified my request that I was not asking for evidence of all contractual agreements, rather that I would have been satisfied if the agency were able to provide me with one example of a completed contract that contained the necessary confidentiality provisions.
157. Again, the agency declined to provide me with one contract, stating that contracts varied between individuals and that one contract might not necessarily reveal the confidentiality provisions of other contracts.
158. The agency did provide me with extracts of template contracts. Of particular importance, I refer to the following extracts:

#### Confidentiality

- (a) In this Employment Contract, 'Confidential Information' means all information of a confidential nature (as determined by the University) whether in tangible or intangible form generated, accessed or obtained by or made available to the Staff Member in the course of or in connection with the Staff Member's employment with the University including but not limited to
- (i) **information relating to the business affairs of the University and associated entities;**
  - (ii) technical information, trade secrets, technical data, marketing procedures and information, accounting programs and procedures, **financial information**, course structures, teaching and lecture notes and aids, reference materials, student information, student lists, know how, technology operation procedures, price lists, data bases, source codes, methodology **and like information relating to the business of the University and associated entities;**
- ...
- (b) Subject to this clause, the Staff Member agrees:
- (i) not to copy, reproduce, divulge or use any Confidential Information other than in the proper course of the Staff Member's duties as an employee of the University;

- (ii) not to use any Confidential Information in any matter which may cause loss, embarrassment or be in any other way detrimental to the University; and
  - (iii) to immediately notify the University if the Staff Member becomes aware of a breach of this clause.
- (c) The Staff Member must not disclose any Confidential Information unless one of the following circumstances applies:
- (i) The University has consented in writing to the disclosure. The consent may be subject to the condition that the person to whom the disclosure is to be made enter into a separate confidentiality agreement with the University.
  - (ii) The disclosure is specifically contemplated and permitted by this Employment Contract.
  - (iii) The disclosure is to a professional adviser of the Staff Member in order for it to provide advice in relation to matters arising under or in connection with this Employment Contract provided that the adviser is bound not to disclose the Confidential Information or to use it for any purpose other than providing the relevant advice.
  - (iv) The disclosure is required by law.
- (d) If the Staff member wishes to use any of the University's Confidential Information for a non-employment related purpose, either during or after employment with the University, they must seek the University's written approval and, if given, negotiate and agree the terms and conditions apply in the particular circumstances at that time.

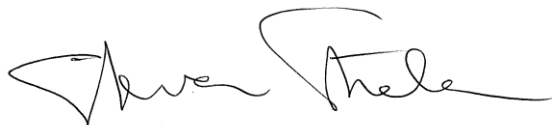
[Emphasis by the agency]

159. Based on my reading of the above extracts, the confidentiality provisions indicate that the agency owns its confidential information, and that it is individual staff members that have an obligation not to disclose certain kinds of confidential information, such as the business affairs of the agency or its intellectual property.
160. The above extract also specifies that the agency may designate information confidential, and that it can include but is not limited to information relating to the business affairs of the agency. However the agency did not provide any contracts that clearly indicate that salaries were confidential terms of the contracts.
161. I still remain of the view that the information in issue does not have the necessary quality of confidence, nor that the information was received by the agency in circumstances that import an obligation of confidence.
162. If I were to accept that staff remuneration has the necessary quality of confidence, and that its disclosure would found an action for breach of confidence, then based on the confidentiality provisions before me, that breach would apply to staff members rather than the agency itself, as the provisions stipulate that staff members must not use the agency's confidential information outside of the proper course of their duties and employees.
163. If I were to accept the agency's position that staff remuneration is confidential information, the corollary is that its staff members would be restrained from revealing their salaries outside of the identified exceptions. This would include restraining staff members from discussing their remuneration to friends and relatives, or from disclosing this information to third parties for the financial benefit of the staff member, such as the staff member seeking a loan from a bank.
164. The agency has not put forward any submissions that would support this view and I would find it difficult to conclude that this is the case.

165. In summary of the above points with regards to clause 13(1)(a), I make the following observations:
- the agency has not relied upon any legal authority in making its submissions other than the initial authority I cited in my provisional determination
  - I am not satisfied that the information in issue has the necessary quality of confidence, as the agency has not provided me with any evidence that salary information of staff members is not 'common' or that it ought to be protected under equity
  - I am not satisfied that the agency *received* the information in issue
  - I am not satisfied that the information was provided to the agency in circumstances that imported a duty of confidence *on the agency*, noting that the agency has not provided me with a single completed contract indicating that staff members have an expectation that the agency will treat salary information as confidential under equity
  - the evidence the agency has provided me with indicates that it is its staff members who have an obligation of confidence to the agency with respect to confidential information.
166. In light of the above, I am not satisfied that the criteria referred to in paragraph 133 have been established and I do not consider that disclosure of the information would found an action for breach of confidence.
167. Accordingly I am not satisfied that the document to be exempt pursuant to clause 13(1)(a).

#### Determination

168. In light of my views above, I reverse the agency's determination to the effect that the document is disclosed in full.



Steven Strelan  
DEPUTY OMBUDSMAN

24 November 2021

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**APPENDIX**
**Procedural steps**

<b>Date</b>	<b>Event</b>
27 April 2021	The agency received the FOI application dated 27 April 2021.
14 May 2021	The agency determined the application.
14 May 2021	The agency received the internal review application dated 14 May 2021.
28 May 2021	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>1</sup>
5 June 2021	The Ombudsman received the applicant's request for external review dated 5 June 2021.
8 June 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
17 June 2021	The agency provided the Ombudsman with its submissions and documentation.
10 September 2021	The Deputy Ombudsman issued his provisional determination and invited submissions from the parties.

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<sup>1</sup> *Freedom of Information Act 1991*, section 29(5).