



## Determination

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

<b>Applicant:</b>	Ms Orla Dingle
<b>Agency:</b>	Minister for Health and Wellbeing
<b>Ombudsman reference:</b>	2021/06631
<b>Agency reference:</b>	MHW-H21-6007
<b>Determination:</b>	The determination of the agency is varied.
<b>Date of Ombudsman's determination:</b>	14 February 2022
<b>Issues considered:</b>	Whether disclosure constitutes an offence
<b>Exemption clauses relied upon:</b>	12(1)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i> <i>Independent Commission Against Corruption Act 2012</i>

#### Terms of the original application:

I am looking for communication between the Office of public integrity [sic] and ministers wades [sic] office. I am looking for all communication and documents with my name "Orla Dingle". I am looking for communication between the "Lifetime Support Authority" and minister wades [sic] office back and forth between them both in regards to me. I am also looking for any communication in regards to me between the ministers wades [sic] office and the office of the premier Steven Marshall. I am looking for this between the following dates 1<sup>st</sup> of August 2020 to today the 31<sup>st</sup> of August 2021.

## REASONS

### Application for access

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

I am looking for communication between the Office of public integrity [sic] and ministers wades [sic] office. I am looking for all communication and documents with my name "Orla Dingle". I am looking for communication between the "Lifetime Support Authority" and minister wades [sic] office back and forth between them both in regards to me. I am also looking for any communication in regards to me between the ministers wades [sic] office and the office of the premier Steven Marshall. I am looking for this between the following dates 1<sup>st</sup> of August 2020 to today the 31<sup>st</sup> of August 2021.

### 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 Minister's determination to the parties, by my provisional determination dated 24 January 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the Minister's determination.
5. By email dated 31 January 2022, the applicant provided submissions in response. The applicant submits that section 54 of the *Independent Commission Against Corruption Act 2012* (ICAC Act) only operates to prevent the disclosure of information relating to an ongoing investigation. The applicant further submits that, as there is no ongoing investigation at this time, the documents in issue ought to be released in full.
6. I do not agree that section 54 of the ICAC Act only applies to documents relating to an ongoing investigation. Rather, I consider that once a document is afforded the protection of section 54, that protection will remain in place unless disclosure is authorised in accordance with section 54(3)(a).
7. To this point, I have had regard to the recent decision of the South Australian Civil and Administrative Tribunal in the matter of *Knight v South Australia Police*. The Tribunal considered the confidentiality provision contained within the *Police Complaints and Discipline Act 2016* (PCD Act) and made the following observations:

The section has no express time limit on when disclosure of information constitutes an offence, and so any limitation to the extent of the exclusion must be found in the words themselves. There seem to be two possible interpretations. One interpretation is that the making of a complaint renders the disclosure of information in relation to the complaint a criminal offence for all time. In other words, information is still related to or connected with a matter that forms or is the subject of a complaint, report, assessment or investigation after the complaint has been closed, and in the absence of any time limit, it is an offence to disclose such information for all time.

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The alternative interpretation is that the information is only 'in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment or investigation under the Act' while a complaint is active, or up until the time that a report or assessment or investigation is completed.

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To determine which is the interpretation intended by Parliament, it is necessary to consider the Act as a whole and the underlying purpose of the confidentiality provision, to determine how extensive Parliament intended it to be.

...

Parliament intended the confidentiality provision to be time limited. The limit is indicated in the complex description of the relevant information, being that which is 'in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment or investigation.' Information is only connected with a matter that is the subject of a complaint while the complaint is on-going. Once it is completed, there is no longer a matter that forms the subject of a complaint.<sup>1</sup>

8. Although the Tribunal's decision appears to support the applicant's submissions, I note that the decision has been appealed to the Supreme Court of South Australia, and that an order was made on 31 January 2022 to stay the operation of the Tribunal's decision until the appeal is finalised. Accordingly, I cannot rely on the Tribunal's recent decision in my consideration of this matter.
9. In any event, even if the Tribunal's decision remained operational, I am satisfied that the application of the confidentiality provision in the ICAC Act can be distinguished from the Tribunal's assessment of the PCD Act. The Tribunal observed that to understand the application of the confidentiality provision it is necessary to consider the Act as a whole.
10. The ICAC Act deals with matters of corruption, and previously also matters of misconduct and maladministration. Such matters are clearly highly sensitive and it stands to reason that not all complaints or allegations will be substantiated. It seems highly unlikely to me that Parliament intended that potentially harmful but unsubstantiated information could be released to the public at the conclusion of an investigation or assessment.
11. This is supported by section 3(1) which sets out the objects of the ICAC Act, including:
  - (c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).
12. I consider that if section 54 ceased to apply upon the conclusion of an investigation, this would undermine the public interest in avoiding undue prejudice to a person's reputation. I also consider that the task of striking the balance envisaged by section 3(1) ought to properly rest with those who can authorise disclosure of information pursuant to section 54(3)(a), namely the Independent Commissioner Against Corruption and the Director of the Office for Public Integrity. This is achieved by adopting an approach that section 54 remains operational after the conclusion of an investigation.
13. In light of the above, I am not persuaded that section 54 of the ICAC Act will only prevent the disclosure of information while an investigation is ongoing.
14. The applicant has also submitted that the matter the subject of the documents in issue was not in fact investigated. I am satisfied that this does not prevent disclosure from

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<sup>1</sup> *Knight v South Australia Police* [2021] SACAT 94, at [23-26], [40].

amounting to an offence as section 54 also refers to a complaint, report, assessment, referral or evaluation.

15. In summary, I am not persuaded by the applicant's submissions to alter the views expressed in my provisional determination. As I did not receive a response from the Minister, this determination is in the same terms as my provisional determination.

### Relevant law

16. A person has a legally enforceable right to be given access to a Minister's documents in accordance with the FOI Act.<sup>2</sup>
17. The FOI Act provides that upon receipt of an access application, a Minister may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by a Minister as a basis for refusing access.

18. The following clause of Schedule 1 of the FOI Act is relevant to my external review:

#### **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.

19. Section 54(3) of the *Independent Commission Against Corruption Act 2012 (ICAC Act)* is also relevant to my review:

#### **54—Confidentiality**

(3) A person who receives information knowing that the information is connected with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act must not disclose that information unless—

- (a) the person is authorised in writing by the Commissioner or the Director of OPI, or by a person approved by the Commissioner or the Director of OPI under this section to give an authorisation; or
- (b) the disclosure of that information is for the purpose of—
  - (i) dealing with a matter referred under this Act by the Commission or the Office; or
  - (ii) a criminal proceeding, a proceeding for the imposition of a penalty or disciplinary action; or
  - (iii) a person obtaining legal advice or legal representation or for the purposes of determining whether a person is entitled to an indemnity for legal costs; or
  - (iv) a person obtaining medical or psychological assistance from a medical practitioner or psychologist; or
  - (v) a person advising their employer; or
  - (vi) a person advising their business partners or others with whom a relevant fiduciary relationship exists; or
  - (vii) the management of a workers compensation claim; or
- (c) the information relates to the person and is disclosed by the person to a close family member of the person.

Maximum penalty: \$2 500 or imprisonment for 6 months.

20. Under section 48, the onus is on the Minister to justify its determination 'in any proceedings'. This includes the external review process.
21. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the Minister's determination in an external review, based on the circumstances existing at the time of review.

<sup>2</sup> *Freedom of Information Act 1991*, section 12.

### Documents in issue

22. The Minister did not determine the applicant's FOI application or internal review application within the statutory time frames and is deemed to have refused access to all documents.<sup>3</sup>
23. The Minister identified six documents within the scope of the application.

### Issues in this review

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

### Consideration

25. The Minister did not make a determination and has failed to provide me with any submissions as to whether the documents in issue are exempt. Accordingly, the Minister's position in relation to the documents in issue is unknown.
26. Noting that section 48 of the FOI Act places the onus on an agency to justify its determination, including a deemed refusal determination, ordinarily in instances where an agency fails to provide me with any submissions, I would propose to determine that all documents in issue be released.
27. That said, it is clear to me that disclosure of documents 1-3 by the Minister would constitute an offence under section 54(3) of the ICAC Act. Based on the information before me, it does not appear that any of the legislated exceptions to this offence are applicable.
28. Documents 1-3 are therefore exempt pursuant to clause 12(1). Absent any submissions from the Minister, I am not satisfied that the remaining documents are exempt.

### Comment

29. In light of the circumstances of this external review, I consider it appropriate to comment on the conduct of the Minister.<sup>4</sup> I emphasise that my view of the Minister's conduct is not part of the reasoning for my determination.
30. Noting that an offence under section 54(3) of the ICAC Act carries a substantial maximum penalty which includes imprisonment, it is alarming to me that the Minister has apparently made no effort to consider whether the documents are exempt.
31. In light of there being only six documents in issue and the fact that the Minister did not expend any resources in drafting either a determination or submissions to my Office, it is also unclear why the Minister required more than two months to respond to my request for documents and submissions.
32. In my provisional determination I advised that I would welcome any explanation the Minister may be prepared to provide me for the apparent lack of care and responsiveness in this matter. I did not receive a response.

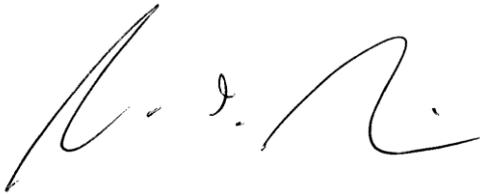
<sup>3</sup> *Freedom of Information Act 1991*, sections 19(2), 29(5)

<sup>4</sup> *Freedom of Information Act 1991*, section 39(16).

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33. As an agency as defined by the FOI Act, the Minister has an obligation to properly deal with FOI applications received, including giving proper consideration to whether the documents in issue may be exempt and cooperating with me in the course of my external review.

**Determination**

34. In light of my views above, I vary the Minister's deemed refusal determination such that documents 1-3 are exempt pursuant to clause 12(1) and documents 4-6 are not exempt.



Wayne Lines  
**SA OMBUDSMAN**

17 February 2022

## APPENDIX 1

### Procedural steps

Date	Event
31 August 2021	The agency received the FOI application dated 31 August 2021.
30 September 2021	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
4 October 2021	The agency received the internal review application dated 4 October 2021.
19 October 2021	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>
2 November 2021	The Ombudsman received the applicant's request for external review dated 2 November 2021.
16 November 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
21 January 2022	The agency provided the Ombudsman with its submissions and documentation.
24 January 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.
31 January 2022	The applicant provided submissions in response to the provisional determination.

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).