

OFFICIAL



Determination

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

Applicant:	Mr Peter Malinauskas MP
Agency:	Department of the Premier and Cabinet
Ombudsman reference:	2021/07312
Agency reference:	DPC21/1712
Determination:	The determination of the agency is varied.
Date of Ombudsman's determination:	2 March 2022
Issues considered:	Whether disclosure constitutes an offence
Exemption clauses relied upon:	12(1)
Legislation considered:	<i>Freedom of Information Act 1991</i> <i>Ombudsman Act 1972</i>

Terms of the original application:

All emails, letters, memos, text messages, notes and any other documents that relate to correspondence between the Department of Premier and Cabinet and the Ombudsman in relation to the use of data, website redirections, facebook advertising, NationBuilder, promotions on Steven Marshall's facebook page by the Government or the Office of the Premier.

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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:

All emails, letters, memos, text messages, notes and any other documents that relate to correspondence between the Department of Premier and Cabinet and the Ombudsman in relation to the use of data, website redirections, facebook advertising, NationBuilder, promotions on Steven Marshall's facebook page by the Government or the Office of the Premier.

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 8 February 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. By emails dated 8 February 2022 and 22 February 2022, the applicant and agency respectively advised that they had no further submissions to make. Accordingly, this determination is in the same terms as my provisional determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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.
8. 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.
9. Section 29A(3) of the *Ombudsman Act 1972* is also relevant to my review:

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

29A—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 Ombudsman or by a person approved by the Ombudsman under this section to give an authorisation; or
 - (b) the disclosure of that information is for the purpose of—
 - (i) dealing with a matter under this Act; 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.

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 38 documents within the scope of the application and submits that all 38 documents are fully exempt.

Issues in this review

13. 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 documents in issue in this external review.

Consideration

14. Clause 12(1) of the FOI Act provides that a document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act. As outlined in the agency's determination, the documents in issue relate to matters dealt with by my Office under the *Ombudsman Act 1972*.
15. Section 29A(3) of the *Ombudsman Act 1972* provides that it is an offence for a person who receives information connected with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under the Act to disclose the information.
16. Many of the documents in issue were clearly received by the agency and relate to a matter dealt with under the *Ombudsman Act 1972*.
17. Although several of the documents were not received, but were in fact created by the agency. I am satisfied that those documents contain information which was received by

the agency. Additionally, it is my view that section 29A(3) is intended to have a broad application such that it should apply to information which reveals even the existence or nature of a complaint, report, assessment, investigation, referral or evaluation. The reference to information 'connected' with such a matter supports a broad interpretation of the section.

18. I have also given consideration to the extent to which the information contained in the documents might be within the public domain, particularly noting the applicant's reference to media involvement in their application for external review.
19. In my view, regardless of whether or not the information is known to a person, or whether certain information has already been revealed, in the circumstances of this matter, I consider that any disclosure of information would be an offence under the *Ombudsman Act 1972*.
20. In reaching this view, I have given regard to the matter of *Ward v Courts Administration Authority*² (**Ward**). In that matter, the District Court considered clause 12(1) of the FOI Act and the confidentiality provisions of the since repealed *Children's Protection Act 1993*.
21. The repealed Act provided that under section 58, a person 'must not divulge' information of a certain kind, and that the act of divulging information of that kind would be an offence.
22. The District Court made the following observation in relation to the construction of what it meant to 'divulge' information of the kind captured by section 58 of the Children's Protection Act:

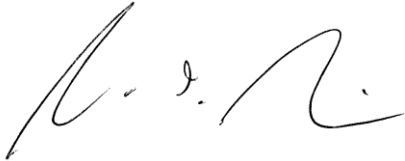
In my view, the plain and ordinary meaning of "divulge" is to disclose. It does not necessarily convey the imparting of that which is previously unknown.³
23. The District Court also went on to consider the principles underlying the Children's Protection Act.
24. I consider that the observation by the District Court in *Ward* is relevant to the circumstances of this matter. As held by the District Court, I consider that to 'divulge' is to 'disclose'. Further, having regard to the principles of the *Ombudsman Act 1972*, I consider that 'disclose' should be given a similarly broad interpretation in this case.
25. In my view, the meaning of 'disclose', in the context of this matter, includes disclosure of information that may already be known to certain parties. Regardless of what information has already been released, disclosure of the information is an offence, and, on the information before me, none of the relevant legislated exceptions are applicable.
26. I consider that, other than two exceptions, all of the documents in issue contain information the disclosure of which would constitute an offence, and are therefore exempt.
27. I do however consider that Attachment A in document 18 and the entirety of document 23 can be disclosed. Absent any further context from the surrounding documents, it is my view that these two documents do not contain any information connected with a matter dealt with by my Office.

² *Ward v Courts Administration Authority* [2003] SADC 18.

³ *Ward v Courts Administration Authority* [2003] SADC 18 [57].

Determination

28. In light of my views above, I vary the agency's determination such that Attachment A in document 18 and the entirety of document 23 be released. The remainder of the documents are exempt pursuant to clause 12(1).



Wayne Lines
SA OMBUDSMAN

2 March 2022

APPENDIX 1

Procedural steps

Date	Event
30 September 2021	The agency received the FOI application dated 30 September 2021.
31 October 2021	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
10 November 2021	The agency received the internal review application dated 10 November 2021.
23 November 2021	The agency confirmed the determination.
26 November 2021	The Ombudsman received the applicant's request for external review dated 26 November 2021.
29 November 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
20 December 2021	The agency provided the Ombudsman with its submissions and documentation.
8 February 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.
8 February 2022	The applicant advised that he had no further submissions to make.
22 February 2022	The agency advised that it had no further submissions to make.

¹ *Freedom of Information Act 1991*, section 14(2).

² *Freedom of Information Act 1991*, section 19(2).