



## Determination

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

<b>Applicant:</b>	Ms Joyce Woody
<b>Agency:</b>	Department for Child Protection
<b>Ombudsman reference:</b>	2022/01450
<b>Agency reference:</b>	2022/01450
<b>Determination:</b>	The determination of the agency is varied.
<b>Date of Ombudsman's determination:</b>	8 July 2022
<b>Issues considered:</b>	Definition of personal affairs Unreasonableness (personal affairs) Effective performance of agency's functions
<b>Exemption clauses relied upon:</b>	6(1) 16(1)(a)(iv)
<b>Legislation considered:</b>	<i>Freedom of Information Act 1991</i>
<b>Terms of the original application:</b>	
Department for Child Protection Practice Manual	

## **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:

Department for Child Protection Practice Manual

### **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 30 May 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. My provisional view assessed the agency's initial position that the redacted information was not subject to review, and did not consider whether the redacted information might be exempt as the agency had not claimed exemption at that stage. On 14 June 2022 the agency provided submissions acknowledging that the redactions were subject to review and detailing the agency's revised position that the document is partially exempt.
6. I provided my revised tentative view to the parties by my revised provisional determination dated 22 June 2022. I informed the parties that subject to receipt and consideration of any further submissions from the parties I now proposed to vary the agency's determination.
7. By email dated 24 June 2022 the applicant provided a response agreeing with the terms of my revised provisional determination.
8. By email dated 6 July 2022 the agency provided further submissions in support of its previously revised position. The agency has largely reiterated its position as previously communicated to me with the addition of providing other examples where information disclosure has been limited and reference to real life instances in which members of the public have been surprised to learn information contained in the document. I will address the former first.
9. The agency has first referred to a joint decision of the agency and the Youth Court of South Australia to limit access to CourtSA for parents who are a party to care and protection proceedings. The portal holds all documents which have been filed in the proceedings.
10. I consider that access to the document in issue can be distinguished from information contained on CourtSA. The documents filed in care and protection proceedings are heavily detailed and specific to the parties, whereas the document in issue is general such that it is relied upon in every matter dealt with by the agency. It is easier to see a

connection between documents which specifically apply to a person and any care concerns about them and the possibility for that person to alter their behaviour.

11. As an example, where the document in issue might specify the various factors which might indicate that a drug assessment is necessary, documents held on CourtSA would likely specify which factor is relevant to a particular person, and they may take steps to hide or eliminate that one factor. The list of factors in the document in issue is intentionally long in order to detect any indicators of drug use; I am not satisfied that a person could alter their behaviour such that every single factor is undetectable whilst still engaging in drug use.
12. The agency has also referred to an instance in which the Public Service Association was refused access to the psychological assessment tool used to assess potential employees as to their suitability to work in licenced children's residential care facilities. I am not persuaded that this reference adds anything further to the agency's submissions as the decision to refuse access appears to have been made solely by the agency.
13. In any event, I anticipate that I would have formed a different view as to disclosure of the assessment tool.
14. The agency has submitted that in its experience, many individuals who come into contact with the child protection system are surprised to learn of some of the information redacted in the document in issue. The agency therefore submits that it is not open to me to find that a reasonable person could speculate about the contents of the document.
15. I disagree with this submission. There is no evidence before me to indicate that those individuals had given any consideration to the contents of the document in issue. I remain of the view that any reasonable person who actively turned their mind to the contents of the document in issue could largely speculate as to its contents.
16. In reviewing all of the agency's submissions it is clear to me that the agency has taken a highly risk-averse stance in dealing with this matter. This approach is understandable given the sensitive nature of the agency's functions and responsibilities, as well as the potential severity of any outcome eventuating from an improper exercise of those functions. However, my view is that the agency's consideration of the specific document in issue may have been disproportionately influenced by its broader knowledge and actions within the child protection system.
17. To this point, the agency disputes my characterisation of the document in issue being 'general' and highlevel'. I remain of the view that this is an appropriate characterisation, but consider that this submission might indicate that the agency's assessment of the document has included a consideration of matters known by the agency but not actually within the document in issue.
18. In addition to the reasons provided in my revised provisional determination and repeated below, I have had consideration to the amount of information of a similar nature which is available to the public in other jurisdictions. In particular, the New South Wales, Victoria and Queensland equivalents of the redacted information in the document is readily available online.
19. I have also considered the unlikeliness that if the agency were somewhat obstructed in its usual methodology, it would refuse to take alternative steps to fulfil its functions. As an example, if contact with a person could not be made via telephone due to the person refusing to answer calls, I would expect that the agency would then adopt alternative

methods of communication rather than simply accepting that contact could not be made.

20. Accordingly, even if I were to accept that disclosure of the document might result in a person altering their behaviour (for example not answering phone calls), it seems unlikely that this would truly prevent the agency from properly fulfilling its functions.
21. In summary, I am not persuaded by the agency's further submissions to alter my views. Accordingly, this determination is in the same terms as my provisional determination.

#### **Relevant law**

22. 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>
23. 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.
24. The following clauses of Schedule 1 are relevant to my 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).

#### **16—Documents concerning operations of agencies**

(1) A document is an exempt document if it contains matter the disclosure of which—  
(a) could reasonably be expected—  
(i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or  
(ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or  
(iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or  
(iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; or  
(v) to have a substantial adverse effect on the conduct of industrial relations by an agency; and  
(b) would, on balance, be contrary to the public interest.

25. Section 20(1)(b) of the FOI Act is also relevant to my external review:

#### **20—Refusal of access**

(1) An agency may refuse access to a document—  
(b) if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this Act, whether or not inspection of the document is subject to a fee or charge;

26. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
27. 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.

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

## **Documents in issue**

28. The agency did not determine the applicant's FOI application within the statutory time frame and is deemed to have refused access to all documents.<sup>2</sup> The agency purported to issue a belated determination to the applicant.
29. Section 19(2)(b) provides that if an agency fails to determine an application within 30 days after receiving it, it is to be taken to have determined the application by refusing access to the documents sought. However, section 19(2a) of the FOI Act provides that 'nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and such a determination is to be taken to have been made under this Act)'.
30. It should be noted that section 19(2a) only permits agencies to make belated determinations 'to give access to a document' and cannot be utilised to refuse access. Noting that the agency belatedly 'determined to refuse' the FOI application, I do not consider the determination to be valid for the purpose of section 19(2a).
31. Upon internal review the agency varied its deemed refusal determination such that access to the one document identified as falling within scope was refused.

## **Issues in this review**

32. 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**

33. The agency stated in its purported belated determination:

I advise that Part 2 of the *Freedom of Information Act 1991* (FOI Act) and specifically section 10(1), provides that an Agency (in this case DCP), must cause copies of each of its policy documents to be made available for inspection and purchase by members of the public.

Consequently, pursuant to section 19(1)(a) and 20(1)(b) of the FOI Act, I have determined to refuse your FOI application that seeks access to the "*Department for Child Protection Practice Manual*" on the basis that I am providing it to you in accordance with Part 2 of the FOI Act.

I further note for your reference that section 10(2) of the FOI Act sets out:  
*Nothing in this section prevents an agency from deleting information from the copies of a policy document if its inclusion in the document would result in the document being an exempt document otherwise than by virtue of clause 9 or 10 of Schedule 1.*

...  
Accordingly, you will note that some information has been redacted (deleted) from the document provided to you where I have determined that clause 16 of the FOI Act is applicable. I have attached a copy of clause 16 for your reference.

34. The agency initially refused to provide my Office with an unredacted copy of the document in issue and took the view that, because access has been refused in accordance with section 20(1)(b), the applicant is not entitled to a review in relation to the portions of the documents redacted pursuant to section 10(2) of the FOI Act.

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

35. I consider that the agency's initial submissions reflect a misunderstanding of the provisions of the FOI Act, particularly around the distinction between proactive disclosure of information and disclosure pursuant to the determination of an access application.
36. The provisions of the FOI Act cannot be considered in isolation. Rather, each provision should be considered in the broader context of the Act and having particular regard to the Part of the Act in which the provision appears. The FOI Act is separated into the following parts:
  - Part 1 - Preliminary
  - Part 2 - Publication of certain information
  - Part 3 - Access to documents
  - Part 4 - Amendment of records
  - Part 5 - External review
  - Part 6 - Miscellaneous
37. Whilst the various Parts will of course interact with one another, consideration of the proper application of a section should be conducted in the context of the Part in which that section appears. Of relevance in this matter, Part 2 of the Act deals with publication of certain information. This refers to information which agencies are required to publish regardless of any specific FOI application. In other words, information which must be proactively disclosed.
38. Section 10(1) requires agencies to publish its current policy documents. Whilst section 10(2) permits an agency to delete information from a policy document which might be exempt, the application of this section does not extend to instances where a policy document falls within scope of an FOI application. Considering section 10(2) in the context of Part 2, clearly this discretion is only conferred upon an agency in relation to its requirement to publish policy documents under section 10(1).
39. In short, section 10(2) has no relevance to an FOI application and cannot be relied upon by an agency as a basis for determining a document is partially exempt. The manner in which an agency must determine an FOI application is governed instead by Part 3 of the Act.
40. Upon receipt of an FOI application an agency is required to determine the application in accordance with section 19. Further, section 20 sets out the grounds on which an agency may refuse access to a document. The agency determined that access to the document was refused on the basis of section 20(1)(b) which states that access to a document can be refused:

...if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this Act, whether or not inspection of the document is subject to a fee or charge;
41. It is important to note that section 20(1)(b) refers to a document, rather than a document containing information or matter. This specific wording indicates that section 20(1)(b) may only be applied in instances where the entirety of the document is available for inspection.
42. This interpretation is supported by section 20(4) which states that an agency must not refuse to grant partial access to a document if it is practicable to delete the exempt matter. Given that Parliament saw fit to include this section, the inference to be drawn is that in the absence of section 20(4), section 20(1)(a) would have the effect that

where a document contains even a small portion of exempt material, the entirety of the document is exempt.

43. Given that section 20(4) refers only to the redaction of exempt matter and not matter available for inspection, it is my view the section does not permit an agency to partially refuse access to a document in accordance with section 20(1)(b).
44. The applicant has sought access to the agency's practice manual, which appears to me to be a standalone document. By the agency's own submissions, the document is not available for inspection in its entirety. Accordingly, the agency cannot rely upon section 20(1)(b) to refuse access to the document.
45. Section 20(1)(a) in conjunction with section 20(4) of course permits the agency to partially release the document to the applicant, redacting the portions considered to be exempt on the basis of clause 16, and any such redactions are subject to review.
46. That said, in my provisional determination I concluded that as the agency had declined to provide me with an unredacted copy of the document and failed to explain or justify a claim of partial exemption, I was not satisfied that the agency had justified its position in accordance with section 48. Accordingly, based on the limited information before me I provisionally concluded that the document is not exempt and ought to be released in full.
47. In response to my provisional determination the agency conceded that it has refused partial access to the document in accordance with clauses 6(1) and 16(1)(a)(iv), and that such redactions are open to review by me. The agency has also provided me with a copy of the unredacted document as requested.
48. The agency submits that, upon further consideration, several portions of the redacted material can be released to the applicant. I accept the agency's revised position and therefore advise that the remainder of this determination will only consider the portions of the document over which the agency maintains a claim of exemption.
49. The agency submits that a mobile phone number is exempt on the basis of clause 6(1) as the number has now been allocated to an agency staff member for the purpose of case work. It is unclear whether the phone is also utilised for personal purposes, however I accept that the ability to be contacted beyond ordinary business hours is sufficient to characterise the number as constituting personal affairs.
50. I am also satisfied that disclosure would be unreasonable as the number does not contribute to understanding the document generally.
51. As to the application of clause 16(1)(a)(iv), with the exception of the redactions applied to the Intake chapter and page 3 of the Raising and Responding to Care Concerns chapter, generally the agency submits that:
  - it employs a broad range of processes and strategies to detect and minimise the risk of harm to children and young people
  - the public disclosure of the agency's processes and strategies may enable a person to behave in such a way that could conceal harm or risk of harm to a child or young person. This may involve a perpetrator of abuse:
    - altering their behavior to avoid detection
    - coaching a child or young person to act or respond to questions in a certain way
    - staging an inaccurate home environment
    - taking steps to avoid being located.

52. Clause 16(1)(a)(iv) requires that disclosure is reasonably expected to have a 'substantial adverse effect'. The phrase is not defined in the FOI Act but has been held to be a high threshold where the effect is 'sufficiently serious or significant to cause concern to a properly informed reasonable person'.<sup>3</sup>
53. When considering whether the agency's effective performance of its functions would be substantially adversely affected by disclosure, I consider it relevant to turn my mind to the nature of those functions. The agency has legislated functions under the *Children and Young People (Safety) Act 2017*(the CYPS Act) which aim to detect and minimise risk of harm to children and young people. Any impact upon the agency's ability to carry out those functions therefore arguably result in harm or risk of harm remaining undetected and unaddressed.
54. I consider that any effect which might place a child or young person at risk, or allow a child or young person to remain at risk would cause concern to a properly informed reasonable person. Accordingly, in the circumstances of this matter, I am satisfied that any effect on the agency's ability to perform its functions may satisfy the initial requirements of clause 16(1)(a)(iv).
55. That said, the anticipated effect must still be one that can reasonably be expected to result from disclosure, and is not considered to be irrational, absurd or ridiculous.<sup>4</sup>
56. I accept that the kind of outcomes identified above can be characterised as substantially adverse. I also accept that the agency has experienced instances of behaviour being altered in that manner. That said, it is not clear to me that further instances of such behaviour could reasonably be expected to specifically eventuate as a result of disclosure of the redacted information.
57. A person perpetrating abuse could, regardless of disclosure of this particular document, alter their behaviour to avoid detection. Such a person would naturally turn their mind to the processes that the agency might employ to detect problematic behaviour and I consider that a reasonable person doing so could speculate what the redacted material contains.
58. As has been outlined, the document is a policy document; the processes contained therein are general and high-level such that they can be applicable in all circumstances. From my viewing of the redacted material, the information appears to be a kind which a reasonable person would expect would be contained within a policy document. I therefore consider that although the adverse effects anticipated by the agency may occur in the future, it would not specifically be as a result of disclosing the document in issue.
59. As to the public interest, the agency submits:

Agency considered the following factors in favour of disclosure:

- a. The public interest in fulfilling the objects of the FOI Act;
- b. The public interest in individuals who are impacted by Agency decisions in having access to documents which guide the operations of the Agency; and
- c. The benefit to the Agency in members of the public having access to documents such as the Manual of Practice to provide them an opportunity to participate in the formulation of policy.

And the following factors in favour of non-disclosure:

<sup>3</sup> *Konieczka v South Australia Police* [2006] SADC 134.

<sup>4</sup> *State of South Australia (Department of the Premier and Cabinet) v Seven Network (Operations) Ltd* [2022] SACAT 11 at [46]

- d. The document subject to the FOI application is the guiding document used by all Agency practitioners in their work with children and young people across the spectrum of time that the Agency may be involved with that individual.
  - e. The public interest in ensuring that children and young people at risk of harm are protected by the very statutory Agency tasked with the administration of the CYPSCA;
  - f. The risk to the welfare of a child or young person where methods employed to detect risk of harm are disclosed resulting in the opportunity for individuals to thwart detection; and
  - g. That the risk of harm to even just one child or young person is sufficient to justify non-disclosure.
60. I agree with the factors identified in favour of disclosure and further note that section 10 indicates a Parliamentary intention that an agency's policy documents ought to be available to the public.
61. As to the factors contrary to disclosure, the first factor appears to simply be a factual statement. The agency has simply described the nature of a policy document and it is unclear to me what relevance this has to the public interest.
62. I strongly agree that protecting children and young people from harm and safeguarding their welfare is in the public interest. I also agree that a risk of harm to even one child or young person would weigh substantially against disclosure. However, as outlined above, I am not satisfied that the agency has established that disclosure of the redacted information specifically would create that risk.
63. On balance, I am not satisfied that disclosure would be contrary to the public interest.
64. As to the information redacted in the Intake chapter and on page 3 of the Raising and Responding to Care Concerns chapter, it is clear from the surrounding information that the redacted information is a phone number. The agency has explained that the number is a landline dedicated solely for the agency to make priority contact with the Child Abuse Report Line (**CARL**). Of particular relevance, the agency further submits that:

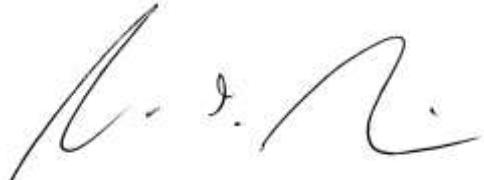
The general CARL line received 66833 telephone calls in the 2020/2021 financial year.

The average wait time was 11 minutes and 49 seconds... It would be an inefficient use of department resources if staff members were required to spend time on hold waiting to make a notification to CARL.

65. I agree with the agency's submissions in this regard. Noting the average wait time for the general CARL line, it seems likely that disclosure of the priority line would result in members of the public utilising the latter, effectively undermining the purpose of establishing a separate priority line at all.
66. If agency staff are unable to quickly and efficiently contact CARL, a task presumably undertaken frequently, this will detract from the time available to staff to fulfil other functions. Again noting the frequency of this task, I am satisfied that unrestricted disclosure of the priority number could reasonably be expected to substantially adversely affect the agency's performance of its functions.
67. I consider that there is very little public interest in disclosing the number beyond fulfilling the objects of the FOI Act. Balanced against the public interest in safeguarding the agency's internal processes and ensuring efficient use of the agency's resources, I am satisfied that disclosure would be contrary to the public interest.

**Determination**

68. In light of my views above, I vary the agency's determination such that the document be released in full except:
- the mobile phone number which is exempt on the basis of clause 6(1)
  - the CARL priority landline number which is exempt on the basis of clause 16(1)(a)(iv).



Wayne Lines  
SA OMBUDSMAN

8 July 2022

## APPENDIX 1

### Procedural steps

Date	Event
16 September 2021	The agency received the FOI application dated 12 September 2021.
15 October 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>
16 November 2021	The agency purported to issue a belated determination to the applicant.
18 February 2022	The agency received the internal review application dated 18 February 2022.
3 March 2022	The agency varied the deemed refusal determination.
10 March 2022	The Ombudsman received the applicant's request for external review dated 10 March 2022.
22 March 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
5 April 2022	The agency provided the Ombudsman with some of the requested submissions and documentation.
3 May 2022	The agency provided the Ombudsman with some of the requested submissions and documentation.
22 June 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.
24 June 2022	The applicant provided submissions in response to the provisional determination.
6 July 2022	The agency 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).