



Determination

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

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| Applicant: | Mr Greg Griffin |
| Agency: | Attorney-General's Department |
| Ombudsman reference: | 2022/06783 |
| Agency reference: | qA38271 |
| Determination: | <p>The determination of the agency is varied, the effect of which is</p> <ul style="list-style-type: none">• I confirm the agency's determination in relation to redactions made pursuant to clause 6(1)• I vary the agency's determination in relation to documents claimed to be exempt by virtue of clause 12 as set out on page 16 below.• I vary the agency's redactions made to documents pursuant to clause 17(c) as set out on page 16 below. |
| Date of Ombudsman's determination: | 6 March 2023 |
| Issues considered: | Secrecy provision Whether documents would infringe privilege of parliament |
| Exemption clauses relied upon: | 12, 17(c) |
| Legislation considered: | <i>Freedom of Information Act 1991</i> <i>Work Health and Safety Act 2012</i> |

REASONS

Application for access

2. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:
 1. A copy of the full report of SafeWork SA into the Adelaide Football Club Training Camp 2018 convened on the Gold Coast, Queensland between 29 January 2018 to 2 February 2018 (the Camp).
 2. Copies of any and all correspondence between Mr Jenkins and the Adelaide Football Club and/or SafeWork SA pertaining to the Camp and/or the SafeWork SA investigation into the Camp.
 3. Copies of the following other documents in relation to the Camp and/or the SafeWork SA investigation into the Camp, being:
 - 3.1. the request for SafeWork SA to conduct the investigation into the Camp;
 - 3.2. all correspondence between SafeWork SA and any party as to the scope of any SafeWorkSA investigation into the Camp;
 - 3.3. all correspondence to and from any person invited to or requested to provide evidence to SafeWork SA in the investigation;
 - 3.4. all statements taken by SafeWork SA both in draft and final from persons interviewed in the SafeWork SA investigation;
 - 3.5. all draft versions of the SafeWork SA Report;
 - 3.6. all correspondence between the Adelaide Football Club, the Australian Football League and SafeWork SA (AFL) pertaining to the SafeWork SA investigation including any suggested amendments to any draft Report provided to them for review or comment.

Background

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

Jurisdiction

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

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 2 February 2023. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
6. The applicant, agency and interested party provided submissions in response. I have considered these submissions below.

The applicant's submission

7. The applicant disagrees with my view that the agency's description of documents is in accordance with section 23 of the FOI Act, because:

We submit that these findings are at odds with the findings at paragraphs 14, 16 and 17 as it cannot be said that particularisation of the documents as requested will render the schedule of documents exempt if the description is simply administrative - which it is.

Identifying who sent an email and/or document and who received the email and/or document does not fall within the ambit of section 271(1) as this is not information gained

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or received “*exercising any power or function under this [the WHS] Act.*” The only possible time the description may be “exempt” would be if it identified a person who was otherwise unknown to the Inspector except for information he/she had obtained exercising his/her powers under the WHS Act.

8. The agency is not required to produce a schedule of documents; it is not a feature of the FOI Act. In any event, given that the document is not a document ‘within scope’ of the access application, I have no jurisdiction pursuant to section 39(11) to determine the applicant’s contention about the schedule of documents.
9. The applicant could raise a complaint with me pursuant to the *Ombudsman Act 1972* in relation to the agency’s administration of the matter, but I foreshadow I would be unlikely to consider that further given I do not agree with the applicant’s submission for the reasons given above and in my provisional determination, the substance of which is repeated in this determination.
10. The applicant has asked that I address the following issue:

In addition the Internal review has indicated that document 203 titled “Investigation Summary Draft” is in fact the full report of SafeWork SA into the Adelaide Football Club Training Camp 2018 (being document 1 sought by the FOI Application)(the SafeWork SA report).

Not only does this seem unlikely given the use of the word “Draft” but also means that if in fact that is the full (final) report then the Agency has failed to identify the “draft reports” as requested by dot point 3.5 of the FOI Application and thus has failed to make a determination on those documents.

Whilst we understand from the Provisional Determination that the content of the draft reports will not be disclosed, this does not mean that it cannot be identified how many draft reports were created and to whom they were sent to (accepting of course that if they were sent to a person who was otherwise unknown to the Inspector except for information he/she had obtained exercising his/her powers under the WHS Act then such person’s name would be exempt)

11. For the reasons given above I refuse to confirm or deny whether any of the other documents are, or are not investigation summaries or drafts of same; to do so would not be consistent with section 39(15) of the FOI Act.

The agency’s submission

12. The agency advises that it accepts my views in relation to documents:

40, 45, 201 (with the third substantive paragraph redacted), 240, 241, 242, 244, 31a, 261, 262 and 263. Subject to any third-party submissions I also accept the determination as it pertains to paragraph 2, page 2 of document 65a, and pages 2 and 3 of 65a.2 (noting the redactions required in respect of information about third parties).

13. The agency’s submission focuses on documents 158, 207, 218 and 251.
14. I cannot repeat the agency’s submission as to do so would reveal the substance of the documents. I appreciate this puts the applicant at a disadvantage, notwithstanding, having considered the agency’s submission I have determined that documents 158, 207, 218 and 251 are exempt as they relate to issues (and contain information obtained) by inspectors while exercising a power under section 160 of the WHS Act.
15. I have therefore determined that documents 158, 207, 218 and 251 are exempt pursuant to clause 12(1).

Interested third party submissions

16. I consulted with an interested third party (ITP) in relation to documents 65a and 65a.2, in consideration that disclosure of the information could involve a disclosure of information it considered to be their business affairs, pursuant to clause 7.
17. In essence, the ITP opposes the disclosure of any information within documents 65a and 65a.2, save for a few sentences, which would render the documents meaningless.
18. In relation to document 65a.2 the ITP submits that disclosure of the document would undermine the confidentiality expected of the ITP when it receives information pursuant to the exercise of its functions. It says that should this information be released, it would have an adverse effect on its affairs because, in essence, people might doubt whether they can speak with the ITP without confidential information being released. The agency therefore claims the information is exempt pursuant to clause 7(1)(c)(ii).
19. I do not find this argument persuasive when considering that the nature of the ITP's affairs, and its functions, are not explicit, or even implicit, in the document. I find it difficult to reconcile that release of the information could prejudice the ITP at all, particularly noting that much of the information has been made public.
20. While the agency has addressed the public interest test implicitly, I consider that there is a strong argument that the public interest weighs in favour of disclosure because:
 - the document does not reveal the affairs of the ITP, in fact, the nature of the ITP and its functions are not explicit, or even in my view, implicit from the document
 - the public interest must also balance against the applicant's right to have access about themselves, as is the intention of subsection 271(3)(a).
 - most of the information is already in the public domain.
21. I am therefore not persuaded either document 65a or 65a.2 is exempt pursuant to clause 7.
22. While the ITP was not consulted in relation to the application of clause 12(1), it has nevertheless made a submission in relation to same.
23. The ITP contends in relation to documents 65a and 65a.2 that greater redaction is required in order not to reveal information about persons other than the applicant. While I had redacted a version of the document so as not to reveal the identity of any other person, the ITP appears to submit that information about other persons where that information is redacted or anonymous should also be redacted. I am not persuaded that it is inconsistent with the exception at 271(3)(a) of the WHS Act that information as relayed by a person about another anonymous person should be redacted, particularly where that information is about an experience of the person. I am of the view that the redactions strike the right balance between the exemption at 271(3)(a) and section 271(2).
24. I also note that the agency advised that it accepts my view in relation to documents 65a and 65a.2, but 'noting the redactions required in respect of information about third parties'. I consider that the agency will generally be best placed to identify where information pertaining to its functions should be exempt. Accordingly, I am not persuaded that further redactions are required to documents 65a and 65a.2 in the manner proposed by the ITP. I note however, that one further redaction is required to the header of page 2 of document 65a.2, so as not to reveal the name of the ITP.

Relevant law

25. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
26. 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.
27. The following clauses of Schedule 1 of the FOI Act 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).

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.

17—Documents subject to contempt etc

A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown—

- (a) constitute contempt of court; or
- (b) contravene any order or direction of a person or body having power to receive evidence on oath; or
- (c) infringe the privilege of Parliament.

28. In conjunction with clause 12(1), the agency has also relied upon section 271 of the *Work Health and Safety Act 2012* (WHS Act) which states:

271—Confidentiality of information

(1) This section applies if a person obtains information or gains access to a document in exercising any power or function under this Act (other than under Part 7).

(2) The person must not do any of the following:

- (a) disclose to anyone else—
 - (i) the information; or
 - (ii) the contents of or information contained in the document;
- (b) give access to the document to anyone else;
- (c) use the information or document for any purpose.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
- (b) in the case of a body corporate—\$50 000.

(3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—

- (a) about a person, with the person's consent; or
- (b) that is necessary for the exercise of a power or function under this Act; or
- (c) that is made or given by the regulator or a person authorised by the regulator if the regulator reasonably believes the disclosure, access or use—
 - (i) is necessary for administering, or monitoring or enforcing compliance with, this Act; or
 - (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations; or
 - (iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent

¹ Freedom of Information Act 1991 s 12.

- a serious risk to public health or safety; or
- (iv) is necessary for the recognition of authorisations under a corresponding WHS law; or
- (v) is required for the exercise of a power or function under a corresponding WHS law; or
- (d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
- (e) that is required or authorised under a law; or
- (f) to a Minister.

- 29. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
- 30. 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

- 31. The agency identified 284 documents within the scope of the application, totalling approximately 3490 pages. The agency provided access to 24 documents in full, 8 documents in part, and refused access in full to the remaining 252 documents.

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 documents in issue in this external review.

Consideration

Identification of documents

- 33. The applicant alleges in their submission that:

Both the initial determination and the Internal Review failed to properly particularise the vast majority of documents identified by the Agency which fell within the scope of the FOI application. This failure deprived our client of any reasonable opportunity to make an objective determination as to whether the said documents are indeed exempt documents or whether any exception to the proscription against disclosure may apply. As such our client has been denied procedural fairness and natural justice in respect of the FOI application.

The enclosed document titled "Internal Review Schedule of Documents" (the Schedule of Documents) evidences the ground of review set out above.

- 34. Section 23(4) of the FOI Act provides:
 - (4) An agency is not required to include in a notice any matter if its inclusion in the notice would result in the notice being an exempt document.
- 35. Particularisation of the documents in greater detail would result in the determination and schedule of documents becoming an exempt document. It is not uncommon for agencies to use generalised document descriptors in determinations and schedules so as to avoid a determination or schedule becoming exempt.
- 36. Similarly, section 39(15) provides:

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(15) A relevant review authority should avoid disclosing in its reasons for a determination any matter that the agency claims is exempt matter (whether or not the relevant review authority agrees with that claim).

37. Accordingly, I am obliged not to disclose exempt material, and will adopt the nomenclature used by the agency in its determination and schedule of documents.
38. The agency's determination and schedule of documents are in my view, consistent with the requirements of section 23 of the FOI Act.

Clause 6(1)

39. While the applicant has not raised an objection to the redaction of matter pursuant to clause 6(1), for completeness, I have turned my mind to its application.
40. I am satisfied that the mobile phone numbers of public servants are the personal affairs of those named. I am satisfied that it would be unreasonable to disclose the mobile phone numbers of staff in documents 86 and 96, given the likelihood that those staff could then be contacted outside of office hours. I therefore confirm the agency's determination in respect of the clause 6(1) redactions in documents 86 and 96.

Clause 12

41. The majority of the documents within scope have been refused in full on the basis of clause 12(1), as disclosure would constitute an offence against an Act, namely, section 271 of the WHS Act.
42. It is public knowledge that SafeWork SA conducted an investigation into a pre-season camp undertaken by players and staff of the Adelaide Football Club in 2018. Besides the fact that the investigation was undertaken and the Adelaide Football Club was cleared of any wrongdoing for the purposes of the WHS Act, SafeWork SA has not published or provided the public with any further information about its investigation. As I understand it, this is its standard practice.²
43. The agency, in its initial determination advised:

The exempt documents/attachments relate to an investigation conducted by SafeWork SA inspectors in the course of exercising their powers and functions under the Work Health and Safety Act 2012 (the WHS Act). Section 271 of the WHS Act makes it an offence to disclose information obtained under that Act except in specified circumstances.

Where the exception criteria to section 271 of the WHS Act has been met and the documents relate to your client, access has been granted to documents in part/in full.

In addition, attachments 8a, 8b, 43a, 82a, 83a, 84a, 85a, 86a, 87a, 88a, 89a, 90a, 91a, 110a, 119a, 120a, 120b, 133a, 151a, 156a, 156b, 156c and 159a are administrative in nature and were not gained by exercising a power or function under the WHS Act and can also be disclosed.

As none of the exceptions contained in sub section 271(3) apply to the remaining documents and attachments listed under clause 12; I consider it would be an offence under section 271 of the WHS Act to disclose the exempt material to you/your client. A copy of section 271 of the WHS Act is provided for your information.

44. The agency largely confirmed its position on internal review, though some further redactions were removed from documents provided in part.

² <https://www.safework.sa.gov.au/news-and-alerts/news/news/2021/investigation-into-adelaide-crows-2018-camp-complete>

45. The applicant submits that:

...(T)he description of the documents in the Schedule of Documents would seem to indicate that all documents where the author is described as “SWSA” are documents that have been created by SafeWork SA and therefore cannot be documents that fall within Clause 12 as the documents cannot have been obtained or gained by exercising any power or function under the WHS Act “except to the extent that they contain information that was obtained or gained by the relevant SafeWork inspector in exercising his functions under the WHS Act.” (see Treasury and Finance, Department of 2018/11929 [2019] SAOmbFOI 5).

One would question though how the documents could contain such information because to disseminate that information to someone else would constitute a breach of s271 of the WHA Act if its disclosure was not permitted under s271(3) of the WHS Act. The Internal review did not address this issue.

In addition the attachments associated with those emails would not be exempt under Clause 12 unless they too contain information obtained or gained in exercising any power or function under the WHS Act and the disclosure had been permitted under 271(3) of the WHS Act.

Further the SafeWork SA report being sought by our client would also not be exempt under Clause 12 as it was not a document that was obtained or gained by exercising any power or function under the WHS Act. It was a document created by SafeWork SA.

Without specifically addressing every document in the Schedule of Documents, the above applies to them as well.

Further any document created by any other person, body and/or entity that was not obtained or gained by the relevant SafeWork inspector in exercising his functions under the WHS Act is also not exempt by virtue of clause 12.

However when one looks at the documents requested in the FOI application a number of them cannot possibly be caught by s271 of the WHS Act (eg the request for SafeWork SA to conduct the investigation into the Camp) and others are only caught “to the extent that they contain information that was obtained or gained by the relevant SafeWork inspector in exercising his functions under the WHS Act” (eg the SafeWork SA report).

Looking at the SafeWork SA report, it is fair to assume that such a report would contain information and/or documents that have been obtained by the relevant SafeWork inspector in exercising his functions under the WHS Act such as records of interviews, submissions etc and as such that information should not be disclosed. However this information would not be the only content of the report. The author would have considered the information and documents he had obtained and gained and then would have formulated his own opinions and come up with recommendations etc. By their very nature such opinions and recommendations have been created by the author and simply cannot have been obtained or gained in exercising his/her powers or functions under the WHS Act.

46. Section 271 of the WHS Act applies if a person ‘obtains information’ or ‘gains access to a document’ when exercising any power or function under the WHS Act. Subsection 271(2) limits the use of the information and documents.
47. The applicant’s submission invites a discussion about whether or not there is a class of documents which may disclosed as they can be ‘carved out’ from offending both subsections 271(1) and (2).
48. I am of the view that section 271(1) only applies to the *receipt* of information and documents; the words ‘obtain’ and ‘gain’ substantively constrain the application of the section to acts of receiving information and documents, as distinct from creating

information or documents. That is not to say that a document created could not be in breach of subsection 271(2) if the information obtained is 'used'. I will return to this point later in my consideration.

49. The powers and functions of SafeWork SA (referred to in the WHS Act as the 'regulator') are extremely broad. For example, section 153 of the WHS Act provides that:
- (1) Subject to this Act, the regulator has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
 - (2) Without limiting subsection (1), the regulator has all the powers and functions that an inspector has under this Act.
50. SafeWork SA has many functions, as described by section 152 of the WHS Act. The most applicable in the context of this matter is subsection (b), to 'monitor and enforce compliance with this Act'.
51. Additionally, as noted above, SafeWork SA has all the powers and functions that an inspector has under the WHS Act. Section 160 and Division 2 of Part 9 of the WHS Act sets out the functions and powers of inspectors under the WHS Act. It is clear from these provisions that inspectors appointed under the WHS Act have extremely broad investigative powers. In this context I refer in particular to the following powers:
- powers of entry (section 163)
 - power to inspect, examine and make enquiries at a workplace (section 165(1)(a))
 - power to require production of documents and answers to questions (section 171)
 - powers to copy and retain documents (section 174)
 - power to seize evidence (section 175)
 - power to seize dangerous workplaces and things (section 176).
52. In my view, while the powers of the regulator are broad, both the above sections and divisions narrow the exercise of its powers to the performance of one of its 'functions'.
53. In his second reading speech, Minister Russell Wortley, as he was then, said in relation to section 271 that:
- 271—Confidentiality of information - **Inspectors** are given broad powers and protections under the Act. Clause 271 is one of a number of mechanisms designed to ensure that **inspectors** are accountable and credible when they perform functions and exercise powers [emphasis added]³
54. This suggests to me that section 271(1) could be read in relation specifically to the work of inspectors. In that case, then the transmission of information or receipt of documents incidental to the work that an inspector undertakes (pursuant to their functions) is *not* going to be protected by section 271. I think this is common sense although I also accept that a plain reading of section 271(1) does not evince this position. Notwithstanding, a routine email from one staff member to another within SafeWork SA, which is not revelatory of information gained, but is otherwise within scope of the access application, could not attract the protection of 271; the author may not be exercising a power or function as described above.
55. I have previously formed the view that information which is of a purely administrative nature may be disclosed without offending section 271(1) of the WHS Act, I remain of that view for the above reasons.⁴ The agency appears to accept that this is the case, as

³ South Australia, *Second Reading Speech*, Legislative Council, Thursday 26 February 2022, page 203, MLC Wortley

⁴ Treasury and Finance, Department of 2018/11929[2019] SAOmbFOI 5 (22 July 2019)

it has determined that a number of documents are purely administrative and could be released.

56. Accordingly, I am of the view that documents 40, 45, 201 (with paragraph 3 redacted) 240, 241, 242 and 244 are also purely administrative and would not reveal information obtained or a document gained in the course of the exercise of a power or function under the WHS Act.
57. I note, with regard to the applicant's access application, that information of this type is unlikely to be of interest to them.
58. There is another class of documents which the applicant seeks access too, namely those where:

The author would have considered the information and documents he had obtained and gained and then would have formulated his own opinions and come up with recommendations etc. By their very nature such opinions and recommendations have been created by the author and simply cannot have been obtained or gained in exercising his/her powers or functions under the WHS Act.

59. I think that the point that the applicant arrives at, which is that information should be disclosed where the information discloses an opinion or recommendation by a SafeWork SA employee is somewhat of a non sequitur. Section 271(1) applies if a person 'obtains information' or 'gains access' to a document in the exercise of any power or functions under the WHS Act. Therefore, wouldn't the disclosure of that opinion or recommendation still be *revelatory* of information obtained or a document gained by virtue of the exercise of a power or function under the WHS Act if it were to be disclosed? In my view the answer is yes. What would be the purpose of section 271(1) if information obtained pursuant to that section could simply be restated and disclosed in the exercise of expressing an opinion about the subject matter of the information obtained?
60. Further, in the context of this 'class' of documents, it is my view that disclosure of opinion or recommendations would be a 'disclosure' of the information that is prohibited by section 271(2)(a):
- (2) The person must not do any of the following:
 - (a) disclose to anyone else—
 - (i) the information; or
 - (ii) the contents of or information contained in the document;
 - (b) give access to the document to anyone else;
 - (c) use the information or document for any purpose.
61. I also construe the terms 'must not' in the commencement of subsection 271(2) as inclusive of *any* type of disclosure, including if such a disclosure were to occur in the expression of an opinion or recommendation.
62. It also follows that disclosure under the FOI Act would be prohibited by section 271(2)(c) as that would constitute a 'use' of the document for 'any purpose'. I therefore conclude that a document containing an opinion or recommendation of an inspector concerning an investigation undertaken by same is not a class of information that can be disclosed.
63. The applicant submits:

Further given that the SafeWork SA report appears to have been disclosed to other persons/bodies/entities as discussed in paragraph 10 above, this in our opinion confirms

that at least those parts of the report that contains opinions and recommendations is not exempt from disclosure and access should have been provided to our client.

64. Having viewed each of the examples provided by the applicant, I confirm that each dissemination was not disclosed to any other person/body/agency not permitted by section 271(3)(c)(i)-(v). Accordingly, I do not consider that this point adds any weight to the argument that opinions or recommendations can be carved out and disclosed.

65. The applicant submits:

In any event, we say that disclosure to our client of the SafeWork SA report is permitted under the FOI Application as the report falls within the exemption set out in s271(3)(a) of the WHS Act. Our client was a participant in the camp, made a complaint about its conduct, was interviewed by a SafeWork Inspector and implicitly provided his consent to the disclosure of the document by making the FOI Application.

Our client accepts that if the report contains information about other persons then such information should not be disclosed but that is all that should not be disclosed. Any findings, opinions and/or recommendations made in the report would relate to our client and therefore in our opinion be “about” our client and thus disclosure of the balance of the SafeWork SA report would fall within the ambit of s271(3)(a) of the WHS Act.

66. I have previously considered the application of section 271(3)(a), which I appreciate has been cited by the applicant in their submission.⁵ The following passages from that determination are relevant to the submission of the applicant:

20. The application of section 271(3)(a) of the WHS Act was discussed by the *District Court of South Australia in the matter of Pages Hire Centre (NSW) Pty Ltd and Boros v Department of Premier and Cabinet*⁶ (**Pages Hire Centre**). This matter considered the application of the predecessor to the WHS Act, the Occupational Health, Safety and Welfare Act 1986 (OHSW Act) as it related to clause 12(1) of Schedule 1 to the FOI Act. However, despite finding that in that case, the relevant Act was the OHSW Act, His Honour Beazley DCJ also examined the application of section 271 of the WHS Act.

21. In discussing the differences between section 55(1a)(c) of the OHSW Act and section 271(3)(a) of the WHS Act, Beazley DCJ stated:

Under s 55(1a)(c) of the OHSW Act disclosure was permitted when it was made ‘with the consent of the person to whom the information relates or who furnished the information’. By contrast under s 271(3) of the WHS Act, the proscription against disclosure does not apply in respect of information: ‘about a person, with the person’s consent’. Upon a literal reading, disclosure would be permitted under the repealed Act if either the person to whom it related or the person who furnished it consented.

Such a construction would lead to the unfortunate consequence that the consent of the very person to whom the information relates, would not be required if the informant gave his consent. The informant, of course, will already be aware of the information. The person to whom it related may not be aware at all, and will not know of its contents until it is disclosed to him.

This may well explain why it was that Parliament restricted the exemption in the repealing Act to only that person, and deleted the reference to the person who furnished the information whose consent must be obtained.

⁵ Treasury and Finance, Department of 2018/1 1929 [2019] SAOmbFOI 5 (22 July 2019)

⁶ [2014] SADC 3.

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This seems consistent with the attitude expressed by Parliament in s 27(2) of the FOI Act that an agency must obtain the views of the person concerned before access is given.⁷

22. Applying this interpretation of section 271(3)(a) of the WHS Act, the agency was required to consider to whom the information in the documents (that it claimed were subject to clause 12(1) of the FOI Act) related, to ascertain whether section 271(3)(a) of the WHS Act applied.

23. The construction of the term 'about a person' was also discussed in Pages Hire Centre. The District Court stated:

It must be construed strictly. If it were construed in the manner suggested by the appellants, disclosure may never be permitted. An officer could not be certain as to all of the potential persons who may have been 'referred' to directly or indirectly in a document. Even if he could identify them it would be difficult to ensure that all had given their consent. In my opinion it ought be restricted to those persons directly concerned, or to put it in the language of s 271(3) of the WHS Act, limited to information 'about' a person.⁸

67. As noted above, the exemption must be construed strictly, and be limited to information 'about' a person. Having viewed the documents, I am largely of the view that the agency has applied this section appropriately.

68. Notwithstanding, I am of the view that paragraph 2 of page 2 of document 65a and pages 2 and 3 of document 65a.2 contain information about only the applicant and their experiences. Information about other persons can be redacted so the document is consistent with the exception at 271(3)(a).

69. I also advise that the applicant is mentioned in some documents but in circumstances where information about the applicant is fused together with information about various people; it is impossible to sever the information about the applicant from those various other people and even if it was possible the document would be rendered meaningless with the level of redactions required.

70. The applicant submits:

We are also of the opinion that disclosure of the SafeWork SA report would be permitted under s271(3)(b) of the WHS Act particularly given the regulators functions as set out in s152 of the WHS Act.

The camp conducted by the Adelaide Football Club, the subject of the SafeWork SA report, had significant ramifications for a number of the participants involved in the camp including our client. It also had wider ranging ramifications for the remainder of the teams in the Australian Football League (AFL) in the conduct of future training camps.

As such we are of the opinion that the disclosure of the SafeWork SA Report may assist in the exercise of the regulator's functions, particularly under sections 152(c), (e), (f) and (g).

71. I accept the applicant's point that disclosure of the report may very well achieve some of the regulators functions, as outlined in section 152 of the WHS Act. But the decision to disclose the report rests solely with SafeWork SA; it is not within my jurisdiction as the relevant review authority to suggest that it should release the report. The agency's public statement about the report advises that it does not 'provide detail on investigation matters, and will not do so in this case'.⁹ I can only presume that the

⁷ [2014] SADC 3 at paragraphs 88 - 93.

⁸ [2014] SADC 3 at paragraph 120.

⁹ <https://www.safework.sa.gov.au/news-and-alerts/news/news/2021/investigation-into-adelaide-crows-2018-camp-complete>

agency arrived at that decision after a careful consideration of all of the factors that weigh upon it successfully carrying out its functions.

72. Accordingly, I am not persuaded by the applicant's submission that the agency has erred in its application of clause 12(1), save for the documents identified above. I therefore confirm the agency's application of clause 12(1) to the documents that I have not identified above.

Clause 17(c)

73. The agency determined that documents 31, 31a, 32, 33, 33a, 36, 36a, 36a.1, 37, 42, 42a, 42b, 46, 46a, 46b, 183, 183a, 188, 188a, 192, 192a, 261, 262, 263, 264, 265 are exempt by virtue of clause 17(c), namely, that to disclose those documents would infringe the privilege of parliament.
74. The agency has determined that documents 31, 32, 42b, 46, 46a, 46b, 183, 183a, 188, 188a, 192, 192a were also exempt by virtue of clause 12, and having viewed those documents, I confirm those documents as exempt by virtue of the discussion about clause 12 above. Accordingly, I have examined the remaining 15 documents, being 31a, 33, 33a, 36, 36a, 36a.1, 37, 42, 42a, 261, 262, 263, 264, 265.

75. The agency initially determined that:

The exempt documents are correspondence between the Occupational Safety, Rehabilitation and Compensation Committee (OSRCC) and SWSA in relation to enquiries of the investigation undertaken by SWSA, documents which were prepared by SWSA for staff to appear before the OSRCC and extracts of Hansard.

The OSRCC is a Standing Committee of the Parliament established under the Parliamentary Committee's Act 1991. Therefore, I consider disclosure of these documents will infringe on the privileges of Parliament.

76. It also advised in its internal review determination that:

Your sixth point concerns the application of clause 17 of Schedule 1 of the FOI Act. In respect of the Hansard records, the FOI Officer provided the required information for you to access those materials. This approach is consistent with maintaining parliamentary privilege.

77. The applicant submits:

The Internal Review also relied upon Clause 17 of Schedule 1 of the FOI Act in refusing access to 26 documents sought in the FOI Application. We are of the opinion that Clause 17 has no role to play in refusing access to such documents.

We are of the opinion that by their very nature the documents cannot be exempt under clause 17 for the simple reason that the documents (except for 31a, 36a, 36.1a, 42b, 261, 262 and 263) were created by SafeWork SA and the sending of them to whomever does not invoke parliamentary privilege. The use of them in parliament may well attract parliamentary privilege but this cannot have occurred prior to them being used and is therefore not a valid reason for the documents not to be disclosed.

78. The concept of Parliamentary privilege has developed from Article 9 of the *Bill of Rights 1688*, which states that 'freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament'. The intention behind the privilege is, inter alia, to allow Parliament to proceed with parliamentary business without undue interference.

79. Unlike the Commonwealth, an Act to regulate parliamentary privilege has not been enacted in South Australia,¹⁰ however the privilege is preserved in South Australia by section 38 of the *Constitution Act 1934* which provides:

38—Privileges, powers etc of Council and Assembly

The privileges, immunities, and powers of the Legislative Council and House of Assembly respectively, and of the committees and members thereof respectively, shall be the same as but no greater than those which on the twenty-fourth day of October, 1856, were held, enjoyed, and exercised by the House of Commons and by the committees and members thereof, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

80. Parliamentary privilege is generally accepted to cover all words spoken in Parliament. Very clearly, Hansard extracts will fall within this category and, unlike legal professional privilege, parliamentary privilege is absolute and cannot be waived.¹¹ I therefore accept that the Hansard extracts are subject to parliamentary privilege.
81. That said, clause 17(c) does not prevent the disclosure of documents merely because they are subject to parliamentary privilege, rather the document will only be exempt if disclosure would *infringe* that privilege. Relevantly, privilege acts to prevent material being the subject of civil or criminal action.¹²
82. Each of the extracts, documents 31a, 261, 262 and 263 appears to be publicly available via the South Australian Parliament website. I appreciate from the internal review determination that the agency may have provided the applicant with a link to be able to view the relevant extracts, without having to disclose the extracts themselves, so as not to infringe the privilege of parliament. This suggests to me that the agency takes the view that the extracts as discovered are confidential and distinct from the extracts which are already public and that disclosure of the discovered extracts would somehow *infringe* on the privilege of parliament.
83. Given that the information already exists within the public domain, it would stand to reason that any use of the information which might infringe the privilege of parliament would be attributed to the publication of the information rather than a subsequent release under the FOI Act.
84. Additionally, clause 17(c) specifically refers to the 'public disclosure' of matter. In the matter of *Department of Treasury and Finance v Mullighan* the South Australian Civil and Administrative Tribunal observed that 'disclosure' means:
- ...a revelation for the first time. However, this is not to be understood to refer to the document itself but to the information. If the information, though not necessarily the document, is within the public domain, to that extent release of the document containing the information may not constitute a disclosure as there may not be a revelation.¹³
85. Although the above comments were made in the context of a consideration of clause 1(1)(e), I consider that they can be equally applied to clause 17(c). The information in documents 31a, 261, 262 and 263 cannot be 'disclosed' in the sense intended by clause 17(c) as the information has already been revealed.

¹⁰ See the Parliamentary Privileges Act 1987 (Cth).

¹¹ Parliamentary privilege and the common law of parliament: can MP's say what they want and get away with it?, Carren Walker, (2018); *Prebble v Television New Zealand Limited* (1994) 3 All ER 407-20 at [407]; Report relating to the use of or reference to the records of proceedings of the House in courts, House of Representatives Committee of Privileges, (1980), page 154.

¹² Parliamentary privilege and the common law of parliament: can MP's say what they want and get away with it?, Carren Walker, (2018).

¹³ *Department of Treasury and Finance v Mullighan* [2021] SACAT 28, at [94].

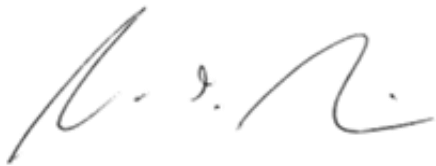
86. The wording of clause 17(c) supports an interpretation that consideration be given to the contents of the documents, rather than the documents themselves as the clause refers to 'matter'.
87. Accordingly, I am of the view that the disclosure of document 31a, 261, 262 and 263 would not *infringe* the privilege of parliament. If the applicant has already been directed to the relevant Hansard extracts, I suspect this point will be of little value.
88. Documents 33, 33a, 36, 36a, 36a.1, 37, 42, 42a, 264 and 265 are correspondence between government officials, and government officials and a Minister directly related to House proceedings. In *Re Saffioti and Minister for Transport; Housing* the Western Australian Information Commissioner referred to a decision in which the UK Information Commissioner listed the types of information that would normally fall within the parliamentary privilege exemption, including:
- ...
 - correspondence between Members, Officers, Ministers and Government Officials directly related to House proceedings;
 - ... and
 - bills, amendments and motions, including those in draft, where they originate from Parliament or a Member rather than from parliamentary counsel or another government department.¹⁴
89. Consequently, I consider that the disclosure of documents 33, 33a, 36, 36a, 36a.1, 37, 42, 42a, 264 and 265 would infringe the privilege of parliament.
90. I therefore confirm the agency's application of clause 17(c), save for the Hansard extracts, being documents 31a, 261, 262 and 263, which I am of the view should be disclosed in full.

¹⁴ *Re Saffioti and Minister for Transport; Housing* [2012] WAICmr 10 (11 April 2012), [32]. See also [33-34].

Determination

91. In light of my views above, I vary the agency's determination in the following manner:

- I confirm the agency's determination in relation to redactions made pursuant to clause 6(1)
- I confirm the agency's determination in relation to documents claimed to be exempt by virtue of clause 12, save for:
 - i. documents 40, 45, 201 (with paragraph 3 redacted), 240, 241, 242 and 244 which are purely administrative and therefore, disclosure would not be a breach of section 271 of the WHS Act
 - ii. paragraph 2 of page 2 of document 65a and pages 2 and 3 of document 65a.2 contain information about only the applicant, and are therefore not exempt by virtue of section 271(3)(a), save for the redactions I have made to the document to remove the names of other persons
- I confirm the agency's redactions made to documents pursuant to clause 17(c), save for:
 - i. documents 31a, 261, 262 and 263, the disclosure of which would not infringe the privilege of parliament.



Wayne Lines
SA OMBUDSMAN

6 March 2023

APPENDIX 1

Procedural steps

| Date | Event |
|------------|--|
| 09/08/2022 | The agency received the FOI application dated 9 August 2022. |
| 30/08/2022 | The principal officer of the agency determined to extend time to deal with the application. |
| 05/10/2022 | On application to this Office, I determined to vary the decision of the principal officer to extend time to deal with the application, to 25 October 2022. |
| 25/10/2022 | The agency determined the application. |
| 1/11/2022 | The agency received the internal review application dated 1 November 2022. |
| 15/11/2022 | The agency varied the determination. |
| 29/11/2022 | The Ombudsman received the applicant's request for external review dated 29 November 2022. |
| 02/02/2023 | The Ombudsman issued his provisional determination and invited submissions from the parties. |
| 14/02/2023 | The applicant provided submissions in response to the provisional determination. |
| 10/02/2023 | The agency provided submissions in response to the provisional determination. |
| 17/02/2023 | The interested third party provided submissions in response to the provisional determination. |