

Determination

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

Applicant	Mr John Houlahan
Agency	City of Onkaparinga
Ombudsman reference	2018/05396
Agency reference	ONK 160901
Determination	The determination of the agency is varied.

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:

Copies of all fringe benefit tax records for calendar years 2014 to 2017 inclusive as per the requirements of Chapter 4 of the Australian Tax Office's Fringe Benefit Tax Guide for Employers.

2. Following correspondence with the agency, the applicant amended his request for access in the following terms:

I no longer require Fringe benefits tax records for the FBT year 1 April 2017 to 31 March 18, I also confirm that I am seeking details of Council's fringe benefits tax detailed records as per Australian Taxation Office requirements for the FBT years 1 April 2013 to 31 March 2017 As I understand from our discussion today the annual FBT return to the ATO provides FBT details under categories as well as details of individual and multiple payments where more than one employee is involved. I note the ATO requirements for FBT electronic record keeping and consider a copy of those records and Council's annual submissions for the relevant years provided electronically would hopefully adequately respond to my FOI request.

Background

3. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

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

Revised provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my revised provisional determination dated 6 August 2018. 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 agency provided a response to my revised provisional determination by way of email on 15 August 2018, indicating that it had no further comment to make.
7. The applicant provided a response to my revised provisional determination by way of letter dated 19 August 2018. The applicant's submission relevantly states:

I have serious concerns regarding Council's suggestion that the Work, Health and Safety Act 2012 (WH&S Act) should apply and therefore the names and positions of the Directors and CEO should be redacted from the information provided. The rightly (sic) intent of the WH&S Act was to provide a safe and healthy working environment for employees. I do not believe it was ever the intent that it could be used to prevent release of information that identifies senior managers who have potentially engaged in the misappropriation of public money.

8. In his submissions, the applicant then details a number of specific allegations against the council and some of its employees. The applicant then submits:

...As a result of the above and many other similar experiences, I have had to resort to the media in an attempt to hold those responsible to account. I have, and continue to have, enormous respect for the overwhelming majority of Council employees. They are doing their best in sometimes very trying circumstances and I have stated this publicly and in writing. Regretfully, I cannot state the same for Council's CEO and Director Group.

I respectfully submit that any information that identifies positions or names of the CEO and/or Directors should not be redacted.

9. I have considered the applicant's submissions. I note that the agency has always had, and continues to have, ongoing obligations under the WH&S Act. However, I interpret the applicant to be submitting that the provisions of the WH&S Act should not be a relevant factor when considering the application of the FOI Act to the documents in issue.
10. I make it clear that the views I have reached on the exempt status, or otherwise, of the documents are based upon Schedule 1 to the FOI Act and are not based upon the WH&S Act. However, I comment that matters such as employees' health and wellbeing can be relevant considerations when applying clause 16(1)(a)(iii). I discuss clause 16(1)(a)(iii) later in this determination.
11. I have considered the other allegations made by the applicant. However, I remain of the view, detailed later in this determination, that the applicant has sufficient information available to him, which has already been released to him by the agency, to bring his concerns to the relevant investigatory authorities if he chooses. Accordingly, this determination is in substantially the same terms as my revised provisional determination.

Relevant law

12. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹

¹ Freedom of Information Act 1991, section 12.

13. 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.
14. The agency has claimed that clauses 6(1), 7(1)(c) and 16(1)(a)(iii) of Schedule 1 to the FOI Act are applicable to a number of the documents. I set out the relevant clauses below:

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).

7—Documents affecting business affairs

(1) A document is an exempt document—

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

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—

- ...
 (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; [and]
 (b) would, on balance, be contrary to the public interest.

15. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
16. 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.
17. I am mindful of section 39(15) which provides that I should avoid disclosing in my reasons for determination any matter that the agency claims is exempt.

Documents in issue

18. The agency identified 18 documents within the scope of the application.
19. The agency determined to provide full access to one document and to provide partial access to 17 documents.

Issues in this review

20. It is for me to determine whether the agency has justified its determination to provide partial access to the 17 documents in issue.

Submissions of the parties

The agency

21. The reasoning of the agency is set out in the Chief Executive Officer's determination, which relevantly states:

I have determined that documents 2-6, 8-12, 14 and 16-18 contain personal information...I am providing copies of these documents with the exempt matter deleted...

In my view, it is unreasonable to disclose this information with the officers' names. With the names redacted, it should still provide you with information relevant to your application i.e. the FBT amounts.

These documents contain the following personal affairs information:

- Documents 2, 4, 8, 10, 14 and 16 contain contractual employment information specific to roles.
- Documents 3 and 9 contain reimbursement of study fees, which is financial and employment information for those officers.
- Documents 5, 6, 11, 12, 17 and 18 contain information about officers' payments, including employee fuel contributions, private mileage and payroll deductions.

...I have determined that documents 1-2, 7-8 and 13-14 contain business affairs...

Documents 2, 8 and 14 contain employee identification numbers, which must be maintained within the organisation, as it is the agency's security information. This information has been redacted as it is not in the public's interest to release security information.

Documents 1, 7 and 13, contain the agency's Tax File Number (TFN), which in my view, is business affairs as it is a unique identifier, provided by the ATO to administer the taxation and superannuation laws. If disclosed to the public, it could reasonably be expected to have an adverse effect and there is no benefit to the public from receiving the agency's TFN.

The other redacted information in these documents consists of officers' names, position titles and team identifiers.

In addition, in favour of non-disclosure of the redacted information is exemption Schedule 1, clause 16 of the FOI Act...

I note our previous experience, where determinations provided to you have been released broadly to the media, including social media, identifying officers individually at all levels often without context. There has been commentary about officers in the media, which has been inappropriate, unacceptable and seeking to injure reputations.

City of Onkaparinga has a duty of care towards its employees and their safety is paramount to our agency. It is likely the same impact will arise if the exempt matter is released. It is my view, the redacted information containing names, position titles and team identifiers, which if disclosed, will impact the officers named and teams with adverse effects on officers' work, health and safety.

I am mindful that there is a public interest test and on balance I have determined that it is not in the public interest to disclose this information.

22. The agency provided the following additional submissions to my external review:

Documents 2-6, 8-12, 14 and 16-18

These documents contain personal affairs information about the agency's employees. The employees' names were redacted in accordance with exemption Schedule 1, clause

6(1) to de-identify the information personal to the employees. The information is contractual, study arrangements (financial and employment information) and details of payments to employees.

Taking into account the factors considered in *Re Chandra and Minister for Immigration and Ethnic Affairs (1994)*, as the information is personal, collated for the purposes of complying with ATO requirements, is still current information and it is of a very personal nature; and balancing the reasonable versus unreasonable test to disclose, I determined the information was unreasonable to disclose.

Documents 2, 8 and 14

The information redacted included unique employee identification numbers and exemption Schedule 1, clause 7(1)(c) was applied as it is not considered in the interest of the agency for security identification details to be released and neither is it in the public's interest to have access to such information.

Documents 1, 7 and 13

The information exempted by applying Schedule 1, clause 7(1)(c) is the agency's Tax File Number (TFN). I refer to 'External Review Document 5', which is email confirmation from the ATO that I am unable and should not release the agency's TFN.

Documents 1-2, 7-8 and 13-14

These documents include officer names, position titles and team identifiers, which were redacted due to the application of the exemption for documents affecting business affairs and for documents concerning operations of agencies.

This agency has provided information to Mr Houlahan previously, which was subsequently released to the media and this caused staff safety and wellbeing issues for the agency. Many officers at all levels, including support staff and officers in unrelated service areas have been unfairly impacted from the unreasonable media commentary as a result of the release of the names contained in the FOI material.

My primary concern continues to be for the safety and wellbeing of the agency's officers. I have a duty of care under Work, Health and Safety legislation.² A previous release of documents to Mr Houlahan, where officers were referenced, was provided to the media, with media extracting information out of context and inappropriate use of officers' names. This had a substantial adverse effect on the management of the agency's officers. Immediate wellbeing support was required for all officers and there is now anecdotal evidence regarding a noticeable spike in non-attendance at work for mental health reasons.

² I understand the following sections of the *Work, Health and Safety Act 2012* to be relevant to the agency's submissions:

3–Object

- (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by—
- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant;

4–Definitions

In this Act, unless the contrary intention appears—

health means physical and psychological health;

17–Management of risks

- (1) A duty imposed on a person to ensure health and safety requires the person—
- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

19–Primary duty of care

- (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—
- (a) workers engaged, or caused to be engaged by the person; and
- (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

It is reasonable to expect that a repeated provision of names, position titles and team identifiers will cause the same detrimental effect. As the adverse effect of not applying the redactions are known and not speculative, the redactions are considered reasonable and necessary.

In addition, I note that in the previous case of *Onkaparinga v Houlahan* (2015), Mr Houlahan identified he did not wish to pursue access to the names and positions of the individuals identified. I took this into consideration for the current determination.

As the public interest test applies for both these exemptions, the following reasoning in favour of non-disclosure of the exempt matter was considered:

- The objects of the Act are to promote openness and further the good government of the State and effective participation by members of the public in the processes involved in the making and administration of laws and policies. The disclosure of names, positions and teams will not provide any additional and beneficial openness, other than to be detrimental to the agency's officers. The information with the exemptions applied provides openness for FBT details, whilst maintaining the safety and wellbeing of the agency's officers.
- The agency's administration, in order to exercise its functions adequately, needs to ensure efficient and effective conduct of the agency's functions. Officers are critical to the effectiveness of the organisation and their safety and wellbeing is paramount and as the CEO, it is my view, it must be maintained by the agency.
- There are known impacts from social media harassment and bullying on the mental health of persons. This is evident in national media reports and as this is a growing area of concern, I consider providing this information compromises our officers' wellbeing further.
- The exempt information is of interest to a limited number of members of the public.

In favour of disclosure of the exempt matter:

- It is in the public's interest for the information to be disclosed, in line with the objects of the Act.
- Council officers are public officers and their names are available in the public domain to some extent.

On balance, I determined it is not in the public interest to disclose this information.

In summary, I have considered the redactions extensively and applied them out of necessity as detailed in my initial determination...

23. The agency provided the following submissions in response to my first provisional determination:

The Council is, of course, pleased that your provisional assessment concurs with the Council's submission that:

- disclosure of certain information would constitute the disclosure of personal affairs of certain employees;
- disclosure of certain information could also reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its employees, and release is, on balance, contrary to the public interest;
- there is a public interest in protecting the personal privacy of the individuals concerned;
- the objects of the FOI Act would not be furthered by the release of the information;
- release of the information would be unreasonable, and accordingly, exempt, under clauses 6(1) and 16(1)(a)(iii) of Schedule 1 to the FOI Act.

The above findings have been variously made in relation to information contained in the documents pertaining to:

- employee names;
- employee email addresses; and
- employee identification numbers.

However, based on the considerations set out above, the Council **disagrees** with your provisional finding that release of:

- position titles; and
- team identifiers

would not likewise constitute the unreasonable disclosure of personal affairs of certain employees and could not also reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its employees, particularly with regards to smaller teams and senior management position titles.

Council's submissions in this regard are set out below.

Briefly, by way of background, in assessing the Applicant's application under the FOI Act, the Council identified 18 documents within the scope of the application and determined to provide access to one (1) document in full (document 15), and partial access to the remaining documents. Partial access was achieved by way of redacting certain information from the documents, and in particular, information that disclosed the personal details of Council employees.

The Council was, and is, of the view that disclosure of this information is exempt pursuant to clauses 6(1) and 16(1)(a)(iii) of Schedule 1 because it would amount to the unreasonable disclosure of the personal affairs of Council employees and it could also reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its employees and release is contrary to the public interest.

As identified in the provisional report (paragraph 38), the Applicant **has previously released** Council documents obtained under the FOI Act to media organisations, including "Today Tonight", and there has been, and is, sustained media attention regarding the council's expenditure. The documents in issue under this external review are, accordingly, likely to attract community and media attention.

The Council remains of the view that the release of position titles and team identifiers in documents 2, 8 and 14; and team identifiers in documents 5 and 11,³ would amount to the unreasonable disclosure of information concerning the personal affairs of Council employees and could also reasonably be expected to have a substantial adverse impact on the management of the Council's employees and release is contrary to the public interest, particularly for employees of the Council's smaller teams, where employees are relatively easily identifiable, and for senior management.

Indeed, the provisional report accepts that senior management personnel can be identified based on the position title alone within some of the documents (paragraph 54). Accordingly, release of the position title under this external review is akin to releasing the individual employees' name.

With respect, while it is true that senior management have a higher level of responsibility and accountability within the organisation, the Council cannot accept that this automatically correlates to an expectation for those employees of a reduction in protections that ought to be afforded to them under the Work, Health and Safety Act 2012 ("the WHS Act").

To suggest otherwise to is establish a precedent that employees in a managerial position, within any organisation, must necessarily expect less protection, and consideration for, their personal wellbeing.

The Council respectfully submits that the position held by an employee at the Council should not, and cannot, under the WHS Act, have any bearing on the safety and welfare considerations of those employees, or establish a regime under which their safety and wellbeing is any less significant than that of junior employees.

³ While the agency's submissions refer to both document 5 and document 11, I note that document 11 does not contain any team identifiers.

The Council, as a corporate entity, has obligations under the WHS Act to protect all its employees and to maintain a safe working environment for them, regardless as to role, which necessarily also includes the CEO.

As Officers of the Council, the Administration is duty bound by section 27(1) of the WHS Act⁴ to exercise due diligence to ensure the organisation complies with all of its duties and obligations. To fail to ensure compliance exposes not only the Officers individually and collectively but also the organisation to allegations of breach of the Act.

On this basis, the Council redacted certain information from the documents released to the Applicant, including team identifiers and position descriptions, which is information that can be readily used to identify individual employees.

Accordingly, the Council respectfully rejects any assertion that the release of position titles and team identifiers could not reasonably be expected to have a substantial adverse impact on the management or assessment of the Council of its employees for the purposes of clause 16(1)(a)(iii) of Schedule 1 of the FOI Act, nor that [it] does not constitute the unreasonable release of information concerning the personal affairs of employees for the purposes of clause 6(1) of Schedule 1 of the FOI Act.

In this regard, it is further noted in the Applicant's submission that the Applicant contends he required the names of Council employees, and in particular "senior managers", because he is of the view that "*senior managers have inappropriately used public money*" in some circumstances.

With respect, it is not the role of the Applicant to investigate such allegations. If the Applicant contends this to be the case, he should report those matters to the relevant oversight authority, with the statutory mandate and power to investigate such allegations.

The concern is, of course, that armed with such information, and with a limited understanding of the relevant statutory framework within which the Council is required to operate, the Applicant could cause serious and irreparable reputational damage to Council employees, including senior management, who would be identifiable through the release of position titles.

As held by Judge Herriman in *Treglown v SA Police* [2011] SADC 139, when interpreting "unreasonable" for the purpose of clause 6 of Schedule 1, a decision maker needs:

...to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use [133] (my emphasis).

The Council submits that the Applicant's interest in obtaining information that would identify Council employees, and in particular, senior employees, is not a legitimate and bone fide exercise of the objects and purpose of the FOI Act. Rather, the Applicant is on a "fishing expedition", intent on finding wrong doing. Such a purpose is not, and cannot be, in furtherance of the FOI Act, nor in the public interest.

Accordingly, taking the above submissions into account, together with the findings made in the provisional report, the Council submits that the release of the position titles and team identifiers in the documents would constitute the unreasonable disclosure of personal affairs of certain employees, and could also reasonably be expected to have a substantial adverse effect on the management or assessment by the Council of its

⁴ This section relevantly states: **27—Duty of officers**

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

employees, and release is, on balance, contrary to the public interest. The release of this information does nothing further to promote the objects of the FOI Act.

Conversely, as this information could reasonably be said to lead to the identification of individual employees, then the following public interest factors that have been applied under the external review to the release of the employee's names, email addresses and identification numbers are equally relevant in the circumstances, namely:

- release of this information is not likely to contribute to increased transparency and accountability **of the Council**;
- release of this information may lead to unnecessary and unjustified criticism of the employees who may be so identified;
- given the short time frame that has elapsed, many of the employees in the individual teams and senior management positions remain employees of the Council;
- the objects of the FOI Act can be achieved without releasing team identifiers and position titles, which is likely to cause unreasonable, personal, detriment to those individual employees; and
- it cannot be the case that a senior manager should expect any less protection be afforded to them under the WHS Act, simply based on his or her role in the organisation.

The Council respectfully submits that the provisional determination should be amended such that position titles and team identifiers within documents 2, 8 and 14 **are not** released, and the team identifiers within documents 5 and 11 **are not** released, based on the exemptions provided for under clauses 6(1) and 16(1)(a)(iii) of Schedule 1 to the FOI Act.

The applicant

24. The applicant provided the following submissions, principally addressing the public interest:

I believe the redaction of Officers names, positions and team identifiers in documents 2, 8 and 14 is not appropriate. There is significant evidence that the CEO and senior managers are either the beneficiaries of or have approved potentially inappropriate fringe benefits to staff. The suggestion that releasing details of those employees is an occupational health issue appears to be little more than an attempt to avoid scrutiny of questionable behaviour by Council senior management. It would seem the public interest is not served by withholding this information.

25. The applicant also submitted:
- he had never gone public with the names of any staff members, although he did provide documents previously received under FOI to Today Tonight, who subsequently published the names of staff members of the agency
 - he needed to know who was benefitting from the items purchased which attracted Fringe Benefits Tax
 - his understanding was that an organisation does not need to pay Fringe Benefits Tax in respect of items that remain the property of the agency
 - he considered that the information that had been redacted needed to be provided for the purpose of transparency and accountability
 - there is evidence in other documents that senior managers have inappropriately used public money to pay for taxi services, despite the fact they are provided with fully serviced and maintained motor vehicles plus free petrol for public as well as private use.
26. In response to my first provisional determination, the applicant submitted:

Para. 15

In response to Mr Dowd's claim that:

"A previous release of documents to Mr Houlahan, where officers were referenced, was provided to the media with media extracting information out of context and inappropriate use of officer's names. This has had a substantial effect on the management of the agency's officers. Immediate wellbeing support was required for all officers and there is now anecdotal evidence regarding a noticeable spike in non-attendance at work for mental health reasons"

Phone calls I have had from current and former Council employees as well as advise (sic) from other individuals who have been contacted by Council employees do not match Mr Dowd's claims. One phone call urged me to continue my efforts and advised that following revelations in the media, staff were giving each other "high fives". There appears to be a significant number of staff that are aware and have concerns regarding the issues revealed in the media and other matters not yet in the public domain. Regardless, my overriding concern is the condoning/approving and/or participation of senior management in what I believe is significant and numerous instances of inappropriate expenditure of public money.

Para. 43

I understand the conclusion you have reached except where the employee is a senior manager.⁵ As stated in Para 54, you consider *"senior management have a higher level of responsibility and accountability to the public—"*

My concern is that in a number of instances the title "staff" has been used rather than senior managers (sic) names or positions. A search of Council's gift register shows multiple gifts to senior managers to attend AFL, soccer, concerts, cocktail parties, etc. As previously advised the senior management group are all provided with a fully serviced and maintained motor vehicle for private as well as work use. Regardless of the appropriateness of accepting gifts from contractors, potential contractors and service providers to council, it seems most inappropriate for those managers to be using public money for taxis to take them to and from these events. As an example, document 14, GL date 30/6/16 details return taxi fare from [suburb] to Adelaide of \$238.20 (including FBT) to attend VFL game. As CEO Mr Dowd lives in [suburb] and has received a number of gifts to attend VFL games[.] [!]t does not seem unreasonable to assume that he incurred the taxi fare cost.

Para 44

In view of my previous comments, I have concerns, that in some cases, the individual employee's names redacted may be Senior Managers and therefore should not be redacted.

Para 56

As already stated where Senior Managers have been the beneficiaries of fringe benefits and are only identified as staff members or by name in the documents I do not consider that those details should be exempt under clause 16(1)(a)(iii)

Paras 69 & 72

As you have already stated Senior Managers have a higher level of responsibility and should expect that their actions may be subjected to a higher level of scrutiny; with this in mind, where their names are redacted and there is no other identifier I do not consider the names should be redacted under clause 16(1)(a)(iii).

⁵ In a telephone conversation with my Legal Officer on 17 July 2018, the applicant clarified that when he refers to "senior management" he is referred to the Directors Group and the CEO.

Consideration of the exemption clauses

Clause 6(1)

27. For information to be exempt pursuant to clause 6(1) the information must concern the personal affairs of someone other than the applicant and it must be unreasonable to release it.
28. A non-exhaustive definition of ‘personal affairs’ is given in section 4(1) of the FOI Act:
- personal affairs* of a person includes that person's—
- (a) financial affairs;
 - (b) criminal records;
 - (c) marital or other personal relationships;
 - (d) employment records;
 - (e) personal qualities or attributes,
- but does not include the personal affairs of a body corporate;
29. Deciding whether the disclosure of ‘personal affairs’ information would be unreasonable requires consideration of all of the circumstances, including:
- the nature of the information that would be disclosed
 - the circumstances in which the information was obtained
 - the likelihood of the information being information that the person concerned would not wish to have disclosed without consent
 - whether the information has any current relevance.⁶
30. In addition, unreasonableness has ‘as its core, public interest consideration’,⁷ such as protection of personal privacy (the FOI Act generally does not restrict the use of information once it is released), the objects of the legislation being satisfied, and ensuring transparency and accountability within representative government.
31. In considering unreasonableness, the South Australian District Court has held that a decision maker should consider:
- ...not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant’s interest in it and any disclosed intentions with respect to its use.⁸
32. A person’s name and the fact that they are an employee of an agency is not, ordinarily, considered to constitute the person’s personal affairs. It has been held that:
- [T]he name of an officer or employee doing no more than the apparent duties of that person could not be properly classified as information concerning the personal affairs of that person. The affairs disclosed are not that person’s affairs, but the affairs of the agency.⁹
33. ‘Employment records’ have been held to include information which relates to an employee’s status as an employee and will include their name, age, date of birth, address, next of kin, records of leave and applications for promotion.¹⁰

⁶ Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALD N257 at 259.

⁷ Colakovski v Australian Telecommunications Corporation (1991) 29 FCR 429 at 438 per Lockhart J.

⁸ Treglown v SA Police [2011] SADC 139 at [133] per Herriman J.

⁹ Commissioner of Police (NSW) v District Court (NSW) (1993) 31 NSWLR 606 at 625 per Kirby P.

¹⁰ Priebe v SA Police [2007] SADC 119 at [19] per Boylan J.

34. However, once a person is appointed to a particular position, the fact that the person applied for the position and was subsequently granted the position is a matter in the public domain. In the case of an appointment to a government agency, the fact that the person is an employee of the agency is a matter of public record.
35. Whether any person's name would, in the circumstances, constitute their personal affairs given the particular nature and context of the document, will in each circumstance be dependent on the facts.
36. It has been held that:

It seems to me that, generally speaking, the Act is concerned with "the affairs" of individuals and that as a matter of ordinary English a person's name would not be considered as falling within that concept. On the other hand it may be that in particular circumstances it may be right to conclude that a person's name, or the particular name that that person was using at that time, was a matter concerning that person's personal affairs. Those considerations lead me to conclude that whether in particular circumstances a person's name concerned that person's personal affairs is a question of fact and that it cannot be laid down as a matter of law that the name must always concern a person's personal affairs.¹¹

Clause 7(1)(c)

37. When claiming clause 7(1)(c) as the basis for refusing access to a document it is necessary to demonstrate that:
- the document consists of information concerning the business, professional, commercial or financial affairs of any agency or any other person
 - disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency
 - disclosure of the document would, on balance, be contrary to the public interest.
38. The phrase 'business, professional, commercial or financial affairs' is not defined in the FOI Act, however, the Administrative Appeals Tribunal has commented that:
- ...they are words of very wide application, and cover all the aspects, both fiscal and administrative, of an organisation or undertaking; I do not think that they should be narrowly construed.¹²
39. The phrase 'could reasonably be expected' requires that I make an objective judgment as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect that disclosure could result in one of the listed effects.¹³ That is, the expectation must be based on reason and not be 'fanciful, far-fetched or speculative'.¹⁴
40. In regards to the 'adverse effect' the District Court has commented that:

It is sufficient for s7(1)(c)(ii) if any adverse effect is established...However, it must be something which can be properly categorised as an adverse effect and not something so de minimus that it would be properly regarded as inconsequential...It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.¹⁵

¹¹ Commissioner of Police (NSW) v District Court (NSW) (1993) 31 NSWLR 606 at 644 per Clarke JA.

¹² Martin Saxon v Australian Maritime Authority [1995] AAT 165 at [99].

¹³ Ipex Information Technology Pty Ltd v Department of Information Technology Services [1997] SADC 3618; citing Attorney-General's Department v Cockroft [1986] FCA 35.

¹⁴ Konieczka v South Australia Police [2006] SADC 134 at [14].

¹⁵ Ipex Info Tech v Dept of Info Tech Services (1997) 192 LSJS 54 at 65.

Clause 16(1)(a)(iii)

41. In order for a document to be exempt under clause 16(1)(a)(iii), the document must contain matter the disclosure of which could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel. In addition, for the document to be exempt, clause 16(1)(b) must be fulfilled: release of the document must, on balance, be contrary to the public interest.
42. The District Court has held that the phrase 'substantial adverse effect' refers to an effect that is sufficiently serious or significant to cause concern to a properly informed, reasonable person,¹⁶ and that the test 'is a high one'.¹⁷
43. Clause 16(1)(a)(iii) is not primarily concerned with protecting the content of the document, but rather with the effect of its disclosure. In considering section 40 of the Australian Capital Territory FOI Act (the equivalent to clause 16 of the FOI Act), Deputy President Hall stated:
- The primary focus of the s. 40(1)(d) exemption, in my view, is upon the effect that disclosure of the document would, or could reasonably be expected to, have upon the way in which the agency conducts its operations. It is not primarily concerned...with protecting from disclosure particular information contained in a document...¹⁸
44. I consider that Deputy President Hall's comments have persuasive value.

Consideration of documents in issue*Employee names*

45. Given the frequency with which the agency has claimed exemption clause 16(1)(a)(iii) throughout the documents and due to the nature of its submissions, I will first consider whether the agency has properly redacted the names of its employees throughout the documents where it has done so pursuant to clause 16(1)(a)(iii).
46. In essence, the agency's submission is that the documents released to the applicant may be provided verbatim to the media and expose its employees to 'unreasonable media commentary'. I am mindful that there has recently been sustained media attention regarding the expenditure of the agency and that the documents in issue in this FOI application are likely to attract community and media attention.
47. I must first consider whether release of the employee names could reasonably be expected to have a substantial adverse effect on the management or assessment by the agency of its personnel. I am prepared to accept that release could reasonably be expected to have a substantial adverse effect, for the following reasons:
- the high level of media scrutiny of the agency's expenditure at present
 - these documents relate broadly to the issue of council expenditure
 - the high likelihood that there will be media attention following the release of the documents
 - media attention commenced with the publication of documents previously obtained under FOI by the same applicant
 - I accept the agency's submission that the media attention has negatively affected the mental health of the agency's staff and has drawn criticism, whether reasonable or unreasonable, of both the agency and its staff members

¹⁶ Konieczka v South Australian Police [2006] SADC 134 at [15], citing Re Thies and The Department of Aviation (1986) 9 ALD 454.

¹⁷ Konieczka v South Australian Police [2006] SADC 134 at [18].

¹⁸ Re Brennan and Law Society ACT (No 2) (1985) 8 ALD 10 at [23].

- sustained negative media attention and community attention could reasonably be expected to lower the productivity of staff members and increase the amount of sick leave entitlements being claimed
 - I accept that the above has affected the agency's ability to manage its staff, particularly regarding staff wellbeing
 - additional media attention based on new material is likely to produce further mental health issues for the agency's staff, which would be exacerbated if those staff were personally named in the documents.
48. I comment that I am not persuaded by the applicant's submission, made in response to my first provisional determination, that evidence from the agency regarding the effect the media attention has had on its staff members' wellbeing and mental health should not be accepted. The agency has over 600 staff members.¹⁹ Whilst I accept that the applicant can offer anecdotal evidence, the fact that a small number of either former or current staff members may have contacted the applicant is not sufficient to persuade me that there has not been a detriment to the wellbeing of a significant number of agency employees.
49. I have considered whether release of the employee names is, on balance, contrary to the public interest.
50. The following public interest factors are in favour of disclosure:
- the objects of the FOI Act, particularly regarding transparency and accountability
 - the community interest in the issues
 - the importance of promoting scrutiny of an agency's expenditure
 - the ongoing relevance of the information to the applicant.
51. The following public interest factors are contrary to disclosure:
- release of the individual employee names is not likely to contribute to increased transparency and accountability *of the agency*
 - many of the employees are not in positions of seniority within the council and, in the context of the media attention, release of their names may lead to unnecessary and unjustified personal criticism
 - given the short time that has elapsed, many of the employees named in the documents remain employees of the agency
 - the objects of the FOI Act can be achieved without naming, and causing potential detriment to, individual employees.
52. On balance, I consider that it is not in the public interest to release the employee names. In reaching this conclusion, I particularly note that the objects of the FOI Act of transparency and accountability have already been achieved with the release of the majority of the information within the documents, and release of individual employee names is likely to negatively affect those employees whilst not meaningfully promoting the objects of the FOI Act.
53. Therefore, where individual employee names appear within the documents and the agency has relied upon clause 16(1)(a)(iii), the names should be redacted.

Documents 1, 7 and 13

54. Each of these documents is an Australian Tax Office (ATO) tax return form for Fringe Benefit Tax (FBT), lodged by the agency for three consecutive years. The agency has relied upon clauses 7(1)(c) and 16(1)(a)(iii) to claim that information in these documents is exempt.

¹⁹ Website of agency, accessed 2 August 2018; agency's Annual report 2016-2017, page 33.

55. In each of these documents, the agency has redacted its TFN pursuant to clause 7(1)(c). I agree that an agency's TFN is information concerning its business affairs, and that disclosure could reasonably be expected to have an adverse effect on those affairs. I note that a TFN is not publicly available information and release could create a risk that the agency would be exposed to fraud or impersonation of the agency with the ATO. I do not consider that release of this information would further the objects of the FOI Act or contribute to effective transparency of public decision making. I consider that release of this information would, on balance, be contrary to the public interest. The TFN is therefore exempt under clause 7(1)(c).
56. The agency has also redacted an employee's name from each of the documents and, in documents 7 and 13, has also redacted the part of the employee's email address that discloses their name. The agency has relied upon clause 16(1)(a)(iii). As per my reasoning in paragraphs 47-53 above, I agree that this information is exempt.

Documents 2, 8 and 14

57. Each of these documents is titled 'Entertainment FBT' and contains a large table listing individual entertainment-related expenses which incurred FBT. The agency has relied upon clauses 6(1), 7(1)(c) and 16(1)(a)(iii) to claim that information in these documents is exempt.
58. In each of these documents, the agency has redacted employee identification numbers pursuant to clause 7(1)(c). I accept that employee identification numbers comprise security information which constitutes the business affairs of the agency and that disclosure could reasonably be expected to have an adverse effect on those affairs. I accept that there is no particular public interest in making this information available. I consider that release of the employee identification numbers would, on balance, be contrary to the public interest. This information is therefore exempt under clause 7(1)(c).
59. The agency has claimed that each of these documents 'contain contractual employment information specific to roles' and therefore some of the information is exempt under clause 6(1). None of the information within these documents appears to be 'contractual employment information'. I do not consider that any of the information within these documents is exempt under clause 6(1).
60. As outlined in paragraphs 47-53, I accept that employee names are exempt under clause 16(1)(a)(iii).
61. The agency has claimed that position titles and team identifiers are exempt information under clause 16(1)(a)(iii).
62. In my first provisional determination, I expressed the view that, with the omission of employee names, information which identifies the team or area which received a benefit that was subject to FBT could not reasonably be expected to have a substantial adverse impact on the management of the agency's personnel.
63. The agency provided detailed submissions in response. In particular, the agency submitted that a number of its teams are small teams and disclosure of the name of the team could enable the members of those teams to be identified.
64. I have carefully examined the team identifiers contained in documents 2, 8 and 14. I note that numerous different teams are identified throughout the documents. I accept that some of the team identifiers are very specific and that it is likely that many of these teams are still operative within the organisation of the agency. I also accept that whilst I

have not received submissions on the precise composition of the teams named in these documents, it is likely that some of these teams are small. Regardless of the size of the teams, however, I accept that it is possible the applicant (or, given that release under the FOI Act is generally considered to be release to the world at large, any other person) could determine the composition or membership of many of these teams based on information that is publicly available on the internet. I also note that contact details for specific teams are often made available on the agency's website.

65. Given the probability that, if released, members of some of the teams could be personally identified, I consider that the factors which I considered in relation to whether employee names should be released are equally applicable in my consideration of whether team identifiers should be released. As per my reasoning in paragraphs 47-53 of this determination, I consider that the team identifiers are exempt pursuant to clause 16(1)(a)(iii) and therefore should not be released.
66. In my first provisional determination, I accepted that some senior management personnel would be able to be identified based on the position title within the documents. I stated that I considered that senior management have a higher level of responsibility and accountability to the public and thus should expect that their actions may be subjected to a higher level of scrutiny.
67. The agency provided detailed submissions in response. In particular, the agency emphasised that:
 - the applicant has previously provided information obtained under FOI to the media
 - there is sustained media attention regarding the agency's expenditure
 - releasing the position titles of senior management personnel is akin to directly releasing their names
 - senior management personnel are entitled to equal protections in terms of their welfare and wellbeing at work.
68. For the reasons set out in paragraph 47 above, I am prepared to accept that release of the position titles, which would almost certainly lead to the identification of individual senior employees, could reasonably be expected to have a substantial adverse effect on the management of the agency's personnel. I must therefore consider whether release of the position titles is, on balance, contrary to the public interest.
69. The following public interest factors are in favour of disclosure:
 - the objects of the FOI Act, particularly regarding transparency and accountability
 - the applicant's specific interest in ascertaining the identities of senior management personnel who received fringe benefits, and the relevance of such information to the applicant
 - the importance of promoting scrutiny of an agency's expenditure.
70. The following public interest factors are contrary to disclosure:
 - release of the position titles is not likely to contribute to increased transparency and accountability *of the agency*
 - given the short time that has elapsed, many of the senior management personnel remain employees of the agency
 - the objects of the FOI Act can be achieved without identifying, and causing potential detriment to, individual employees
 - transparency has already largely been achieved by the agency releasing the majority of the information in the documents
 - accountability *of the agency* has been achieved by the agency releasing the majority of the information in the documents.

71. On balance, I consider that it is not in the public interest to release the position titles. In reaching this conclusion, I particularly note that the objects of the FOI Act of transparency and accountability have already been achieved with the release of the majority of the information within the documents. I consider that any criticism of the agency's policies and practices which have resulted in Fringe Benefits Tax being paid should properly be directed *to the agency*. I do not consider there to be a public interest in holding employees, including senior management, personally responsible for individual expenses which were approved in line with processes of the agency. I consider that sufficient information has been released to the applicant to enable him to pursue his concerns.
72. I have carefully considered whether this reasoning also applies to the CEO of the agency. The CEO and the elected body together ultimately share responsibility for the practices and processes of the agency. However, I have had particular regard to a submission of the applicant that:
- There is significant evidence that the CEO and senior managers are either the beneficiaries of or have approved potentially inappropriate fringe benefits to staff.
73. I consider that regardless of whether the CEO was the beneficiary of, or approved, any fringe benefits, the applicant may choose to make a complaint to an investigative body. I do not consider that it is essential that the applicant be able to demonstrate that the CEO was the beneficiary of any particular fringe benefit in order to choose to criticise any practices or processes of the agency, which permitted such fringe benefits to be paid. It is already open to the applicant to make such criticism, if he so chooses, based on the information which has already been released to him.
74. It is therefore my view that it would, on balance, be contrary to the public interest to release the position titles of the senior management personnel, including the CEO. This information is therefore exempt under clause 16(1)(a)(iii).
75. The agency has also redacted some information relating to services for cars. I am unable to see how release of this information could reasonably be expected to have a substantial adverse impact on the management of the agency's personnel. It is therefore not exempt under clause 16(1)(a)(iii).

Documents 3 and 9

76. Each of these documents is titled 'HECS and Education Fees'. The agency has relied upon clause 6(1) to redact the names of employees. I agree that disclosure of the names would constitute the disclosure of the personal affairs of those individuals, given the other material within the documents which has already been released.
77. I consider that there is a public interest in protecting the personal privacy of the individuals. I do not consider that the objects of the FOI Act would be furthered by the release of the individual employee names. I have also considered the factors outlined in *Treglown* including the level of sensitivity of the information, the likely attitudes of the persons who would be affected if the information were to be released, the circumstances in which the information was obtained and recorded by the agency and the nature of the applicant's interest in securing the information. It is my view that release of the names would be unreasonable and therefore this information is exempt under clause 6(1).

Documents 4, 10 and 16

78. Each of these documents is titled 'Non-meal entertainment FBT'. The agency has relied upon clause 6(1).

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79. The agency has redacted one employee identification number. As per my reasoning in paragraph 58, I accept that this information is exempt pursuant to clause 7(1)(c). I have therefore not considered whether it may also be exempt under clause 6(1).
80. The agency has redacted the names of six employees. The information released by the agency indicates that these employees receive 'home office line rental and call charges'.
81. I have considered whether this information constitutes the personal affairs of the employees. In substance, the combination of the employee name and the fact that the employee has a work telephone line at home would tend to suggest that the employee works from home. I consider that this information constitutes the personal affairs of the employee.
82. I must therefore consider whether it is unreasonable to release the employee names. I do not consider there to be a strong public interest in releasing the names in order to further the objects of the FOI Act. I consider it is likely that the six employees would object to this information being disclosed without their consent. I consider that the public interest in protecting the personal privacy of individuals is persuasive in this matter.
83. In my view, it would be unreasonable to release the names of the employees, and the names are therefore exempt pursuant to clause 6(1).

Documents 5, 11 and 17

84. Each of these documents is titled 'Vehicles FBT'. The agency has relied upon clause 6(1) in refusing to grant full access.
85. The information in these documents which has already been released indicates the fleet number of the vehicle, whether the vehicle was still active at the time the FBT return was lodged, whether the employee made fuel contributions and if so, the amount of the fuel contributions, and the amount of FBT paid per vehicle.
86. The agency has redacted the following information:
- from document 5, the names of 157 employees and three 'other' entries which are not the names of individuals
 - from document 11, the names of 171 employees and four 'other' entries which are not the names of individuals
 - from document 17, the names of 49 employees.²⁰

Employee names

87. I am satisfied that, within the context of the document and in light of the other information that has been released, the employee names constitute the personal affairs of those employees.
88. I must therefore consider whether it is unreasonable to release the employee names. I consider that it is unlikely that the employees would wish to have this information disclosed without their consent. There is a clear public interest in protecting the personal privacy of individuals. I note that whilst some of the employees named in the documents are in positions of seniority, many of the employees are not. It would appear that they have been provided with vehicles in order to enable them to complete their role within a particular job classification.

²⁰ The agency has been notified of the seven 'other' entries by email from my Legal Officer on 20 June 2018.

89. The objects of the FOI Act are to promote openness and accountability of government agencies and thereby to enhance respect for the law and further the good governance of the state; and to facilitate more effective participation by members of the public in the processes involved in the making and administration of policies. The primary mechanism through which members of the public can actively participate in the making of council policies is through deputations to the elected body, lobbying directly with elected members or through community consultation processes. Should the council reconsider its policy position on providing vehicles to employees, these documents may assist the public in reaching an independent view. However, I consider that effective participation by the public could be facilitated based on the information which has already been released by the agency. I do not consider that the release of the employee names would further enhance effective participation by members of the public. Release of the names would, however, broadly promote openness by the agency.
90. I have also considered the factors identified in *Treglown*, such as the relevance of the information in the documents within the context of other information already in the possession of the applicant and the nature of the applicant's interest in the information.
91. Based on the information before me, I consider that it would be unreasonable to release the employee names. In reaching this view I have had particular regard to the interest in protecting personal privacy of individuals and the fact that the objects of the FOI Act have been attained due to the agency having already released the majority of the information in the documents. The employee names are therefore exempt under clause 6(1).

Information which is not employee names

92. Document 5 contains three other entries and document 11 contains four other entries.
93. One of the entries in document 5 is a staff team identifier.
94. Personal affairs must relate to the affairs of a person. I do not consider that the name of a team within the agency constitutes the personal affairs of any person, given that no person's name is included. On that basis, I do not consider that the staff team identifier is exempt information under clause 6(1).
95. However, as per my reasoning in paragraph 64-65 above, I consider that the team identifier is exempt under clause 16(1)(a)(iii).
96. The remaining six entries are the names of businesses. A business cannot have 'personal affairs'. The names of the six businesses are therefore not exempt information under clause 6(1) and should be released.

Document 6, 12 and 18

97. Each of these documents is titled 'Utes FBT'. The agency has redacted the names of the drivers of the utes pursuant to clause 6(1).
98. The information released by the agency indicates the make and model of the utes, the category, the total amount of private mileage and the rate of deduction. I am satisfied that, in the context of the other information in the document, the employees' names constitute their personal affairs.
99. I must therefore consider whether it is unreasonable to release the employees' names. The employees are drivers of utes carrying goods. I do not consider the employees to

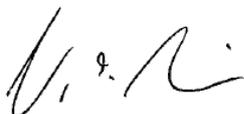
occupy positions of seniority. I consider that the information already released fulfils the objects of the FOI Act by promoting accountability within the agency and facilitating effective participation by members of the public in policy making. I do not consider that release of the names would further the objects of the FOI Act to a greater extent. On the other hand, the drivers are likely to object to the disclosure of their names without their consent. I consider based on the above factors, and due to the public interest in protecting personal privacy, it would be unreasonable to release the names of the drivers.

100. The names of the drivers are therefore exempt pursuant to clause 6(1).

Determination

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

- the descriptions related to car services within documents 2, 8 and 14 should be released
- the names of businesses within documents 5 and 11 should be released.



Wayne Lines
SA OMBUDSMAN

22 August 2018

APPENDIX

Procedural steps

Date	Event
26/03/2018	The agency received the FOI application.
09/05/2018	The agency determined the application.
18/05/2018	The Ombudsman received the applicant's request for external review.
23/05/2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
08/06/2018	The agency provided the Ombudsman with its submissions and documentation.
16/07/2018	The Ombudsman provided the parties with his first provisional determination for comment.
31/07/2018	The applicant and the agency provided submissions in response to the Ombudsman's first provisional determination.
06/08/2018	The Ombudsman provided the parties with his revised provisional determination for comment.
15/08/2018	The agency provided a response to the Ombudsman's revised provisional determination.
19/08/2018	The applicant provided a response to the Ombudsman's revised provisional determination.