

Determination

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

Applicant	Mr David Pisoni MP
Agency	Department for Education and Child Development
Ombudsman reference	2013/01540
Agency reference	DECD 12/10328
Determination	The determination of the agency is varied.

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* received by the agency on 12 December 2012, the applicant requested access to:

The notification sent to the Minister for Education and Child Development relating to the 15 May 2012 arrest of a Norwood Morialta High School teacher for unlawful sexual intercourse.

2. The Accredited FOI officer of the agency purported to make a determination on 22 January 2013,¹ which was confirmed on internal review by the Chief Executive of the agency on 29 January 2013 (**the agency's determination**).
3. By application dated 8 February 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
4. By letter dated 15 February 2013, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the agency's burden of proof under section 48 of the FOI Act.

Relevant provisions of the FOI Act

5. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
6. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt

¹ The determination was made outside the statutory timeframe of 30 days.

document by virtue of Schedule 1'.² Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

7. Clause 12 of Schedule 1 to the FOI Act, for example, provides:

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.
- (2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is made, would constitute such an offence.

8. An agency needs to be mindful of secrecy provisions in legislation in drafting a notice of an FOI determination. For example, simply acknowledging the existence of documents in a notice of determination may offend such provisions. This may result in the notice being an exempt document under clause 12(1). More significantly, it may also result in the commission of an offence.

9. Documents of the type requested by the applicant, for example, may be subject to the secrecy provisions of the *Children's Protection Act 1993*, and to disclose the fact of their existence may in itself be breach of section 58(1) of that Act.

10. Sections 58(1) and 58(3) of the Children's Protection Act provide:

58—Duty to maintain confidentiality

- (1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child, must not divulge that information.
Maximum penalty: \$10 000.
- ... [not applicable]
- (3) This section does not prevent—
 - (a) a person from divulging information if authorised or required to do so by law; or
 - (b) a person from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or
 - (c) a person engaged in the administration of this Act from divulging information if authorised or required to do so by his or her employer.

11. The prohibition in section 58(1) applies whether or not divulgence of the personal information would be unreasonable,³ or whether or not the subjects of the information consent to its release. Subject to the exceptions in section 58(3)(a)-(c), section 58(1) provides absolute protection of the information.

12. Section 23(3) and (4) of the FOI Act provide:

- (3) Where an applicant applies for access to a document that is an exempt document for reasons related to criminal investigation or law enforcement, the notice may be given in a form that neither admits or denies the existence of the document and, if disclosure of the existence of the document could prejudice the safety of a person, the notice must be given in that form.
- (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.

² See section 4 and section 20(1)(a), FOI Act.

³ Compare this with exemption clause 6(1) in Schedule 1 to the FOI Act, which talks of personal affairs information as being exempt its disclosure would be unreasonable.

13. Sections 23(3) and (4) provide the agency with a discretion in its notice of determination to neither admit nor deny the existence of exempt law enforcement documents, and to exclude exempt information. In my view, it is inconceivable that the Act would have intended that an agency could include information in its determination notice which would result in a breach of legislative secrecy provisions and the commission of an offence.

Consideration of the agency's determination

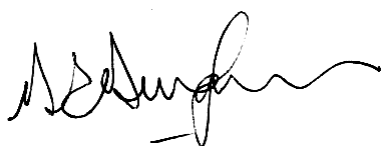
14. During this review, my office communicated with the agency in particular about sections 23(3) and (4) of the FOI Act, and also met with the Crown Solicitor's Office.
15. I provided my tentative views about the agency's determination in my provisional determination, which I sent to the agency on 22 April 2013. I received a response from the agency on 26 April 2013, which did not dispute my views.
16. In light of this, I consider that the agency's determination should have neither admitted nor denied the existence of the documents requested by the applicant.

Determination

17. I therefore vary the agency's determination under section 39(11) of the FOI Act.

Comment

18. It is often my practice to provide an applicant with my provisional determination, to elicit comments in response before finalising my views under section 39(11). In this instance, I did not provide the applicant with my provisional determination. I considered I was unable to disclose any meaningful information to the applicant for response, as to do so would have been in breach of legislative secrecy provisions.
19. I am conscious of the peculiarity of the process and outcome of this review and my determination, and the sense of frustration that the applicant might feel. However, such is the nature of the FOI Act and restrictive secrecy provisions in legislation, that applicants are left to trust the judgement of the review authority or the court to assess the documents and consider the agency's determination.⁴



Richard Bingham
SA OMBUDSMAN

30 April 2013

⁴ See SA District Court cases of *Bray and Smith v Workers Rehabilitation and Workers Compensation Corporation and Stanley* (1994) 62 SASR 218; *Everingham v Director General of Education*, unreported, 13 November 1992 and *Barbaro v Liquor Licensing Commissioner*, unreported, 6 January 1995.