

Determination [Redacted Version]

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

Applicant	[Name Redacted]
Agency	Department for Education
Ombudsman reference	2018/05763
Agency reference	DE18/05763
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 in the following terms:

Can I please have a copy of the email and pdf report sent by [Teacher] of [] High School to [University staff member] on Tuesday 19 November 2013 at 7.16am... .

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

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

Provisional determination

4. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 7 September 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.
5. The agency advised it accepted that document 4 was no longer in dispute and otherwise it had no submission to make in relation to the provisional determination.
6. The applicant provided information and submissions to my provisional determination and I have given consideration to both before making this final determination. He provided a significant amount of information demonstrating that he obtained academic success in his University studies and had otherwise received good feedback about his teaching performance.

7. The applicant also provided a number of documents to support his submissions about the authenticity as well as the veracity of the content of the documents in issue. The applicant makes serious allegations about the behaviour of staff at ... University (**the University**). I have not canvassed those matters in this determination.
8. In his submission the applicant named a number of children who were attending the school at the time he undertook his placement. He also named employees of the school and staff of the University. I am mindful of my obligations not to reveal information that the agency considers is exempt and as such, when referring to those submissions I have redacted all names except where the information is included in the applicant's original access request or it is information that is not claimed as exempt.

Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
10. After considering an application for access to a document, an agency must determine whether access to the document is to be given or refused.²
11. An agency must notify an applicant in writing of its determination of his or her application; or, if the application relates to a document that is not held by the agency, of the fact that the agency does not hold such a document.³
12. The South Australian Civil and Administrative Tribunal has held that a claim by an agency that it does not hold a document is not a determination which is reviewable under the FOI Act.⁴
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. . In this matter the agency has claimed the document is exempt pursuant to clause 6 and 16(1)(a)(iii). Those clauses provide as follows:

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).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
- (3) A document is not an exempt document by virtue of subclause (1) or (2) merely because it contains information concerning the person by or on whose behalf an application for access to the document is made.
- (3a) A document is an exempt document if it contains matter–
 - (a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and

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

² *Freedom of Information Act 1991*, section 19(1)(a).

³ *Freedom of Information Act 1991*, section 23(1).

⁴ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 at paragraph 27.

- (b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

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.
14. If it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears to the agency that the applicant would wish to be given access to such a copy, the agency must not refuse to give access to the document to that limited extent.⁵
15. Section 48 of the FOI Act provides that in any proceedings concerning a determination made under it by an agency, the burden of establishing that the determination is justified lies on the agency. 'Proceedings' in this context includes the external review process.
16. 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.
17. 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

18. The agency provided me with unredacted copies of all documents within the scope of the applications.
19. The agency identified one document within the scope of the application being an email chain with a six page attachment (the Attachment). The agency released the email in full. The Attachment is made up of six individual documents which are the documents in issue and are identified as follows:
- Document 1: Page 1 of the Attachment
 Document 2: Page 2 of the Attachment
 Document 3: Page 3 of the Attachment
 Document 4: Page 4 of the Attachment
 Document 5: Page 5 of the Attachment
 Document 6: Page 6 of the Attachment
20. Document 4 was the subject of a previous external review in which I determined it was not an exempt document. The agency agrees that document 4 is not exempt and therefore I have not considered it further in this determination.

⁵ *Freedom of Information Act 1991*, section 20(4).

Issues in this review

21. The issue to be determined is whether the agency has justified its determination that the documents in issue are exempt documents.

Consideration

22. In 2012 the applicant was undertaking studies at the University and undertook a student teacher placement at [] High School. The documents in issue concern that placement.
23. In the course of the mandated consultation on the release of these documents, the agency consulted with the University. The University provided the agency with copies of the documents it provided to the applicant in response to an application made under the *Information Act 2002* (NT). I have been provided with a copy of the University's response and I am aware that documents 2, 3, 5 and 6 have already been disclosed to the applicant with some, but not all, names of children and staff redacted.
24. In relation to the above paragraph the applicant submitted the following:

I note you have stated that the agency and [the] University consulted, and [the] University provided the agency with copies of the documents it provided to me under the Information Act 2002(NT).

.....

However, I have stated before that [the] University staff are not to be trusted. I do not doubt they had to consult because I strongly suspect someone else wrote [teacher's] 'To Whom it May Concern' letter as it reads very strangely in the copy sent by FAX on 4 October 2013, which to me looks like a draft which is undated and unsigned. The whole point of obtaining the copy from the SA Education Department was to check it was the same one, not to receive a copy of the one I already have, and it appears they are colluding again.

Considering that [the] Director of Governance, of [the] University has put the 'highest level of security' upon my records he really should not be giving out my records without permission, which I did not give, and I shall check how that is happening with the 'highest level of security' upon my records. However, the question I would ask is 'Why is the agency not providing its own documents to you?'

25. I confirm that the University did not provide me with any documents. The agency undertook consultation with the University in accordance with the obligations set out in sections 26 and 27 of the FOI Act. At my request, the agency provided me with copies of the University's response to that consultation. As stated above, the agency provided me with unredacted copies of all documents within the scope of the applications.

Clauses 6(1) and 6(3a)

26. I turn then to consider whether the documents in issue are wholly or partially exempt pursuant to clause 6(1) or 6(3a).
27. In order for a document to be considered exempt under clause 6(1), the following elements must be established:
- the document contains information concerning the personal affairs of someone other than merely the applicant's (the term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act); and
 - it would be unreasonable to release it.

28. Section 4(1) of the FOI Act states:

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 considerations',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. For a document to be exempt pursuant to clause 6(3a) it must contain information concerning a person who:

- is presently under the age of 18, or
- was under the age of 18 at the time the information was furnished, or
- was suffering from mental illness, impairment or infirmity at the time the information was furnished or currently; and

disclosure of that information would be unreasonable having regard to the need to protect that person's welfare.

33. The agency determined that the documents in issue were exempt pursuant to clause 6(1) and 6(3a) on the basis that:

the documents name and identify students and staff members who raised particular matters with their superiors. They contain information that is personal to the individuals named and considered unreasonable to release.

34. I am of the view that as a general principle, the mere mention of the name of an employee in the context of that employee performing his or her usual duties or responsibilities, is not information concerning that person's personal affairs.⁹ However

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 *Treglown v SA Police* [2011] SADC 139 at [138] per Herriman J quoting *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606, Kirby P at 624

- an employee's name, when linked with other information, or in particular circumstances, may amount to information concerning their personal affairs.
35. Document 1 is a response by [] High School to a request by the University for information relating to the applicant's student placement. It was written by a staff member in the context of his professional duties as a teacher at [] High School. I do not consider this document concerns the personal affairs of the staff member who authored it.
 36. Document 1 does not name or identify any staff members or student who raised particular matters of concern. Document 1 names staff members only in the context of them carrying out their professional duties and without any reference to wrongdoing on their behalf. I do not consider document 1 contains the personal information of any person other than the applicant. I have no information before me to suggest that section 6(3a) is relevant.
 37. I consider document 1 is not exempt pursuant to clause 6(1) or 6(3a).
 38. Documents 3 and 6 are reports made by teachers in relation to alleged observed inappropriate behaviours by the applicant. These reports were made in the context of the performance of the authors' professional duties and there was no complaint of inappropriate behaviour towards the teachers who authored the documents. The documents do not contain information furnished by a child or in relation to any specific child.
 39. I consider documents 3 and 6 are not exempt pursuant to clause 6(1) or 6(3a).
 40. Document 2 contains the names of students who are alleged to have expressed concerns about the behaviour of the applicant. These students were under the age of 18 at the time this information was said to have been furnished. I have no information before me to justify a finding that the disclosure of this information would have an adverse impact on those people's welfare and as such do not consider the information is exempt pursuant to clause 6(3a).
 41. Document 2 contains highly sexualised statements about people who were children at the time. Those children are named. I would have no hesitation in finding that the disclosure of this information would be unreasonable having regard to the need to protect the welfare of the people about whom the statements were allegedly made, and who were children at the time. However, those people are no longer under the age of 18, and clause 6(3a) applies only to protect the welfare of adults who furnished information when there were under the age of 18.
 42. I consider disclosure of the information in document 2 would involve the disclosure of information concerning the personal affairs of the students who furnished the information as well as those about whom the statements are recorded, and as such meets the requirements of the first limb of clause 6(1).
 43. Document 5 is authored by a teacher and reportedly contains information furnished by a student who was under the age of 18 at the time. I have no information before me as to whether the disclosure of this information would be unreasonable having regard to the need to protect that person's welfare and as such do not consider the information is exempt pursuant to clause 6(3a).
 44. I do not consider disclosure of document 5 would involve the disclosure of information concerning the personal affairs of the teacher who authored the document. I consider it would involve disclosure of the information concerning the personal affairs of the

student named in the document, and as such meets the requirements of the first limb of clause 6(1).

45. I turn then to consider whether it would be unreasonable to disclose the personal information contained in documents 2 and 5. I am aware that the applicant has obtained redacted copies of both of these documents through the University. In his submission the applicant advised that he had received approximately 900 pages from the University and those documents had been located from six different sources within the University. He advised that

[the documents] came from various departments with bits redacted and bits unredacted allowing me to piece together even more of the documents content, consequently I have all children's names and only lack [two teacher's names].

46. I am aware that the agency has no control over the disclosure of this information. In determining the impact of that previous disclosure I have had regard to the comments of Judge Herriman in *Treglown v SA Police* that 'an exemption claim should not be adjudged according to what the appellant knows or says he knows about it'.¹⁰

47. In relation to documents 2 and 5 the applicant submitted the following:

it appears to be irrelevant worrying about the content of the children's statements, and their names, when the children's names and statements were being handed around so freely and frequently at [the] University (and I suspect elsewhere). I question whether these [] High School students knew the intent of the documents, did the students even know the documents were being used as 'witness statements' without their signatures and could end up in a court of law, did their parents know their children were giving 'witness statements' and the intent of the documents which could end up in a court of law, were the children questioned as to whether their stories were authentic or a misrepresentation of the facts, would their parents be happy seeing their children's names thrown backwards and forwards around the various departments of [the] University, and I suspect elsewhere, and then given to me to give to everyone else.

48. I have had regard to the applicant's submission and disagree about the importance of protecting the personal information about the students named in these documents. In determining if it would be unreasonable to release this information, I have considered the following matters:
- the highly sensitive nature of the information
 - the students who disclosed this information, more likely than not, assumed their identities would be kept confidential
 - it is highly likely that the students about whom the alleged statements were made would not want the information to be disclosed
 - the age of the documents, and
 - in terms of procedural fairness, that the applicant is aware of the general thrust of the information in the documents.

49. In considering these factors, I have decided that disclosure of the information in documents 2 and 5 relating to students who are alleged to have provided information, and the comments relating to individual named students, would involve the unreasonable disclosure of personal affairs information and as such the documents are exempt pursuant to clause 6(1).

50. I am of the view that it would be reasonably practicable to redact that information from documents 2 and 5 in accordance with section 20(4). I consider below whether the information within these documents is otherwise exempt.

¹⁰ *Treglown v SA Police* [2011] SADC 139 at [105].

Clause 16 (1)(a)(iii) and (b)

51. The agency claims the documents are exempt pursuant to clause 16(1)(a)(iii) (in conjunction with clause 16(1)(b)). For a document to be exempt pursuant to this clause it must be established that it contains 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; and would, on balance, be contrary to the public interest.
52. The phrase 'could reasonably be expected' has been interpreted to mean that the claimed effects that disclosure of the documents would have is not 'fanciful, imaginary or contrived', or 'irrational, absurd or ridiculous'.¹¹
53. The phrase 'substantial adverse effect' is not defined in the FOI Act. The District Court has held that the phrase refers to an effect that is sufficiently serious or significant to cause concern to a properly informed, reasonable person.¹² The test is 'a high one'.¹³
54. For this exemption to apply, disclosure of the documents must have the requisite effect on either the management of personnel or the assessment of personnel. These terms are not defined in the FOI Act. The Australian Information Commissioner defines these terms as follows:
- the management of personnel** - includes the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety
- the assessment of personnel** - includes the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.¹⁴
55. I agree with these definitions and adopt them.
56. In support of its determination the agency provides:
- The disclosure of the document will reveal or tend to identify the persons raising the particular matters with their superiors, which will impact on the agency's capacity to manage personnel and carry out its agency's core functions, including employee conduct, performance, inappropriate behaviours, supporting staff members and relationships, reducing the risk to students and ensuring safe environments for staff and students.
- The department depends on the willingness of staff members to raise particular matters or provide information to their superiors and if the supply of such information is threatened with routine disclosure, it will have a substantial and adverse effect on the management and assessment of personnel and on the performance of the agency's function.
57. I agree with the agency that these effects, if made out, would amount to an 'effect on the management of personnel'.
58. Document 1 is a description of the process undertaken by [] High School in responding to requests from the University for information relating to the applicant's student placement.

¹¹ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 63-64.

¹² *Konieczka v South Australian Police* [15], citing *Re Thiess and The Department of Aviation* (1986) 9 ALD 454.

¹³ *Konieczka v South Australian Police* [18].

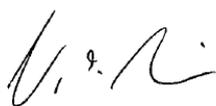
¹⁴ Office Of Australian Information Commissioner, *Guidelines on the Freedom of Information Act 1982 (Cth)* 6.114

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59. This document does not name any staff member or student, or reveal information which tends to identify any student or staff member, who provided information in relation to allegations of inappropriate behaviour.
60. I am of the view that the disclosure of document 1 would not have a substantial adverse effect on the management or assessment of agency personnel. I do not consider this document is exempt pursuant to clause 16(1)(a)(iii).
61. Documents 2, 3, 5 and 6 contain information in relation to allegations of inappropriate behaviour towards students by the applicant.
62. I consider that candour is essential when an agency seeks to investigate complaints made about the behaviour of adults (staff, volunteers or student teacher placements) who work with children.
63. In his submission to me the applicant provided his view as follows:
- The intent [of the documents] was clearly to 'deceive' and to use those documents provided by the [] High School for [the] University's own purpose. This purpose had nothing to do with alerting anyone to my (alleged) behaviour because this is 15 months after I had been at the [] High School, in which I had no contact at all with anyone at [place] and had never returned since the placement in August 2012. In fact, after an 8-month investigation, all [the] University had were these 6 documents from [] High School. However, if the [] High School's intent had been to 'alert' it was coming 'very late'. Consequently, the intent of these documents has been all along to 'deceive' and nothing to do with my (alleged) behaviour at the school.
64. In relation to this submission, I understand the agency to be advising of its view that where allegations of this nature exist against an individual, the risk is not just to students at the campus at which the alleged behaviour is said to have occurred, but to any child who may come in contact with that individual.
65. In its submission to me the agency provided:
- Staff members have obligations under the *Public Sector Code of Ethics* to report and assist in such matters. However, staff may be willing to breach their obligations or be less than forthcoming to provide information in circumstances where they fear that the information may be released.
 - Further, if staff members feel that they are unable to disclose this type of information to their assistant principal/principal in a confidential context, it may pose risk to other staff members or children.
 - The disclosure of the documents will reveal or tend to reveal the identity of the informants as the persons raising the concerns with the principal, which will impact on the agency's capacity to manage personnel and carry out its core functions, including employee conduct, performance, inappropriate behaviours, supporting staff members and relationships, reducing the risk to students and ensuring safe environments for staff and students.
66. I accept the agency's submission in this regard. I am of the view that it could reasonably be expected that staff may be less likely to provide information with candour in relevant investigations where the contents of such information may become a matter of public knowledge. I am of the opinion that it follows that it could reasonably be expected that disclosure of documents 2, 3, 5 and 6 would have a substantial adverse effect on the management or assessment by the agency of the agency's personnel.
67. I turn then to consider whether disclosure of documents 2, 3, 5 and 6 would, on balance, be contrary to the public interest.

68. The agency submits that 'the disclosure would be contrary to the public interest if staff members raise concerns of the conduct of another staff member with the risk of open disclosure. It may cause apprehensions, stress, anxiety and fears of retribution in some cases. This may cause staff members not to raise concerns or cooperate in like matters'.
69. The 'public interest' is usually different from purely private or personal interests. However, the courts recognise that '... the public interest necessarily comprehends an element of justice to the individual'.¹⁵
70. I have taken into account the applicant's submission that he already has access to most of the content of these documents through the University. I note that he asserts that he has been able to 'piece together' the names of the children but does not have the names of all the teachers. In this regard, it is my view that the exempt status of document is not necessarily determined by what the applicant knows or asserts he knows.
71. In this matter, I note that there is a public interest in people understanding the nature of allegations made about them in order to ensure that they are afforded appropriate procedural fairness. In assessing this factor I have taken into account the amount of the information already known to the applicant. There is also a public interest in persons having access to information which shows the reasons for a decision that has affected them. I also note that disclosure would promote the objects of the FOI Act.
72. I have balanced these public interest factors favouring disclosure against the following public interest factors against disclosure. Teachers have a professional obligation to report behaviour of those with whom they work closely where there are the types of allegations concerning children that have been raised against the applicant. Whilst it is hoped that these obligations would override concerns for their personal interests, the closeness of the relationships between colleagues is an added sensitivity. I am of the opinion that disclosure of these documents could reasonably be expected to prejudice an agency's ability to obtain information relating to the behaviours of adults who work with children. This is a significant public interest factor against disclosure.
73. In this matter I have given greater weight to the factors against disclosure. I am of the view that giving the applicant access to documents 2, 3, 5 and 6 would, on balance, be contrary to the public interest and these documents are therefore exempt.

Determination

74. In light of my views above, I vary the agency's determination such that document 1 is not exempt and documents 2, 3, 5 and 6 are exempt.



Wayne Lines
SA OMBUDSMAN

24 September 2018

¹⁵ *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 12.

APPENDIX

Procedural steps

Date	Event
10 April 2018	The agency received the FOI application dated 10 April 2018.
10 May 2018	The agency determined the application.
10 May 2018	The agency received the internal review application dated 10 May 2018.
25 May 2018	The agency confirmed the determination.
28 May 2018	The Ombudsman received the applicant's request for external review dated 28 May 2018.
29 May 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
14 June 2018	The agency provided the Ombudsman with its submissions and documentation.
17 August 2018	The applicant provided submissions and further information
7 September 2018	Ombudsman SA provided a provisional determination to the parties.
9 September 2018	The applicant provided a submission to the provisional determination.
14 September 2018	The agency advised document 4 was no longer in dispute.
18 September 2018	The agency advised it had no submission to make on the provisional determination.

