

## Determination

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

Applicant	[The applicant]
Agency	Department for Education
Ombudsman reference	2018/01841
Agency reference	DECD17/34533
Determination	The determination of the agency is confirmed.

## 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:

Personal information and government information when it includes information regarding me both personally and professionally.

As always I require that information even when it does not name or identify me directly but which can be reasonably used to identify me is included.

I also request that the requisite statutory declaration signed when employees search for relevant information are included, for quality assurance purposes.

If there are no relevant documents found in active email accounts then I would like the backups to be searched in addition.

1. Employees' email accounts and any relevant hard copies not electronically stored:  
[Employee 1]  
[Employee 2]  
(both from ECU)  
[Employee 3]

I would like additionally copies of any and all notes kept of telephone conversations which I heard being taken at the time of conversations with ECU. Please search for both of my legal names: [the applicant] and [the applicant]. Also any relevant derivatives: eg [the applicant], etc.

Date range: June 2014- December 2014.<sup>1</sup>

2. Request for all of my panel reports, as mentioned.

[2014 -[The applicant] was appointed to a contract position at Ernabella Anangu School (EAS) via application. Panel report attached. 2014-2015 - [The applicant] applied for 9

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<sup>1</sup> On 11 September 2017 the applicant amended the scope of the application by changing the date range of documents from 'June 2014 - present' to 'June 2014 to December 2014'.

permanent teaching positions to begin 2015. Panel reports attached. [The applicant] was nominated for 4 of these positions.]

Request for policy or guidelines documentation regarding DECD standard practice when a teacher is under investigation, as mentioned.

[Incident 4th February removal from community - standard practice if a teacher is under investigation / in possible danger to remove from community until safe to return or matter has been investigated. [Person 1] and [Person 2] lodged IRMS report for incident.]

3. A copy of what is being called the 'wellbeing evaluation' (below) although I understand it to be a 'pre-employment psychological test' recently introduced by DECD. Also any relevant guidelines, policy documents, information around this test, the definitions 'psychological suitability', 'psychological preparedness', 'resilience factors', the number of tests administered, selection criteria used and their results.

The wellbeing evaluation is focussed on assessing aspects relevant to working in the Anangu lands. In particular,

- **Psychological suitability:** appropriateness of fit for a role in the Anangu Lands from a personality and potential clinical perspective in managing any risks associated with those factors
- **Psychological preparedness:** readiness for the cultural, social, emotional, physical and environmental challenges associated with living in the Anangu lands - including wellbeing and resilience factors.'

## 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 May 2018. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. The agency advised that it had no submissions to make and the applicant did not respond. This determination is therefore in the same terms as the provisional determination.

## Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>2</sup>
7. After considering an application for access to a document, an agency must determine whether access to the document is to be given or refused.<sup>3</sup>

<sup>2</sup> *Freedom of Information Act 1991*, section 12.

<sup>3</sup> *Freedom of Information Act 1991*, section 19(1)(a).

8. 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.<sup>4</sup>
9. 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.<sup>5</sup>
10. 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.
11. The following clauses are relevant in this matter:

#### **Clause 6**

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

#### **Clause 16(1)**

A document is an exempt document if it contains matter the disclosure of which -

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

<sup>4</sup> *Freedom of Information Act 1991*, section 23(1).

<sup>5</sup> *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 at paragraph 27.

12. 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.<sup>6</sup>
13. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
14. 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.
15. 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

16. The agency identified 40 documents within the scope of the application. It released documents 1, 2, 4, 5, 15, 16, 17, 18, 19, 20, 21, 22, 25, 25a, 37 and 38 in full. These documents are not in issue in this review.
17. The documents in issue are documents:
  - 3, 6 - 14, 16a, 18, 23, 24, 26, 28 - 35 which the agency claims contain exempt matter and have been released to the applicant in redacted form, and
  - 16b, 22a, 27 and 36 which the agency claims are fully exempt.

### Issues in this review

18. The issue to be determined is whether the documents in issue contain exempt matter.

### Consideration

#### *Personal affairs - clause 6(1)*

19. 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.
20. The term 'personal affairs' is defined in section 4(1) of the FOI Act to include, amongst other things, that person's employment records and personal qualities and attributes. This definition is not exhaustive. The term has been held to involve 'matters of private concern to an individual'<sup>7</sup> and the 'composite collection of activities personal to the individual concerned'.<sup>8</sup>
21. The agency has determined that documents 3, 6 - 14, and 31- 33 are partially exempt and 16b and 22a are fully exempt in accordance with clause 6(1).
22. I have considered the information that has been claimed by the agency as exempt pursuant to clause 6(1).
23. Documents 3 and 6 are hand written notes of telephone conversations of [Employee 1]. The information which has been claimed as exempt relates to the personal

<sup>6</sup> *Freedom of Information Act 1991*, section 20(4).

<sup>7</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88 - 89.

<sup>8</sup> *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

- circumstances and feelings of other agency employees. I am satisfied that this is information concerning those people's personal affairs.
24. Documents 7 -14 are Selection Process Reports for employment positions for which the applicant has applied. The information which has been claimed as exempt relates to the assessment of other applicants for those positions. I am satisfied that this is information concerning those people's personal affairs.
  25. Documents 16b, 31, 32 and 33 are titled *Summary of Suitability and Preparedness for Candidates*. Each document contains a summary of the results of the psychological wellbeing test of various candidates for employment. I am satisfied that this is information concerning those people's personal affairs.
  26. Document 22a is a copy of the *Assessment and Monitoring of Psychological Wellbeing Test*. I am not satisfied that this document contains information concerning the personal affairs of any person.
  27. For information to be exempt pursuant to clause 6(1), it must involve the 'unreasonable' disclosure of a person's personal affairs. In deciding whether the disclosure of a person's personal affairs would be unreasonable, a decision-maker should have regard to all matters relevant, logical and probative to the question.<sup>9</sup> Whether a disclosure would be unreasonable requires 'a consideration of all 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, and whether the information has any current relevance'.<sup>10</sup>
  28. In addition, unreasonableness has 'as its core, public interest considerations',<sup>11</sup> such as the 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.
  29. The information I have assessed as being information concerning other people's personal affairs consists of:
    - records of the personal circumstances and feelings of other employees,
    - selection panel reports of other candidates for positions, and
    - psychological test results of other candidates for positions.
  30. Having regard to the principles for considering when disclosure would be unreasonable, I consider:
    - the nature of this information is such that it would involve a considerable breach of personal privacy if it were to be disclosed,
    - it is very unlikely that the people concerned would consent to having this information disclosed to the applicant; and
    - there is no discernible public interest in having this information disclosed to the applicant.

It is my view that it would be unreasonable to release the information I have assessed as being information concerning other people's personal affairs.
  31. I am therefore satisfied that the information the agency has redacted from documents 3, 6 - 14, and 31- 33 is exempt in accordance with clause 6(1) and document 16b is fully exempt pursuant to clause 6(1).

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<sup>9</sup> *Victoria Police v Marke* [2008] 23 VR 223.

<sup>10</sup> *Re Chandra and Minister for Immigration & Ethnic Affairs* (1984) 6 ALN N257 at [51].

<sup>11</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhart J at 438.

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*Documents concerning operations of agencies - clause 16*

32. The agency claims documents:
- 16a, 23, 24, 26, 28, 29, 31, 32, 33, 34, 35 are partially exempt, and
  - 16b, 22a, 27, 30, 36 are wholly exempt
- pursuant to clauses 16(a)(i), (ii) and (iii).
33. As set out above, I consider the information redacted from documents 31 - 33, and all of document 16b is exempt pursuant to clause 6(1) and therefore I will not further consider these documents.
34. The phrase 'could reasonably be expected' means that the claimed effects that disclosure of the documents would have is not 'fanciful, imaginary or contrived', or 'irrational, absurd or ridiculous'.<sup>12</sup>
35. The phrase 'prejudice the effectiveness of any method or procedure' in the context of clause 16(1)(a) has not been judicially interpreted. That said, the South Australian District Court has attributed the ordinary meaning to the words when used in a very similar phrase in clause 4(2)(a)(iii) of Schedule 1, that is, 'prejudice the effectiveness of any lawful method or procedure'. The Court commented that '[p]rejudice will be caused to the relevant methods and procedures if disclosure of them would make them less useful ...'<sup>13</sup>

It is one thing for observers to deduce, with varying success from everyday experience, media reports and other informal sources, what appear to be methods and procedures employed by such agencies to achieve their objectives, but it is quite another to have spelt out publicly from the agency's own documents ... what those methods and procedures are. The risk that they be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them.

36. The terms 'tests', 'examinations' and 'audits' as used in clause 16(1)(a)(i) and (ii) are not defined in the FOI Act or the *Acts Interpretation Act 1915*, and should be accorded their ordinary meaning.
37. The phrase 'substantial adverse effect', which is used in clause 16(1)(a)(iii), 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.<sup>14</sup> The test is 'a high one'.<sup>15</sup>
38. In its original determination the agency provided the following reasons in support of its claims that the documents are exempt:

Specifically, these documents are exempt in accordance with clause 16(1)(a), parts (i), (ii) and (iii), as they contain actual tests, names of tests and components, processes relating to testing and scoring, and records of subsequent assessment, questioning of employees and their responses.

Disclosure of this information would compromise the integrity of the systems, methods and analysis of testing individuals and impair the method for conducting such tests, and may be released to other persons, thereby permitting others to predict the nature of the questions that are asked as part of the process. It is essential to protect the viability of a method or procedure for the conduct of a test, examination or audit, as prior knowledge for testing would defeat the object or purpose of the tests. Release of

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<sup>12</sup> *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 63-64.

<sup>13</sup> *Konieczka v South Australian Police* [2006] SADC 134, [15].

<sup>14</sup> *Konieczka v South Australian Police* [15], citing *Re Thieess and The Department of Aviation* (1986) 9 ALD 454.

<sup>15</sup> *Konieczka v South Australian Police* [18].

this information would significantly affect the way in which DECD evaluates and addresses employee matters of this nature.

In addition, disclosure would reveal sensitive information and have a considerable effect on the efficient administration of the agency, and have an adverse effect on the supply of similar information to the agency, thereby creating a substantial risk to the agency's effective management and assessment of its personnel.

This would very likely impact upon the willingness of individuals to provide frank information in relation to future such testing by the agency. It is obviously beneficial for an agency's management and assessment of its personnel that the information collected is as candid as possible. Also taken into account is the expectation of the participants that information will only be released to other parties where strictly necessary to afford procedural fairness to those involved.

39. Document 22a is a blank copy of the psychological/psychometric tests used by the agency and document 27 is an extract from information used in the psychological interview. Both the test and the interview are used to assess suitability of candidates for working at schools located in the Anangu Pitjantjatjara Yankunytjatjara (APY) lands.
40. Documents 30 and 36 contain the matrix used to assess the results of the psychological and psychometric tests.
41. The portions of documents 16a, 23, 24, 26, 28, 29, 34 and 35 that the agency has claimed as exempt set out information about the content of the psychometric tests and psychological interview used by the agency.
42. I am persuaded that it is reasonable to expect that the release of the psychological tests used, the assessment matrix information and information that reveals the content of the tests used (**the test information**) would prejudice the effectiveness of the procedures for the conduct of tests undertaken by the agency to determine persons' suitability for working at schools located in the APY lands. I am of the opinion that disclosure of the test information meets the criteria of clause 16(1)(a)(i).
43. I consider that the release of the test information could reasonably be expected to lead to an outcome where results of the tests and psychological interview would not be an accurate reflection of the subject's honest answer to the questions. In my opinion that would prejudice the attainment of the objects of administering the tests. It is my view that disclosure of the test information meets the criteria of clause 16(1)(a)(ii).
44. I turn then to consider whether, as required by clause 16(1)(b) it would, on balance, be contrary to the public interest to disclose the test information.
45. 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'.<sup>16</sup>
46. In relation to the balancing of the public interest the agency provided the following in its determination:

I have balanced the above against the general public interest of access to documents, the importance and relevance of the document and the need to demonstrate that proper process is applied in matters of staff dispute and performance. I determine that on this occasion the public interest favouring nondisclosure carries greater weight

47. I accept that there is a public interest in persons who are subjected to tests having access to those tests and the assessment criteria in order to ensure that the agency

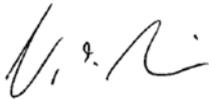
<sup>16</sup> *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 12.

undertakes the processes associated with the tests in a fair and proper manner. There is also a public interest in persons having access to information which shows the reasons for a decision that has affected them.

48. I have weighed these public interest factors in disclosing the information against the public interest in maintaining the integrity of tests designed to assess the suitability of persons to work with children in the APY lands.
49. I am of the view that the overwhelming public interest is in maintaining the confidentiality of the tests and the assessment criteria in order to preserve the effectiveness of the tests.
50. I consider that the information claimed exempt by the agency and set out in paragraph 32 is exempt pursuant to clauses 16(1)(a) (i) and (b) and 16(1)(a)(ii) and (b).
51. Given this view, I do not consider it necessary to consider the agency's further claim of exemption for the same information pursuant to clause 16(1)(a) (iii).

#### **Determination**

52. In light of my views above, I confirm the agency's determination.



Wayne Lines  
**SA OMBUDSMAN**

25 May 2018

## APPENDIX

### Procedural steps

Date	Event
11 July 2017	The agency received the FOI application dated 11 July 2017.
20 December 2017	The agency determined the application.
22 January 2018	The agency received the internal review application dated 15 January 2018.
15 February 2018	The agency confirmed the determination.
15 February 2018	The Ombudsman received the applicant's request for external review dated 15 February 2018.
16 February 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
9 March 2018	The agency provided the Ombudsman with its submissions and documentation.
7 May 2018	I provided the parties with the provisional determination.
16 May 2018	The agency advised that it did not have any submissions to make.