

Determination

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

Applicant	Mrs [REDACTED]
Agency	Department of Treasury and Finance
Ombudsman reference	2018/11929
Agency reference	T&F18/0551
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:

SafeWork Investigation and results into the serious injury that occurred from an uncapped pin left behind from work carried out by the Port Adelaide & Enfield Council on the 8th of March 2018 at [REDACTED]. The injured person was [REDACTED] who resides at the above address.

Background

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

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 24 June 2019. 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 applicant provided submissions in response by email dated 1 July 2019. I have considered these submissions in this determination.
6. The agency advised that it did not wish to make submissions by email dated 8 July 2019.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
8. 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. 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).

...

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.

9. Section 271 of the *Work Health and Safety Act 2012* (WHS Act) provides

271—Confidentiality of information

- (1) This section applies if a person obtains information or gains access to a document in exercising any power or function under this Act (other than under Part 7).
- (2) The person must not do any of the following:
 - (a) disclose to anyone else—
 - (i) the information; or
 - (ii) the contents of or information contained in the document;
 - (b) give access to the document to anyone else;
 - (c) use the information or document for any purpose.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
 - (b) in the case of a body corporate—\$50 000.
- (3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—
 - (a) about a person, with the person's consent; or
 - (b) that is necessary for the exercise of a power or function under this Act; or
 - (c) that is made or given by the regulator or a person authorised by the regulator if the regulator reasonably believes the disclosure, access or use—
 - (i) is necessary for administering, or monitoring or enforcing compliance with, this Act; or
 - (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations; or

¹ Freedom of Information Act 1991, section 12.

- (iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety; or
 - (iv) is necessary for the recognition of authorisations under a corresponding WHS law; or
 - (v) is required for the exercise of a power or function under a corresponding WHS law; or
 - (d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
 - (e) that is required or authorised under a law; or
 - (f) to a Minister.
10. Section 20(4) of the FOI Act provides that if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give the applicant access to a copy of the document to this limited extent.
 11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
 12. 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

13. The agency identified 42 documents within the scope of the application.
14. The agency granted access in full to 11 documents. The agency granted access in part to 18 documents. The agency refused access to 13 documents.

Issues in this review

15. The issue to consider is whether the agency is justified in refusing the applicant access to the documents in issue.

Consideration

Clause 6(1)

16. 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.
17. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. The definition specifically refers to 'personal qualities or attributes'. The term has also been held to involve 'matters of private concern to an individual'² and the 'composite collection of activities personal to the individual concerned.'³ This is relevant to clause 6(1).
18. The agency has provided the applicant with copies of documents 1, and 26 - 29 with the material that it claims is exempt deleted.

² *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.

³ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

19. Documents 1 and 26 - 29 are photographs of individuals, presumably performing work at a worksite. The redacted matter in these documents are the parts of the photograph which may assist in identifying the identity of the individuals who have been photographed.
20. Documents 26 - 29 were attached to an email sent by the applicant's daughter Ms [REDACTED] to the relevant SafeWork inspector of the agency, the Chief Executive and the Mayor of the City of Port Adelaide Enfield Council and also to a third party.
21. The origin of the document 1 is not clear. It seems likely that the applicant or [REDACTED] provided it to the agency. It may be that the photograph was obtained by the relevant SafeWork inspector in the course of exercising functions and powers under the WHS Act.
22. Regardless, on examination of the redacted material, I am not satisfied that the redacted material contains personal affairs of the individual(s) the subject of the photograph. I have formed this view on the basis that:
 - it is not immediately evident that the photographs are of individuals
 - the individual is standing at an angle to the camera and the identifying features of the individual are not easily identifiable
 - without prior knowledge of the individuals in the photographs, it would be almost impossible to identify the subject of the photographs
 - the individuals pictured in these photographs are working in a public space.
23. In any event, the agency has not satisfied the second limb of the test in clause 6; namely that the release of the redacted material in these documents would be unreasonable.
24. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, 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.⁴
25. I consider the following factors to be relevant in considering the reasonableness of disclosure in the context of clause 6(1):
 - the information is already known to the applicant
 - the sensitivity of the information is very low
 - the interest in the information by the applicant is very high
 - the information in documents 26 - 29 was obtained by the agency from [REDACTED]
 - it is very likely that the applicant already has un-redacted copies of the documents.
26. I am not satisfied that it would be unreasonable to disclose documents 1 and 26 - 29 to the applicant.
27. I am not satisfied that the redacted information in documents 1 and 26 - 29 is exempt under clause 6(1). I am of the view that the agency should release document 1 in full to

⁴ *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

the applicant. Although not claimed by the agency, I will discuss the application of clause 12(1) to documents 26 - 29 further in this determination.

Clause 12

28. Clause 12(1) enables an agency to refuse access to documents which are the subject of secrecy provisions in other legislation.
29. The documents subject to this external review relate to a SafeWork SA investigation conducted between 13 April and 24 July 2018; and therefore are subject to the WHS Act.
30. Division 2 of Part 9 of the WHS Act sets out the functions and powers of inspectors under the WHS Act. It is clear from these provisions that inspectors appointed under the WHS Act have extremely broad investigative powers. In this context I refer in particular to the following powers:
 - powers of entry (section 163)
 - power to inspect, examine and make enquiries at a workplace (section 165(1)(a))
 - power to require production of documents and answers to questions (section 171)
 - powers to copy and retain documents (section 174)
 - power to seize evidence (section 175)
 - power to seize dangerous workplaces and things (section 176).
31. Moreover, hindering an inspector exercising his or her powers under part 9, or failing or refusing to comply with a requirement of an inspector under part 9 of the WHS Act, is a criminal offence subject to a substantial pecuniary penalty.⁵
32. Further section 271 of the WHS Act provides that the disclosure of information gained in exercising a power or function under the WHS Act is prohibited subject to the exceptions provided for in subsection (3) of section 271 of the WHS Act.
33. Paragraphs (a) and (e) of section 271(3) of the WHS Act are relevant in this regard. They relevantly provide that information gained in exercising the powers or functions under the WHS Act is not exempt from disclosure:
 - about a person, with the persons consent (paragraph (a)) or;
 - that is required or authorised under a law (paragraph (e)).

Section 271(3)(a) of the WHS Act

34. The application of section 271(3)(a) of the WHS Act was discussed by the District Court of South Australia in the matter of *Pages Hire Centre (NSW) Pty Ltd and Boros v Department of Premier and Cabinet*⁶ (**Pages Hire Centre**). This matter considered the application of the predecessor to the WHS Act, the *Occupational Health, Safety and Welfare Act 1986 (OHSW Act)* as it related to clause 12(1) of Schedule 1 to the FOI Act. However, despite finding that in that case, the relevant Act was the OHSW Act, His Honour Beazley J also examined the application of section 271 of the WHS Act.
35. In discussing the differences between section 55(1a)(c) of the OHSW Act and section 271(3)(a) of the WHS Act, Beazley J stated:

Under s 55(1a)(c) of the OHSW Act disclosure was permitted when it was made 'with the consent of the person to whom the information relates or who furnished the information'. By contrast under s 271(3) of the WHS Act, the proscription against disclosure does not

⁵ See for example offences contained in sections 165(2), 171(6), 177(2), 177(6) and 188(a) of the WHS Act, all of which carry a maximum penalty of \$10,000.00 in the case of an individual.

⁶ [2014] SADC 3

apply in respect of information: 'about a person, with the person's consent'. Upon a literal reading, disclosure would be permitted under the repealed Act if either the person to whom it related or the person who furnished it consented.

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

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

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

36. Applying this interpretation of section 271(3)(a) of the WHS Act, the agency was required to consider to whom the information in the documents (that it claimed were subject to clause 12(1) of the FOI Act) related, to ascertain whether section 271(3)(a) of the WHS Act applied.
37. The construction of the term 'about a person' was also discussed in Pages Hire Centre. The District Court stated:

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

Documents 8 - 9

38. I note that both documents 8 and 9 were generated by SafeWork SA itself (rather than obtained or gained by the SafeWork inspector in 'exercising any power or function' under the WHS Act.). These documents therefore do not fall under the provisions of section 271 of the WHS Act, except to the extent that they contain information that was obtained or gained by the relevant SafeWork inspector in exercising his functions under the WHS Act.
39. The information contained in documents 8 and 9 relate solely to the applicant and [REDACTED].
40. I consider that the remainder of the information in documents 8 and 9 is of purely an administrative nature and may be disclosed without offending section 271(1) of the WHS Act.
41. I have formed the view that disclosure of the information in documents 8 and 9 would not constitute an offence under section 271 of the WHS Act and that therefore the information in documents 8 and 9 is not exempt under clause 12 of Schedule 1 to the FOI Act.

Document 10

42. Document 10 contains information relating to:
- the applicant
 - [REDACTED]

⁷ [2014] SADC 3 at paragraphs 88 - 93

⁸ [2014] SADC 3 at paragraph 120

- a third party.
43. I note that the agency has redacted information in document 10 relating to the third party.
 44. Document 10 contains information which has been obtained by the relevant SafeWork inspector in exercising his powers and functions under the WHS Act. I consider that the exception in section 271(3)(a) of the WHS Act applies in respect to information about the applicant.
 45. I have considered the application of section 271(3) of the WHS Act in relation to the information about the third party, and consider that none of the exceptions to the prohibition on disclosure apply to that information.
 46. The information in document 10 relating to the third party is therefore exempt pursuant to clause 12(1) of Schedule 1 to the FOI Act.
 47. In my view, the agency has appropriately given access to document 10 with the exempted material deleted in accordance with section 20(4) of the FOI Act.

Documents 11 and 19

48. Documents 11 and 19 are chains of emails between [REDACTED] and the relevant SafeWork inspector. These documents contain information about the applicant provided to the agency by [REDACTED], and emails from the relevant Safework inspector acknowledging receipt of the information provided by [REDACTED].
49. On assessment of the information contained in documents 11 and 19, it is evident that the information relates to the applicant.
50. I have formed the view that disclosure of the information in documents 11 and 19 would not constitute an offence under section 271 of the WHS Act as the information is 'information about a person, with the person's consent' and therefore pursuant to section 271(3) proscription against disclosure does not apply.
51. Formal consent from the applicant to release the information to her is not required in the context of an FOI application. It is inferred from the application for access⁹:

Document 21

52. Document 21 is a letter from the applicant's treating medical practitioner regarding the applicant. This document was provided to the agency by [REDACTED], but the information contained in the documents relates to the applicant. I am satisfied that document 21 was obtained by the relevant SafeWork inspector in the course of exercising functions and powers under the WHS Act. I am therefore satisfied that disclosure of document 21 is prohibited under section 271(2) of the WHS Act, unless an exception applies.
53. The agency has redacted information in document 21, namely the third party to whom the letter is addressed. I am not satisfied however that the material redacted by the agency is 'about' the third party. While referring to the third party, it cannot be said that the document is 'about' the third party.
54. In my view section 273(3) permits disclosure of the redacted information and therefore disclosure of the redacted material to the applicant would not constitute an offence under section 271 of the WHS Act.

⁹ [2014] SADC 3 at paragraph 67

55. Accordingly, I am of the view that the agency has not justified its claim that the redacted information in document 21 is exempt under clause 12(1).

Documents 12-18, 23, 32 and 39 - 42

56. I am satisfied that documents 12 - 18, 23, 32 and 39 - 42 contain information which was obtained by the relevant workplace inspector in the course of exercising functions and powers under the WHS Act.
57. Accordingly, disclosure of the information contained in documents 12 - 18, 23, 32 and 39 - 42 would amount to an offence under section 271(2) of the WHS Act, unless disclosure is permitted under section 271(3).
58. I am satisfied that disclosure of the information contained in documents 12-18, 23, 32 and 39 - 42 is not permitted under section 271(3) of the WHS Act and that therefore disclosure of these documents would constitute an offence. Accordingly, I am of the view that the information in these documents is exempt under clause 12(1).

Documents 22 and 24 - 29

59. Documents 22 and 24 are emails from ██████████ to the relevant SafeWork inspector and to third parties. Documents 25 to 29 are photographs attached to document 22. Each document appears to have been unsolicited by SafeWork. I note that ██████████ also simultaneously emailed these documents to other parties.
60. Document 25 is a photograph of a heavy vehicle. The redacted information is the promotional / identifying material which has been retrofitted to the door of the vehicle.
61. I am satisfied that documents 22 and 24 - 29 contain information which was obtained by the relevant workplace inspector in the course of exercising functions and powers under the WHS Act and that therefore disclosure of the information in these documents would constitute an offence under section 271(2) of the WHS Act. I have considered the exemptions to disclosure contained in section 271(3) of the WHS Act and I am satisfied that none of these exemptions apply to the information contained in documents 22 and 24 - 29.
62. Considering both the content of the documents and the nature of the relationship between the applicant and ██████████¹⁰ it is extremely likely that the applicant already has full access to these documents. Nevertheless, disclosure of the information contained in documents 22 and 24 - 29 may amount to an offence and therefore clause 12(1) of Schedule 1 to the FOI Act applies.
63. I am therefore of the view that the agency has justified its refusal to give the applicant full access to documents 22 and 24 - 29.

Documents 30 - 31, 34 - 35

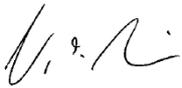
64. Documents 30 - 31 and 34 - 35 contain information which was obtained by the relevant workplace inspector in the course of exercising functions and powers under the WHS Act. Accordingly, disclosure of the information contained in documents 30 - 31 and 34 - 35 would amount to an offence under section 271 of the WHS Act, unless disclosure is permitted under section 271(3). I note that the agency has redacted information in documents 30 - 31 and 34 - 35 relating to third parties.
65. I am satisfied that none of the exemption clauses contained in section 271(3) of the WHS Act apply to the redacted information in documents 30 - 31 and 34 - 35.

¹⁰ Based upon prior interactions with my Office, it appears that ██████████ often acts as an agent for the applicant.

66. In my view, the agency has appropriately given access to document 30 - 31 and 34 - 35 with the exempted material deleted in accordance with section 20(4) of the FOI Act. I am therefore satisfied that the redacted information in documents 30 - 31 and 34 - 35 is exempt under clause 12.

Determination

67. In light of my views above, I vary the agency's determination such that it releases documents 8, 9, 11, 19 and 21 in full to the applicant.



Wayne Lines
SA OMBUDSMAN

22 July 2019

APPENDIX 1

Procedural steps

Date	Event
27 July 2018	The agency received the FOI application dated 27 July 2018.
12 September 2018	The agency determined the application.
25 October 2018	The agency received the internal review application dated 25 October 2018.
7 November 2018	The agency confirmed the determination. The Ombudsman received the applicant's request for external review dated 7 November 2018. The Ombudsman advised the agency of the external review and requested submissions and documentation.
22 November 2018	The agency provided the Ombudsman with its submissions and documentation.
24 June 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.
1 July 2019	The applicant provided submissions.
8 July 2019	The agency advised that it did not wish to make submissions.

