

Determination

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

Applicant	Ms Tammy Giles
Agency	Department of Treasury and Finance
Ombudsman reference	2019/02612
Agency reference	T&F19/0017
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 manner:

My company, O'Connors (A. G O'Connor P/L), reported to SafeWork SA in October 2018, a personnel hoist failure incident involving our employees who were inside the hoist at the time it failed, at the Prince Alfred College Boarding House construction project in Kent Town South Australia. SafeWork SA have advised that an independent design engineer carried out a review of the hoist in question and prepared a report advising if the hoist meets Australian Standards and what items/faults with the hoist needed to be fixed, I am requesting a copy of the report prepared for SafeWork SA by the independent design engineer.

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 9 July 2019. 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 applicant provided submissions in response to my provisional determination, and, having regard to these submissions, I sought the views of the agency about the applicability of section 271(3)(b) of the *Work Health and Safety Act 2012 (the WHS Act)*. I have considered the agency's response below.

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.¹
7. 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 claimed that the document in issue is the subject of secrecy provisions and is therefore exempt by virtue of clause 12, which 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 matters 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. The agency claimed that release of the document would constitute an offence under section 271 of the WHS Act which 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

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

- (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations; or
 - (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.
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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

11. The agency identified one document within the scope of the application and refused access to that document in full.
12. The document in issue is an assessment report of a personnel hoist located at a construction site where the applicant's employees had been working.

Issues in this review

13. The issue to be determined is whether the agency has justified the determination to refuse access to the document in issue on the basis that it is exempt by virtue of clause 12.

Consideration

Applicant submissions

14. In response to my provisional determination, the applicant stated:

We feel as four of our employees were inside the hoist at the time of its failure, the potential seriousness of how the incident could have ended and the fact that these hoists are being used on numerous other construction sites across Adelaide, we are within our rights to request to see the report.²

² Letter from the applicant to my officer dated 23 July 2019.

Agency submissions

15. The agency submitted that:

The document in question was an independent report commissioned by one of the PCBU's (person conducting a business or undertaking) involved, which was obtained by SafeWork SA inspectors as a part of their investigation under the WHS Act. Pursuant to clause 12(1) of Schedule 1 of the FOI Act, a document is exempt from disclosure if 'it contains matter the disclosure of which would constitute an offence against an Act'. Section 271 of the WHS Act prohibits the release of information that has been obtained by SafeWork SA inspectors during the course of exercising their powers and functions under the WHS Act. Consequently, release of the document would constitute an offence against section 271 of the WHS Act.³

16. The agency also provided a summary of the actions taken by various parties involved in the incident, including the actions of the SafeWork SA inspectors before and after the document was created.⁴

Section 271 of the WHS Act

17. I am satisfied that the document was obtained by SafeWork SA inspectors in the course of exercising their powers and functions under the WHS Act and that disclosure of the document would constitute an offence under section 271 of the WHS Act.

18. In order to justify a claim of clause 12, it is my view that an agency must do more than state the effect of a secrecy provision in isolation. Rather, an agency should grapple with the effect and intention of the secrecy provision in the context of the relevant statute.⁵ The first step in doing so may be to consider any exceptions to the secrecy provision.

19. In forming my provisional view, I also considered whether subsection 271(3) of the WHS Act applies in the circumstances. In relation to subsection 271(3)(e), I note that the FOI Act neither requires nor authorises disclosure of information to any person. Rather, it provides members of the public with a right to be given access to an agency's documents, subject to the agency's determination to refuse access to documents that are exempt. As such, I do not consider that subsection 271(3)(e) is applicable in the circumstances.

20. In light of the applicant's submissions in response to my provisional determination and having regard to section 271(3)(b) of the WHS Act, I sought clarification from the agency as to whether, in the circumstances, disclosure of the document to the applicant may assist in the exercise of the regulator's functions, particularly under sections 152(c), (e) and (g). Section 152 of the WHS Act provides:

The regulator has the following functions:

- (a) to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act;
- (b) to monitor and enforce compliance with this Act;
- (c) to provide advice and information on work health and safety to duty holders under this Act and to the community;
- (d) to collect, analyse and publish statistics relating to work health and safety;

³ Letter from the agency to my officer dated 27 March 2019.

⁴ Email from the agency to my officer on 4 June 2019.

⁵ *Minister for Education and Child Development v Chapman* [2013] SADC 130.

- (e) to foster a cooperative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters;
- (f) to promote and support education and training on matters relating to work health and safety;
- (g) to engage in, promote and co-ordinate the sharing of information to achieve the object of this Act, including the sharing of information with a corresponding regulator;
- (h) to conduct and defend proceedings under this Act before a court or tribunal;
- (i) any other function conferred on the regulator by this or any other Act.

21. In response to my enquiry, the Manager of Policy and Governance at SafeWork SA submitted the following:

Noting the content of the report and having regard to the facts and circumstances of the matter... I am of the view that the release is not necessary to lessen or prevent a serious risk to public health or safety or otherwise carry out a power or function under the WHS Act.

I agree that function [sic] of the regulator is lessening and preventing serious risk to health and safety is paramount; [sic] the legislative obligation is not restricted in this regard. However, it requires careful consideration in determining the scope of the obligation.

Prior to any disclosure, close consideration must be given to what is reasonably necessary to disclose and to whom to lessen the risk. Information which is not reasonably necessary should not be disclosed on this basis. If there is no basis for disclosure, there is no requirement to provide disclosure and disclosure should not be made.

Having regard to the facts and circumstances of the notification and the content and findings of the report, I am of the view that it is not reasonably necessary to release the report, that is, it is not necessary to prevent serious risk to public health and safety/breach of duty/potential offences under the WHS Act or otherwise carry out a function under the Act.⁶

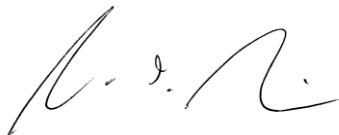
22. Having regard to the circumstances of the document's creation, I understand the effect of this argument to be that because proactive steps were taken to ensure that the personnel hoist was safe for continued use, release of the document was not necessary to ensure compliance with the WHS Act. Though the agency did not identify which function under section 152 was most relevant to this argument, it appears to reflect section 152(g). That is, that sharing information by releasing the document was not necessary to achieve the object of the WHS Act which is 'to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces...'.⁷
23. I do not agree that the only consideration for releasing a document for the exercise of the regulator's functions is whether release would lessen or prevent risk to work health and safety, as the submissions above appear to suggest.
24. Nevertheless, I am satisfied that the agency has now considered whether the circumstances in this matter give rise to an exception to confidentiality under section 271(3)(b).

⁶ Email from the agency to my officer, 11 September 2019.

⁷ *Work Health and Safety Act 2012*, section 3.

Determination

25. In light of my views above, I confirm the agency's determination that the document in issue is exempt by virtue of clause 12.

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

22 October 2019

APPENDIX 1

Procedural steps

Date	Event
8 January 2019	The agency received the FOI application.
8 February 2019	The agency determined the application.
25 February 2019	The agency received the internal review application.
12 March 2019	The agency confirmed the determination.
14 March 2019	The Ombudsman received the applicant's request for external review.
15 March 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
27 March 2019	The agency provided the Ombudsman with its submissions and documentation.
9 July 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.
10 July 2019	The agency provided a response to the Ombudsman's determination.
23 July 2019	The applicant provided a response to the Ombudsman's determination.
9 August 2019	The Ombudsman sought further submissions from the agency.
11 September 2019	The agency provided a response to the Ombudsman's request for further submissions.