

Determination

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

Applicant	Mr Chris Picton MP
Agency	Minister for Health and Wellbeing
Ombudsman reference	2019/06314
Agency reference	MHW-H19-1095
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:

Any documents (including but not limited to emails, letters, minutes, text messages, instant messaging application, briefings, messages etc) between the Minister and/or Minister's office and Ms Georgina Downer and/or the Liberal for Mayo campaign.
2. The applicant sought a copy of any documents within the scope of the application for the period 1 November 2018 to 20 February 2019.

Background

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

Jurisdiction

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

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 24 February 2020. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
6. An interested party was identified and its submissions were provided prior to the release of my provisional determination. A further opportunity to make submissions was offered to the interested party following my provisional determination.

7. The applicant, the agency and the interested party did not provide a response to my provisional determination. As the deadline for further submissions has passed, I have accordingly not considered any additional submissions in this determination

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. 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.
10. In this matter, clause 5(1) of Schedule 1 of the FOI Act was relied upon by the agency. Although not expressly stated by the agency, it would appear that the agency has also relied upon clause 6(1).
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 three documents within the scope of the application.
14. Whilst the agency purportedly released two documents, it only partially released those documents and stated in the determination that access to the documents 'will be granted with personal information redacted'. I have presumed the agency is relying on clause 6(1) to partially release the relevant documents although it did not expressly refer to clause 6(1) in its determination.
15. The agency determined on internal review to partially release all three documents on the following bases:
 - partially release documents 1 and 2 on the basis of clause 6(1); and
 - partially release document 3 on the basis of clause 5(1).

Issues in this review

16. It is for me to decide whether or not the agency has justified its determination to refuse access to the documents on the basis of the clauses relied upon by the agency.

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

Consideration

Clause 6(1) - Documents affecting personal affairs

17. The agency partially released documents 1 and 2 with personal information redacted.

18. Clause 6(1) provides as follows:

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).

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. Document 1 comprises a letter from Ms Georgina Downer to the agency and document 2 comprises a letter from the agency to Ms Downer. This correspondence is in relation to a concern received by a resident ('**the concerned resident**') of the Mayo electorate about a hospital service.

20. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. The definition specifically refers to 'financial affairs' and '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

21. Having reviewed documents 1 and 2, I am satisfied the information redacted in those documents contain the personal affairs of a person, namely the name, age, financial affairs, residential address and personal qualities or attributes of a person, i.e. the concerned resident, not being the applicant.

22. In deciding whether disclosure of the information would be unreasonable, I must give consideration to 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.

23. In addition, unreasonableness has 'at its core, public interest considerations'⁴, such as the protection of personal privacy, the objects of the legislation being satisfied and ensuring transparency and accountability within representative government.

24. In my view, it would be unreasonable to disclose the person's name, age, financial affairs, personal qualities and attributes and residential address, particularly given the information has little relevance to the application and the high likelihood the person, i.e. the concerned resident, would not wish to have the information disclosed without consent.

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] AATA 226; (1985) 8 ALD 219 and *Young v Wicks* [1986] FCA 169; (1986) 13 FCR 85 at 88-89.

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

⁴ *Colakovsk v Australian Telecommunications Corporation* (1991) 29 FCR429 per Lockhart J at 438.

25. Accordingly, I am satisfied that clause 6(1) of Schedule 1 applies to documents 1 and 2.

Clause 5(1) - Documents affecting inter-governmental or local governmental relations

26. Clause 5(1) provides:

Clause 5(1)

A document is an exempt document if it contains matter—

- (a) the disclosure of which—
- (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
- (b) the disclosure of which would, on balance, be contrary to the public interest.

27. It is necessary to examine whether either of the conditions in subclause 5(1)(a) are met.
28. The agency submits that document 3 contains information exempt pursuant to clause 5(1) being information still subject to negotiation with the Commonwealth Government.
29. In both, the agency's determination on internal review and submission to my office, the agency claims document 3 is partially exempt pursuant to clause 5, however, the agency did not indicate whether clause 5(1)(a)(i) or 5(1)(a)(ii) or both is relied on.
30. I also note that the agency has not made submissions in relation to whether disclosure of these documents would be contrary to the public interest, as is required by clause 5(1)(b). Merely satisfying the initial criteria of an exemption clause which includes a public interest test, is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest. I remind the agency that it must engage in a 'public interest balancing process' when applying the public interest test.⁵
31. In the course of this external review, I have sought the views of the Commonwealth Government as to whether document 3, or any parts thereof, is exempt by virtue of clause 5.
32. The Commonwealth Government made the following submissions in relation to document 3 and in particular the parts of document 3 that the agency redacted on the basis of clause 5:
- The redactions contain matter the disclosure of which would divulge information from a confidential intergovernmental communication. The communication was made from the Agency to the Minister. The confidential communication provided information to support future Commonwealth government decision-making in relation to funding under the Community Health and Hospitals Program.
33. The Commonwealth Government submits that parts of document 3 are exempt pursuant to clause 5(1)(a)(ii).
34. Document 3 comprises an email from the Chief of Staff of the Minister for Health and Wellbeing to Ms Downer and three attachments, namely:
- letter from the agency to the Minister for Health, the Honourable Greg Hunt MP;

⁵ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

- summary of proposals - Community Health and Hospitals Program; and
 - Community Health and Hospitals Program expressions of interest.
35. Document 3 does not on its face appear to be a confidential communication. However, given that I have information before me indicating that both parties to the relevant intergovernmental communication (ie the Commonwealth Government and the South Australian Government) consider the communication to be a confidential intergovernmental communication, I am satisfied that the condition at clause 5(1)(a)(ii) is met.
36. I have no information before me which suggests that the document includes any information the disclosure of which could reasonably be expected to cause damage to intergovernmental relations. Accordingly, it does not appear to me that the condition at clause 5(1)(a)(i) is met.
37. To make out the exemption in clause 5(1), only one of the conditions in clause 5(1)(a) needs to be met. As I have concluded that the condition in clause 5(1)(a)(ii) is met in respect of document 3, it is necessary to then consider whether the disclosure of any parts of document 3 would, on balance, be contrary to the public interest as required by clause 5(1)(b).
38. The Commonwealth Government made submissions to my office with respect to the consideration of public interest as follows:

The disclosure of those parts of the document [Document 3] currently subject to the redactions would, on balance, be contrary to the public interest.

Given the sensitive nature of funding proposals, disclosing the information would affect future Commonwealth funding deliberations by likely limiting the nature of future State-Commonwealth communications, including at ministerial level. Public interest favours the Commonwealth making funding decisions based on full and frank information. The risk of the Commonwealth considering funding proposals on the basis of limited communications is contrary to the public interest.

39. In respect of the document, the following public interest considerations are relevant:

Contrary to disclosure

- the protection of confidential information and the flow of information required for the administration or development of intergovernmental projects, programs and for long-term intergovernmental planning;
- the Commonwealth Government's objections to disclosure;
- the agency's objections to disclosure;
- supporting and encouraging the free exchange of ideas during deliberative processes, including through the frank and candid assessment of advice supplied to government;
- ensuring confidence and trust between governments and avoiding the possibility of damage to the relationship between the Commonwealth Government and the South Australian Government (or elements thereof);

In favour of disclosure

- fulfilling the objects of the FOI Act, particularly the public interest in:
 - promoting openness in government and accountability of Ministers of the State and the Crown;

- facilitating more effective participation in, and scrutiny of, the agency's and the Government's decision-making processes;
 - transparency and accountability regarding the manner and extent to which the South Australian Government participates in a national governmental forum;
 - transparency regarding the economic and other impacts of the South Australian Government's submissions to the Commonwealth;
 - transparency and accountability regarding the effective management of public infrastructure;
 - maintaining consistency in public disclosure given document 3 has already been disclosed to a member of the public, namely Ms Downer.
40. Weighing the above factors, I am not satisfied that it would be contrary to the public interest to release document 3.
41. The fact that the agency has acted contrary to confidentiality by releasing the document to a member of the public is a persuasive consideration in reaching this conclusion. I note that once a document is released to a member of the public, any control over the distribution of that document is forgone.
42. Accordingly, I am not satisfied that the exemption at clause 5(1) of Schedule 1 to the FOI Act applies to any parts of document 3.

Determination

43. In light of my views above, I vary the agency's determination in the manner set out in Appendix 2.



Wayne Lines
SA OMBUDSMAN

13 February 2020

APPENDIX 1

Procedural steps

Date	Event
21 February 2019	The agency received the FOI application dated 20 February 2019.
23 March 2019	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
8 May 2019	The agency received the internal review application dated 8 May 2019.
30 May 2019	The agency determined the internal review application.
4 July 2019	The Ombudsman received the applicant's request for external review dated 4 July 2019.
16 July 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
31 July 2019	The agency provided the Ombudsman with its submissions and documentation.
24 February 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.

¹ *Freedom of Information Act 1991*, section 14(2).

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

APPENDIX 2

Document in issue	Description	Agency's determination	Ombudsman's determination	Information to be released
1	Letter from Georgina Downer 14 January 2019	Partially exempt on the basis of clause 6(1)	The agency's determination is confirmed	No further release
2	Response to Georgina Downer 19 February 2019	Partially exempt on the basis of clause 6(1)	The agency's determination is confirmed	No further release
3	Email 1 February 2019 and attachments	Partially exempt on the basis of clause 5(1)	Not exempt	The document is to be released in full