

Determination

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

Applicant	[redacted]
Agency	South Australian Tourism Commission
Ombudsman reference	2019/09699
Agency reference	07/2019
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:

‘all documents about myself, [redacted] from the Clipsal 500 and/or the Adelaide 500 and/or Superloop 500. I have been an Official at their Events from 2011 until 2016 and in 2014 I was subjected to an Occupation, Health, Safety & Welfare incident on the 1st March 2014 where I wrote a Report about it and then I was taken to the Medical Centre for treatment and an assessment. As a result of that I was stood down from duty for the rest of the event. This later evolved on the day into a clash with 2 Senior Officials where they abused and harassed me. In subsequent years when I applied to being an Official for the Event I was refused and that because of my persistence a letter was written in February 2018 by the Organisation to CAMS (Confederation of Australia Motor Sports) which subsequently led to my Suspension of Officials Licence [redacted] until 30 June 2019, with the licence renewal to be reconsidered after this time. I now wish to have my licence renewal reconsidered and I want to have copies of all correspondence relating to myself while I was an Official at all Events.’

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. The Deputy Ombudsman provided her tentative view about the agency’s determination to the parties, by provisional determination dated 25 June 2020. She informed the parties that subject to receipt and consideration of submissions from the parties it was proposed to reverse the agency’s determination.

5. The applicant and agency provided submissions in response. I have considered these submissions in this determination.
6. In her provisional determination, the Deputy Ombudsman proposed to reverse the agency's determination, granting access in full. As a result of the agency's further submissions raising clause 6(1), I have now taken the view that two discrete redactions ought to be made to documents 6 and 15 to preserve the privacy of the authors' mobile number and email address. Since these are limited, I have proceeded to finalise my determination varying the agency's determination. I explain my reasoning below.

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.
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.
11. The following provisions are relevant to my review:

4—Documents affecting law enforcement and public safety

- (2) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - (i) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case; or
 - (ii) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; ... and
 - (b) would, on balance, be contrary to the public interest.

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.

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

- (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.

7—Documents affecting business affairs

- (1) A document is an exempt document—
 - (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
 - (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

13—Documents containing confidential material

- (1) A document is an exempt document—
 - (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
 - (b) if it contains matter obtained in confidence the disclosure of which—
 - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
 - (ii) would, on balance, be contrary to the public interest

Documents in issue

12. The agency has identified 11 documents within the scope of the application, four of which the agency claims are exempt, documents 5, 6, 11 and 15. The agency relies upon clauses 4(2)(a)(ii), 6(1), 7(1)(c) and 13(1)(b).

Issues in this review

13. It is for me to decide whether or not the agency has justified its determination to refuse access to the documents in issue, and whether I should confirm, vary or reverse the agency's determination that documents 5, 6, 11 and 15 are exempt.

Facts and initial submissions

14. In February and March 2014, the applicant worked as a volunteer at the Clipsal 500 as a radio communications officer. On 18 July 2014 the applicant wrote to Mr Jeff Mattner, Manager of the South Australian Motor Sport Board, outlining a number of issues which had arisen whilst he was working at the Clipsal 500. In the letter he complained about the behaviour of three marshals
15. The applicant also worked at the 2016 event. However, his licence was suspended in 2018. He now wishes to apply for its renewal and seeks disclosure of all documents for this purpose.
16. The agency submitted that the four documents in issue are exempt under clauses 4(2)(a)(ii) and 13(1)(b)(i) of the FOI Act and should not be disclosed because:
 - they were created by individuals as part of an investigation into the conduct of the applicant as a Confederation of Australian Motor Sport (**Motorsport Australia**) official and the information provided in the documents was provided on the basis that it was confidential
 - the confidentiality should be maintained to ensure individuals feel comfortable raising future issues and the release of the information could deter individuals from making honest and detailed reports about future events
 - the documents remain relevant to an investigation that resulted in the applicant's Motorsport Australia licence being suspended and the suspension is still current
 - ensuring the safety of individuals involved in or attending an event with inherent high risk activities outweighs any public interest in releasing the documents
 - the agency must have discretion and the ability to provide assurances of confidentiality to individuals when critical issues and concerns around safety are raised or being investigated.

Submissions responding to the provisional determination

17. I summarise submissions made by the parties, in response to the provisional determination, however I will also address issues raised throughout my consideration below.
18. In the applicant's response to the provisional determination he noted that his licence as a Motorsport marshal was suspended and that he did not believe that he had done anything wrong. He alleged that Senior Officials from Motorsport Australia violated its code of ethics and that the agency should be 'directed' to investigate it. I note that this is not relevant to the external review before me.

19. The applicant stated his believe that correspondence was sent from the agency to Motorsport Australia which he considered had some effect on his suspension and that he wanted to see it.
20. The agency made a number of submissions including the application of confidentiality, secrecy and personal and business affairs. I have considered all of the submissions and changed my view in relation to documents 6 and 15. This is only a partial change.
21. The agency requested leave to consult those it considered to be interested parties under sections 26 and 27. I note however, that as the matter is now subject to external review, any requirement to consult falls on me. Sections 26 and 27 no longer apply to the agency, and neither are they a requirement for complying with my review or determination. I have not consulted individual authors, because I have taken the view that the documents do not relate to their personal affairs, except in two discrete places where I do not propose to give access (a mobile number and email address). I have not consulted Motorsport Australia, because I do not consider the information to concern to its business affairs.

Consideration

22. I am not of the view that clause 4(2)(a)(ii) is applicable in this case; the persons who provided reports regarding the applicant's behaviour at the 2014 Clipsal 500, cannot be classed as confidential sources of information in relation to the enforcement or administration of the law. This clause applies in circumstances where it is the source, rather than the information which is confidential and the information in question may enable an agency responsible for enforcing or administering a law to enforce or administer it properly. It applies in circumstances where the person who supplies the information wishes their identity to be known only to those who need to know it for the purpose of enforcing or administering the law.²

Clause 6(1)

23. The agency has contended that the documents comprise the personal affairs of the authors. The content of the documents were drafted by the authors in their capacity as senior officials of Motorsport Australia. Although their engagement was on a voluntary basis, they were engaged officially with Motorsport Australia and made their complaints in their capacity as senior officials. With one exception, discussed below, I find that the personal affairs contained in the documents are those of the applicant, since they described the alleged personal qualities and attributes of the applicant.
24. I take the view that the mobile number of the official should be redacted from document 6 and the email address of the other official should be redacted from document 15. As the personal email address and personal mobile number may be used to contact the individual outside of their official capacity, I accept that it is a matter of personal concern to that individual.³ Given that I do not propose to release this, I am not required to consult with that official.

Clause 7(1)(c)

25. Without strictly distinguishing between 'business, professional, commercial or financial affairs', financial information has been considered in other jurisdictions to amount to the business affairs of non-profit third parties. I accept the reasoning in the following decisions.

² *Department of Health v Jephcott* (1985) 8 FCR 85.

³ *S72 and Department of Justice and Attorney General* [2019] QICmr 49, [100].

26. In *Handicapped Children's Centre, NSW v Director, Department of Ageing, Disability & Homecare*⁴ and *Community Care Incorporated and Department of Communities*⁵ the New South Wales Administrative Decisions Tribunal and the Queensland Information Commissioner, respectively, considered that audit reports and financial information of non-profit organisations, commissioned by the relevant departments, concerned the business affairs of the organisations. The relevant clause of the repealed New South Wales *Freedom of Information Act 1989*,⁶ and the relevant clause of the repealed Queensland *Freedom of Information Act 1992*⁷ are identical to the wording of clause 7(1)(c) in the South Australian Freedom of Information Act.
27. Similarly, in *Bell and Secretary, Department of Health (Freedom of Information)*,⁸ the Commonwealth Administrative Appeals Tribunal concluded that funding agreements and donation information of a non-profit organisation constituted that party's business affairs.
28. Where clear financial information is not present, documents may still concern the business affairs of non-profit third parties. Progress reports, detailing an organisation's overall position, the status of its projects and its achievements were considered by the Australian Information Commissioner in *'AQ' and Department of Resources, Energy and Tourism*⁹ to concern the business affairs of the organisation. Further, in Victoria, information and agreement terms for St John Australia's sponsorships amounted to the business affairs of that organisation.¹⁰
29. More recently, a building association's contact with a department, where it made enquiries and noted concerns about a particular policy, was considered by the Australian Information Commissioner to amount to the business affairs of that organisation:

I am satisfied that the building association's contact with the Department was initiated pursuant to its business affairs as a member-based organisation representing its members in the building industry. Although the association is not a profit-making business, I am satisfied that it raises funds through member subscriptions, amongst other means, and uses those funds to further the objects of the association.¹¹

30. I consider it appropriate that the affairs of a non-profit organisation may fall within the exemption of clause 7(1)(c). In this respect, the New South Wales Administrative Decisions Tribunal provided a persuasive view in *Handicapped Children's Centre, NSW v Director, Department of Ageing, Disability & Homecare*:

I do not accept the Department's submissions that clause 7(c)(ii) of schedule 1 of the FOI Act required the HCC to establish that disclosure of the Corben Report would have an "unreasonable adverse effect" on the "competitive position" of its business and, as it was a non-profit organisation, it could not have a competitive position. Such an interpretation of this particular clause would limit its operation to all businesses other than non-profit organisations. There is nothing in the wording of clause 7(c)(ii) which would justify such a construction. Indeed, the contrary would be the case as government agencies, particularly those providing services such as the respondent Department, regularly deal with businesses which are non-profit and retain information from or about such businesses. If Parliament had intended such agencies to be excluded from relying on the exemption in clause 7(c)(ii) of schedule 1 of the FOI Act, it would have expressly provided for such.¹²

⁴ *Handicapped Children's Centre, NSW v Director, Department of Ageing, Disability & Homecare* [2013] NSWADT 116.

⁵ *Community Care Incorporated and Department of Communities; Mr M Howard (Third Party)* [2008] QIMR 14.

⁶ *Freedom of Information Act 1989* (NSW), clause 7(1)(c)(i).

⁷ *Freedom of Information Act 1992* (Qld), section 45(1)(c)(i).

⁸ *Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 (9 July 2015).

⁹ *'AQ' and Department of Resources, Energy and Tourism* [2013] AICmr 79 (7 November 2013).

¹⁰ *Australian Institute of First Aid and Emergency Care Providers Pty Ltd v Victorian Workcover Authority* [2000] VCAT 2058.

¹¹ *Construction, Forestry, Mining and Energy Union and Australian Building and Construction Commission (Freedom of Information)* [2017] AICmr 125 (1 December 2017).

¹² *Handicapped Children's Centre, NSW v Director, Department of Ageing, Disability & Homecare* [2003] NSWADT 116 at [45].

31. While I consider it appropriate that non-profit organisations may find exemption under clause 7(1)(c), I am also mindful of the approach adopted by Jones P of the Victorian Administrative Appeals Tribunal in *Re Croom and Accident Compensation Commission*:

For the exemption to apply, the information must relate to matters of a business, commercial or financial nature not merely be derived from a business or concerning it or have some connection with it... Is the essential quality or character of the matter business, commercial or financial?¹³

32. In my view, this is an appropriate final step in establishing whether a document concerns the business affairs of a non-profit organisation. While an organisation may not be concerned with the generation of profits, where a document contains information that is clearly tied to its business, commercial or financial operations, viability and generation of income, that information may concern the organisation's business affairs within the meaning of clause 7(1)(c).
33. I turn to consider the documents that the agency claimed are exempt by virtue of clause 7(1)(c).
34. Motorsport Australia is a not for profit corporation. Its objects include the promotion and regulation of vehicular sport in Australia. Its website describes it as the peak motorsport organisation. Its marshals, which once included the applicant, are volunteers. As I noted above, this does not preclude Motorsport Australian from having business affairs, but it does inherently reduce the number of activities it performs that may be described as business, commercial or financial in comparison to a for-profit corporation.
35. While the documents primarily relate the events the subject of investigation, they do contain some incidental references the racetrack operations, I am not persuaded that these amount to being information about the business, commercial or financial affairs of Motorsport Australia.
36. I do not consider that the documents have the essential quality or character of business, commercial or financial matter. Instead they are about the personal affairs of the applicant, qualities and attributes concerning him raised in the complaint. I therefore do not consider them to be exempt pursuant to clause 7(1)(c).

Clause 13(1)(b)

37. In considering whether the exemption in clause 13(1)(b) of Schedule 1 of the FOI Act applies to documents 5, 6, 11 and 15, it is necessary for me to decide:
- whether the document 'contains matters obtained in confidence'
 - whether disclosure might reasonably be expected to prejudice the future supply of such information to the agency
 - whether disclosure would, on balance, be contrary to the public interest.
38. For a document to be exempt pursuant to clause 13(1)(b), it must contain information that was 'received under an express or inferred understanding that [it] would be kept confidential'.¹⁴
39. Documents 5, 6, and 11 are reports provided by marshals about their observations and interactions with the applicant on the relevant days. They include the names and job

¹³ *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441, 468.

¹⁴ *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

titles of the marshals and are dated 1 March 2014, 2014 and 9 June 2016 respectively. Document 15 is an email transmitted on 13 December 2018 by the Manager, Motor Sport to an officer of the agency.

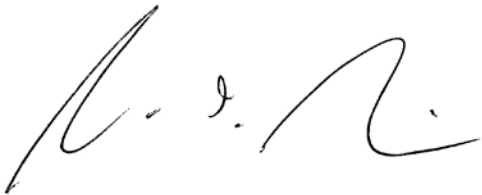
40. In reviewing the applicant's FOI application, the agency's principal officer said the information in the reports was provided on the basis that it remained confidential. The agency has not provided any material to support this submission. Further, none of documents 5, 6, 11, & 15 are endorsed with the words 'confidential' or any other indication that the authors intended the information to be treated confidentially. I note that document 5 was sent to at least three other persons including Mr Mattner. From the information provided, it is apparent that the marshals had discussed the matters amongst themselves. On several occasions, they interacted with the applicant in public areas, and in the presence of other marshals and the public. I also note the applicant recounted his interaction with the marshals in his letter to Mr Mattner of 18 July 2018. All of these facts diminish the confidentiality of the material in the document.
41. For the reasons provided, I am not presently persuaded that the information in documents 5, 6, 11 or 15 was provided in confidence.
42. I am likewise not persuaded that disclosure might reasonably be expected to prejudice the future supply of such information to the agency. The Full Court of the Federal Court, in *Attorney-General's Department v Cockcroft*¹⁵ held, in the context of the *Freedom of Information Act 1982 (Cth)*, that the expression 'reasonably be expected to prejudice' was to be given its ordinary meaning and required a judgment as to what was reasonable, as distinct from something that was irrational, absurd or ridiculous.
43. The test to be applied in these circumstances is whether people would fail to disclose information about the transgressions of a fellow worker at a future public event if disclosure were to occur. Noting the seniority of the marshals, I am not of the view that the ability of the agency to obtain similar information in the future would be impaired or that less detailed information would be provided on a future occasion if disclosure were to occur. It would be incumbent upon a marshal as part of a marshal's duty to provide this sort of information.
44. I now weigh the public interest factors in favour and against disclosure to determine whether on balance, disclosure would be contrary to the public interest.'
45. Factors in favour of disclosure include that disclosure would:
 - enable access to documents concerning the personal affairs of the applicant and held by the government, which I consider to serve the broader public interest of protecting privacy that the Act seeks to ensure
 - benefit the transparency of government
 - enable functions of the FOI Act to be used, such as the adding of notations if the power is relevant.
46. Factors against disclosure include that disclosure would:
 - potentially dissuade cooperation between the agency and Motorsport Australia, however I am satisfied that the agency and Motorsport Australia are unlikely to cease cooperating over the Adelaide 500 due to disclosure of documents about the personal affairs of the applicant
 - discourage provision of information to the agency by Motorsport Australia, however I consider that this is of limited risk, given the type of information being provided and the nature of the cooperation between the agency and Motorsport Australia.

¹⁵ (1986) 64 ALR 97, per Bowen CJ and Beaumont J at paragraph 156.

47. In light of the above, I am persuaded that the factors in favour of disclosure outweigh those against.

Determination

48. In light of my views above, I vary the agency's determination over the documents in issue and grant full access to the documents aside from redaction of the mobile number of the official in document 6 and the email personal address of the author of document 15.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

19 October 2020

APPENDIX 1

Procedural steps

Date	Event
30 June 2019	The agency received the FOI application
12 August 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
28 October 2019	The agency received the internal review application
7 November 2019	The agency confirmed the determination.
22 November 2019	The Ombudsman received the applicant's request for external review
3 December 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.
23 December 2019	The agency provided the Ombudsman with its submissions and documentation.
25 June 2020	The Ombudsman issued her 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).