

Determination

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

Applicant	[redacted]
Agency	University of Adelaide
Ombudsman reference	2018/00025
Agency reference	2017-6008
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:

A Preliminary Assessment Report of Research misconduct investigation presented by [the Designated Person]

All the supported (sic) documents provided with the preliminary assessment report mentioned above

The response of Dr. [A] against my complaint with all the supported document that he submitted in this regards (sic)

Any additional documents relating to my complaint

I submitted my complaint to the university on 05th September 2016 & received the outcome on 18th July 2017 and 30th August 2017.

Background

2. For ease of reference, the procedural steps relating to the application 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.

Revised provisional determination

4. I provided the parties with my tentative views by way of my revised provisional determination dated 21 March 2018. I advised the parties that subject to my receipt and consideration of their submissions I proposed to vary the agency's determination.
5. Dr A did not provide a response to my revised provisional determination.
6. The agency provided a response to my revised provisional determination by way of letter dated 26 March 2018. The agency indicated that it had no further submissions to make.
7. The applicant provided a response to my revised provisional determination by way of email on 4 April 2018. I have addressed the applicant's submissions in the body of 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 its determination, the agency relied upon clauses 9 and 10 of Schedule 1 to the FOI Act. In its response to my first provisional determination, the agency also relied on clauses 6(1), 6(2), 13 and 16(1)(a)(iv). Dr A relied upon clause 8(1). I set out these clauses in full:

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.

8—Documents affecting the conduct of research

(1) A document is an exempt document if it contains matter—

(a) that relates to the purpose or results of research (other than public opinion polling that does not relate directly to a contract or other commercial transaction that is still being negotiated), including research that is yet to be commenced or yet to be completed; and

(b) the disclosure of which—

(i) could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out; and

(ii) 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 research that is being, or is intended to be, carried out by the agency or other person by or on whose behalf an application for access to the document is made.

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

9—Internal working documents

- (1) A document is an exempt document if it contains matter—
- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of—
- (a) matter that appears in an agency's policy document; or
 - (b) factual or statistical material.

10—Documents subject to legal professional privilege

- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.

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.

16—Documents concerning operations of agencies

- (1) A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—
 - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; and
 - (b) would, on balance, be contrary to the public interest.

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 60 documents within the scope of the application.
14. The agency determined to provide full access to 39 documents and to refuse access to 21 documents.
15. On internal review, the agency varied its determination. The agency provided full access to a further seven documents and partial access to seven documents. The agency confirmed its determination to refuse access to seven documents.
16. The 14 documents subject to external review are the documents to which full access has been denied.

Issues in this review

17. It is for me to decide whether the agency has justified its determination to refuse access, either in whole or in part, to the 14 documents in issue.

Consideration

Clause 8(1)

18. Dr A has submitted that portions of documents 31, 36 and 41 are exempt pursuant to clause 8(1). Dr A stated:

The allegation of research misconduct against me by [the applicant] relates to the publication of a conference paper by [the PhD student], [Dr A] and [Dr B], (2015)...The first author of this paper was [the PhD student] who also happened to be the corresponding author of the paper and the paper was also presented by him at the conference. As the allegations were made against me by [the applicant], the Enquiry Officer appointed by the University of Adelaide asked me to respond to these allegations and therefore I have to depend mainly on [the PhD student] to formulate the response as the paper was based originally on the research done by him for [his] ongoing PhD thesis work and the major part of the paper was essentially written by him and the two minor authors (Dr [B] and myself) offered critical comments for the paper. Therefore I compiled the response with the assistance of my fellow authors and I submitted these to the University under the good faith that it will remain confidential at all times; my fellow authors also cooperated with me in this task under the impression that these documents will not be released to third parties...It also contains confidential and professional details of myself and my co-workers and also the kind of collaboration between the...Research group academics at the University; therefore disclosing this information to a third party will be detrimental to their professional interests and standing.

My response in Documents 36 in larger part and Document 31 to some extent contains privileged information and details on research methodology, test methods, equations and analytical procedures developed by [the PhD student] and research work being carried out by [the PhD student] for his PhD work; his candidature for PhD is still ongoing and the thesis has not yet been submitted by him for the award of the degree. Therefore disclosing these details will jeopardise the confidentiality of unpublished work and this will harm the PhD prospects of [the PhD student]. For the same reason, the data information contained in Document 41 collected by [the PhD student] was essentially meant for his PhD thesis work; this was submitted to the enquiry in order to repudiate the allegations levelled against the authors of the conference paper by [the applicant]...this is...privileged test data and there will be no public interest served by disclosing to the applicant the responses contained in documents 31, 36 and also the data in document 41.

19. In her response to my revised provisional determination, the applicant submits that:

...Dr [A] alleged falsely that my plagiarism allegations [were] levelled against the authors of the conference paper. While, in reality all my plagiarism allegations [were] against Dr [A] only...

20. I have considered Dr A's submissions to me and I do not agree that he has alleged that the applicant's plagiarism allegations were levelled against all of the authors of the conference paper. He clearly refers to 'the allegation of research misconduct against me'.
21. In order to find information in a document exempt under clause 8(1), I must be satisfied that the information relates to the purpose or results of research, the disclosure of which could reasonably be expected to have an adverse effect on the agency or other person by or on whose behalf the research is being carried out. In addition, disclosure of the information must, on balance, be contrary to the public interest.

22. For there to be a reasonable expectation that an adverse effect could result from disclosure, there must be real or substantial grounds for the expectation, rather than grounds which are speculative, imaginable or theoretically possible.² It is sufficient if the adverse effect is slight and if it is produced by the document in connection with other information.³

Document 31

23. Document 31 includes a document that was created by the applicant. The document includes a comparison of Dr A's research and the applicant's research. I am satisfied that disclosure of the information which relates to Dr A's research could reasonably be expected to have an adverse effect on Dr A and/or the PhD student. I particularly note that some of the research was conducted by the PhD student and is also related to the PhD student's ongoing PhD candidature. I consider that publication of the material which may form part of the PhD student's final thesis publication could reasonably be expected to have an adverse effect on the PhD student and his ability to publish material in his own name. I have considered the public interest test below.
24. Document 31 also includes two copies of a draft research paper, which is purportedly a joint research paper between Dr A and the applicant. The applicant has indicated that the draft research paper was never published in this format. However, the applicant submits that data from the draft research paper was plagiarised by Dr A in the 2015 conference paper, which has been published. I also note that the applicant published a paper in 2017 which is a modified version of the draft research paper. While the draft research paper was not published, I consider that the substantial content of the draft research paper was published separately by both Dr A and the applicant in other publications. It is my view that disclosure of the draft research paper could not reasonably be expected to have an adverse effect on the agency or any other person. The research paper therefore is not exempt under clause 8(1) and should be released.
25. Document 31 also includes an email from Dr A to the agency. The email was sent as part of Dr A's response to the agency's investigation of the applicant's complaint. Most of the information within the email relates to a conference paper which has already been presented. It does not appear to me that the email contains any sensitive research material. It is my view that the release of the email could not reasonably be expected to have an adverse effect on the agency or any other person. The email is therefore not exempt under clause 8(1).

Document 36

26. Document 36 includes a document that was created by Dr A. I am satisfied that some of the information contained therein relates to the purpose or results of research, the disclosure of which could reasonably be expected to have an adverse effect on the agency or another person for the reasons outlined in paragraph 23 above. Document 36 could therefore potentially be exempt under clause 8(1). However, I observe that this document has already been released to the applicant as part of document 34.
27. As this information has already been released to the applicant, I am unable to form the view that it would be contrary to the public interest to release it again. Document 36 is therefore not exempt under clause 8(1).

² *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

³ *Ipex Tech v Department of Information Technology Services* (1997) SA District Court 3618 per Lunn J.

Document 41

28. Document 41 contains a large amount of data information.
29. In her response to my revised provisional determination, the applicant submits that it is untrue that the PhD student was the presenting author of the paper at the 2015 conference. The applicant submits that Dr A was the presenting author. The applicant has provided a Final Program which lists Dr A as the presenting author. I have considered this submission but I am of the view that even if Dr A was the presenting author, this is not in itself indicative that the PhD student did not produce the data required to prepare the conference paper.
30. The applicant also provided submissions supporting her allegation that her work had been plagiarised. I comment that it is not my role to determine whether the applicant's work has been plagiarised.
31. I am satisfied that the data information relates to the results of research, the disclosure of which could reasonably be expected to have an adverse effect on the PhD student due to his ongoing PhD candidature. I have considered the public interest test below.

Clause 8(1) - the public interest test

32. I have determined that the requirements of clause 8(1)(a) and (b)(i) have been fulfilled in relation to parts of document 31 and the data information in document 41. I must therefore determine whether release of this information would, on balance, be contrary to the public interest (clause 8(1)(b)(ii)).
33. Due to the nature of the information, some of the usual factors which favour disclosure are not applicable. Release of the information would not promote accountability within the government. The underlying public interest consideration in this matter is the need to ensure that investigative processes by public universities are robust and ensure that procedural fairness is accorded. The ongoing relevance of the information to the applicant, as reiterated in the applicant's response to my revised provisional determination, is also a factor in favour of disclosure. However, I am mindful that disclosure under the FOI Act is considered to be disclosure to the world at large, as the FOI Act generally does not restrict the publication of material that has been obtained under the FOI Act.
34. The potential detriment to the researchers is a factor weighing against disclosure, but that factor alone cannot be determinative. Similarly, the agency's and Dr A's submissions regarding the confidentiality of the agency's investigation are relevant factors, but any obligation of confidentiality is subject to the provisions of the FOI Act.⁴ However, I do not consider there to be any particular public interest in releasing the content of the information or enabling public scrutiny of the information. I note the sensitive nature of the information, which has not yet been published by the researchers and which relates to a PhD candidature which is ongoing.
35. In the circumstances, I consider that the factors weighing against disclosure are persuasive and that release of this information would, on balance, be contrary to the public interest. The information is therefore exempt under clause 8(1).

⁴ *Iplex Info Tech v Department of Info Tech Services* (1997) 192 LSJS 54, 70.

Clause 6(1)

36. In its response to my first provisional determination, the agency claimed that clause 6(1) applied to certain information in documents 40 and 41.
37. For a document to be exempt under 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.⁵ 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'.⁶
38. The agency stated:
- The University submits that the emails dated 6 February 2017 contain information about the personal affairs of a third party. It relates to contact details of the persons named in the documents. Pursuant to clause 6...it ought to be redacted. It is proposed that release of those details would be an unreasonable disclosure.
39. The emails to which the agency refers appear in both document 40 and document 41.
40. I do not consider that the emails contain the personal affairs of any person. While contact information is included in the email, this contact information relates to a person's contact details at their work, and all of the contact details are publicly available on the University of New South Wales website. In my view, the contact information is not personal affairs information and is not exempt under clause 6(1).

Clause 6(2)

41. In its response to my first provisional determination, the agency claimed that clause 6(2) applied to a letter contained within document 33.
42. In order to find that a document is exempt under clause 6(2), I must be satisfied that the documents contain allegations of criminal or improper conduct on the part of a person; that the truth of the allegation has yet to be established by judicial process; and that the disclosure of that information would be unreasonable.
43. The agency submitted that the letter:
- ...contains an allegation of improper conduct, which has not been established by due process. Disclosure of this document may detrimentally affect the recipient of the letter particularly in light of the final outcome of the investigative process.
44. I agree that the letter contains an allegation of improper conduct on the part of a person. As the phrase 'judicial process' implies some sort of resolution by way of court proceedings, and it is apparent that this matter was handled internally by the agency, I agree that the truth of the allegation has yet to be established by judicial process.
45. I have considered whether disclosure of the information would be unreasonable. I note that this letter has already been released to the applicant as part of document 32. The letter does not contain the final decision of the agency. I also comment that the agency

⁵ *Victoria Police v Marke* [2008] 23 VR 223.

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

has already released, in full, document 47 which contained the agency's final assessment and a cover letter, which was very similar to the letter in document 33.

46. In all of the circumstances, I do not consider that release of the letter would be unreasonable. The letter is therefore not exempt under clause 6(2).

Clause 10

47. The agency relied on clause 10(1) to withhold full access to 12 documents.
48. Of those 12 documents, the agency provided partial access to the following documents: 5, 6, 7, 10, 20 and 24.
49. The agency refused any access to the remaining documents: 30, 31, 33, 36, 40 and 41.
50. In its original determination, the agency stated:

13 documents are exempt from release as they contain information that would be privileged from production in legal proceedings on the grounds of legal professional privilege as defined by Schedule 1 Clause 10 of the FOI Act.

51. There is some ambiguity over whether the agency considered that document 55 was exempt under clause 9 or clause 10. I note that in both the Schedule to the original determination and the Schedule to the internal review determination, document 55 is listed as being exempt under clause 9. However, the original determination refers to 13 documents as being exempt under clause 10, rather than 12 documents. The internal review determination also discussed document 55 with reference to clause 10.
52. In its internal review determination, the agency stated:

Documents 5, 6, 7, 10, 20, 24 and 55

The original determination was that these documents were exempt pursuant to clause 10...On reviewing these documents, I have formed the view that not all of the material in these documents is covered by legal professional privilege, and I determine to grant partial access to these documents.

...

Documents 30, 33, 36, 40, 41 and 43

I confirm the original determination to refuse access to those documents...for the reasons that follow:

...

Clause 10 provides that a document will be exempt from disclosure *"if it contains matter that would be privileged from production in legal proceedings on the grounds of legal professional privilege"*. It is generally accepted that the legal professional privilege test to be applied for freedom of information inquiries is the common law test.

The common law test requires a consideration of:

- whether there is a legal advisor-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or in use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.

A document can be created for more than one purpose and still meet the test, provided that its main purpose (dominant purpose) was for the purpose of giving or receiving legal advice...

Legal professional privilege is not confined to communications between a client and an external lawyer; it can also exist for communications involving in-house legal counsel. The University has qualified legal personnel on staff both in a dedicated legal team and in its human resources functions.

After reviewing the documents listed in the Document Schedule, I am satisfied that all documents concerned communications between University personnel and the University's legal advisors (either in-house or external to the University). The information in the documents discloses communications for the dominant purpose of giving or receiving legal advice. I am also satisfied that the advice was given on an independent basis and was intended to be confidential to the University.⁷

53. In the circumstances, it appears that the agency considered document 55 to be exempt under clause 10. I have therefore considered document 55 as well as the 12 documents listed in the Schedules.

54. In order for the information in the documents to be exempt under clause 10(1), it must be protected by legal professional privilege.

55. The information must be a confidential communication between a client and their lawyer that was created for the dominant purpose of obtaining or giving legal advice.⁸ The word 'dominant' has been held to mean a 'ruling, prevailing or most influential' purpose.⁹

56. The advice sought from, or given by, the lawyer must be 'legal advice'. In *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd*, Justice Elliott stated:

With respect to advice privilege, in considering whether a communication is for the purposes of legal advice, the purposes must be construed broadly. Although it does not extend to pure commercial advice, legal advice, in this context, includes any advice as to what should prudently and sensibly be done in the particular legal circumstances in which the client finds itself.¹⁰

57. While the concept of legal advice is fairly wide, it does have limitations, as discussed in *Von Stieglitz v Comcare* by Deputy President Humphries:

It extends to professional advice as to what a party should prudently and sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character...¹¹

58. Deputy President Humphries went on to discuss the judicial authorities:¹²

The Federal Court in *Barnes v Commissioner of Taxation* (2007) 242 ALR 601 at [8] commented on what kind of documents would not be protected by such privilege:

If the advice given by a legal adviser is predominately for a financial, personal or commercial purpose, as opposed to a purpose of seeking legal services or assistance, it will not be protected: *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610.

⁷ Citations omitted.

⁸ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

⁹ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49, 64-65.

¹⁰ *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311 at [47].

¹¹ *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at [44], applied in *Von Stieglitz v Comcare* [2016] AATA 367 at [17].

¹² *Von Stieglitz v Comcare* [2016] AATA 367 at [18]-[19].

In *Waterford* the High Court considered the circumstances when advice touching on policy might attract privilege. Brennan J commented:

I would agree that, if a communication were brought into existence for a purpose of seeking or giving advice as to the government's policy in administering the Act, as distinct from the policy of the Act itself, the communication would not be privileged.¹³

In similar vein, Dawson J held:

That is, of course, policy advice concerned with the administration of the Act rather than the conduct of the particular proceedings and for that reason does not, in my view, constitute legal advice which attracts legal professional privilege.¹⁴

59. Justice Dawson further stated:

...an employed legal advisor, particularly a government employee, may have duties which extend to those performed in a professional capacity as lawyer and he may be required to act or advise in relation to matters which form no part of the profession of the law. It is one thing to apply legal professional privilege to communications between a salaried legal advisor and his employer when the advisor is conducting litigation on behalf of government, such as acting in the defence or prosecution of a claim, or giving advice such as might be given by an independent legal advisor to his client about his private rights. It is another thing, in my view, where the advice is intended to form the basis of an administrative decision to be made in the performance of some public duty. Such advice does not form part of the process of the law which serves the administration of justice. It is concerned rather with the executive function of government.¹⁵

60. In *Rilstone v BP Australia*, Justice Besanko considered the purpose for which the documents under consideration were brought into existence.

61. He found that the documents in question had been created in the exercise of statutory investigatory powers, in the course of investigatory proceedings. After discussing the fact that the officer of the agency had decided to seek legal advice to assist in his investigatory proceedings, Justice Besanko stated:

Even if I accept Mr Ronson's evidence that on or about 18 August 2006 he decided that it would be necessary for him to seek legal advice, that fact supports, at its highest, only the conclusion that obtaining legal advice was *one* purpose, alongside the admitted investigatory purpose. Without "specific and focused evidence" (*Barnes v Commissioner of Taxation* [2007] FCAFC 88 at [18] per Tamberlin, Stone and Siopis JJ) I am unable to find that obtaining legal advice was the *dominant* purpose behind the creation of the documents.¹⁶

62. I have considered each of the documents in issue.

Document 5

63. The agency provided partial access to document 5. The agency redacted two portions of document 5.

64. The first redaction comprises an email from the in-house counsel. Legal professional privilege can extend to communications between salaried legal employees and their client, provided that the legal employee is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.¹⁷

¹³ *Waterford v Commonwealth* (1987) 163 CLR 54 at 77.

¹⁴ *Waterford v Commonwealth* (1987) 163 CLR 54 at 104.

¹⁵ *Waterford v Commonwealth* (1987) 163 CLR 54 at 96.

¹⁶ *Rilstone v BP Australia Pty Ltd* [2007] FCA 1557 at [16].

¹⁷ *Waterford v Commonwealth* (1987) 163 CLR 54 at 58 per Mason and Wilson JJ.

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65. I am satisfied that the in-house counsel is a qualified and independent legal practitioner although she provides in-house legal services to the agency. The email was sent to a small number of employees of the agency. I am satisfied that the email was a confidential communication between a lawyer and client. Based on the content of the email, I am satisfied that the dominant purpose of the communication was the provision of legal advice.
66. The second redaction comprises an attachment to the email from the in-house counsel, and was specifically referred to in the email from the in-house counsel. I am satisfied that the attached document was compiled by the in-house counsel and is intrinsically related to the legal advice provided by the in-house counsel.
67. I am satisfied that the information redacted by the agency in document 5 is privileged and is therefore exempt under clause 10(1).

Document 6

68. The agency provided partial access to document 6. The agency redacted one portion of document 6. The material redacted comprises the same email that was redacted from document 5. For the reasons given above, I am satisfied that this material is exempt under clause 10(1).

Document 7

69. The agency provided partial access to document 7. The agency redacted three portions of document 7.
70. The first redaction comprises two emails between the in-house counsel and Employee C. I am satisfied that the information contained therein was a confidential communication between a lawyer and client. However, it does not appear to me that the emails were created for the dominant purpose of obtaining or giving legal advice.
71. In response to my first provisional determination, the agency reiterated its submission that the emails were subject to legal professional privilege, stating:
- ...the communication was for the dominant purpose of giving or receiving legal advice about a response to be provided by the University to the applicant's allegation of research misconduct. The advice was given on an independent basis and was intended to be confidential to the University.
72. Broadly, the purpose of the email to the in-house counsel was to provide her with a draft copy of a document. The purpose of the subsequent email from the in-house counsel was to provide her comments on the draft. Based on the document, the information in the emails, and the in-house counsel's comments, I do not think this can be construed as legal advice. The dominant purpose of the creation of the emails appears to be administrative or strategic in nature, relating to the process of the agency's investigation. It is my view that the two emails are not exempt under clause 10(1) and should therefore be released.
73. The second redaction comprises the same email that was redacted from document 5. For the reasons given above, I am satisfied that this material is exempt under clause 10(1).
74. The third redaction comprises the draft document mentioned in the emails between the in-house counsel and Employee C. For the reasons given later in this determination, it

is my view that this draft document is exempt pursuant to clause 9(1). It is therefore unnecessary for me to determine whether it is also exempt under clause 10(1).

Document 10

75. The agency provided partial access to document 10. The agency redacted one portion of document 10. The redacted portion comprises the same email that was redacted from document 5. For the reasons given above, I am satisfied that this material is exempt under clause 10(1).

Document 20

76. The agency provided partial access to document 20. The agency redacted one portion of document 20. The redacted information comprises three emails. The first email is an enquiry from Employee C to the in-house counsel. The second email is a response from the in-house counsel to Employee C. The third email is from Employee C to the Designated Person. The purpose of the third email is to draw the Designated Person's attention to the advice provided by the in-house counsel.
77. I am satisfied that the redacted information consists of confidential communications between a lawyer and client. While the final email is between two agency employees, I am satisfied that the purpose of the email was to communicate the content of the legal advice received by Employee C. Disclosure would disclose the nature of the advice received.
78. Having regard to the content of the emails, I am satisfied that the emails were created for the dominant purpose of obtaining or giving legal advice, and that disclosure would disclose the nature of that advice. The information redacted by the agency in document 20 is therefore privileged and is exempt under clause 10(1).

Document 24

79. The agency provided partial access to document 24. The agency redacted one portion of document 24. The redacted information comprises two emails. The first email is an enquiry from Employee C to the in-house counsel and the second email is the in-house counsel's response.
80. I am satisfied that the redacted information consists of confidential communications between a lawyer and client and that the communications were for the dominant purpose of obtaining and giving legal advice respectively. The information redacted by the agency in document 24 is therefore privileged and is exempt under clause 10(1).

Document 30

81. The agency refused access to document 30. Document 30 comprises an email from Employee C to the in-house counsel, an email from the in-house counsel to Employee C, and a draft Research Misconduct Preliminary Assessment report (**RMPA report**).
82. I am not satisfied that the emails between Employee C and the in-house counsel were created for the dominant purpose of obtaining and giving legal advice. The emails are related to the university's investigation. I do not consider that the information contained therein can be construed as legal advice. In the event that the information could be construed as legal advice, I do not consider that obtaining legal advice, or providing legal advice, was the dominant purpose of the emails. The emails are therefore not exempt under clause 10(1) and should be released.

83. For the reasons given later in this determination, it is my view that the draft RMPA report is exempt pursuant to clause 9(1). It is therefore unnecessary for me to determine whether it is also exempt under clause 10(1).

Document 31

84. The agency refused access to document 31. Document 31 comprises an email from Employee C to the in-house counsel, an attachment labelled 'preliminary assessment' which contained numerous other documents, and a draft RMPA report.
85. The email from Employee C is the same email found in document 30. For the reasons given above, I do not consider that it is exempt under clause 10(1).
86. The documents which comprise the 'preliminary assessment' are not, in my view, privileged. I do not consider that Employee C provided those documents to the in-house counsel for the dominant purpose of obtaining legal advice regarding those documents. It appears that the documents were forwarded to the in-house counsel to provide her with general background information, relevant to the progress of the agency's investigation. I do not consider that the documents are exempt under clause 10(1).
87. The draft RMPA report is not the same version of the report as is contained in document 30. For the reasons given later in this determination, it is my view that the second version of the draft RMPA report is exempt pursuant to clause 9(1). It is therefore unnecessary for me to determine whether it is also exempt under clause 10(1).

Document 33

88. The agency refused access to document 33. Document 33 comprises an email from Employee C to the Designated Person, a draft letter from the Designated Person to Dr A, and a draft RMPA report.
89. The email from Employee C to the Designated Person is not a communication between a lawyer and client. While the email mentions the fact that the in-house counsel has suggested some changes to the RMPA report, I do not consider that this could be construed as Employee C relaying legal advice to the Designated Person. The email is therefore not exempt under clause 10(1).
90. The draft letter to Dr A is not a communication between a lawyer and a client. It is a communication between the agency and one of its employees as part of an investigatory process. The letter is therefore not exempt under clause 10(1).
91. The draft RMPA report is not the same version of the report as is contained in document 30 or document 31. For the reasons given later in this determination, it is my view that the third version of the draft RMPA report is exempt pursuant to clause 9(1). It is therefore unnecessary for me to determine whether it is also exempt under clause 10(1).

Document 36

92. The agency has refused access to document 36. Document 36 comprises an email from Employee C to the in-house counsel and a document created by Dr A in response to the agency's investigation.
93. I am satisfied that the email is a confidential communication from a client to a lawyer. The email comprises five paragraphs. I consider that the first four paragraphs are

investigatory or strategic in nature. The information contained therein is background information and does not appear to be a request for legal advice, although it may be broadly construed as a request for investigatory advice.

94. In response to my first provisional determination, the agency stated:

The University will abide with the view expressed in the provisional determination for paragraphs 1-2 of the email but not paragraphs 3-4 of the email...

The University maintains the claim of legal professional privilege over paragraphs 3-4 (in addition to paragraph 5) of the email as these paragraphs were communications between a University staff member and University's in-house counsel made for the dominant purpose of obtaining legal advice about the submissions provided by Dr [A] to [the Designated Person] during the course of the internal investigation of a research misconduct allegation.

Paragraphs 3-4 in essence summarise the reasons provided by Dr [A] (in his response) for contesting the initial finding of [the Designated Person] and is contextual to the request for legal advice expressly made in paragraph 5 and therefore an integral element of the chain of communication between the staff member and in-house counsel.

95. I have considered the agency's submissions. However, I remain of the view that the dominant purpose of seeking the opinion of in-house counsel in paragraphs 3-4 was to seek investigatory advice. As outlined in *Rilstone*, a decision-maker must be satisfied that seeking legal advice was the dominant purpose of the communication. The first four paragraphs are therefore not privileged.

96. The final paragraph is, in my view, a request for legal advice and the seeking of legal advice was the dominant purpose behind this information being included in the email. The final paragraph is therefore privileged and is exempt under clause 10(1).

97. The document created by Dr A is clearly not a communication between a client and a lawyer. On its own, it could not be a privileged document. However, it formed an attachment to the email to the in-house counsel.

98. I have already expressed the view that the majority of the information in the email to the in-house counsel is not privileged. I consider that the document created by Dr A relates to the investigatory information and, on its face, legal advice pertaining to the document created by Dr A is not being sought. My view is that the document created by Dr A is not privileged. It is therefore not exempt under clause 10(1).

99. I have considered document 36 later in this determination, in my consideration of clause 9.

Document 40

100. The agency refused access to document 40. Document 40 comprises an email from Employee C to the in-house counsel, a chain of emails between the agency and the Professor, University of Sydney, and a letter from the Designated Person to the Professor.

101. I am satisfied that the email from Employee C to the in-house counsel is a confidential communication between a lawyer and client. I am satisfied that Employee C was requesting legal advice regarding one email from the Professor (contained on page 1 of document 40) and that the request for the legal advice was the dominant purpose of the email.

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102. The communications contained on page 1 of document 40 are therefore privileged and exempt under clause 10(1).
103. On pages 2 and 3 of document 40, there are two emails between the agency and the Professor, both dated 6 February 2017. The emails are clearly not communications between a lawyer and client. I do not consider that the request for advice contained in the email to the in-house counsel extends to advice about these emails. The content of the emails is basic and administrative in nature. I do not consider that disclosure of the two emails could identify the nature of the legal advice sought. The two emails dated 6 February 2017 are therefore not privileged and are not exempt under clause 10(1). The two emails should be released.
104. Similarly, the letter from the Designated Person to the Professor is not a communication between a lawyer and a client. While the letter was attached to Employee C's email to the in-house counsel, it appears to have been attached to give background and context for his request for legal advice. I do not consider that disclosure of the letter could identify the nature of the legal advice sought. The letter is therefore not privileged and is not exempt under clause 10(1). The letter should be released. I also observe that the letter has already been released to the applicant within document 38.

Document 41

105. The agency has refused access to document 41. Document 41 comprises seven emails and a large amount of data information.
106. The first email is from Employee C to the Designated Person. It is clearly not a communication between a lawyer and client. The content of the email does not disclose any legal advice that was previously sought. While it mentions that legal advice was sought, the substance or effect of the legal advice is not discussed. The remaining information in the email is administrative in nature. I consider that the first email is not privileged and is not exempt under clause 10(1).
107. The second email is from the in-house counsel to Employee C. I am satisfied that it is a confidential communication from a lawyer to a client and that the communication was created for the dominant purpose of providing legal advice. The second email is therefore privileged and is exempt under clause 10(1).
108. The third email is from Employee C to the in-house counsel. It is apparent from the content of the email that it is purely administrative in nature and does not contain a request for legal advice. It is therefore not privileged and is not exempt under clause 10(1). However, the email contains the name of a third party. This third party has not been consulted and I consider that in the context, the name constitutes the personal affairs of the third party. It is unlikely that the third party would wish to have their name released and I consider that release of the name would be unreasonable. Therefore the name of the third party is exempt under clause 6(1) and should be redacted from document 41.
109. The fourth and fifth emails are the same emails as were present on page 1 of document 40. For the reasons given above, I am satisfied that these emails are exempt under clause 10(1).
110. The sixth and seventh emails are the same emails as were present on pages 2 and 3 of document 40. For the reasons given above, I consider that these emails are not exempt under clause 10(1).

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111. I have considered the large amount of data information. This data was an attachment to the first email in document 41. Given my view that the first email is not exempt under clause 10(1), it follows that I consider that the data information is also not exempt under clause 10(1). However, I note that I have determined that the data information is exempt under clause 8(1).
112. Therefore the first, sixth and seventh emails should be released in full. The third email should also be released, with the name of the third party redacted under clause 6(1).

Document 43

113. The agency refused access to document 43 in reliance on clause 9(1). However, I have also considered whether any of the information in document 43 is exempt under clause 10(1).
114. Document 43 comprises an email from Employee C to the Designated Person, an email from the Professor to the Designated Person, and a blank Declaration form.
115. The email from Employee C to the Designated Person conveys to the Designated Person the substance of the legal advice that was contained in the second email contained in document 41. Given my view that the second email in document 41 is privileged, it follows that the email from Employee C is also privileged, as the email would disclose the legal advice in question. This email is therefore exempt under clause 10(1).
116. The email from the Professor to the Designated Person is the same email as was present on page 1 of document 40. For the reasons given above, I am satisfied that the email is exempt under clause 10(1).
117. It is apparent that the blank Declaration form is not exempt under clause 10(1), nor has the agency claimed that it is exempt under clause 10(1). I have considered the blank Declaration form later in this determination, in my consideration of clause 9.

Document 55

118. The agency provided partial access to document 55. As noted, it is unclear whether the agency redacted information pursuant to clause 9 or clause 10, a matter which I discuss further below.
119. I have considered whether the redacted information is exempt under clause 10. The agency has applied one redaction to part of one email contained in document 55. While the email is from one agency employee to another employee, I am satisfied that the dominant purpose of the email was to communicate the substance of legal advice previously obtained by the agency to another employee to whom it was appropriate the confidential advice be disclosed. I consider that the redacted information is therefore privileged and is exempt under clause 10(1).

Clause 9

120. The agency relied on clause 9(1) to withhold full access to two documents. The agency provided partial access to document 55. The agency refused access to the whole of document 43.

121. In its original determination, the agency stated:

9 documents are exempt from release as they are internal working documents which contain interactions in relation to obtaining legal advice as defined by Schedule 1 Clause 9 of the FOI Act.

122. In its internal review determination, the agency stated:

I am...required to consider whether the disclosure of these documents would, on balance, be contrary to the public interest. While the public interest is served in the non-disclosure of these documents to enable the University a full opportunity to undertake all inquiries into a research misconduct allegation, I am of the view that, on balance, the public interest in knowing how decisions are made outweighs that. I therefore determine that Documents 26, 27, 29, 39 and 54 should be released in full.

123. The internal review determination stated that the determination in relation to document 43 was confirmed and varied the determination in relation to document 55 in order to provide partial access. However, the internal review determination discussed documents 43 and 55 in relation to Clause 10.

124. I note that in both the Schedule to the original determination and the Schedule to the internal review determination, documents 43 and 55 are listed as being exempt under clause 9.

125. Given my view that the information in document 55 is exempt pursuant to clause 10(1), I have not further considered whether it is also exempt pursuant to clause 9(1).

126. In response to my external review, the agency provided the following additional submissions regarding clause 9:

Document 43 concerns matter that relates to an opinion, advice or recommendation that has been prepared, or a consultation or deliberation that has taken place, in the course of the university's decision-making functions. Having regard to the public interest test, the university maintains that there are good reasons to preserve the confidentiality of the communication given the status of the persons concerned and the circumstances in which it was made. It is therefore unreasonable to release this document.¹⁸

127. For a document to be exempt pursuant to clause 9(1), three limbs must be satisfied. The document must relate to opinion, advice, recommendation, consultation or deliberation; the document must have been obtained, prepared or recorded in the course of or for the purpose of the agency's decision-making functions; and the disclosure of the information must, on balance, be contrary to the public interest.

128. The test for whether a document has been obtained by an agency for the purpose of its decision making function is quite broad, as was articulated in *Daycorp Pty Ltd v Parnell*.¹⁹

Central to this class of documents are advising and deliberative documents which may influence or reflect the "thinking" of government decision-makers when performing a "decision-making function". This potentially encompasses most documents produced in the course of decision making or policy formulation by a minister or agency other than matter which has only an administrative purpose.

¹⁸ Citation omitted.

¹⁹ [2011] SADC 191 at [31].

Draft RMPA reports

129. Documents 30, 31 and 33 each contain a different version of the draft RMPA report. The drafts contain comments by various persons in relation to style, grammar and content. I have considered whether the draft RMPA reports are exempt pursuant to clause 9(1).
130. I accept that the draft RMPA reports relate to opinions or advice, obtained for the purpose of the agency's decision-making functions.
131. The following public interest factors favour disclosure:
- the public interest in fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability within government agencies
 - the ongoing relevance of the information to the applicant
 - disclosure may enhance scrutiny of the agency's decision-making processes.
132. The following public interest factors oppose disclosure:
- the short time that has elapsed since the documents were created
 - the draft nature of the documents indicate that these versions of the documents were never intended to be made available outside the agency
 - the content of the documents may not reflect the actual finalised position of the agency
 - disclosure of the draft documents may impact on the agency's ability to make interim decisions due to internal and external pressures.
133. In response to my revised provisional determination, the applicant provided submissions supporting her allegation that her work had been plagiarised. The applicant stated:
- ...Since the UofA confessed previously that I achieved everything relevant to my research program and preparing the designs and the report and paper manuscripts in the previous investigation process, it is very shocking to me that the RMPA report comes up today with a new assumption by considering Dr [A] as a co-author to my research paper that I achieved totally by myself only, after around one year from the official date of ending my visit to the UofA...
- ...Based on what I have stated above, I would be grateful if it is possible to release all the previous draft versions of the RMPA report and the name of the interested party.
134. I have considered the applicant's submissions. However, I remain of the view that the public interest factors opposing disclosure are persuasive. I particularly note the fact that the contents of draft documents may not reflect the final position of the agency and may lead to unnecessary criticism of the agency's decision-making process. I also take into account the fact that the agency has already released the final version of this report to enable effective scrutiny of the agency's decision-making process and promote transparency within the agency. Therefore disclosure of the draft RMPA reports would, on balance, be contrary to the public interest; the reports are exempt under clause 9(1).

Document 7

135. Document 7 contains a draft letter. The draft contains 'tracked changes' with comments about the content of the letter. It is my view that the letter relates to opinions or advice obtained for the purpose of the decision-making functions of the agency.
136. I consider that the public interest factors identified above in paragraphs 131 and 132 of this determination are also applicable to document 7. I note that the final version of this draft document has been sent to the applicant. I do not consider that release of this

draft is necessary to fulfil the public interest in promoting openness and accountability. In the circumstances, I consider that the factors opposing disclosure are persuasive, particularly the draft nature of the document and the risk that release would lead to unjustified criticism of the agency. Therefore disclosure of the letter would, on balance, be contrary to the public interest and the letter is exempt under clause 9(1).

Documents 30, 31, 33, 36, 40 and 43

137. I have considered whether any of the other material in documents 30, 31, 33, 36 and 43 is exempt pursuant to clause 9(1).
138. Document 30 contains two emails between the in-house counsel and Employee C. Document 31 contains one email which is also featured in document 30. Document 33 contains one email from Employee C to the Designated Person. Document 36 contains one email from Employee C to the in-house counsel.
139. I accept that the information contained therein relates to opinions or advice obtained for the purpose of the agency's decision-making functions.
140. I have considered whether disclosure would, on balance, be contrary to the public interest. I do not consider that the information is particularly sensitive. It does not appear that release of the information would have an adverse effect upon the efficient administration of the agency.²⁰ I consider that there is a strong public interest in promoting openness and accountability in decision-making. In the circumstances, I do not consider that disclosure would, on balance, be contrary to the public interest. The emails are therefore not exempt under clause 9(1) and should be released.
141. Document 31 contains a response from the applicant. I accept that the applicant's response relates to consultation undertaken for the purpose of the agency's decision-making functions. I consider that the reasons given in paragraph 140 above are also applicable to the applicant's response. I do not consider that disclosure would, on balance, be contrary to the public interest. The applicant's response is therefore not exempt under clause 9(1).
142. Document 33 contains a letter from the Designated Person to Dr A. The letter is identical to the letter contained in document 32 which has already been released to the applicant, except for the fact that the version of the letter in document 33 is unsigned. In my first provisional determination I stated that in the circumstances, I did not consider that release of the letter would, on balance, be contrary to the public interest.
143. In its response to my first provisional determination, the agency provided detailed submissions regarding the letter:

The letter contains information obtained by the University, and the initial opinion, advice or recommendation of the Designated Person; and consultation that occurred between the respondent and the Designated Person. This was in the course of, and for the purpose of, finalising the Designated Person's assessment and advice to the Delegated Officer - a University decision-making function under the relevant National Code and a University Procedure.

The letter was sent in accordance with the University's Procedure for Managing Complaints of Research Misconduct/Serious Misconduct. The procedure provides a respondent to an allegation with an opportunity to be heard before final advice is given to, and a final decision is made by, the Delegated Officer. The letter is a document, within a chain of documents, which records an interim step in an internal decision-making process.

²⁰ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38 at [81].

Disclosure of this document is contrary to the public interest in that it would:

- reveal a deliberation or consultation conducted, in such a way as to prejudice a deliberative process of the University;
- potentially compromise the University's ability to investigate allegations of research misconduct effectively and confidentially (noting the potential impact an adverse decision may have on the careers of the respondent researchers); and
- reveal unsubstantiated allegations about a person (noting the potential impact of these allegations without the benefit of the context of the final decision).

144. I find the agency's submissions puzzling, given that the signed version of the letter has already been released to the applicant. Nevertheless, I have reconsidered whether release of the letter would, on balance, be contrary to the public interest.
145. The letter is from the agency to Dr A. There is no indication within the letter that it was intended to be confidential. It appears that Dr A was at liberty to share or publish the letter with whomever he chose. As the investigative process of the agency has now concluded, I do not consider that release of the letter could reveal a deliberation of the agency in such a way as to prejudice the agency's investigative process. I am not persuaded that release of this particular document, in this particular context, could reasonably be expected to compromise the agency's ability to investigate future allegations of research misconduct, given that each FOI application is considered individually and takes into account the circumstances existing at the time. I remain of the view that release of the letter would not, on balance, be contrary to the public interest. The letter is therefore not exempt under clause 9(1).
146. Document 36 contains Dr A's response to the RMPA report. Dr A's response has already been released to the applicant in document 34. In my first provisional determination I stated that in the circumstances, I did not consider that release of Dr A's response would, on balance, be contrary to the public interest.
147. In its response to my first provisional determination, the agency provided submissions that Dr A's response was exempt under clause 9(1):
- The document contains matter of a highly technical nature that relates directly to the initial opinion, advice or recommendation of the Designated Person as prepared or recorded in the course of investigating the alleged research misconduct, and which caused the Designated Person to consider there a need for expert advice in order to finalise an assessment for the consideration of the Delegated Officer under the relevant National Code.
148. The agency's submissions are puzzling. The document in issue is Dr A's response to the agency's preliminary views on whether he had committed research misconduct. The document was written by Dr A. The opinions contained within the document are the opinions of Dr A, not the opinions of the Designated Person.
149. I am prepared to accept that submissions in response to an allegation can be considered to be opinions obtained for the purpose of the decision-making functions of an agency.
150. The agency has not engaged in a public interest balancing test in respect of document 36. Regarding the manner in which the public interest for or against disclosure is to be weighed under clause 9(1), the Administrative Appeals Tribunal has observed:

Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to

matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be “misunderstood or misapplied by an ill-informed public”; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned.²¹

151. In my view, it is nonsensical for the agency to now argue that release of Dr A’s response is contrary to the public interest in circumstances where the agency has already released Dr A’s response to the applicant. In the circumstances I am unable to determine that release would, on balance, be contrary to the public interest. Dr A’s response should therefore be released.

152. Document 40 contains a letter to the Professor. In its response to my first provisional determination, the agency claimed the letter is exempt under clause 9(1), stating:

The letter constitutes a document that relates to a consultation or deliberation that has taken place in the course of the University’s decision-making functions pursuant to clause 9(1)(a)(ii)...

The public interest test is satisfied as the University must be able to investigate allegations of research misconduct effectively and confidentially not only because of the requirements of the relevant National Code but also because of the potential impact an adverse decision may have on a respondent researcher. Designated Officers must be permitted to have confidential communications with experts (to ascertain their availability) where the subject matter, by its nature, demands such expertise to ensure a fair and objective assessment, especially when there is an expectation of confidentiality over the communications (see further the 6th and 7th emails of Document 41). There is a strong public interest in protecting the integrity of the University’s internal investigation processes, including the involvement of experts where required, for procedural fairness and natural justice.

153. Again, the agency’s submissions are puzzling given that the letter has already been released to the applicant within document 38, in accordance with the agency’s initial determination. If the agency now considers that release of the letter is, on balance, contrary to the public interest, this is inconsistent with its determination to release the letter to the applicant within document 38. This was released in full by the agency on 17 November 2017.

154. In all of the circumstances, and particularly in light of the fact that the document has already been released to the applicant and that the document relates to an investigative process which has now concluded, I do not consider that release of the letter to the Professor would, on balance, be contrary to the public interest. The letter is therefore not exempt under clause 9(1).

155. Document 43 contains a blank Declaration form. I do not consider that this blank template relates to opinion, advice, recommendation, consultation or deliberation. It is therefore not exempt under clause 9(1) and should be released.

Clause 13(1)

156. In its response to my first provisional determination, the agency claimed that clause 13(1) was applicable to document 36. The agency submitted:

²¹ *Re Lianos and Secretary to the Department of Social Security* [1985] AATA 38 at [81].

...the response is an exempt document pursuant to clause 13 of Schedule 1 (document containing confidential information) as the response is marked "Confidential" and at no time was Dr [A] advised that part or all of his response would be disclosed. If the University were required to produce such response documents in verbatim form, it is reasonably expected to prejudice future investigations.

157. The agency has not specified whether it is relying upon clause 13(1)(a) or clause 13(1)(b). However, I have determined that in light of the content of the submission, the agency intended to rely on clause 13(1)(b).
158. In order to be satisfied that a document is exempt under clause 13(1)(b), I must be satisfied that the document contains matter that was obtained in confidence; that disclosure of the information might reasonably be expected to prejudice the future supply of such information to the agency; and that disclosure of the information would, on balance, be contrary to the public interest.
159. As stated above in this determination, Dr A's response has already been released to the applicant. In these circumstances, I do not consider that release would, on balance, be contrary to the public interest. Clause 13(1)(b) is therefore not applicable to document 36.

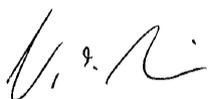
Clause 16(1)(a)(iv)

160. In its response to my first provisional determination, the agency claimed that clause 16(1)(a)(iv) was applicable to document 40. The agency submitted:
- ...the letter contains matter the disclosure of which could reasonably be anticipated to have a substantial adverse effect on the effective performance of the University's functions (clause 16(1)(iv)) - specifically the internal investigation of a research misconduct allegation.
161. In order to be satisfied that a document is exempt under clause 16(1)(a)(iv), I must be satisfied that disclosure of the matter within the document could reasonably be expected to have a substantial adverse effect on the effective performance by an agency of the agency's functions; and that disclosure of the matter would, on balance, be contrary to the public interest.
162. Given my view, expressed in paragraph 154 of this determination, that disclosure of the letter to the Professor would not, on balance, be contrary to the public interest, it follows that document 40 is not exempt under clause 16(1)(a)(iv). The letter to the Professor should therefore be released.

Determination

163. In light of my views above, I vary the agency's determination in the following manner:
- the emails between the in-house counsel and Employee C should be released from document 7
 - the emails in document 30 should be released
 - document 31 should be released, with the exception of:
 - the draft RMPA report
 - within the applicant's response documents, the information relating to Dr A's research

- the following information should be released from document 33:
 - the email from Employee C
 - the letter to Dr A
- the following information should be released from document 36:
 - paragraphs 1-4 of the email from Employee C
 - Dr A's response
- the following information should be released from document 40:
 - the emails dated 6 February 2017
 - the letter to the Professor
- the following information should be released from document 41:
 - the first email
 - the third email, with the exception of the name of the interested party
 - the sixth email
 - the seventh email
- the blank Declaration form in document 43 should be released.



Wayne Lines
SA OMBUDSMAN

13 April 2018

APPENDIX

Procedural steps

Date	Event
03/10/2017	The agency received the FOI application dated 2 October 2017.
17/11/2017	The agency determined the application.
20/11/2017	The agency received the internal review application.
05/12/2017	The agency varied the determination.
27/12/2017	The Ombudsman received the applicant's request for external review.
03/01/2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
19/01/2018	The agency provided the Ombudsman with its submissions and documentation.
09/02/2018	The Ombudsman provided the applicant, the agency and an interested party with his provisional determination.
22/02/2018	The agency provided a response to the Ombudsman's provisional determination.
09/03/2018	The interested party provided a response to the Ombudsman's provisional determination.
21/03/2018	The Ombudsman provided the applicant, the agency and an interested party with his revised provisional determination.
26/03/2018	The agency provided a response to the Ombudsman's revised provisional determination.
04/04/2018	The applicant provided a response to the Ombudsman's revised provisional determination.