

Determination

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

Applicant	[Applicant]
Agency	Department for Education and Child Development
Ombudsman reference	2012/06800
Agency reference	DECD 12/3977
Determination	The determination of the agency is confirmed.

REASONS

Background

1. By application under the *Freedom of Information Act 1991* (the FOI Act) received by the agency on 28 June 2012, the applicant requested access to:

All documents showing why we were suspended and concerning reason for suspension of international and local home stay students placed in our care.

2. In a determination dated 2 August 2012, accredited FOI officer of the agency, Mr Arved Jalast stated that:

The facts of the investigation I have undertaken are as follows. Searches have been conducted for information in relation to your request. Twenty one (21) documents relating to your application have been located.

I have considered these documents together with the provisions of the *Freedom of Information Act 1991* ('the FOI Act') and have determined that:

- 9 documents will be released to you in full (documents 1-6, 7b, 8 and 8b).
- 1 document will be released to you in part (document 7).
- 11 documents will be exempt in full (documents 7a, 7c, 7d, 8a, 9, 10, 11, 12-14 and 15).

I have determined that document 7 is exempt in part and documents 7a, 7c, 7d, 8a, 9, 10, 11, 12-14 and 15 are exempt in full from release in accordance with Clause 4(2)(a)(ii) of the FOI Act.

I have determined that document 10 is exempt in full from release in accordance with Clause 4(2)(a)(iii) of the FOI Act.

...

I have determined that document 7 is exempt in part and documents 7a, 7c, 8a, 9, 10 and 12-14 are exempt in full from release in accordance with Clauses [sic] 6(2) of the FOI Act.

3. The applicant requested an internal review of this determination, by application received by the agency on 15 August 2012.

4. The principal officer of the agency, Mr Keith Bartley then confirmed the determination on 28 August 2012 (**the agency's determination**).

External review

5. By application received over the telephone on 30 August 2012, the applicant requested my external review of the agency's determination under section 39 of the FOI Act.
6. By letter dated 30 August 2012, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.

Provisional determination

7. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 22 October 2012. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to confirm the agency's determination pursuant to section 39(11) of the FOI Act.
8. On 23 October 2012, the applicant telephoned my officer, Mr Andrew Adams to discuss my provisional determination. During this conversation, Mr Adams explained to the applicant that I proposed to confirm the agency's determination, which would mean that no additional documents would be released under the FOI Act. Mr Adams reiterated that an FOI external review relates to access to documents, rather than any broader investigation.
9. The issues raised by the applicant during her conversation with Mr Adams appeared to be legal questions outside the scope of my FOI external review, therefore, Mr Adams suggested that the applicant address these issues by obtaining legal advice. The applicant indicated at this time that she was unlikely to provide submissions in response to my provisional determination.
10. In an email dated 25 October 2012, Mr Jalast responded to my provisional determination on behalf of the agency and stated:

DECD does not wish to make any submission about the proposed outcome of the review.

11. Based on these responses from the applicant and agency, I have decided to move to a final determination in the same terms as my provisional view.

Relevant provisions of the FOI Act

12. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
13. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and

- (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...

14. Section 3A(1) states that the parliament has intended:

- (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
- (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.

15. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'¹ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

16. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.

17. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act;² and in my opinion, it is equally applicable in an external review.

18. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

The documents

19. In a letter dated 10 September 2012, the agency provided my office with copies of the documents relevant to this review. The agency identified 21 documents as falling within the scope of the application.

20. As I understand it, the following 9 documents have been released to the applicant in full:

1	2	3	4	5	6	7b	8	8b
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21. Further, document 7 has been released to the applicant in part, and access to the following 11 documents has been refused in full:

7a	7c	7d	8a	9	10	11	12	13	14
15									

¹ See section 4 and section 20(1)(a), FOI Act

² Section 23(f), FOI Act

The agency's submissions

22. The agency has claimed that the documents listed above at paragraph 16 are exempt on the basis of clause 4(2)(a)(ii), clause 4(2)(a)(iii) and clause 6(2) of Schedule 1 to the FOI Act.
23. In its original determination dated 2 August 2012, the agency stated:

Clause 4(2)(a)(ii)

Information contained in these documents was obtained in confidence from a third party. The release of the matter in these documents would enable the existence or identify of the confidential source of information to be ascertained. It would be against the public interest for DECD to release matter of this type as it is likely to reduce the future flow of information relating to allegations of misconduct to DECD which, in turn, would affect the department's ability to investigate these allegations and provide recommendations of action to be taken. The release of these documents could impede this process; thereby damaging the ability of DECD to provide the services required and ensures the integrity of international home stay host families.

Clause 4(2)(a)(iii)

I have determined that document 10 is exempt in full as it relates to details for preventing detecting, investigating, or dealing with any contravention of the law. Any such disclosure may be prejudicial as it would reveal processes undertaken as part of the examination of these issues. Release could prejudice any further investigations by the premature release of information. It would be against the public interest to hinder current processes that would adversely affect the examination of any alleged contravention of the law.

I have determined that document 7 is exempt in part and documents 7a, 7c, 8a, 9, 10 and 12-14 are exempt in full from release in accordance with Clause 6(2) of the FOI Act.

...

The documents pertain to allegations the truth of which is yet to be established by a court of law. The disclosure of matter in the documents at this time could affect the fair trial or impartial adjudication of a case. The release of these documents may be interpreted that the allegations are proved which would be misleading and may adversely impact a person's right to natural justice.

Consideration of the submissions and the agency's determination

24. As well as claiming clause 4(2) and 6(2) as a basis for refusing access to the documents, the agency's determination dated 28 August 2012, stated:

As a result of the concerns conveyed to DECD, relevant clauses were applied to exempt in part and refuse access to documents following your initial FOI application. In addition, as the *Children's Protection Act 1993* is committed to the Minister for Education and Child Development and the Department of Education and Child Development, these requirements are consistent with our broader obligations under this Act that provides:

58—Duty to maintain confidentiality

- (1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child, must not divulge that information.

Section 58 of the *Children's Protection Act* prohibits DECD from divulging any such disclosures.

25. Based on the agency's reference to the *Children's Protection Act 1993* in its determination, it appears that the agency may be claiming that the release of the documents would constitute an offence under that Act.
26. In my view, as well as section 58, section 13(2) of the Children's Protection Act may be relevant.
27. Section 13 of the Children's Protection Act provides:

13—Confidentiality of notification of abuse or neglect

- (1) For the purposes of this section, a notifier is a person who notifies the Department that he or she suspects that a child has been or is being abused or neglected.
- (2) Subject to this section, a person who receives a notification of child abuse or neglect from a notifier, or who otherwise becomes aware of the identity of a notifier, must not disclose the identity of the notifier to any other person unless the disclosure—
- (a) is made in the course of official duties to another person acting in the course of official duties; or
 - (b) is made with the consent of the notifier; or
 - (c) is made by way of evidence adduced in accordance with subsections (3) and (4).
- Maximum penalty: \$5 000.

28. In relation to the FOI Act, clause 12(1) provides:

12—Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.
29. Essentially, clause 12(1) enables an agency to refuse access to documents which are the subject of secrecy provisions in other legislation.
30. Having considered the information within the documents, in conjunction with the evidence provided by the agency; in my view, document 7 is exempt in part, and documents 7a, 7c, 7d, 8a, 9, 10, 11, 12, 13, 14, 15 are exempt in full under clause 12(1) of the FOI Act, by virtue of sections 13(2) and 58 of the Children's Protection Act.

Consideration of the other exemption clauses claimed by the agency

31. Rather than expressly claiming clause 12(1) to refuse access to the documents, the agency relied on clause 4(2)(a)(ii), 4(2)(a)(iii) and 6(2) of the FOI Act.
32. The relevant portions of clause 4(2) provide:
- (2) A document is an exempt document if it contains matter the disclosure of which—
- (a) could reasonably be expected—
 - (i) ...
 - (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; or
 - (iii) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law); or
 - (iv) ...
 - (v) ...
 - (vi) ...; and

- (b) would, on balance, be contrary to the public interest.

Clause 4(2)(a)(ii) of Schedule 1 to the FOI Act

33. In my view, although clause 4(2)(a)(ii) may be relevant, as the identity of a 'confidential source of information' would be exempt under clause 12(1) of the FOI Act, by virtue of sections 13(2) and 58 of the Children's Protection Act, it is not necessary for me to determine whether such information is also exempt under clause 4(2)(a)(ii).

Clause 4(2)(a)(iii) of Schedule 1 to the FOI Act

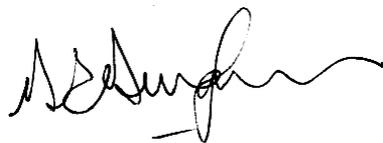
34. Clause 4(2)(a)(iii) applies where the release of a document would mean that an agency's procedures and strategies for detecting possible breaches of the law may become less effective or ineffective.
35. While exemption under clause 4(2)(a)(iii) does not necessarily require the agency's procedures and strategies to be secret, prejudice is less likely to occur where the procedures are either overt or the obvious course of action.
36. On the facts, I am not satisfied that the release of document 10 would prejudice the agency's method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law. In any event, document 10 does not appear to contain the agency's methodologies or procedures for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law. In my view, clause 4(2)(a)(iii) does not apply to any of the documents in this review.

Clause 6(2) of Schedule 1 to the FOI Act

37. Clause 6(2) provides:
- (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.
38. The agency has claimed exemption under clause 6(2) as the documents contain allegations, the truth of which has not been established by judicial process.
39. It is important to note that clause 6(3), which limits the scope of clause 6(2), states that:
- (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.
40. In my view, as the information within the documents concerns the person by or on whose behalf the application was made, I do not consider that the documents are exempt under clause 6(2) of the FOI Act.
41. Although I do not agree with the agency's claims that the documents are exempt under clause 4(2)(a)(iii) and 6(2) of the FOI Act, I agree with the overall outcome of the agency's determination, albeit for slightly different reasons.
42. I reiterate my view that, document 7 is exempt in part, and documents 7a, 7c, 7d, 8a, 9, 10, 11, 12, 13, 14, 15 are exempt in full under clause 12(1) of the FOI Act, by virtue of section 13(2) and 58 of the Children's Protection Act.

Determination

43. In light of the above, I confirm the agency's determination pursuant to section 39(11) of the FOI Act.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long horizontal flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

19 November 2012