TABLE OF CONTENTS

Chapter 1 Introduction and the Investigation p 2

Chapter 2 The HSC system p 8

Chapter 3 The applicant and the significance of the information he sought p 15

Chapter 4 The OBOS's FOI system and history of FOI applications for information about students' raw marks p 25

Chapter 5 The way the OBOS handled Mr Parsonage's December 2005 and January 2007 FOI applications p 32

Chapter 6 Conclusions about the way the OBOS handled Mr Parsonage's December 2005 and January 2007 applications p 54

Chapter 7 Concerns about the way the OBOS responded to intervention by the Ombudsman p 88

Chapter 8 Findings and Recommendations p 106

Annexures A, B, C and D p 111

Chapter 1: Introduction and the Investigation

1. INTRODUCTION

This report outlines the observations and findings concerning an investigation by the office of the Ombudsman into the way the Office of the Board of Studies ('the OBOS') handled FOI applications for information relating to the current system for determining levels of student achievement in the Higher School Certificate (HSC).

The HSC is the most important qualification for students leaving school in NSW. For many people it represents the culmination of 13 years of academic study and effort. The level of achievement attained in the HSC determines, to a large extent, what future study and work experiences will be available to each young person. Each year the HSC is an integral part of the lives of over 67,000 students and their families. Teachers, tertiary institutions, prospective employers and other community members also have an interest in the HSC.

It is vitally important for all these stakeholders to have confidence that the levels of achievement reported for individual students are a fair and accurate reflection of that student's capabilities and knowledge.

The OBOS is expected to ensure 100% accuracy of the approximately 40 million marks awarded to students. This investigation has revealed a system that relies on the public to trust the OBOS to make no mistakes in processing students' results. The system does not provide anyone with sufficient information to understand how a particular student's results were arrived at. It does not provide anyone with the information they would need to test, scrutinise or challenge how a particular student's results were produced.

While the OBOS actively provides reams of information to assist students in their learning and preparation for exams, it reveals very little information to help students understand why the final marks they were awarded, were awarded.

The complainant sat his HSC exams in 2004 and 2005. During that time, he was a regular contributor to the discussion forum on the boredofstudies.org.au website — a website used by HSC students to share information, discuss issues that affect them, and generally support each other through challenging times.

In this report, I outline how the OBOS reacted when the complainant and 49 of his fellow school-leavers attempted to obtain key information about the 2005 HSC that would have helped them understand their final results. I have found that the OBOS perceived that it was the subject of a campaign being waged by the complainant and others on the website. The OBOS took the position that the confidentiality of the information was something so precious and integral to the current HSC system that all attempts to access that information had to be warded off.

The way the OBOS handled this situation, when seen in totality from beginning to end, is of serious concern. Some of the means adopted by the OBOS were contrary to principles of good administrative practice. Others ignored a number of basic principles of good complaint-handling. The OBOS also displayed a poor understanding of certain aspects of the FOI system and did not act consistently with the objects of the FOI Act. In particular, I found that the OBOS:

- advised the complainant that the three sets of documents he requested either did not exist or could not be produced, when in fact they did exist and could be produced

- repeatedly failed to address the complainant's reasonable concerns or respond to his criticisms and logical arguments about why the documents must exist or be able to be created, and instead used a defensive and overly fastidious tone and approach when replying to his letters
- incorrectly decided to treat as 50 separate applications a FOI application from the complainant (meeting all the technical requirements of an application under section 17 of the FOI Act) that sought information about 50 students, all of whom signed forms consenting to the complainant inspecting the documents
- made no attempt to resolve what I believe was essentially a communication problem, by engaging with the complainant or the other parties cooperatively, which forced him to escalate the matter to the ADT
- made no attempt during the 10 months in which the ADT proceedings were taking place to try to resolve the matter, and spent $15,000 in legal fees as a result
- made the complainant make a fresh FOI application where the issue should have been handled as part of the internal review process
- misled the complainant into thinking that a decision had been reviewed by two different officers when in fact the same person who made the original decision subsequently reviewed that decision twice.

For an agency which depends vitally on public confidence, it appears to me from the evidence uncovered during this investigation that the OBOS also displayed a lack of candour and adopted tactics that had the effect of misleading both the complainant and the Ombudsman.

In this report I make recommendations to improve the transparency and accountability of the OBOS, and enhance the confidence that the public deserves to have in the system of calculating and reporting final HSC results. In response to a draft of my report, at a consultation on 2 September 2009, the Minister for Education and Training and the President of the Board of Studies advised me that they have accepted my findings and recommendations. This positive response is very welcome.

2. THE COMPLAINT

On 11 September 2007, our office received a letter from Mr Robert Oakeshott MP, enclosing a complaint by Mr Hugh Parsonage about the handling of two applications he had lodged with the OBOS under the *Freedom of Information Act 1989* ('**FOI Act**').

The first application was dated 28 December 2005, and received by the OBOS on 4 January 2006 (in this report I refer to this as '**the December 2005 application**'). The second application was dated 11 January 2007 and received by the OBOS on 15 January (in this report I refer to this as '**the January 2007 application**').[1]

The applications were identical in relation to the information sought, which was:

[1] Mr Parsonage had made previous FOI applications to the Board, seeking different information to that sought by the applications the subject of this report. These previous applications are described in chapter 4.

(A) In relation to each HSC course entered by each of the 50 students named (including himself), a comprehensive schedule of student achievement in the 2005 HSC, including:

i examination mark

ii assessment mark

iii total weighted mark

iv raw marks attained in each question

v weighted marks attained in each question

vi pre-moderated assessment mark (raw school assessment mark)

vii initial moderated assessment mark

viii state rank in the course

(B) For each 2005 HSC course with more than 1000 candidates:

(1) the official marking criteria – including the answers in science and mathematics courses endorsed by the Board as completely correct – where this is different from the publicly available marking guidelines

(2) the total weighted marks corresponding to the examination marks separating the performance bands.

In effect, Mr Parsonage asked for three discrete pieces of information — firstly, a group of raw / unadjusted marks awarded to individual students, secondly, standards that were applied in the process of awarding these marks and thirdly, how many marks students needed to meet particular levels of achievement in individual subjects.

For the purposes of this report, I will refer to these as:

- the **students' raw marks**
- the **marking documents**, and
- the **cut-off marks**.

The 50 students were Mr Parsonage and 49 contributors to the boredofstudies.org.au website who had answered his call to participate in a 'class action' against the Board to find out their unscaled marks.

Mr Parsonage complained that the OBOS had:

- inappropriately refused to grant access to the documents
- lost documents, not searched properly for documents or was deliberately hiding documents, and
- had made a series of wrong decisions in handling his applications.

In his complaint, Mr Parsonage explained that he had applied for this information for two broad reasons.

The first was out of curiosity. He wanted to see what he actually achieved in the individual examinations, especially in his Music courses, as the marks for things such as performances, compositions and essays are all aggregated, making it impossible to see how well he did in each area.

The second was his belief that there is significant public interest in these documents. He observed that the HSC is probably the primary means of measuring the education of the State. He argued that while the Government and the Board used HSC results as a testament to the success of their education policies, in his view there is no public scrutiny into the integrity of these standards. In effect, he argued that without such scrutiny, the system was exposed to possible manipulation and error.

3. THE CONDUCT THE SUBJECT OF INVESTIGATION

The conduct which was made the subject of this investigation comprised all of the actions and inactions of the Office of the Board of Studies or the Board of Studies which were part of any process used:

- when handling Mr Hugh Parsonage's FOI applications dated 28 December 2005 and 11 January 2007 and related complaints from him
- in the implementation of appropriate policies and procedures regarding requests for information, including FOI applications, that have been received by the OBOS or the Board of Studies since January 2001
- in the creation, distribution, storage, retention and disposal of documents related to the marking of the 2005 HSC examination papers
- in the release of information to individual students about the raw marks that they were allocated for individual questions and examination papers in individual HSC examinations since the 2001 HSC.
- in the release of information to the public about the measures and standards that have been applied in individual HSC examinations since the 2001 HSC to assess and report levels of individual student achievement.

4. THE PUBLIC AUTHORITIES THE SUBJECT OF INVESTIGATION

- The Office of the Board of Studies ('the OBOS').
- The Board of Studies ('the Board').[2]

5. THE INVESTIGATION

After receiving the complaint on 11 September 2007, the Ombudsman case officer attempted to resolve the matter using informal means. She made preliminary inquiries of the OBOS in

[2] The *Education Act 1990* established the Board of Studies as a statutory body with a membership representative of community interests. The *Public Sector Employment and Management Act 2002* established the Office of the Board of Studies as a department. It provides professional and administrative support and services to the Board. Although they are separate bodies in a legal sense, the Office undertakes all administrative activities, including administering the Higher School Certificate and School Certificate examinations, on behalf of the Board. We decided to make both bodies the subject of our investigation because we were unclear about their arrangements for record-keeping and the processing of FOI applications.

October and held a meeting with its Director, Corporate Services, late in November. In this report I refer to him as '**the Director**'.

Following that discussion and further analysis of the information available at that time, the case officer wrote to the OBOS in February 2008 setting out her concerns about how Mr Parsonage's applications had been handled and suggesting how the January 2007 application could be redetermined, and the complaint resolved.

She also commented that the Board consider changing their approach for future HSC examinations by automatically releasing the 'cut-off marks' for each course and each student's raw marks together with their final (aligned) marks.

The Board did not accept any of the case officer's suggestions. No information was released to Mr Parsonage.

In these circumstances, I was of the view that further investigation was required to clarify the reasonableness of the OBOS's decisions, the way in which those decisions had been communicated to Mr Parsonage and the way in which the OBOS had handled our inquiries and suggestions. As a result, I decided to commence a formal investigation pursuant to section 13 of the *Ombudsman Act 1974* ('**Ombudsman Act**').

On 8 April 2008, I issued notices of investigation to both the OBOS and the Board.

I received responses from the OBOS and the Board in June. It became clear that the decisions and actions that I was investigating, and the documents I needed for the investigation, were solely those of the OBOS

In June and July, I exchanged correspondence with the OBOS and the Board, primarily about the issue of legal professional privilege. The OBOS had refused to produce a number of documents on the basis of this privilege.

After analysing all the information available at that time, I decided to test some of the evidence by conducting hearings under oath pursuant to section 19 of the Ombudsman Act. I conducted two hearings during September 2008, obtaining evidence from the General Manager, Dr John Bennett (who heads the OBOS and is responsible for making internal review determinations under the FOI Act) and the Director, Mr David Murphy (who holds a very senior position and is responsible for making original FOI determinations).

Other evidence reviewed as part of the investigation included the boredofstudies.org.au website and the website of the Board (www.boardofstudies.nsw.edu.au), including the Board's annual reports and a number of journal articles describing the standards-referenced framework which has been used in relation to HSC marks since 2001. A review was also done of the OBOS's records relating to a number of FOI applications it had received since 2001.

In March 2009, a document containing my preliminary findings and recommendations was provided to the OBOS.

After considering their response, a draft report was provided to the Minister for Education and Training in June 2009. In this report I refer to her as '**the Minister'**.

As is her right under section 25 of the Ombudsman Act, the Minister requested that I consult with her. I met with the Minister and the President of the Board of Studies on 2 September 2009.

A full description of the investigation may be found in Annexure A.

Chapter 2: The HSC system

6. THE STANDARDS-SETTING SYSTEM

Mr Parsonage's FOI applications and the way the OBOS handled them need to be seen in the context of the current system used to determine students' final marks.

In 2001, the Board introduced a new standards-setting system for determining the standards of achievement of students. As was stated in the 2002 HSC Update Newsletter 6:

> 'A major part of the new HSC is the description of standards of achievement in performance bands that accompany students' HSC marks. Each performance band for a course includes a description that summarises the knowledge, skills and understanding typically demonstrated by students whose achievement meets that standards. The standards-based marks that are reported are determined through a standards-setting process in which students' raw examination marks are aligned (or transferred) to the HSC performance scale. See figure 1.

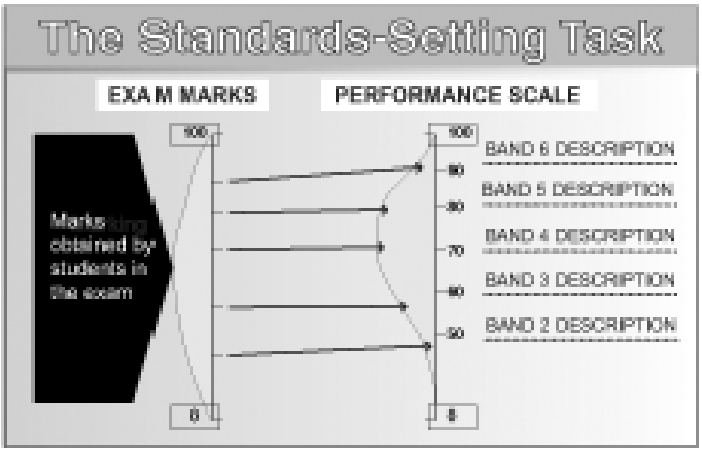

Figure 1

> Experienced teachers (working as judges) make decisions about which raw marks equate with the cut-off points between bands on the performance scale.
>
> Once a correspondence is established between particular raw marks and the cut-off points between bands at 50, 60, 70, 80 and 90 on the performance scale, it is possible to align (transfer) all marks to the scale.'

Significantly, the cut-off marks are different for each subject in each year. The standards-setting system requires different groups of judges to undertake a meticulous and rigorous process in relation to their particular subjects to determine what these cut-off marks should be each year.

In the *Board Bulletin* Vol 9 No 6, September 2000, this process is discussed in the following terms:

> '**The Procedure**
>
> For each course in the New HSC a team of experienced markers is created. These markers, who are referred to as judges during this activity, are given special training for this task. They are also given a copy of the band descriptions for their course, a copy of the examination paper and specially designed recording sheets.

Step 1

Working independently of his or her colleagues, each judge reads the band descriptions carefully. They develop an 'image' of the knowledge and skills of students whose achievement would place them in each performance band in that course. The judges, using this information, then develop images of students whose achievements would place them on the borderline between two bands. Having done this, each judge records the mark for each examination question (or task) that a borderline band 5/band 6 student would receive. Adding up these individual marks gives the total examination mark that the judge believes corresponds to the borderline (or cut-off mark) between band 5/band 6. Averaging the cut-off marks proposed by all the judges produces the first estimate of the examination mark that will represent the borderline between band 5 and band 6. The judges follow the same procedure for the other band borderlines.

Step 2

The judges then meet and discuss the decisions they have made individually. At the same time they are given special statistical reports that are very effective in showing how students of different abilities performed on each question in the examination. The judges work through and discuss this information. During this process each has the opportunity to modify any of the decisions he or she recorded during the first step. Through this step the team starts to develop a common image of students who would be at the borderlines between bands. The judges recording sheets are again collected and processed as in Step 1. This results in a new set of band cut-off marks.

Step 3

The examination responses of samples of students whose marks were equal to each of the band cut-off marks are collected. The judges then meet again and review and discuss these examination responses. They are asked to confirm that the responses are typical of what they would expect of students placed at the borderline between bands. The judges also review student works above and below the cut-off marks. During this process the judges have the opportunity to further refine their band cut-off marks.

Step 4

The judges next review the band descriptions in light of the information they have gained from the procedure to ensure that they correctly and appropriately encapsulate the knowledge, skills and understanding typically possessed by students who achieve each band.

What next?

At the end of this procedure the team recommends to the HSC Consultative Committee a set of band cut-off marks that are appropriate for the performance standards that will be used in reporting achievement in the course. The Consultative Committee meets with the judges and discusses the processes and issues that arose during the application of the procedure. Finally, the Consultative Committee gives its approval to the cut-off marks to be used for that course for the 2001 HSC examinations. The Consultative Committee also approves the maximum and minimum mark in the course.

Once this is done the Board's computer is programmed so that the band 5/band 6 cut-off mark will be mapped to 90, the band 4/band 5 cut-off mark will be mapped to 80, and so on. Marks in between these key values are simply adjusted in a linear manner.

School assessment marks are then moderated using a similar process to that currently in use. In this way both the examination marks and the assessment marks are aligned to the performance standards.

Finalising the standards

After the examinations, the final version of the band descriptions, the 2001 examination paper and samples of responses of students at each borderline and other statistical information are collected and incorporated into a standards package. The material is presented in such a way that teachers, students and others can most effectively develop a clear understanding of the standards that have been developed for each course. The standards packages developed for the School Certificate are an example of this material. These standards packages are also an essential part of the standard setting procedure for the following examinations. The teams of judges become thoroughly familiar with the material and apply the same standards in determining the band cut-off marks in subsequent years. In this way, while the actual cutoff marks may vary from year to year for a number of reasons, the standards used to report students' achievement will not vary.'

7. THE DOCUMENTS CREATED TO HELP MARKERS MARK STUDENT EXAM PAPERS

7.1 'Marking guidelines'

In the run up to the introduction of the new HSC system in 2001, the Board published an article in its Board Bulletin[3] that explained the new principles approved by the Board of Studies that were to be applied to the marking of examination papers for the 2001 HSC. It stated that examination committees would use these principles to develop 'marking guidelines' for examination questions, which would be used by markers to consistently determine the standards of performance reached by students.

According to the OBOS's Disposal authority DA174, 'a master set of final examination papers and marking guidelines' for each HSC and School Certificate course must be kept as State archives.

The process of developing marking guidelines was described by the OBOS in the following way[4]:

'***Marking guidelines***

The Examination Committee develops marking guidelines as an integral part of the examination development process. Careful consideration is given to the purpose of each test item, to the range of possible response to that item, and to the way in which those responses are to be scored. The Examination Committee for each course follows the Board's general principles for developing examinations and marking guidelines and works to an examination brief that identifies the learning outcomes to be addressed, the content to be covered and the types of questions to be used.

Once completed, the draft paper and the draft marking guidelines are subjected to a variety of reviews designed to ensure that each paper meets quality standards established by the Board. Supervisors of Marking are directly involved in this review process. At the conclusion of this process, there is a set of marking guidelines for each examination. Copies of the marking guidelines are provided electronically (ie in Word

[3] entitled 'Principles for Developing Marking Guidelines for the New HSC Examinations in a Standards-Referenced Framework' (Board Bulletin Vol 9 No 3, May 2000).

[4] This information was provided in response to my section 18 notice to produce statements of information and documents, issued 8 April 2008.

format) to the Supervisor of Marking via 'SOMs Online', and a hard copy is sent to the marking centre.

At the beginning of the marking process the Chief Examiner and the Supervisor of Marking brief the senior markers to explain the development and intent of the questions and the marking guidelines. After wide reading and pilot marking of student samples by the senior markers, minor adjustments may be made to marking guidelines, in consultation with both the Supervisor of Marking and the Chief Examiner.

Any adjustments are made on the hard copy of the marking guidelines at the marking centre, and are initialled by the Chief Examiner and the Supervisor of Marking. The signed-off version is the official version of the marking guidelines used at the marking centre. At the conclusion of marking, this copy is returned to the Office of the Board of Studies. The changes are desktopped, and this becomes the 'official' copy that is published in the Notes from the Marking Centre. The signed-off copy and the final desktopped copy are filed at the Board.

Each marker is provided with a copy of the marking guidelines for the question(s) they are marking.'

Marking guidelines specify, in relation to each question, the 'Outcomes assessed' (in a code form), the 'Criteria' and the 'Marks' to be allocated according to that criteria, and, most significantly, information under the heading 'Sample answer/Answers could include'.

An extract from the marking guidelines for 2005 Mathematics Extension 1 appears below:

2005 HSC Mathematics Extension 1
Marking Guidelines

Question 2(d)(ii)
Outcomes assessed: HE3

MARKING GUIDELINES

Criteria	Marks
• Correct solution	3
• Evaluates k or equivalent merit	2
• Evaluates A or equivalent merit	1
Sample answer/Answers could include: $T = 25$ when $t = 0$, so $35 = 3 + A$ ie $A = 22$ $T = 11$ when $t = 10$, so $11 = 3 + 22e^{-10k}$ …(etc)	

7.2 'Marking schemes'

At the time of marking, markers also have access to other information, which the OBOS refers to as 'marking schemes'.

The OBOS provided the following description of these 'schemes' in its response to my section 18 notice to produce statements of information and documents, dated 8 April 2008:

'***Marking schemes***

While marking guidelines identify the characteristics of responses to be awarded at each mark or mark range, in most marking operations supplementary material, known

as a marking scheme, is developed to help markers interpret and apply the marking guidelines consistently. A marking scheme is developed by senior markers working with the Supervisor of Marking for use by marking teams. The marking scheme, based closely on the marking guidelines, is developed to add detail, to describe or 'unpack' terms and to elaborate particular components of anticipated student responses.

Marking schemes take different forms in different subjects or even in different questions within a subject. In some cases a marking scheme takes the form of additional notes to accompany the marking guidelines. In most questions with extended responses, the principal component of the marking scheme is a set of 'benchmark' scripts. These comprise typical scripts at a number of mark levels or ranges, and are frequently accompanied by handwritten annotations.'

The OBOS has informed us that at the end of the marking process, this 'supplementary material' is shredded. No file copies are kept.

7.3 'Notes from the Marking Centre'

After the marking is completed, the Office prepares a document called 'Notes from the Marking Centre' for each subject, for publication on its website.

These documents have two parts. The first part contains a discussion of how students performed on each question. It will include, for example, the most common errors made.

The second part is entitled 'Marking Guidelines' and consists of an edited version of the marking guidelines originally used by the markers. An Assessment Officer completes this task, using the following checklist:

'□ All changes that were indicated in red pen on the SOM Master copy, and initialled by the Supervisor of Marking, the chair of the examination committee and the Assessment Officer have been completed.

□ All outcomes listed for each question have been checked as appropriate, and are identical with the Mapping Grid for this examination.

□ The Marking Guidelines for all parts of the examination except machine scored marking guidelines questions are included.

□ The Marking Guidelines have been stripped of any 'Sample answers' or 'Answers may include' information.

□ The Marking Guidelines are now ready to be published by the Office of the Board of Studies.'

The most significant change is that this version of the 'Marking Guidelines' contain no 'sample answers / answers may include' information.

An extract from the notes from the marking centre for 2005 Mathematics Extension 1 appears below:

2005 NOTES FROM THE MARKING CENTRE MATHEMATICS EXTENSION 1

Introduction

This document provides candidates and teachers with feedback in relation to the quality of responses provided by candidates to the 2005 Mathematics Extension 1 HSC examination paper. It should be read in conjunction with the 2005 HSC Mathematics Extension 1 examination paper, the marking guidelines and the *Mathematics Stage 6 Syllabus*.

Question 1

a) The main errors included omitting the 1/7, writing tan x rather than $\tan^{-1} x$, and omitting the constant.

b) This part was poorly done. Many candidates drew an X-shaped rather than V-shaped graph or just drew one line. Of those who drew the correct graph, a large proportion did not shade the section below the x-axis or did not make clear whether the area below the x-axis was included.

...

2005 HSC Mathematics Extension 1
Marking Guidelines

Question 2(d)(ii)

Outcomes assessed: HE3

MARKING GUIDELINES

Criteria	Marks
• Correct solution	3
• Evaluates k or equivalent merit	2
• Evaluates A or equivalent merit	1

Question 3(a)(i)

Outcomes assessed: PE3, H3

MARKING GUIDELINES

Criteria	Marks
• Correct solution	1

Chapter 3: The applicant and the significance of the information he sought

8. THE BOREDOFSTUDIES.ORG.AU WEBSITE

The boredofstudies.org.au website was launched in 2002. Their mission statement says:

> 'Established July 8th 2002, Bored of Studies was pioneered by 4 ex-HSC students who finished their HSC in 2001. Being the first to sit the newly revised HSC syllabus, the lack of information for current HSC students became apparent and hence developed into the sole inspiration for the development of this website.
>
> Created by students, for students, Bored of Studies strives to provide current year 12 and year 11 students with all the resources and support they need to succeed during the 2 years that form the most important part of their education and subsequently, their futures.
>
> Along with the help of countless user submitted notes and documents, and the users who spend endless hours helping out those in need in the student forums, Bored of Studies endeavours to become the single most influential, resourceful and helpful service available to students all over Australia.'

Part of the website is an online forum, a discussion space for those undertaking the HSC. Anyone can participate but most contributions are posted by current HSC students. Students' raw marks, and how they are manipulated to produce their final results, have been the subject of some discussion on the boredofstudies.org.au website for some years.

People use nicknames on the website. One of the founding members is James King, nickname Lazarus.[5] Hugh Parsonage's nickname is Captain Pi.

The website also provides an online program, described in the following way:

> 'SAM (Student Assessment Modeller) has been designed to provide you with all of the information you need to know about your HSC marks and courses. Using SAM, you can see exactly how each of your courses has been scaled in the past, which courses have had students scoring in the upper bands, and even what your UAI could have been in a previous year. By using SAM, students are able to clearly identify which areas they need work in, and how improvements in certain subject areas will affect their overall UAI.'

[5] Over the years James King has actively contributed to the discussion about raw marks and how they are changed to produce final results. He also assisted Hugh Parsonage in ADT proceedings brought by Mr Parsonage in March 2006 (further details later in this report).

9. THE SIGNIFICANCE OF THE INFORMATION SOUGHT BY MR PARSONAGE AND OTHERS ON THE WEBSITE

There are a number of pieces of information that a HSC student would need to be able to fully understand how the answers they gave in an exam paper[6] translated into the final mark recorded on their Higher School Certificate for that subject:

(1) the answers they gave to each question

(2) the amount of marks allocated to each of their answers by the markers

(3) the standards against which answers were assessed

(4) the number of marks that were to be awarded to answers achieving particular standards

(5) how weighting adjustments occur to adjust for variations in difficulty between optional questions (and other similar issues)

(6) how marks for each answer are totalled and further adjusted

(7) the cut-off marks that were used to align raw examination marks to the HSC performance scale.

Mr Parsonage's applications covered:

- (2), (5) and (6) — the students' raw marks
- (3) and (4) — the marking documents, and
- (7) — the cut-off marks.

Mr Parsonage's application also covered information relating to the assessment mark originally awarded by each student's school (which Mr Parsonage described as the 'pre-moderated assessment mark (raw school assessment mark)') and how that was adjusted to produce the final assessment mark (described as the 'aligned assessment mark').

The first adjustment to a student's raw school assessment mark changes it into the initial moderated assessment mark. It is calculated by adjusting the raw school assessment mark to take into account the student's position relative to his or her classmates and the school year's performance *as a group* in the external examination.

10. REASONS WHY THIS INFORMATION SHOULD BE MADE PUBLIC

10.1 The impact of keeping this information secret

Currently none of the information listed above is made available to students as a matter of course.[7] The only information provided to a student with his or her Higher School Certificate

[6] or another examination activity they undertook (for example, a dance performance)

[7] Since 2001, the Office has released some of it to individual students who made FOI requests (eg for the exam scripts in which they wrote their answers), but no one has ever asked the Office to release all of this information in its entirety, and nor does the Office release it of its own volition.

is his or her final marks, with a Course Report that describes the level of achievement for each subject that each mark represents.

Without the information listed above, no student or their representative is able to independently verify that the final marks a student is awarded are correct. They have no ability to independently scrutinise how a student's final marks were calculated.

To those outsiders, the system for producing final student marks appears to be a classic 'black box'. Students' answers (or performances) go in one end, and their final marks come out the other. People are expected to trust that the system in between operates at 100% accuracy all of the time.

The OBOS scans into its system approximately 40 million individual marks[8] in relation to students each year. There are numerous opportunities for something to go wrong. Parts of the process are performed by people; other parts involve computer manipulations of numerical information. No matter how robust the OBOS's internal quality assurance processes, genuine errors and corruption are still possible, during any part of the process, but without transparency, no one outside the Board would be able to independently identify errors or even corruption.

In a way, the actions of the complainant, and others on the boredofstudies.org.au website, could be described as an outsider's efforts to pry open the 'black box' to discover what is hidden inside.

Lack of transparency has even led a person who identified themselves as having been part of the marking system, — a judge — to question why judges needed to be kept unaware of the final cut-off marks. The person made the following posting on the boredofstudies.org.au website:

> 'I have been involved over the last couple of years in the part of the marking process whereby we determine the minimum mark needed to reach each of the bands.
>
> We made recommendations to the BOS and were NEVER told whether or not they accepted our recommendation. When we asked for that information we were told that it was none of our business as we had done our job and made a recommendation and had justified that decision but it was now up to the BOS to determine the final cut-offs...
>
> Why students can't simply be given their raw marks on the exam and forget all this cloak and dagger stuff I really don't know...????'[9]

When giving evidence, the Director acknowledged that:

> 'There is an argument that we should explain better how we transform the raw marks into the later reiterations. Having said that, it's extraordinarily complicated and it would be quite a challenge for us to do it in a way that was in plain English...
>
> There is a lot of misinformation out there of what scaling [does] and that students are somehow being cheated of their real marks and that there's little understanding of how we have to align raw marks against standards so that the marks have

[8] In a briefing note from the then Acting Chief Examinations Project Officer to the Director dated 2 March 2005, it was stated that in 2003, over 40 million marks were scanned, including duplicate transactions.

[9] Although the authenticity of this person is unknown to us, the OBOS's repeated argument that it is integral to the system that judges be kept unaware of the final cut-off marks is consistent with the person's description of the system. In its comments on a draft copy of this report, the OBOS pointed out that the quote was unverified and asked that the report note that the facts are in dispute, but did not provide any evidence to explain why.

> meaning...There's little understanding of what our standard setting process is, what our judging process is and how you get from a raw mark to the final mark and why you do that in the first place...
>
> I think there's certainly an argument that that would help in terms of openness and transparency... there's often a suspicion that we might be doing stuff to them rather than for them. And [this is] despite the fact that we see nothing wrong with how we transform the raw marks into final marks. You know there are some people out there who I would accept would have a genuine belief that they're somehow being cheated out of their true marks.'

The General Manager told us that the OBOS strives to attain perfection. In his words:

> 'So in all, and throughout the marking with all the reliability checks and so forth like that, the Board's processes are on about getting it right the first time.'

We support these efforts. Getting a student's results right the first time is clearly preferable and should be what the system aims to achieve. However, this office has 30 years of experience in public administration and from that experience we know that no administrative system is 100% perfect.

Because it is equally unrealistic to *expect* any system to operate with 100% accuracy, an effective feedback or complaints mechanism is essential to maximising that accuracy rate.

10.2 The clerical recheck process

The Board currently has a process called a clerical recheck. Anyone can request a recheck by the OBOS. The recheck is to confirm only that all marks have been correctly entered in the OBOS's corporate computer system. The requester is provided with no information that allows them to independently scrutinise the recheck. Instead, the requester must trust that the OBOS performs the recheck accurately.

I have no evidence to suggest that rechecks are *not* generally done accurately. I simply observe that this process is also not transparent. Since 2001, the number of rechecks has been around 1860 a year, or less than 0.3% of the over 67,000 HSC students. The following table outlines the number of changes made as a result of rechecks each year:

HSC year	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
No. of course rechecks	2257	1712	1825	1784	1830	1751
No. of changes made	27	27	14	5	28	6[10]

The vast majority of these rechecks do not find mistakes. This could be an indication that the system is close to perfect, although the accuracy of the marks in around 99.7% of cases is untested. Alternatively, and more likely, in my view it could be an indication that the current recheck system is not effective in identifying instances of genuine error.

[10] The information in this row for 2001-2004 was provided to James King in response to a FOI application he lodged in January 2005, which is discussed in chapter 4 of this report. The information for 2005 and 2006 was provided by the OBOS after my consultation with the Minister and the President of the Board of Studies on 2 September 2009.

It appears the system is mostly being used by students dissatisfied with their final results (eg because they are not high enough to enter their preferred university course) who want to make sure the results were solely due to their own under-performance, rather than a processing error. If people had all the information they needed to see that their final mark was a correct translation of the answers they gave in the exam paper — in effect, if they could do the 'recheck' themselves — there would be no cause for them to ask the OBOS to do this task. The only exception would be if, on doing the recheck, it appeared that a genuine processing error might have been made.

10.3 Suggested changes to the clerical recheck system

A transparent report on clerical rechecks would include providing the student with each iteration of the students' marks, an explanation of the process by which those marks were adjusted and finally transferred onto the performance scale.

Alternatively, the system could be enhanced by replacing the current recheck system with a two-tiered disclosure and reconsideration system, comprising of:

- firstly, full disclosure of all of the relevant pieces of information, on request
- secondly, a reconsideration process, where a student, who has reviewed all the relevant pieces of information and believes that a genuine processing error has been made, can apply for the Board to review the case.

This system would only be for the purposes of enhancing the reliability of the processing of the marks. With all of the information available to him or her, a student would be able to identify where there might have been a problem with the processing of the marks. The OBOS should be able to readily review the processing of a student's marks to determine whether or not such a claim is valid. Arguments from any student about how many marks his or her answers 'deserved' to be awarded could be handled more effectively through a separate complaints system.

The first tier of such a system would be administratively similar to the current recheck system. It is likely that such requests would be made mostly by those students who are dissatisfied with their results.

The second tier would require additional administrative resources, but would provide the OBOS with an opportunity to identify and correct genuine mistakes or, potentially, corruption.

The purpose of changing the current recheck system would be to:

- improve the overall accuracy of results by enabling genuine processing errors to be identified and corrected
- reduce the potential for corruption
- make the OBOS and the Board more accountable
- give students access to information that relates to their personal affairs
- enhance public confidence in the system by giving students proof that their final results are an accurate translation and assessment of their performance
- help to dispel any suspicions within the community that the system is unreliable because it could make mistakes but no one would ever know.

In its comments on a draft copy of this report, the OBOS argued that:

> 'In order for a student to be fully confident that his/her achievements had been accurately assessed...he/she would need to be confident that the markers had awarded the appropriate marks to his/her responses. To do this...a student would need to have their examination responses returned and be provided with the marking schemes...and set about re-marking their responses, or find someone else to do it...Such a situation as this would be completely impractical and unworkable. It would seriously delay and make unworkable the selection processes for further education and training and delay students seeking to career decisions about their futures.'

I understand the OBOS's concerns, however, given the very low numbers of students who currently request a clerical recheck, it seems that relatively few students are sufficiently dissatisfied with the marks they receive to use that process. It is my view that the suggestion I propose is not so impractical that it could not be considered, at least in principle.

In its comments on a draft copy of this report, the OBOS also stated that 'it would be possible for the OBOS to investigate additional approaches that might be implemented to provide a greater level of confidence to students. Part of this might simply include an explanation of the various processes and steps that are already built in to the various marking, standards-setting and results-processing procedures to ensure the highest level of accuracy and integrity possible. If the perception of there being a risk that marks are inaccurate has caused concern to the Ombudsman's officers, we are happy to pursue other and more effective ways of addressing it.' I am encouraged by these comments.

10.4 Suggestions for providing more information about the answers expected

I am also of the view that, quite independently of any clerical recheck process, the OBOS should consider providing students with more 'sample answer/answers may include' information in its marking guidelines published on its website. This would not only provide students with more information to help them understand what was expected of them, but would improve accountability. Qualitative debates about the guidelines should be encouraged in the same way all complaints should be seen as opportunities to learn and improve.

Currently, HSC Course Reports provide clear descriptions of what students know, understand and can do. This part of the system does help people understand what a student's final marks represent. Improving the transparency of the process that produces those final marks will enhance this understanding and ensure public confidence in the accuracy of those marks.

10.5 Reasons why the cut-off marks should be released

The OBOS has consistently argued that it is contrary to the public interest to publicly release the cut-off marks. They are concerned that if judges know the cut-off marks for previous years, they will not be able to bring an open mind to the process of setting the current year's cut-off marks using the standards-referenced model.

In the General Manager's words:

> 'The fundamental thing in all this was the protection of the integrity of the Higher School Certificate in the standards setting procedure and if those cut off marks were made publicly available either through a student website or through some other means that would impact on the integrity of the Higher School Certificate...
>
> I'm very strong though on the issue of the cut off marks as you can probably appreciate.'

As the Director explained in his letter to Mr Parsonage of 26 March 2007, advising that access to the cut-off marks was to be denied on the basis of clause 16 of Schedule 1 to the FOI Act:

> 'The decision-maker has formed the view that granting access to a document(s) containing the information you seek would prejudice the effectiveness and the attainment of the objects of the HSC by assisting in the determination and the subsequent disclosure to the public or section(s) of the public of the HSC cut scores separating the bands on the performance scale for the HSC. The specific information you seek is a confidential aspect of the annual HSC marking program and the decision-maker has formed the view that its wider availability would compromise the integrity of the marking program in future years by inappropriately influencing the standards setting process undertaken by marking staff by making the outcome of the prior year(s) deliberations known to such person(s) to whom such information might be disclosed.'

In a subsequent letter to Mr Parsonage, dated 8 May 2007, the General Manager explained this in more detail:

> 'It is the decision-maker's belief that...prior knowledge by one or more judges [of the cut-off marks] would inappropriately influence and thereby undermine the independence of the determinations made by those judges in succeeding years.'

For the following reasons, it is difficult to see how making the cut-off marks publicly available would detrimentally affect the integrity of the system in the way suggested.

1. Judges are not new each year and judges' recommendations do not differ much from final approved cut-off marks

People can be judges for more than one year. This means that the judging team will have some judges who were there in the previous year, and some new judges. Some continuity of experience is seen as beneficial.[11] The General Manager explained:

> 'The judging team usually consists of six people...We try and get a balance between those who've done the process before and some new ones. The procedure isn't dependent upon having the same team of six judges every year. In fact we try and have a bit of a rollover so you get some fresh blood coming through.'

In addition, the cut-off marks approved by the HSC Consultative Committee generally do not differ that much from the cut-off marks recommended by each judging team.

This means that although none of the judges will know exactly what cut-off marks the Committee approved in previous years, at least some of the judges will have some memory of the cut-off marks that the previous year's judging team recommended. Those repeat judges would also be likely to be aware that the recommended marks probably differ little from the approved marks.

[11] At the Board meeting of 7 March 2006, a written report on the operation of the HSC Consultative Committee and judges noted that it was 'beneficial to have continuity of judges.'

2. Current checking mechanisms

The checking mechanisms currently in place ensure that repeat judges do not allow this knowledge to impact on the decisions they are required to make during the process. Those mechanisms include:

- the calibre and professionalism of judges is checked through a vigorous recruitment process
- the judges undertake training and are provided with a comprehensive handbook which sets out the process and its rationale in some detail
- at the first stage each judge must work through each exam paper allocating cut-off marks *question by question* (they do not write down any *total* cut-off mark for the paper)
- at the second stage the judges compare the judgements they have made *for each question*, discuss their differences and modify their individual decisions if they wish
- during the whole process, field officers sit with the judges, watching them perform their tasks, giving them support and making sure the procedures are being applied correctly
- at the end of the process, the field officers, the supervisor of marking and the chief examiner all write a report
- after the judging team recommends a set of cut-off marks to the Committee, the Committee meets with some of the judges
- through its consideration of the reports on the process and the meeting with the judges, the Committee evaluates whether there are any issues to do with the standards-setting procedure, with the exam or with the marking that might have impacted on the application of the procedure.[12]

Given how robust this system is, it is difficult to see how the knowledge of some judges of previous years' approved cut-off marks can impact on any individual judge's judgements on individual questions. It also seems highly likely that the system would easily identify if an individual judge was allowing knowledge of those previous approved cut-off marks to influence any of his or her decisions.

10.6 Reasons why students' raw marks should be released

The OBOS has a separate, but related, concern about the release of students' raw marks. In the Sydney Morning Herald article of 21 December 2005 about Mr Parsonage's intentions to lodge his first FOI application, a Board spokeswoman is quoted as saying that the Board:

> 'did not usually release raw marks as they are of no benefit to students and have no meaning in many cases.'

The Director told us that the Board has had concerns that giving people both their raw and final marks would cause confusion and be misleading since before the new standards-reference system began:

> 'I guess raw marks in terms of them being misleading and being misunderstood by the people who look at them it would certainly predate me. But the particular issue that the

[12] When giving evidence, the General Manager said that the Committee asks the judges directly 'was the procedure as outlined by the Board applied by you?' and similarly direct and probing questions.

> Board currently has about disclosing raw marks insofar as its adverse effect on the integrity of the HSC really only dates from when the HSC was a standards reference assessment kind of model and that the disclosure of raw marks in a public way would have those adverse effects.'

I understand the Board's desire not to cause students confusion or provide them with information that could be misunderstood.

However, it seems to me that confusion is exactly what some students feel under the current system, not only those disappointed at missing out on their preferred University course, but even those who receive higher-than-expected results. No student currently has enough information available to them to fully understand how the final results are produced.

Changing the system so that those who wish to understand are given all of the information they need, will give 'meaning' to their raw marks and give clarity to their final results. Students benefit from having a better understanding of the process. The Board benefits from students being more confident in the reliability of the process and being able to appreciate how much care and thought has gone into its development.

10.7 Determinations of FOI applications for this information

The OBOS denied Mr Parsonage, and one other FOI applicant, access to information about cut-off marks on the basis of the two concerns I have just described. In both cases, the OBOS argued that because of these concerns, the exemption in clause 16 of the Schedule 1 to the FOI Act applied.[13]

I do not agree. The test in clause 16 is that something could 'reasonably be expected.' This is more than a mere risk. For the reasons I have outlined, it does not seem reasonable to expect that judges would perform their duties any less professionally than they currently do, if the cut-off marks were released publicly.

When giving evidence, the Director admitted that:

> 'We've never asserted that [it is] anything more than, that it's a risk and it's a tangible risk and it's a risk that we're not prepared to take.'

Clause 16 relevantly states that a document is an exempt document if it contains matter the disclosure of which:

> (a) could reasonably be expected:
>
> (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits
>
> by an agency, or
>
> (ii) to prejudice the attainment of the objects of any test, examination or audit conducted by an agency, or
>
> (iii) – (v)..., and
>
> (b) would, on balance, be contrary to the public interest.

[13] In Mr Parsonage's case, the OBOS also claimed that the exemption relating to the Department of Education and Training in Schedule 2 to the FOI Act also applied. This issue is discussed in chapter 6 of this report.

Chapter 4: The OBOS's FOI system and history of FOI applications for information about students' raw marks

11. FOI DECISION-MAKERS

All FOI applications addressed to the Board or the OBOS are processed by the OBOS. The Board does not perform any functions in this area.

According to the OBOS's Freedom of information procedure:

(1) The primary decision-maker who makes determinations under the FOI Act is the Chief Information Officer, whose functions are performed by the Director. According to the organisational chart, the Director is part of the second-highest row of management, who reports directly to the General Manager.

(2) The decision-maker who makes internal review determinations under the FOI Act is the General Manager. According to the organisational chart, the General Manager is the head of the OBOS.

(3) The FOI Coordinator is a role performed by the Records Manager. It is a purely administrative role. One of the coordinator's responsibilities is to send the letters to FOI applicants that contain the relevant decision-maker's decision. Determination letters typically look like the one extracted at section 14.5.

The General Manager has worked in the OBOS since 1986. He has held the position of General Manager for the last six years. He is not a lawyer.

The Director is also not a lawyer.

12. THE LEAD-UP TO MR PARSONAGE'S FOI APPLICATIONS: HISTORY OF FOI APPLICATIONS MADE BETWEEN 2001 AND 2006 FOR INFORMATION ABOUT MARKS

12.1 2001 – Changes to the HSC

As already explained, in 2001 significant changes were made to the process through which standards were set to determine how many marks a student needed to be awarded to achieve a particular level of achievement.

Between 2001 and June 2008, the OBOS received a total of 85 FOI applications. Of these, 26 included requests for information relating to the applicant's own raw marks or cut-off marks.

12.2 2003/2004 – The OBOS received its first FOI applications for a student's raw marks, since the 2001 changes

James King, a founding member of the boredofstudies.org.au website (alias *Lazarus*), lodged a FOI application with the OBOS in June 2003, seeking his raw examination marks (total weighted marks), moderated assessment marks and scaled HSC marks, for his 2001 HSC. Access was initially denied on the basis of clause 16 of Schedule 1 to the FOI Act. Mr King applied for an internal review and then to the ADT for an external review. Around that time, the OBOS's Director, Assessment and Reporting, met with him to explain the OBOS's concerns about this information being made public. Mr King decided to nonetheless go ahead with the ADT proceedings. Before the ADT heard the matter, the Board decided that his raw examination marks should be disclosed to Mr King.

One reason behind this change of mind was that, during the process of exchanging affidavits and assembling evidence, the OBOS learned that all other States and Territories release this

type of information. The OBOS's lawyers were of the view that, for this reason, the ADT was likely to decide that the raw marks should be disclosed. The OBOS also considered it relevant to consider the view that Mr King should be given the benefit of the doubt that he would not subsequently publish the information.

Mr King put his raw marks, alongside his aligned marks (which had been originally provided with his HSC) on the boredofstudies.org.au website, in a posting entitled 'Board of Studies reveals raw marks!' He wrote:

> 'For the first time since the new HSC was introduced in 2001, an HSC student has been able to successfully obtain their own raw examination marks from the NSW Board of Studies. This unprecedented level of disclosure has accelerated the NSW education system along the path to the ideal of a system that is both meaningful and publicly scrutable...
>
> | 2001 Board Developed | Total Weighted Mark | Aligned Examination Mark | Initial Moderated Assessment Mark | Aligned Assessment Mark |
> |---|---|---|---|---|
> | English (Advanced) | 67/105 | 79/100 | 77.0/105 | 84/100 |
> | English Extension 1 | 33/50 | 44/50 | 36.3/50 | 46/50 |
>
> ...'

In May 2004, the OBOS received a FOI application from a student requesting access to documents concerning his raw examination marks, initial moderated assessment marks and a schedule of the raw exam marks corresponding to each of the five performance bands cut-offs for the courses he completed in the 2003 HSC (the 'cut-off marks' for his 2003 HSC subjects).

The student was also a contributor to the boredofstudies.org.au website. His alias was *Ragerunner*.

The Director's determination was that the raw examination marks would be released but access to the cut-off marks for the subjects would be refused on the basis of clause 16 of Schedule 1 to the FOI Act.

Ragerunner posted his results on the boredofstudies.org.au website, alongside his aligned marks, in a posting entitled 'Board of Studies reveals raw marks – 2003':

> 'For the first time in 2003, the Board of Studies has revealed the raw marks for these particular subjects. A request for raw band cut-offs marks was initially declined, though in future it may be revealed.'

12.3 2004/2005 – More students make FOI applications for information about raw information

The OBOS received 14 FOI applications following the 2004 HSC, all requesting some form of students' raw examination and school assessment marks.

Four of these were received in late December 2004.

The other 10 were received on 24 January 2005.

The first four were handled by the person acting as the Director while the Director was on leave. The determinations were made on 11 January 2005. He granted access to the students' total weighted marks (raw exam marks) and their initial moderated assessment marks. He denied access to any breakdown of their raw exam marks.

Two of the students, using the aliases *acmilan* and *greeninsanity*, put their newly-revealed marks, alongside their aligned marks, on the boredofstudies.org website.

The latter 10 were handled by the Director following his return from leave. He denied access to all of the information sought (including total weighted marks, initial moderated assessment marks and breakdown of raw marks). These determinations were not made until 1 March, well outside the 21 day statutory timeframe.

In considering these applications, the Director sought:

- legal advice from the Crown Solicitor's Office (CSO)
- advice from the Principal Project Officer (Examinations) about how information about a student's raw marks could be used to determine cut-off marks for certain subjects, and
- advice from the Director, Assessment and Reporting, about the public interest considerations against release of this kind of information.

The Director was of the view that releasing the information would prejudice the integrity of the HSC. In forming this view, he took into account:

- material on the boredofstudies.org.au website, and
- similar requests from other FOI applicants.

12.4 James King's January 2005 application

Also in January 2005, James King lodged a FOI application seeking access to documents concerning the following information with respect to all HSC courses from 2001 to 2004 inclusive:

(1) the HSC mark corresponding to each state percentile from 0 to 100 inclusive

(2) the minimum examination marks awarded

(3) the maximum total weighted mark awarded

(4) the number of clerical rechecks that were requested, and the number of examination marks that were varied as a result of those rechecks

(5) the mean and standard deviation of the distributions of raw HSC marks.

The Director determined that information about the number of clerical rechecks (item no. 4) would be provided, in the following form:

	2001	**2002**	**2003**	**2004**
No. of course rechecks	2257	1712	1825	1784
No. of changes made	27	27	14	5

The determination stated that around 40 million individual marks are awarded to HSC candidates annually.

The Director also determined that access to the rest of the information requested be refused. In his internal memo to the then FOI Coordinator, Lambrini Tsipidis, the Director wrote:

> 'In considering the remainder of this request, I have concluded that it has been made in the context of other requests which have been made **as part of a concerted campaign with each other in association with the "boredofstudies.com.au"** [sic] **website**. I am advised that the applicant's alias is "Lazarus" for posts placed on the forums conducted by this website. His role in the campaign is evident from the threads of the posts to these forums. While the differences in scope and content of the applicant's request compared to the others has made the assessment of this request more difficult, on balance, **I believe that this request is made as part of the same campaign and for a related, if not identical, purpose.** However, while the other applicants in this campaign have the public interest argument of a right to their personal information to consider in their favour, this application does not. Given that external examinations have inherently confidential features, the frequently cited argument of openness and transparency needs to be considered in this context as well.' [emphasis added]

None of this reasoning was included in the determination letter to Mr King (dated 8 March 2005), although the OBOS had expressed similar concerns to Mr King in relation to his earlier application of June 2003. Mr King wrote to the General Manager requesting an internal review and outlining a number of reasons why he thought the Director's determination was deficient.

Handwritten notes of the General Manager included the following thoughts:

> 'Question
>
> **With the information he requests in Nos 1, 2, 3, 5 (and other publicly available data) what can be determined about HSC cut-off marks?**
>
> Including stuff from other FOI requests...
>
> Unreasonable Time
>
> Also received a number of other FOI requests at this time. While not identical to King's current one, they were nevertheless similar to an earlier one of King's requesting his raw marks.
>
> The delay, at least in part, was to enable all the varying requests to be considered with a view to seeing if there was **any pattern** that, taken together, could impact on the integrity and good operation of the HSC program...
>
> Taking all of this activity together and **the clear campaign being conducted by the "boredofstudies..." website to encourage students to apply for their raw marks, it is a perfectly reasonable approach not to treat each application independently of the others.**
>
> Failure to properly consider each part on its merits
>
> It is my understanding that the decision maker must also have in mind the overall focus of the request and how it might be used together with other information that is available either in the public domain or to the applicant...
>
> Failure to properly apply the FOI Act and comply with s 28(2)(e)
>
> Is this the case?
>
> Prejudice the effectiveness of methods.

> BOS HSC system and reporting is designed to be clear, simple and meaningful. Its effectiveness would be compromised by any focus on alternative marks, statistics or structures other than those approved by BOS.
>
> Failure to take into account relevant considerations
>
> The fact that only 7 (or 10) followed his call for HSC students to request this information **must be a disappointment**. The call was on the "boredofstudies" website...
>
> (1) Need to get KF, AG, GW, BMc to look at his claims and
>
> i see how he may have been able to use the information he requested and that also available to him to estimate cut scores and/or impact adversely on the effective operation of the HSC program
>
> ii see what else he may have been able to do with this.
>
> (2) Get RL, DC, KF to collect the pattern of King's involvement with raw marks, UAI calculators etc. and his association with the media
>
> (3) Need to get AG, GW, BMc to 'debunk" his claims about VCAA, new HSC system --> old HSC system.' [emphasis added]

The General Manager wrote to Mr King, responding to his complaint that the determination had been delayed. He explained that this had been because the OBOS had been processing a larger than usual number of FOI applications at the same time, because Mr King's application raised complex technical matters, and also because it sought a large volume of information about the HSC that had just been completed.

The internal review was done by Ms Rob Speers, who was the Director, Examinations, at that time. She determined that the request be refused on the basis that the information requested in items 1, 2, 3 and 5 did not exist in a document and was not held electronically in a way that could be extracted, otherwise than by the creation of a new computer programme specifically designed for that purpose or, in the case of 2 and 3, through a process that would take one person approximately 21 working days.

12.5 Hugh Parsonage's February 2005 application

In February 2005, Mr Parsonage made a FOI application for his raw examination marks and initial moderated assessment marks for all HSC courses (he sat two HSC courses in 2004, the rest in 2005), and a question-by-question breakdown for each exam. The Director decided that access to this information was refused on the basis of paragraphs (a)(i) and (ii) of clause 16 of Schedule 1 to the FOI Act.

12.6 The March 2005 Board meeting

On 22 March 2005, the President of the Board reported to a Board meeting issues surrounding FOI applications. The minutes of that meeting record the following discussion:

> '[T]he Board also noted a report with respect to applications under the Freedom of Information legislation for HSC raw marks, and in particular that the information had been sought as part of a campaign to assist in testing a model to predict UAIs. The Board noted that, as a consequence, it had not been considered in the public interest to disclose the raw marks.'

12.7 Hugh Parsonage's June 2005 application

In June 2005, Mr Parsonage made a FOI application for copies of his responses to the two HSC papers he sat in 2004, and his raw examination marks and initial moderated assessment

marks awarded for those courses, and a question-by-question breakdown for each exam. He withdrew this application just over a week later.

12.8 Another FOI application lodged in June 2005

Also in June 2005, the OBOS wrote to another FOI applicant, refusing access to his raw exam marks for a particular subject, stating that it was the decision-maker's view that he:

> '...may be involved in the campaign of determining and then publicly disclosing the HSC cut scores.'

This was the only occasion on which the OBOS included this statement in a determination. This statement was made in relation to a number of other FOI applicants, but only in the internal memo from the Director to the FOI Coordinator.

The applicant responded in the following way:

> 'I take offence to the view...that I may be involved in [such] a campaign...I have no intention of doing this. The thought never entered my mind. I have the upmost respect for my school, the Education Department and the Office of the Board of Studies in relation to their delivery of service to all.'

Despite these reassurances, the General Manager, as the internal reviewer, still denied access to the information.

12.9 Hugh Parsonage's December 2005 application

In December 2005, Mr Parsonage prepared to launch his self-proclaimed class action.

Chapter 5: The way the OBOS handled Mr Parsonage's December 2005 and January 2007 FOI applications

13. MR PARSONAGE'S DECEMBER 2005 APPLICATION

13.1 Preparation of the December 2005 application

On 16 December 2005, following the conclusion of the 2005 HSC and two weeks before Mr Parsonage lodged the December 2005 application with the OBOS, he posted on the boredofstudies.org.au website a 'call for applicants in class action against Board of Studies for raw marks and marks in each question and project and performance-based exams.' The website's official annual newsletter also passed on the message. Mr Parsonage's instructions were as follows:

> 'This is a call for anyone interested in discovering, in each HSC course, his [marks]...through a class action under the *Freedom of Information Act 1989* (NSW)...
>
> If you are interested, please e-mail me with FOI in the subject field...; in your e-mail, just include that you are interested...with your name and a contact phone number. I will reply at the end of the day.
>
> **Fees**
>
> The fee will be $10 per candidate.
>
> This fee structure has recently changed.
>
> I am willing to allow four Band 1 candidates per course to apply free-of-charge. The first four candidates to e-mail me with such an application will be entitled to this. You must declare your Student number and PIN to be eligible.
>
> In addition, I am willing to subsidize this to $5 for anyone who is on the Top Achievers' List for any course in any year.
>
> **Applications close 12 December.**
>
> **Late applications close 20 December ($5 late fee applies)**.'

The OBOS was aware of Mr Parsonage's intentions through its regular monitoring of the activities of the website. On the day he made the posting, the OBOS printed out the posting and the discussion that followed over the next 4 hours. Four days later, on 19 December, the OBOS printed out the website's official annual newsletter and 44 pages of discussion that had taken place on the website over the last four days. They also printed out pages from March and June 2004, and January 2005 (when a number of students shared the news that the OBOS had given them their raw HSC marks).

Also on 16 December, the Director sent an email to CSO requesting legal advice concerning FOI applications that seek information concerning HSC candidates' raw marks.

Around that time, the Board was also contacted by a Sydney Morning Herald journalist for a comment on this intended so-called 'class action'. The article that appeared on 21 December 2005[14] purported to quote a Board spokeswoman as stating that the Board:

> 'did not usually release raw marks as they are of no benefit to students and have no meaning in many cases'.

[14] Justin Norrie, Education Reporter, The Sydney Morning Herald, 'Students battle to learn HSC raw marks' (21 December 2005)

13.2 Lodgement of the application

Mr Parsonage's December 2005 application (dated 28 December) stated that is was 'an application' made pursuant to s 17 of the FOI Act and enclosed the application fee of $30. It also stated:

> 'Please find herewith written permission from all candidates indexed 1-45 below as well as a statutory declaration proclaiming the authenticity of the correspondence...Should the...documents be disclosed to me, they will be passed on only to the candidate to whom the documents directly pertain.'

Each of the 'FOI Permission Forms' was identical except for the individual students' names. They each contained the following statement:

> 'I understand that this correspondence entitles you, being the agent acting on my behalf, to inspect these documents should they be disclosed.'

Mr Parsonage's statutory declaration made the following statements:

> 'Herewith...are letters expressing consent from the authors for me to seek access to, obtain, and inspect the documents as expressed.'

13.3 The briefing to DET

The OBOS received the application on Wednesday 4 January 2006. At the time, the Director and the General Manager were on leave.

An acknowledgement letter, dated 5 January 2006, advised that the result of Mr Parsonage's 'application pursuant to the FOI Act' would be provided in due course.

That Friday the Executive Support Directorate of the Department of Education and Training (DET) requested an urgent briefing about the Herald article. The briefing was provided by the acting General Manager on the following Tuesday (10 January).[15]

The briefing described the situation as follows:

> '**ISSUE**
>
> The Sydney Morning Herald reported that Hugh Parsonage of Port Macquarie is coordinating FOI applications by more than 100 students requesting their "raw HSC marks"...
>
> **BACKGROUND**
>
> The Office of the Board of Studies NSW has previously responded that the figures sought are exempt and that, on balance, the public interest does not favour disclosure. (Pursuant to cl.16(a)(i) and (ii) of Sch. 1 to the *Freedom of Information Act*.)
>
> The Board has a longstanding policy of not publicly disclosing these figures for the reason that the information is only initial information that is used in the determination of the students' reported marks and, as such, likely to mislead or confuse students, parents and prospective employers.
>
> In addition, the publication of the raw mark cut scores could bias future judgements by the teacher/marker judges in the HSC standards-setting process. Having broadly

[15] Document entitled 'Urgent Briefing – HSC Scaling Process' signed by Ms Rob Speers, acting General Manager, dated 10/1/2006.

published knowledge of these cut score figures would jeopardise the independence of their decisions and cast doubt on the validity of the process.

The recent campaign to request "raw marks" has been coordinated through the internet site called "boredofstudies.org" which is owned and managed by James King, also mentioned in the SMH article. This site is a popular forum for HSC students, and markets a service called SAM (Student Assessment Modeller), which claims to be able to predict a student's UAI based upon HSC school assessment and examination marks.

CURRENT SITUATION

Hugh Parsonage has submitted an application for access to 50 students' schedules of HSC student achievement including raw marks. **The Office is currently considering this application, however, previous such applications have been refused**...' [emphasis added]

13.4 The legal advice

A week later, on 17 January, the person acting as the Director while he was on leave faxed the CSO requesting legal advice. The OBOS later described this fax as a 'Request for legal advice concerning letter from Mr H Parsonage to the OBOS dated 28/12/2005 and enclosures to that letter.' I note that Mr Parsonage's correspondence is referred to as a 'letter' not a FOI application.

About a week later, on 25 January, the CSO provided the advice. Later that day, the Director (who had returned from leave) prepared a response for the then FOI Coordinator, Sarah Dooley, to sign and send to Mr Parsonage, attached to a covering memo.

13.5 The decision to treat the letter as 50 incomplete applications — the Beevor letter

It appears that Ms Dooley was then absent, so the letter to Mr Parsonage was signed by the then acting FOI Coordinator, Anne Beevor, on 27 January 2006. In this report I refer to this letter as '**the Beevor letter**'. The Beevor letter stated:

'While, as has been mentioned above, your letter of 28 December 2005 purports to be an application for access to documents under the *Freedom of Information Act*, in my view it constitutes 50 applications under that statute. **The first such application is made by you for access to the documents referred to in para. (A) and para. (B) of your letter** of 28 December last. Subject to what follows, the remaining 49 applications are made by the persons numbered 1-7 (both inclusive) and 9-50 (also both inclusive) whose names are set out on pages 2 and 3 of your letter of 28 December 2005. That this [is] so is borne out by the fact that the numerous letters received from these persons under cover of your letter of 28 December make it plain that those persons constituted you as their agent for the purposes of making these applications. Further, in the final paragraph on the first page of your letter of 28 December 2005, in substance you undertake to OBOS that, should access to the documents referred to in para. (A) be granted to any of your principals, such documents will be passed on by you to the principal to whom they relate and to no one else. Accordingly, and again subject to what follows, the result of the above is that you have been constituted as an agent for 49 disclosed principals for the purpose of making applications on their behalf for access to documents under the *Freedom of Information Act*.

The qualification referred to in the preceding paragraph is that, as no correspondence or other documents have been received by the Office from [three students, named], I infer that these persons have terminated your appointment as their agent...

> The consequence of the above is that...three [applications] ought to be taken as having been withdrawn, and 46 of them are incomplete in that the s.17(c) application fee has not been received...Moreover, in so far as an application fee has been received in respect of one such application, it is not clear to me in respect of which one of the 47 that amount has been paid...
>
> [I]t will be necessary for OBOS to be advised to which of the 47 applications that remain current the $30 received with your letter...ought to be applied.' [emphasis added]

13.6 Mr Parsonage's letter of protest dated 6 February 2006

When Mr Parsonage received the Beevor letter, he wrote back to the OBOS (by letter dated 6 February 2006 and received on 8 February). After two introductory paragraphs, he stated that:

> 'I disagree with Ms Beevor's assertion that my FOI request constitutes multiple and separate applications under the FOI Act.
>
> Nothing in the FOI Act indicates a limit on the number or quantity of documents that may be requested in a single application...nor does the FOI Act imply that personal documents relating to multiple people can only be requested in individual applications. Indeed, Ms Beevor's attempts to construct such an argument contain no reference to the FOI Act or any cases relating thereto, save for the reference to s. 17(c), which merely states that a fee must be paid for each application.
>
> The objects of the FOI Act support my position...
>
> After considering...section [5]...one comes to the conclusion that, given the choice between two options both of which would disclose the same information, the one that is cheaper ought to be taken. I contend...that the design of my application...is a single application, and that this is in conformity with the objects of the FOI Act.
>
> It was always my intention to apply for access to the documents requested...The inclusion of other students in the one application was not...to abuse my right of access; it was to make the entire process more efficient and economical – for both parties...
>
> I reiterate that I have filed only a single application...I expect you to make a determination of my FOI request forthwith.'

He attached permission forms from two of the three students whose permission forms the Beevor letter had advised had not been received

He did not enclose $40 with his letter.

13.7 The print outs from the website and the legal advice

The day before the OBOS received Mr Parsonage's letter (7 February), they printed out 54 pages from the boredofstudies.org.au website, containing discussions that took place in March, October, November and December 2005, and January 2006, about the Board's reasons for not disclosing raw marks.

On the day the OBOS received Mr Parsonage's letter, the Director faxed the CSO requesting legal advice. This was provided two weeks later, on 22 February 2006.

13.8 The decision to defend the decision — the Carroll letter

On the same day the legal advice was provided, the Director prepared a letter for the then Acting FOI Coordinator, Geoff Carroll, to sign and send to Mr Parsonage, and attached it to a covering memo. In this report, I refer to this letter as '**the Carroll letter**'. The Carroll letter reads as follows:

> 'I acknowledge receipt on 8 February 2006 of your letter dated 6 February 2006 with enclosures as advised. After having given consideration to the matters raised by the third and succeeding paragraphs of your letter, I adhere to the views expressed in the second paragraph of the Office's Acting FOI Co-ordinator, Ms Beevor's letter to you of 27 January 2006.
>
> That said, in view of the terms of the enclosures received with your letter dated 6 February 2006, I shall regard only the foreshadowed application of [name] as having been withdrawn. The result is that I regard 48 of the 49 applications now received by me as being inadequate in that the s. 17(c) application fee has not been received in respect of them. Again, in so far as one s. 17(c) application fee has been received, it is not clear to me in respect of which of the 49 application received that that sum has been paid.
>
> Subject of changing the reference to "47" in its second last line to "49", I reiterate what was said in the final paragraph of Ms Beevor's letter to you of 27 January 2006'

13.9 Mr Parsonage applies for the ADT to review the matter

After Mr Parsonage received Mr Carroll's letter, he applied to the ADT seeking an external review of the matter. The application was lodged on 12 March 2006.

He says that he did so because by the time he received the response from Mr Carroll, he was under the impression that it was too late to formally request an internal review (whether on the basis of the 'deemed refusal' provisions or on the basis that either the Beevor or Carroll letter constituted a determination). As he was not aware that the General Manager has the power to grant an extension of time under section 34(2)(e)(iii), he did not ask for one.

Another former HSC student and one of the founders of the boredofstudies.org.au website, James King, made submissions to the ADT on behalf of Mr Parsonage.

The OBOS briefed the CSO and a barrister appeared at the hearing on 8 August 2006 on their behalf.

After 10 months, on 10 January 2007, the ADT dismissed his application, finding that it did not have any jurisdiction to look into the matter. The Tribunal member made the following comments:

> 'The Board's submission is that Mr Parsonage's real complaint is that Ms Beevor has made an error of law. It argues that there is no provision in the FOI Act which provides for an appeal from that determination to this Tribunal. I am inclined to agree with that submission. However, if I am wrong on that point, it is my view that Mr Parsonage's application must fail in any event because of the failure to apply for an internal review of Ms Beevor's determination.
>
> I agree with the Board's submission that Mr Parsonage's letter of 6 February 2006 does not satisfy the requirements of section 34 of the FOI Act. In my view it is not an application for review of a determination but a request for the original determination of the application. More significantly, the letter was not accompanied by any fee.'[16]

13.10 The complaint following the ADT decision

Following the ADT decision, Mr Parsonage complained to the OBOS about the way the December 2005 application had been handled, by letter dated 15 January 2006.[17] On the same

[16] Parsonage v Office of the Board of Studies [2007] NSWADT 10

[17] he sent this by email to customerliaison@boardofstudies.nsw.edu.au

day he lodged his January 2007 application, which is discussed later in this report. The letter was addressed to the General Manager[18] and explained that:

> 'My complaint is focused on the response of the "Acting FOI Coordinators" who responded to my application and subsequent correspondence, Ms Anne Beevor and Mr Geoff Carroll. As their superior, it is your responsibility to ensure complaints regarding their conduct are addressed.'

Mr Parsonage explained that he had made an application for documents relating to the marks of 50 HSC students and:

> 'The Board's response was to regard me as an "agent" for the fifty students and so refused to determine my application until an application fee of $1500 was deposited.'

Mr Parsonage complained about the Beevor letter in the following terms:

> 'While I may not have always made my position clear, the Board's responses have been utterly inconsistent with the FOI Act's objects of assisting citizens acquire information quickly and at reasonable cost...
>
> [Section 5 (Objects)] is a rule of law. Failing to comply with this section means failing to comply with the law...
>
> [The section gives rise to an] obligation of the Board to have assumed that I had a right to access the requested documents...[and] the obligation that the Board ought to have chosen the option that was cheapest for me, so long as it would not be unreasonably burdensome...
>
> [A] citizen who wishes to be given access to a document should only be prevented if the disclosure of the document would prevent the proper administration of the Government. An agency should never impede access to documents by giving confusing or verbose responses to applications or by imposing unlawful fees. Ms Beevor did both these things. Ms Beevor restricted my right of access for reasons that have nothing to do with preserving the proper administration of the Government and everything to do with avoiding public scrutiny...
>
> Ms Beevor was presented with a choice:
>
> - exercise the discretion the Act allows by assuming (correctly) that the application was a single application and accepting it, or
> - entertain the (wrong) assumption that the letter was the sum of fifty applications and charge a large fee.
>
> If she had complied with section 5 of the FOI Act, she would have chosen the first option that facilitates at the lowest reasonable cost the disclosure of information. She did not; she chose the second...
>
> It is possible that Ms Beevor believed that I was trying to evade fees and felt that an application fee for fifty people's information being the same as that for one person was unfair. This, however, is an immature view of the FOI Act and ought to be purged from your agency immediately. The FOI Act is not meant to be a way for agencies to earn money. The $30 application fee is not a kind of admission fee each adult has to pay to exercise his rights. Information is not what is being paid for. As your website says,

[18] A copy was sent to our office, Robert Oakeshott MP and Matthew Moore, FOI Editor for the Sydney Morning Herald. We declined to look in the matter as we usually give agencies a chance to handle complaints directly before we will get involved.

"[t]he fee is applied to recover some of the cost of a staff member seeking out the information you need, collating, copying and sending it to you".

Furthermore, if Ms Beevor had adequately consulted with me, she would have learnt quickly that the only reason the letters from each candidate were written in the first place was to ensure my right to access to them would not be delayed by privacy provisions of the FOI Act. It was not fifty applications.

I gave these arguments in my reply letter dated 6 February 2006.'

Mr Parsonage complained about the Carroll letter in the following terms:

'Mr Carroll gave no response to the arguments I had given. He failed to demonstrate any concern that the Board was charging an excessive fee for my application...His response shows no evidence of any "consideration" of my letter; indeed, his letter is inconsistent with consideration of my letter and lawful behaviour. Furthermore, his letter—which is just an affirmation of Ms Beevor, with some padding—took at least eleven days to complete. Despite this, he included no evidence that this time had been spent on anything except to delay any further responses I could make. In this, Mr Carroll did not respect the importance the FOI Act places on expedient responses...

Either Mr Carroll was not competent enough to deal with my FOI application or he, too, intended to flout the law on which my application was based.

The Commonwealth *Freedom of Information Act 1982* is very similar to the FOI Act of NSW. According to the Commonwealth Ombudsman...

> If an agency is unsure whether or not an applicant is requesting an internal review (for example, the correspondence is in the form of protest or criticism of the agency's decision) the agency should treat the correspondence as a request.

My letter of 6 February 2006 clearly falls into this category. As such, Mr Carroll should have contacted me and confirmed that my letter was intended was intended as an internal review. He would have, of course, been entitled to ask that the $40 internal review fee be paid. He did none of these things. He chose to consider the letter as something to which the Board had no obligation to specify reasons and material questions of fact, unlike formal reviews. His lack of a prompt response also meant that I had no subsequent opportunity to seek a formal internal review (the statutory time limit had expired). Such a response reeks of an agency avoiding scrutiny, the complete opposite of what the law requires.'

Mr Parsonage concludes by saying:

'I have now spent a considerable amount of time and effort explaining things that should be innate in any government official responsible for handling freedom of information applications. I suggest better training for FOI personnel, which should include particular emphasis on s 5(3)(b) and the other objects of the FOI Act as the chief guiding principles.

I write this complaint in the hope that your influence can cause changes in the FOI system at the Office of the Board of Studies. I know you are capable of this, and I know your agency has a great commitment to "open and accountable public service", rather than unlawful pedantry, and "supports the provision of the broadest possible access to departmental information and policies", rather than attempting to subvert the law. It says so on your website. It is a pity Ms Beevor and Mr Carroll did not share this vision...

> ...If I do not receive a satisfactory response to this complaint that addresses the arguments I have put or admits that your officers acted unlawfully, I shall make an additional complaint to the NSW Ombudsman or my local member of State Parliament.'

13.11 The letter responding — the Murphy letter

The General Manager asked the Director to handle the complaint.

The CSO provided advice about this complaint on 1 February 2006.

The next day the Director responded to Mr Parsonage, signing the letter himself. In this report I refer to this letter as '**the Murphy letter**'.

The Murphy letter stated that the General Manager had asked the Director to respond and explained that he intended to respond in some detail to Mr Parsonage's claims.

The first issue addressed was Mr Parsonage's claims that the way Ms Beevor and Mr Carroll handled his application was inconsistent with section 5 (Objects) of the FOI Act. The Murphy letter summarised Mr Parsonage's claims in the following way:

> 'I take the essence of what [you have claimed to be] that Ms Beevor's letter to you of 27 January 2006 and Mr Carroll's letter to you of 22 February 2006: (i) manifested a breach of s. 5(1)(a) of the FOI Act in that they failed to acknowledge that you had a "right to seek access" to documents and, (ii) that those letters manifested a breach of s. 5(2)(b) and s. 5(3)(b) of the FOI Act in that in dealing with your letter of 28 December 2005 (and its attachments) Ms Beevor and/or Mr Carroll failed to choose an "option that was cheapest for [you], so long as it would not be unreasonably burdensome". Fundamental to this contention is the proposition that s. 5 of the FOI Act constitutes "a rule of law", and that failure to comply with it in the manner alleged by you amounted to a breach of law.'

The Murphy letter contained the following response:

> 'First, in my view, it is not correct to characterise s. 5 of the FOI Act as embodying a rule of law. When viewed in the context of the general requirement that statutes are to be read as a whole to further the legislature's intention in passing them, and s. 33 of the Interpretation Act 1987, I think that the purpose of s. 5 is to identify the legislature's intention (or purposes) in passing the FOI Act, and so facilitate a purposive construction of that statute.
>
> Secondly, (and this is a necessary consequence of what has been said in the previous paragraph) in my view, neither s. 5(1)(a), nor s. 5(2)(b), nor s. 5(3)(b) confer rights upon members of the public. To the extent that a right reflecting the first two of these provisions is concerned, it is conferred by s. 16(1) of the FOI Act. So far as the third is concerned, it is reflected in numerous provisions of the FOI Act...
>
> Thirdly, Ms Beevor's letter to you of 27 January 2006 did not involve any denial of the right of the various persons who had constituted you as their agent to make application for access to documents under relevant provisions of the FOI Act...
>
> Fourthly, as well as making the error of statutory interpretation in respect of s. 5 of the FOI Act that has been referred to above, you make the further error of failing to construe the FOI Act as a whole...
>
> ...[When] Ms Beevor's letter of 27 January 2006 is read in the light of the FOI Act interpreted according to proper canons of construction, I am of the view that the result that emerges is that the letter does not involve a breach of any provision of the FOI Act that confers a right upon members of the public.'

In his letter of complaint, Mr Parsonage had asserted that:

> 'An agency should never impede access to documents by giving confusing or verbose responses to applications or by imposing unlawful fees. Ms Beevor did both these things.'

The Murphy letter provided the following response:

> '...it is said that Ms Beevor's letter of 27 January 2006 was 'confusing and verbose'. With due respect, at the time you composed your letter of 6 February 2006, you made no such complaint. Moreover, the way in which that letter was put together makes it plain that you had no difficulty in understanding what Ms Beevor had written and the points that she sought to make in her letter.'

One of Mr Parsonage's complaints was that Ms Beevor did not consult him so he did not have the opportunity to explain the nature of the FOI Permission forms from the other students. The response in the Murphy letter was that:

> '...you criticise Ms Beevor for not consulting with you before writing to you as she did on 27 January 2006. This may well have been because she did not entertain any doubt that what had been received by the Board was 47 applications and not one.'

The Murphy letter then went on to address Mr Parsonage's complaints about the letter from Mr Carroll. The Murphy letter provided the following response:

> '[T]he substance of the complaint appears to be the length of time that Mr Carroll took to respond to your letter of 6 February 2006 (that was received on 8 February 2006) and the fact that Mr Carroll's letter did not contain a statement of reasons for his adherence to the view contained in Ms Beevor's letter of 27 January 2006 viz., that what the Board had received on 4 January 2006 constituted 47 applications for information under s. 17 of the FOI Act. About this, I say the following.
>
> First, it seems to me that the time that elapsed between receipt of your letter of 6 February 2006 and Mr Carroll's response of 22 February 2006 is entirely consistent with him having given consideration to the points that you raised in your letter of 6 February 2006...Moreover, it seems to me that the second and third paragraphs of Mr Carroll's letter demonstrate a very close reading of your letter of 6 February 2006.
>
> Secondly, insofar as Mr Carroll did not include any detailed response to the points that you made in your letter of 6 February 2006, as I understand it, he was not obliged to include in his letter of 22 February 2006 any such material...
>
> Moreover, I do not think that it could seriously be contended that, at the time you composed your letter of 6 February 2006, you intended it to constitute an application for an internal review under s. 34 of the FOI Act. This seems to me to follow from circumstances surrounding your FOI Act application of 22 January 2005 [an earlier application]. By letter dated 14 March 2005, you were advised of the outcome of that application. Under the subheading 'Review and Appeal Rights', you were advised of your entitlement to seek internal review of the relevant decision, and of the fact that any request for an internal review would need to be in writing and accompanied by $40...It seems to me that the tenor of your response of 21 April 2005 is entirely consistent with the proposition that you had understood the procedure and requirements for a s. 34 internal review, but that you had decided to adopt a different course. Consequently it seems to me that if on 6 February 2006 you had intended to make an application for a s. 34 internal review you would have known exactly what was required to secure that outcome...'

On the last of page of the Murphy letter, the following comments about the determination of the Tribunal member were made:

> 'Judicial Member Montgomery was in no way critical of Ms Beevor's conclusion that what had been provided to the Board was in reality multiple applications and not a single application...
>
> In numerous places...you make allegations imputing improper motives both to Ms Beevor and to Mr Carroll, and also you accuse the former of an immaturity of view and the latter of incompetence. Not only do I reject such allegations and observations, but I also permit myself the observation that nowhere in Judicial Member Montgomery's determination of 10 January 2007 is there any criticism made in respect of the way in which the Board or its officers conducted itself or themselves in dealing with your application that was received by it on 4 January 2006.'

14. MR PARSONAGE'S JANUARY 2007 APPLICATION

14.1 Lodging the January 2007 application

As described earlier in this report, the day after Mr Parsonage lost his ADT proceedings (on 10 January 2007), he not only sent the OBOS a formal complaint about the way the matter had been handled so far, but also lodged the FOI application again.

This January 2007 application asked for the same information as the December 2005 application, but included the following statement on the last page:

> 'I urge the Board to contact me via e-mail or by telephone...should any further details be required. To clarify, **this application is made in my own right.** Any supposed relationship of agency has been exhausted for the Board's peace of mind. The students are still happy for me to view their marks.' [emphasis in original letter]

The OBOS received the complaint and the January 2007 application on 15 January.

14.2 Another FOI application, relating to raw marks, processed in January 2007

Around two weeks before the OBOS received Mr Parsonage's January 2007 application, they received an application from another student requesting access to his raw examination marks and initial moderated assessment marks for all HSC courses. In this report I refer to this application as the '**application from Y**'.

The OBOS file shows that the OBOS found postings from the person's brother on the boredofstudies.org.au website.

The Director made the determination, dated 22 January 2007, around two weeks before his decision about Mr Parsonage's January 2007 application. His decision was that 'access to the document(s) requested is refused.' The refusal was pursuant to clause 16 of Schedule 1 to the FOI Act.

14.3 The legal advice

On the same day the OBOS received Mr Parsonage's January 2007 application, the Acting Director faxed a request to the CSO for legal advice. Part of this advice was provided on 29 January.

The Director responded to Mr Parsonage's complaint by letter dated 2 February. The following Monday, 5 February, the CSO provided further advice about the January 2007 application *and* the complaint.

14.4 The costing document

On 17 January, Ms Rob Speers prepared a one-page document entitled 'Costing of FOI request by Hugh Parsonage'. A copy of this document is Annexure B.

The first section of the costing document has the heading 'Request A'. It provides details of each piece of information Mr Parsonage requested in Part A of his application (relating to students' raw marks and rank), listed under the headings 1a – 1h, in relation to a named student and a particular course.[19] Below this information it stated:

> 'The details above took approximately 30 minutes. Some subjects would be simpler but others more detailed. In calculating a cost to undertake the FOI request calculations are based on 30 minutes doing the above report and 15 minutes checking. There are 50 students listed with an average of 6 courses. Provision of a student's rank within the course would require programming changes.
>
> **Costing**
>
> | | |
> |---|---|
> | Request A – Students | $13,000 |
> | Request A – Programming | $ 7,500 |
> | **Request A – Total** | **$20,500**' |

The rest of the document reads as follows:

> '**Request B**
>
> There were 43 courses with more than 1,000 candidates for the 2005 HSC. Extracting marking schemes for each course would cost approximately $300 per course. Extracting TWMs for each of the band cut-offs in each of these courses would cost approximately $100 per course.
>
> | | |
> |---|---|
> | **Costing Request B** | **$17,200** |
> | **Total Cost** | **$37,700**' |

14.5 The decision that no documents existed or could be created — the Lane letter

On the same day as he received part of the CSO advice, 5 February, the Director wrote a memo to the then FOI Coordinator, Penny Lane, communicating his determination of the January 2007 application. He ended that memo as follows:

> 'N.B. In your advice to the applicant notifying him of the outcome of his application, the standard paragraph headed 'Review and Appeal Rights' is to be omitted.'

The following day, on 6 February, Ms Lane sent a letter to Mr Parsonage using the text set out in the memo from the Director. In this report I refer to this letter as '**the Lane letter**'. The letter took the following form, which is the standard form for all FOI determinations:

[19] To ensure the privacy of this person, who is not a person listed in Mr Parsonage's FOI application, I have not included in Annexure B any information identifying the student's name and the subject from which the student's marks were extracted.

Dear Mr Parsonage

I refer to your request under the NSW Freedom of Information Act (FOI Act) for access to documents and information outlined below.

Decision-Maker

Name of decision-maker: David Murphy, Director, Corporate Services, Office of the Board of Studies.

Date of Decision: 5 February 2007

Decision: That the Office of the Board of Studies does not hold any documentation pertaining to your request.

Reasons for Decision

Your application sought access to documents and information as follows:

[description of his application]

In respect of [the request for the students' raw marks and the cut-off marks], such information is of kinds not contained in written documents held by the Office, and the Office could not create a document containing information of the[se] kinds...by the use of equipment that is usually available to it for retrieving or collating stored information. In consequence, you are given notice under s. 23 of the FOI Act that the Office is taken not to hold a document containing information of the kind referred to...

In respect of [the request for marking documents], the decision-maker decided that you also be given notice under s.28(1)(b) of the FOI Act that in respect of each 2005 HSC Course for which more than 1,000 persons presented as candidates, the Office does not hold any documents that contain official marking criteria other than documents that contain publicly available guidelines, which are made available on the Office's website.

Yours sincerely

Penny Lane

FOI Coordinator

6 February 2007

14.6 The relevant sections of the FOI Act

The FOI Act became law at a time when most government records were paper documents. Section 23 covers the situation where the information requested is held electronically. It relevantly provides:

> **23 Information stored in computer systems etc**
>
> If:
>
> (a) it appears to an agency that an application relates to information of a kind that is not contained in a written document held by the agency, and

(b) the agency could create a written document containing information of that kind by the use of equipment that is usually available to it for retrieving or collating stored information,

the agency shall deal with the application as if it were an application for a written document so created and shall be taken to hold such a document.

Section 28 outlines the requirements of communicating decisions to an applicant. It relevantly provides:

28 Notices of determination

(1) An agency shall cause written notice to be given to the applicant:

(a) of its determination of his or her application, or

(b) if the application relates to a document that is not held by the agency—of the fact that the agency does not hold such a document.

(2) Such a notice shall specify:

(a) the day on which the determination was made, and...

(b) – (d)

(e) if the determination is to the effect that access to a document is refused:

(i) the reasons for the refusal, and

(ii) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.

14.7 Mr Parsonage's February 2007 letter protesting the Lane letter

The Lane letter essentially advised Mr Parsonage that access had been refused on the basis that the OBOS held none of the information he had requested in documents.

After he received this letter Mr Parsonage wrote to the General Manager seeking an internal review of the determination, and making what he described as a formal complaint. This letter was dated 15 February 2007 and received by the OBOS on 19 February. He enclosed $40.

Mr Parsonage complained that:

'Mr Murphy's determination:

(1) failed to give adequate reasons for the decision and failed to provide the findings on any material questions of fact underlying those reasons, and

(2) suggests the Board's records are poor, so much so that it is failing to comply with the *State Records Act 1998*, or

(3) was dishonestly made in that it asserted that the documents are inaccessible when they must be.'

Mr Parsonage quoted the requirement in section 28(2)(e) that a determination denying access to documents must provide reasons for that decision and outlined the way in which he believed the Lane letter was deficient.

Mr Parsonage also made the following points:

'**Individual Students' Marks** The Board has released the total weighted marks and the initial moderated assessment marks of several students in the past through FOI. These marks were released promptly. There has apparently been no difference in the

way the Board stores information, so why are they suddenly impossible to create? I expect you will explain why the Board's systems were adequate enough to promptly disclose marks two years ago but are now unable to. I admit that the documents relating to marks attained in each "Question" have not been disclosed previously. I do, however, know from correspondence with the Chief Examinations Project Officer that "Generally, marks are captured for questions or sections on the examination papers and for performances or projects."...

Marking Criteria I have it on anecdotal evidence from numerous markers that the criteria shown on the Board's website is a vastly simplified version of the criteria that is actually used...it is obvious that many science and mathematics courses will have marking criteria where the numerical answer is given. No numerical answers are on any of the marking criteria available online.

Band Cut-offs ...The band cut-offs are the critical raw marks students need to achieve to be awarded marks of 50, 60, 70, 80 and 90 in 2-unit HSC courses. These marks are decided by judges appointed by the Board...The HSC Consultative Committee reviews these decisions...[20]

All these are activities that need to be recorded pursuant to s. 12(1) of the *State Records Act 1998*. The Office must hold full and accessible records of this information. With all due respect to Mr Murphy, his determination shows no understanding of the nature of the documents requested, other than suggesting that they may be on a computer somewhere. In the unlikely event that he is correct, the Board has failed to meet its obligations under the State Records Act.

It is deeply disturbing that a document would be determined not to exist when even notices on your website contradict that very determination. The seniority of the decision-maker is also deeply disturbing.'

14.8 The legal advice and the document containing the approved cut-off marks

Following receipt of Mr Parsonage's February 2007 letter, the Director requested legal advice from the CSO. The CSO provided separate advice on his request for an internal review (on 1 March) and the complaint aspects of the letter (on 21 February and 6 March).

One of the documents considered by the General Manager in deciding how to respond to Mr Parsonage's letter was labelled 'Confidential' and entitled '2005 Consultative Committee Recommendation Aboriginal Studies (15000) Final'. A copy of this document, with numerical and graphical information blanked out, appears in Annexure C to this report. This document contained the cut-off marks recommended by the judges, adjustments made by the Consultative Committee, and the marks approved by the Committee. It was signed off by Pamela Coutts, a member of the Committee, and dated 7 December 2005.

Discussion on the boredofstudies.org.au website (dated from June to October 2004) about the Student Assessment Modeller and raw marks, was printed out on 6 March 2007 and placed on Mr Parsonage's FOI file.

14.9 The first Bennett letter

By letter dated 7 March 2007, the General Manager responded to Mr Parsonage. In this report I refer to this letter as '**the first Bennett letter**'. The letter made four specific points.

[20] He cited an article in the 2002 HSC Update Newsletter 6, entitled 'Aligning HSC results to standards of achievement' and available on the Board's website www.boardofstudies.nsw.edu.au

Firstly, it stated that although Mr Parsonage had tried to apply for an internal review, he was not entitled to one because the Lane letter (extracted at section 14.5 above) did not constitute a FOI determination. The first Bennett letter stated that:

> 'In my view...your claim to be entitled to an internal review fails at the threshold because this Office's correspondence to you of 6 February 2007 does not constitute a determination for the purposes of section 24(1) of the *FOI Act*.'

The letter then stated that, for the same reason, he was not entitled to receive reasons to explain why the OBOS held the views expressed:

> 'The result of this seems to me to be that...this Office's correspondence to you of 6 February 2007 did not give you any entitlement to reasons of the kind referred to in section 28(2)(e)(ii) of the *FOI Act*. Moreover, as a matter of usage of language, it seems to me to be absurd to contend that notifications that this Office either does not or is deemed not to hold documents can amount to a decision to refuse access to them. It seems to me to be meaningless to speak of an agency refusing to grant access to that which it does not hold.'

Secondly, the first Bennett letter reiterated the OBOS's position about the marking documents:

> 'Having considered the matter, [our] position remains unchanged. That is to say, this Office does not hold document(s) containing official marking criteria...that differ from marking guidelines that are made available publicly by this Office.'

Thirdly, the first Bennett letter advised Mr Parsonage that in fact documents could be produced containing the cut-off marks. Then the letter outlined how the matter should proceed:

> 'Upon investigation, it appears that the Office can, by the use of equipment that is usually available to it for retrieving or collating stored information, produce a document containing the information sought in paragraph (B)(2) of your application [the cut-off marks]. In the circumstances, it seems to me that the most convenient course is to treat so much of your letter of 15 February 2007 as seeks an internal review in respect of paragraph (B)(2) of your application as an initial application for access to a document of the kind just referred to. In consequence, I am referring this aspect of the matter for determination as if it were a fresh application under section 17 of the *FOI Act*. In further consequence, $10.00 of the sum referred to in the opening paragraph of this letter is being refunded to you under cover of this letter. This sum represents the difference between the amount payable in respect of a section 34 internal review and the amount payable in respect of a section 17 application for access.'

Finally, the first Bennett letter addressed Mr Parsonage's general complaint about the original determination in the following way.

- In relation to the claim that the determination suggested the OBOS's records are so poor that the OBOS may be failing to comply with the *State Records Act 1998* ('**State Records Act**'), the first Bennett letter stated:

  > 'In my view the giving of a notice [under section 28(1)(b) and section 23 of the FOI Act] does not entitle a reader to draw any inferences as to whether this Office is or is not compliant with its obligations under section 12(1) of the *State Records Act*. That having been said, I am confident that this Office does comply with its obligations under that subsection.
  >
  > Be the contents of section 14(1) of the *State Records Act* as they may, I fail to see their relevance in the context of an application under the *FOI Act*. In this context it

> is noted that the entitlement of members of the public to access to State Records is governed by Pt. 6 of the *State Records Act*.'

- In relation to the complaint that the determination was dishonestly because it claimed that documents are inaccessible when they must be, the first Bennett letter stated:

> 'If I may say so, the allegation...that Mr Murphy did anything "dishonestly" in connection with your application of 11 January 2007, or that he "supposedly" did anything in connection with it, together with the comments contained on the final page of your letter under reply, [extracted above under the heading 'Band Cut-offs'] disclose a misunderstanding on your part of the notifications contained in the Office's letter of 6 February 2007. I see no basis for questioning the motives of a public official, as you have done, for what appears to me to be for no better reason than for holding a view different from your own.'

14.10 The processing of the 'fresh FOI application' for the cut-off marks

On 8 March 2007, one day after the first Bennett letter to Mr Parsonage was written, the CSO provided further legal advice about Mr Parsonage's letter, to which the first Bennett letter had responded.

In the first Bennett letter, Mr Parsonage had been advised that the OBOS would be treating part of Mr Parsonage's February 2007 letter of as a 'fresh' FOI application for the cut-off marks.

On 9 March 2007, pages were printed out from the boredofstudies.org.au website containing discussion that took place between 15 June and 29 Oct 2004 about raw marks, aligned marks, scaled marks, the UAI and what it all meant. The discussion started with James King (aka Lazarus) posting his raw marks on the website, which the OBOS had released to him following a FOI application. These documents were placed on Mr Parsonage's FOI file.

The evidence also shows that copies of other related material on FOI files 05/52 (a file containing some internal documents discussing the impact of publicly releasing raw marks) and 06/33 (the file on Mr Parsonage's December 2005 application) were placed on Mr Parsonage's FOI file.

Later that day, the Director sent a memo to the then FOI Coordinator, Penny Lane, communicating his determination.

After a delay of over two weeks, by letter dated 26 March, Ms Penny Lane advised Mr Parsonage of the decision of the Director. In the letter the OBOS advised that the date of the determination was 9 March and apologised for the delay in sending it to Mr Parsonage. Mr Parsonage did not receive this letter until 30 March.

14.11 Denying access to the cut-off marks on the basis of clause 16, Schedule 1 and Schedule 2 (Department of Education and Training information relating to the HSC)

The determination was that access was to be refused. The letter stated:

> 'The decision-maker has determined that any document produced containing [the cut-off marks] would be an exempt document [under clause 16 and]...by virtue of section 9 of the Act and the entry in respect of the Department of Education and Training Co-ordination (DET) in Schedule 2 of the Act.
>
> In reaching this view, the decision-maker has referred to:
>
> a) information on the website 'boredofstudies.org.au';

b) advice relating to the method of using raw marks to determine the cut scores separating the bands of performance scale of the Higher School Certificate (HSC);

c) advice concerning the adverse effect that public disclosure of the cut scores from previous years may have on the professional judgements made by markers in future years;

d) similar requests from other applicants.

The decision-maker has formed the view that granting access to a document(s) containing the information you seek would prejudice the effectiveness and the attainment of the objects of the HSC by assisting in the determination and the subsequent disclosure to the public or section(s) of the public of the HSC cut scores separating the bands on the performance scale for the HSC. The specific information you seek is a confidential aspect of the annual HSC marking program and the decision-maker has formed the view that its wider availability would compromise the integrity of the marking program in future years by inappropriately influencing the standards setting process undertaken by marking staff by making the outcome of the prior year(s) deliberations known to such person(s) to whom such information might be disclosed. It is for these reasons that the decision-maker has determined that disclosure of a document containing the information referred to in your request would be contrary to the public interest.

The decision-maker has further determined that a document containing information referred to in the request would contain matter relating to functions in respect of which the DET is exempt pursuant to section 9 and Schedule 2 of the Act insofar as such a document would contain 'information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions'. Such information forms an intrinsic part of the means by which students are assessed for the purposes of the HSC.'

14.12 Historical information from the boredofstudies.org.au website about Mr Parsonage

A few days later, on 30 March, pages were printed from the boredofstudies.org.au website that contained discussion between 23 and 28 January 2006 (the time during which the OBOS was considering Mr Parsonage's December 2005 application), about Captain Pi (Mr Parsonage) and raw marks. These documents were placed on Mr Parsonage's FOI file.

14.13 Mr Parsonage's request for an internal review

By letter dated 12 April 2007 and received by the OBOS on 16 April, Mr Parsonage applied for an internal review of this decision, enclosing $40 but protesting the need to pay for yet another internal review.

Mr Parsonage outlined his concerns in the following terms:

'I consider that the determination I received was inadequate. I would like you to consider three points. The determination:

(1) included only one reason, which was unsubstantiated;

(2) incorrectly considered the Board of Studies as part of the Department of Education; and,

(3) did not include considerations in favour of disclosure.

What follows is an attempt by me to convince you that Mr Murphy's decision was inadequate. In doing so, I include points to assist you when you undertake the requested internal review.

Inadequate reasons

...With all due respect to Mr Murphy, these reasons fall well short of the requirements of s. 28(2)(e) of the FOI Act. In particular, they disclose no consideration of the material questions of fact in this case (s.28(2)(e)(ii)) beyond the vague assertion that disclosure would "compromise the integrity of the marking program"...

Mr Murphy's reasons do not disclose the mental process by which he reached his decision, nor the findings made on material questions of fact, nor his construction of the law. His reasons do not provide any assistance to a person who is attempting to understand his decision. They are completely inadequate. Furthermore, his reasons do not extend beyond conjecture and speculation about the effect of disclosure...[which] are not valid reasons for refusing access to documents...

This should be familiar reading to you, as much of it was included in a complaint by Mr James King on 6 April 2005. Mr King made identical complaints against Mr Murphy's conduct as a decision-maker. I note that the determination is almost identical to his, despite the existence of his complaint.

Department of Education exemption

...[The exemption] exempts the *Department of Training and Education Co-ordination* in respect of a particular function. It does not exempt the Board of Studies! The Board of Studies is a separate and independent legal entity...[and] cannot claim an exemption for itself when that exemption has been allowed for a different agency...

Parliament's intention was to allow this exemption *only for specific agencies*, which it named. If it had intended to exempt such documents from all agencies, it would have placed them in schedule 1 of the FOI Act, not schedule 2. Mr Murphy's reason here is irrelevant and, with all due respect, seems like a desperate application of the law.

Reasons for disclosure

Mr Murphy's decision did not include any consideration that disclosure might be in the public interest...

There are many reasons why disclosure is in the public interest. These include the significant contributions such data could make in a debate about a national curriculum and the level of NSW standards, the benefits of public scrutiny into the integrity, objectivity, and rigour of the Board's standards, the benefits of greater understanding of student achievement through thorough reporting thereof, and the general principles of openness and government accountability.

These reasons (and any others) should be considered and expressly noted in any determination.'

14.14 Mr Parsonage's complaint about having to pay another $40

At the end of his letter, Mr Parsonage made the following comments:

'Finally, I wish to mark that your agency inappropriately handled my request for an internal review as a s. 17 application. In your letter of 07 March 2007, you remarked that Mr Murphy's letter of 6 February did not "constitute a determination for the purposes of section 24(1) of the FOI Act". This implies that no determination was made and thus your agency would be taken to have refused access to the documents (s.24(2)). Your letter admits that some of the documents requested existed and so my application was rightly made.

> Later in that letter, you state that "In the circumstances, it seems to me that the most convenient course is to treat...your application as an initial application for access to a document of the kind just referred to." With all due respect, the most convenient course would have been to treat my application for an internal review as that. The determination I received on 30 March 2007 could have been written as an internal review of Mr Murphy's 6 February decision.
>
> Nevertheless, I enclose the requisite $40 fee.
>
> I maintain that this fee is inappropriately charged. I intend to complain to the NSW Ombudsman over this matter. If you are so kind as to undertake this internal review free-of-charge, I will reconsider.'

14.15 The involvement of the Director and the legal advice

On the day the letter was received, the General Manager noted it and allocated it to the Director to prepare the response.

An officer prepared a draft acknowledgement letter for signature by the then FOI Coordinator, Penny Lane, dated 18 April.

On 17 and 18 April the Director faxed the CSO seeking legal advice on this request for an internal review. The advice was provided on 1 and 7 May.

14.16 The internal review determination

On 8 May, the General Manager set out his internal review determination in a memo to the then FOI Coordinator, Penny Lane. She put the determination in the standard form and sent the letter on the same day.

The outcome of the internal review was that access was still to be refused.

The determination stated that in reaching this view, the General Manager referred to the same information as was referred to by the Director in the original determination, as well as 'the section 16(b) public interest reasons in favour of disclosure, outlined by Mr Parsonage in his letter dated 12 April 2007'.

The determination then outlined the decision, using the following terms:

> 'The decision-maker had determined that a document containing the information requested...**would be** an exempt document...and the disclosure of such a document would, on balance, be contrary to the public interest...' [emphasis added]

The determination then set out the reasons for this decision. It first outlined 'the facts'. It secondly explained how it was the decision-maker's belief that those facts meant that the documents were exempt pursuant to clause 16(a)(i) and (ii) of Schedule 1 to the FOI Act. It lastly explained the decision-maker's understanding of the operation of the definition of 'exempt document' in section 6(1) and Schedule 2 of the Act, and stated that this was why the exemption relating to the Department of Education and Training operated to exempt the documents of the OBOS. Relevant extracts follows:

> 'The decision-maker's reasons for these determinations follow:
>
> (i) the facts are that:
>
> - the documents sought will identify the raw marks which are the cut-off marks separating the bands of the performance scale of the HSC;
> - the HSC program includes a process referred to as 'standards-setting'. It involves teams of experienced and specially trained teachers, referred to as

'judges', following a multi-stage Angoff-based standards-setting procedure for each course...

- the judges who determine the cut-off marks each year are not given access to the cut-off marks of previous years;
- a fundamental feature of the 'standards setting' or 'judging' process which is used to determine these cut-off marks is that the judges are required to make independent determinations of the cut-off marks each year based on their professional assessment of how students on the borderline between each of the established standards would perform on that year's examination;
- the website 'boredofstudies.org.au' is a popular, publicly accessible resource for HSC candidates...
- you have an association with the 'boredofstudies.org.au' website and the campaign conducted on that website to publicly disclose the cut scores;
- public disclosure, by means such as publication on the 'boredofstudies.org.au' website, of the cut-off marks from previous year(s) would be likely to provide judges with prior knowledge of the cut-off marks determined in previous years.

It is the decision-maker's belief that such prior knowledge by one or more judges would inappropriately influence and thereby undermine the independence of the determinations made by those judges in succeeding years.

Public disclosure, including by means of publication on the 'boredofstudies.org.au' website, would likely establish an expectation in the minds of students and teachers that if students achieve particular marks on school-based assessment tasks, such as a trial HSC examination, then they will be likely to achieve a particular performance band.

(ii) The HSC is a 'high stakes' credential used for determining university entry and the future employment opportunities of candidates successful in gaining the credential. The effectiveness of the HSC program in providing a reliable and accurate assessment of student performance is based on the integrity of the procedures used in determining those assessments. It is the decision-maker's belief that prior knowledge of the cut-off marks of previous years would prejudice the effectiveness of the method of judging used in the HSC examination program...

Similarly, it is the decision-maker's belief that prior knowledge of the cut-off marks, by prejudicing the effectiveness of the method of judging, would prejudice the attainment of the objects of the HSC in providing a reliable and accurate assessment of student performance...

Accordingly, while accepting the general principle of openness and transparency...the decision-maker believes such disclosure would, on balance, be contrary to the overriding public interest of preserving the effectiveness of the HSC processes and avoiding any prejudice to the attainment of the objects of the HSC program.

(iii) The information sought relates to functions of the DET in respect of which that department is exempt from the operation of the FOI Act...For this reason, a document containing information held by the Office and sought through your application is exempt. The whole purpose of paragraph (b) of the definition of exempt document...and Schedule 2 of that Act is that relevantly, a person cannot seek from another agency information in respect of which the DET is exempt from the operations of the FOI Act for the reason that to allow a person to do so would subvert the whole purpose of the intended operation of paragraph (b) [of section 6] and Schedule 2.'

The letter ended by advising that the General Manager would write separately to Mr Parsonage concerning his comments about the decision in the first Bennett letter to treat his then request for an internal review as a 'fresh FOI application'.

14.17 The second Bennett letter

On the same day, 8 May, the Director provided the General Manager with a draft letter to Mr Parsonage, addressing his comments about the OBOS's decision to process a 'fresh FOI application' for the cut-off marks. In this report I refer to this letter as '**the second Bennett letter**'. It was signed and sent later that day.

The second Bennett letter repeated the line of thought set out in the first Bennett letter, stating again that:

> 'In [my first letter] I advised you that...upon investigation, it appeared that the Office could, by the use of equipment that is usually available to it for retrieving or collating stored information, produce a document containing the information [about cut-off marks]... I advised that, in the circumstances, the most convenient course was to treat so much of your letter of 15 February 2007 as seeks an internal review in respect of [the cut-off marks] as an initial application for access to a document as I could not deal with your request for an internal review as there had not been an original determination of the matter up to that point...'

The second Bennett letter explained that:

> 'The subsequent determination is the subject of your 12 April 2007 request for internal review. There is no discretion under section 34(2)(b) of the FOI Act to refund your $40 fee without also terminating the internal review. Your comments indicate a clear preference for the internal review to proceed in the event. I am unable to refund the $40 fee...
>
> The objective of my decision to consider your request as a fresh application was to preserve your right to having the matter considered in accordance with the FOI Act in the light of the Office's discovery that it did hold a document matching your request despite the earlier advice to you to the contrary. The alternatives would have been to deny you any avenue of appeal or for you to have been required to actually lodge a fresh application rather than my deeming your 15 February 2007 request as sufficient for that purpose. I remain of the view that my decision represented the most practical and advantageous outcome for you.'

Chapter 6: Conclusions about the way the OBOS handled Mr Parsonage's December 2005 and January 2007 applications

15. SPECIFIC CONCLUSIONS ABOUT THE WAY THE JANUARY 2007 APPLICATION WAS HANDLED

15.1 Documents containing students' raw marks could be produced

In his application, Mr Parsonage sought, in relation to each HSC course entered by each of the 50 students named (including himself), a comprehensive schedule of student achievement in the 2005 HSC, including a series of marks that were 'raw' in the sense that they had not yet been re-aligned according to the OBOS's processes.

In the Lane letter the Director (as the named decision-maker) stated that, using equipment usually available to the OBOS for retrieving or collating stored information, documents could not be created containing the schedule of information relating to the 50 students' raw marks sought by Mr Parsonage.

This advice was given despite the existence of the costing document, which outlined how just such a document could be created, how long it might take for each student and approximately how much money it would cost the OBOS.[21]

Further, this advice was given despite the Director having made a determination of the application from Y[22] only two weeks earlier, in which he stated that access to the raw marks requested was refused (implying documents existed or could be created containing that information). In addition, the previous year, on 1 March 2007, he made 10 determinations of FOI applications, all of which included requests for the students' respective raw marks. In those determinations he refused access to 'documents' containing this information.

At a meeting with the OBOS's Director, Assessment and Examinations, the Head, Assessment Strategies and Measurement Services and the Head, Student Records and Production, on 13 May 2008, those three senior officers demonstrated to the Ombudsman case officer how documents could be created containing each item on Mr Parsonage's schedule. There was some uncertainty about what exactly Mr Parsonage meant by some of the items, however the officers were able to extract the information based on their best guess of what he was seeking.

It seems clear that, in fact, the OBOS was, at that time, capable of creating a document containing the schedule of students' raw marks that Mr Parsonage requested.

The Director was asked to explain why his determination of the application from Y was different. He said:

> '...they didn't ask for the same thing...
>
> You can see all of those pieces of information and what he asked for was a comprehensive schedule. He wanted a tailor made document and that is very different to an individual student asking for only two items of information and the view that we took was that we couldn't produce such a tailor made document by the means usually available to us.'

The Director was asked to explain why he made the determination, given that three other senior officers had demonstrated how such documents could be created. He replied:

[21] A copy of the costing document appears as Annexure B and it is discussed at section 14.5 of this report.

[22] Discussed at section 14.2 of this report.

> 'Mmm there's no dispute and never has been that we hold the data and that it is possible with a great deal of technical expertise which was possessed by all of the people that you spoke to that you could extract the data but is it done usually? The answer to that's no... the attributes of that equipment are not usually used for that purpose.'

The Director's view seems to be that the test in section 23 is whether the agency *usually* used its equipment to extract the information requested. This appears to be a misunderstanding of the test. Section 23 unambiguously states that an agency is taken to hold a document that does not actually exist if such a document *could* be created.[23] Significantly, the test uses the expression 'could', not 'could practicably' or 'could easily'. The costing document and the May 2008 demonstration established that the OBOS 'could' in fact create written documents.

The proper application of section 23 would have therefore provided that the OBOS was taken to 'hold' such documents. It is not then open to the OBOS to rely on section 28(1)(b), which relates only to a situation where a document is 'not held' by an agency.

The evidence indicates that the OBOS had decided that section 23 did not apply because, although it was *possible* to create a document, it would require significant time and resources to do so, and this was not something that was usually done.

This was significantly different from the advice that was communicated to Mr Parsonage. In the Lane letter, the OBOS advised Mr Parsonage that the OBOS '**could not create a document** containing information of the[se] kinds...by the use of equipment that is usually available to it for retrieving or collating stored information...'

These deficiencies in the Lane letter had the effect of misleading Mr Parsonage and causing him some confusion, which he expressed in his letter (of 15 February 2007), in which he argued that:

> 'The Board has released the total weighted marks and the initial moderated assessment marks of several students in the past through FOI. These marks were released promptly. There has apparently been no difference in the way the Board stores information, so why are they suddenly impossible to create? I expect you will explain why the Board's systems were adequate enough to promptly disclose marks two years ago but are now unable to.'

In his letter of response (the first Bennett letter), the General Manager failed to provide any such explanation. In fact, he failed to explicitly address the issue of whether or not a document could be created containing the students' raw marks. Instead, he effectively stated that, in the OBOS's view, he was not required to conduct any internal review of the advice because the advice did not constitute a determination under the FOI Act.

When he gave evidence, the General Manager was asked if, when considering this matter, he checked if in fact no document could be produced containing the students' raw marks. His response was:

> 'Well there was nothing, I mean I've had a more than workable understanding of the examination system and the sort of reports that it produced and there was probably nothing that would give the information he wanted in this sort of consolidated form. I

[23] The relevant words of section 23 are that 'if the agency could create a written document containing information of that kind by the use of equipment that is usually available to it for retrieving or collating stored information, the agency shall deal with the application as if it were an application for a written document so created and shall be taken to hold such a document'.

> mean you, you could piece it together from bits and pieces and so forth like that but I guess what this is trying to do is to say "well if we do provide information that he wants you know in the form he's after to do that that's going to you know take something like this". I mean we would it in the system somewhere parts of that. State rank in the course I think it might probably be there but not, not necessarily in the same files or in the same, even in the same areas of the database. I think there's probably more work there than meets the eye in terms of producing it...
>
> My understanding [of the FOI system] is that we're not required to create a document that doesn't otherwise exist. Is that correct or not correct?'

The General Manager was given an opportunity to make submissions on my proposed adverse comment about the deficiencies in the first Bennett letter. On this point, he maintained that:

> 'the point that I wished to make during my evidence was that the information Mr Parsonage is asking for...is not held within an existing document nor can it be extracted by the same retrieval program. While information held in a database could be retrieved and used to produce the information requested, in my view, it would certainly be a significant task to perform and present it in the form requested. The point I wished to convey during my evidence was that according to the advice I received this did not constitute under the Act the creation of a written document by the use of equipment that is usually available to it for retrieving or collating stored information...I am still not sure that the provision applies in this particular case.'

It is unclear from the evidence whether or not, at the time he considered Mr Parsonage's letter of 15 February 2007 and formulated his response (in the first Bennett letter), the General Manager gave proper consideration to the concerns Mr Parsonage expressed, triggered by his being advised that no documents could be created containing the information he had requested about raw marks.

I note again that the General Manager did not attempt to clear up Mr Parsonage's confusion by providing a thorough explanation about the OBOS's position. Instead, he simply did not respond to this point.

In his submission about my proposed adverse comment about the deficiencies in the Lane letter, the Director wrote that:

> 'it would not be my wish that having read my response you conclude that I consider my conduct in this matter to be without scope for improvement. As I have agreed at various points in my response, the clarity and basis of the reasons for many of the decisions taken could and should have been better articulated.'

I am encouraged by the Director's sentiments and hope that in the future, closer attention is paid by all FOI decision-makers at the OBOS to the need to provide members of the public with accurate information and to respond to their concerns in a direct, clear and concise manner.

15.2 Documents containing official marking criteria different from the publicly available marking guidelines did exist

In his FOI application, Mr Parsonage sought, for each 2005 HSC course with more than 1000 candidates, 'the official marking criteria – including the answers in science and mathematics courses endorsed by the Board as completely correct – where this is different from the publicly available marking guidelines'.

In the Lane letter, Mr Parsonage was advised that there were no marking criteria any different from the documents already publicly available. The documents publicly available are the notes from the marking centre published on the Board's website.

In his letter of protest, Mr Parsonage sets out his view as to why this could not be the case:

> '**Marking Criteria** I have it on anecdotal evidence from numerous markers that the criteria shown on the Board's website is a vastly simplified version of the criteria that is actually used...it is obvious that many science and mathematics courses will have marking criteria where the numerical answer is given. No numerical answers are on any of the marking criteria available online.'

Despite this explanation, the first Bennett letter reiterates the earlier advice — that no such 'different' documents exist.

When our office received the complaint, the case officer tried to understand why the OBOS had given Mr Parsonage this advice. She downloaded the Notes marking document for Mathematics Extension 1 for the 2005 HSC.[24] Some of it reads as follows:

2005 NOTES FROM THE MARKING CENTRE MATHEMATICS EXTENSION 1

Introduction

This document provides candidates and teachers with feedback in relation to the quality of responses provided by candidates to the 2005 Mathematics Extension 1 HSC examination paper...

Question 1

a) The main errors included omitting the 1/7, writing tan x rather than $\tan^{-1} x$, and omitting the constant.

b) This part was poorly done...

...

2005 HSC Mathematics Extension 1
Marking Guidelines

Question 1(a)

Outcomes assessed: HE6

MARKING GUIDELINES

Criteria	Marks
• Correct primitive	1

Question 1(b)

Outcomes assessed: P4

MARKING GUIDELINES

Criteria	Marks
• Correct sketch	2
• Correct boundary or equivalent merit	1

[24] A more comprehensive extract of this document appears at section 7.3 of this report.

This document was clearly written *after* the exams were over. It provides an after-the-fact analysis of how students responded to questions. Just as Mr Parsonage had observed, it did not contain sample answers.

It appeared that the notes from the marking centre could *not* be the same as documents used by markers at the time they were performing their marking duties.

Through this investigation, I have established that this is in fact the case. There are a number of documents relating to the marking process. One of these is the master set of the marking guidelines, which contains information under a 'Sample answers / Answers may include' heading. There is a master set for every subject examined in each HSC year.

When giving evidence, the Director was asked a number of questions seeking to clarify why he did not find the master sets of the marking documents or, having found them, why he did not look at them to compare them with the notes from the marking centre. The Director stated that he did not personally know that the master set of marking guidelines existed. He also provided the following explanation of the process he undertook:

> 'My interpretation at the time was that [Mr Parsonage] seemed to be suggesting that there was an official marking criteria that we used which was different to the official marking criteria that we made publicly available as though there was this secret set of marking criteria... And that's the way I understood his request...
>
> I looked at a number of them [notes from the marking centre]... I familiarised myself with what we actually published, yeah and so hence what were the official marking criteria...
>
> [I didn't specifically talk to the Director in charge of the marking process but] I may have checked with one of her staff to see you know "...is there an official set of Marking Guidelines" and if the answer had been yes, "where are they" and they said "oh we publish them on the website".'

As stated above, Mr Parsonage asked for 'the official marking criteria — including the answers in science and mathematics courses endorsed by the Board as completely correct — where this is different from the publicly available marking guidelines.'

If the Director had, as he claims, looked at the notes from the marking centre for a number of subjects, it seems reasonable to infer that he would have immediately seen that none of the science or mathematics courses contained sample answers.

It seems reasonable to expect that he would have then made further inquiries to find documents containing sample answers in science and mathematics that were used in the marking process. On any sensible reading of Mr Parsonage's request, he wanted to know the criteria against which students' performance was judged.

FOI applicants cannot reasonably be expected to frame their applications in a way that is completely consistent with the way agencies operate or the terms they use to describe their documents. They usually do not have the required knowledge. Further, had there been any doubt in this case, the OBOS could easily have told Mr Parsonage that although what he had asked for was not the way the OBOS would describe the documents ('answers...endorsed as completely correct') they had found documents containing 'sample answers' that were provided to the markers to assist them to mark papers.

When the Director was giving evidence, in an attempt to understand why he had not made these inquiries, the case officer showed him an example of the notes from the marking centre for a mathematics course and asked if the appearance of the words 'correct solution' would

imply that firstly there *was* a correct solution, secondly, that there must be a record of that solution somewhere, and thirdly, that the markers would have been given that correct solution when they were marking the papers. His response follows:

> 'Not, not necessarily...
>
> [They would not necessarily need to be told what the correct solution was] because they're expert teachers and they know what the correct solution is...
>
> If you were to, look like I'll give you an example. If the question may've asked for an expression of you know Pythagoras' Theorem markers know what that is without being given a bit of paper to tell them what it is...
>
> What I'm saying is that there is a level of expertise that we require from markers and there were certain things that in terms of the material that markers are supplied by the Board where they would be expected to know the answer. There are certain, to put a simplistic example of that if the question was 'provide a solution to the following equation two plus two', we would not give a bit of paper to a marker that gave the answer of four.'

The fact is that, contrary to the Director's response, detailed records are kept of the sample answers to every exam question.

The evidence indicates that the Director did not undertake adequate searches for documents containing, *at the very least*, the answers in the science and mathematics courses that Mr Parsonage described.

It is equally concerning that, when considering Mr Parsonage's letter of protest in which he sets out very clearly why separate documents must exist, the General Manager also failed to identify that this was in fact the case.

When giving evidence to our office, the General Manager said he thought the master set of the marking guidelines for each subject was the same as the document published on the website. If so, then it would be reasonable to expect that, at the time he made his decision, he would have checked that this was correct.

Instead, he did not open the file for any subject, look at the master set of marking guidelines, look at the notes from the marking centre, and check to see if they were the same.

Neither did he ask anyone else to do this simple task — of comparing two documents to see if they were the same.

This was something that could have been done by the most junior officer in the Office.

If he had opened any of the files, he would not even have needed to check what was on the website. He would have immediately seen the covering checklist page filled out by an assessment officer, which clearly indicates that 'Sample answers' or 'Answers may include' information is removed from the master set of the marking guidelines before they are published on the Board's website.

I have been given no adequate explanation, and have difficulty understanding why the General Manager failed to make even the most cursory inquiry into Mr Parsonage's claim that 'the criteria shown on the Board's website is a vastly simplified version of the criteria that is actually used.'

Even if the General Manager had delegated the handling of the matter to another officer, it is similarly difficult to understand why that person failed to make this cursory inquiry.

The General Manager was given an opportunity to provide submissions on this proposed adverse comment. On this point he submitted that:

> 'In relation to [this issue] there has been much discussion and confusion. Some of this I am sure relates to the different meanings that people place on the terms 'marking criteria', 'marking guidelines' and 'marking schemes'. Sometimes the terms have been used interchangeably...I think that some of the advice provided and the different interpretations made as a result reflect this confusion. Indeed, even Mr Parsonage in his FOI request of 11 January 2007 and his letter to me of 15 February 2007 refers to 'marking criteria' when it is actually 'marking schemes' that he describes...
>
> [I]t seems to me that the initial advice [to Mr Parsonage] was strictly correct and given in good faith. I believe the problem arose in attempting to express this advice in a more succinct and legalistic manner...
>
> [M]y response to Mr Parsonage included the statement 'That is to say, this Office does not hold document(s) containing official marking criteria in respect of 2005 HSC courses at which more than 1,000 candidates presented that contain official marking criteria that differ from marking guidelines that are made publicly available by this Office.' Making allowances for the awkward sentence construction, I believe the meaning it attempted to convey is that '...this Office does not hold document(s) containing official marking criteria...that differ from the marking guidelines that are made available publicly...'. I have acknowledged that this statement is not entirely correct.'
>
> Much is made in the Ombudsman's report that I did not check the accuracy of this specific statement prior to signing the letter, or ask someone else to do this on my behalf...The Board may hold for some subjects a version of the marking guidelines that in some instances is different from that made publicly available. However, the Board does not systematically retain marking schemes, which is what Mr Parsonage was requesting...
>
> I believe that had I asked someone to investigate this [issue] it is quite likely that I would have received the advice that we did not hold the documents he requested...
>
> Where the problem has arisen, I believe, is that in preparing the response to Mr Parsonage that we did not have the documents he requested, the advice was unfortunately phrased in a form that was general, formal and consequently, not entirely correct.
>
> In the interests of providing even greater assistance to teachers and students in some courses, I have given the instruction that starting with the 2008 HSC examinations, the Notes from the Marking Centre for all courses will include the version of the marking guidelines signed off by the Chief Examiner and the Supervisor of Marking. As I state above, this is the version that I believed was already included in these documents. This additional information will be of particular benefit to teachers of HSC students who do not mark. This will happen irrespective of any related recommendation in the Ombudsman's final report.'

I am encouraged by the General Manager's acknowledgements that the advice Mr Parsonage was given was 'not entirely correct'. However, it is of some concern that he refers to the OBOS's apparent understanding (at that time it was handling Mr Parsonage's January 2007 application) that Mr Parsonage had requested the 'marking schemes'. The evidence demonstrates that *at that time*, the OBOS did *not* have this understanding at all. At that time, and at the time we made preliminary inquiries (in September 2007), the OBOS's position about the marking documents had been clearly and unambiguously communicated in three

separate documents: the Lane letter, the first Bennett letter and their response to our preliminary inquiries (by letter received 30 October 2007). The latter letter states:

> 'The problem with this component of Mr Parsonage's request was that he used different words to describe the **same document**, that is, when he asked for a document entitled the 'official marking criteria' which differed from the 'publicly available guidelines', the 'different' document **does not exist**.' [emphasis added]

It was not until after the November 2007 meeting that the OBOS characterised this issue in terms of 'marking schemes'. As the Director stated in his submission relating to my proposed adverse comment:

> 'It was only during my meeting with your officers on 29 November 2007 that they suggested Mr Parsonage was requesting material which we agreed at that meeting were 'marking schemes'.'

Neither the Director nor the General Manager have provided a satisfactory explanation for why, in February and March 2007, the OBOS's position was that no 'different' document existed.

The evidence shows that the OBOS failed to handle this matter in a straightforward manner, for example, by simply asking – do we hold any documents that contain 'the official marking criteria — including the answers in science and mathematics courses endorsed by the Board as completely correct — where this is different from the publicly available marking guidelines'. The evidence shows that the OBOS failed to search for, and then compare internal documents to the publicly available 'notes from the marking centre' for any subject, such as:

- the master set of the marking guidelines (which the OBOS apparently refers to as the 'file copy of the marking guidelines')
- the initial marking guidelines produced by the Board's examination committee
- any copies of marking guidelines retained by the Chief Examiner, Supervisor of Marking or any other staff involved in the marking process.

The characterisation of his request in terms of 'marking schemes' (*following our preliminary inquiries*) made this whole issue much more complicated and confusing than it needed to be. It also had the effect of misleading both Mr Parsonage and our office into thinking that critical information relating to the HSC (the answers to questions) were not retained by the OBOS in an official State record.

I note that the General Manager has now expressed a concern that the marking guidelines published on the website may not contain enough information about the answers in certain subjects, such as mathematics. When giving evidence, he said:

> 'Well I think that I'm surprised that that you know wasn't there. In fact my answer no doubt was based on the fact that I thought these things were there. They're, that's not good [but] you know there may be good reason for it.
>
> [There's not much detail.] No. There may be a rationale that some of my staff who are responsible in pulling this together would tell me why we don't do that...
>
> I just think...looking to the future I don't think it gives very much, as much information I think we could give on it.'

I am encouraged by these comments and by the General Manager's subsequent advice that he intends to make public the version of the marking guidelines signed off by the Chief

Examiner and Supervisor of Marking. In addition to providing greater assistance to students and teachers, I believe this will allow for better transparency and accountability in relation to the students whose examination scripts were assessed against the standards contained in the marking guidelines.

15.3 Documents containing cut-off marks already existed

In the Lane letter Mr Parsonage was advised that the cut-off marks he requested was the kind of information that was not contained in written documents and neither could the OBOS create a document containing that information using equipment usually available to it for retrieving or collating stored information.

This advice was given despite the Director having considered the costing document, which explicitly stated that:

> 'Extracting TWMs for each of the band cut-offs in each of these courses would cost approximately $100 per course.'

Mr Parsonage wrote to the General Manager protesting the Lane letter. In his response (the first Bennett letter), the General Manager advised Mr Parsonage that in fact such a document *could* be produced. According to the Director, the General Manager discussed with him the fact that he had been in error.

Given the existence of the costing document, it appears that the Director did more than make a simple factual error. The Director had information available to him that demonstrated that the OBOS was capable of producing this document, in the way described in section 23 of the FOI Act. The proper application of that section would have meant that the OBOS would consider that it held that document, and the Director would have been obliged to make a determination of whether or not access to that document should be granted.

The Director's decision was partially remedied by the General Manager's advice that documents could be produced.

However, even this advice was a misrepresentation of the facts and had the effect of misleading the applicant. The fact was that documents containing the cut-off marks *already existed*.[25] They did not need to be produced. Section 23 was not relevant.

Documents containing the cut-off marks for 2005 HSC subjects were printed out and signed off by the Chair of the HSC Consultative Committee on 7 December 2005, well before Mr Parsonage's January 2007 application and also before his December 2005 application.[26]

Documents containing this information are printed out and signed *every year*, and kept on a file as the OBOS's official State record of the cut-off marks applied in that year's HSC.

In my view the General Manager would have been well aware of this fact when he considered the matter. He was one of the primary architects of the current HSC system. He has intimate knowledge of the process. In addition, a copy of the HSC Consultative Committee's approval of the cut-off marks for the subject called Aboriginal Studies (15000) was on the file for Mr

[25] At section 14.8 I note that one of the documents on Mr Parsonage's FOI file was the 2005 Consultative Committee Recommendation Aboriginal Studies (15000) Final, containing the cut-off marks approved for that subject that year.

[26] A copy of the 2005 Consultative Committee Recommendation Aboriginal Studies (15000) Final appears as Annexure C of this report. The date 7 December 2005 and the signature of Pamela Coutts, a member of the Committee, appear at the bottom of that document.

Parsonage's January 2007 application, amongst other documents that the General Manager considered at that time.

In Mr Parsonage's letter of protest (dated 15 February 2007), he reasoned that such documents *must* exist:

> '**Band Cut-offs** ...The band cut-offs are the critical raw marks students need to achieve to be awarded marks of 50, 60, 70, 80 and 90 in 2-unit HSC courses. These marks are decided by judges appointed by the Board...The HSC Consultative Committee reviews these decisions...
>
> All these are activities that need to be recorded pursuant to s. 12(1) of the *State Records Act 1998*. The Office must hold full and accessible records of this information. With all due respect to Mr Murphy, his determination shows no understanding of the nature of the documents requested, other than suggesting that they may be on a computer somewhere. In the unlikely event that he is correct, the Board has failed to meet its obligations under the State Records Act.
>
> It is deeply disturbing that a document would be determined not to exist when even notices on your website contradict that very determination. The seniority of the decision-maker is also deeply disturbing.'

Mr Parsonage was entirely correct in his reasoning. When the Director was asked about his knowledge, he asserted that at the time of his decision he did not know of the existence of the documents containing the HSC Consultative Committee's approved cut-off marks. He provided the following explanation:

> 'By way of elaboration and I'd have to say as I did earlier that it was a mistake on my part. That particular document is a highly confidential aspect of the HSC marking program and for that reason alone that was one of the reasons I didn't know that it existed.'

When he was asked whether he had made inquiries of the relevant Director or other staff who would have had more intimate knowledge of the kinds of documents generated by the marking and alignment processes, he responded:

> 'I did that and the person that I consulted didn't know...
>
> He's, at the time he was Principal Project Officer, Examinations and he's I'd have to say a very experienced officer who I did have confidence that he would've been aware of a document being in existence had it existed. As it turned out he wasn't aware of that document's existence, nor was I...
>
> [A]s it turned out ...I asked the wrong person.'

I understand that the Director's role does not involve working with the HSC Consultative Committee. However, these documents record one of the more significant decisions that are made in the process of translating student answers into their final results. It therefore seems reasonable to expect that a person in such a senior position would have enough general knowledge about the process of changing raw marks into final results to have freshly surmised that such documents must exist.

Further, even if he did not have sufficient general knowledge about the process of changing raw marks into final results (which, in itself, would be a cause for concern), it seems reasonable to expect that, as the FOI decision-maker, he would have been able to conduct more thorough searches (whether through conversations with other officers or through the OBOS's record-keeping system) to find the documents.

I have further concerns because although the Director professed not to be aware of the existence of documents containing the cut-off marks for the 2005 HSC, there is evidence that shows he must have been aware of the existence of documents containing cut-off marks for the 2003 HSC.

In May 2004, almost three years before the Director made the inquiries described above, he handled a FOI application from *Ragerunner*, a contributor on the boredofstudies.org.au website. Ragerunner sought access to information including a schedule of the raw exam marks corresponding to each of the five performance bands cut-offs for the courses he completed in the 2003 HSC (the 'cut-off marks' for his 2003 HSC subjects).

In his determination, the Director advised that access to the cut-off marks for the subjects would be refused on the basis of clause 16 of Schedule 1 to the FOI Act.[27] This clause can only be used if the decision-maker knows that a document exists or can be produced. To give the Director a chance to explain the discrepancy between what he appeared to have known in 2003 and what he purported to not know in 2007, the Director was asked whether, in May 2003, he would have looked at the documents containing those cut-off marks in order to make the decision that access to them would be denied. His answer was:

> 'I may have done, yeah...I'm not sure.'[28]

When the General Manager came to consider this matter, it would be reasonable to assume that he would have read Mr Parsonage's letter, including his arguments about why document containing the cut-off marks must exist. The General Manager was asked why he had not advised Mr Parsonage that the documents had been found, and instead advised that the documents could be produced. He responded:

> 'No, I don't know. I don't know. I don't know. Yeah I wouldn't want to speculate on why it may've been phrased that way. I mean that document that's there though would probably if we were to decide to provide it to anybody and that's one we would, you know would seek not to provide it to anybody. We would also, we would probably black out a whole lot of other information and so forth from it, okay. So the equipment is there to produce this report or print this report but we would remove a lot of other information that wasn't asked for...
>
> Why it was phrased that way I don't know but in a sense you know it's what we're saying is "this is the document that I believe meets that definition", okay...
>
> But either way we're admitting that we do have a document and it could be produced.'

The General Manager was given an opportunity to provide submissions on this proposed adverse comment. On this point he argued as follows:

> '[M]uch is made by the Ombudsman of the distinction between saying 'a document exists' and 'a document could be produced'. In my mind in this case the distinction is irrelevant.

[27] This states that a document is an exempt document if it contains matter the disclosure of which could reasonably be expected to have a number of possible adverse effects.

[28] In its comments on a draft copy of this report, the OBOS pointed out that the Director was asked this question over four and a half years after the event and that this quote unfairly creates the perception that he was being evasive. I note that, had the Director *not* been aware of the documents containing cut-off marks in May 2004, this would raise questions about the basis for his decision at that time to deny access to that information on the basis of clause 16 of Schedule 1 to the FOI Act.

> It must be remembered that when this matter was brought to my attention I was the one who made the point that a document containing the Band cut-off marks could be produced. What I had in mind was the reports that existed within the software package used by the HSC Consultative Committee, rather than the printed version of that information which is signed and filed. This is no doubt due to the fact that I still access and use the information in this package, rather than use the archived paper files. If I had set out to provide the information requested...I would have done this by accessing the software package and **producing** the document by printing out the page for each course, rather than photo copy the printed pages of the **existing** document...I do not see the significance or relevance of the distinction.' [emphasis in original document]

I accept the General Manager's explanation for why he expressed himself in terms of considering documents that could be produced, rather than documents that already existed. However, it is of some concern that the General Manager does not understand why this issue is important.

In Mr Parsonage's letter of 15 February 2007, he explicitly expresses how 'deeply disturbing' he finds the Lane letter's advice that the cut-off marks are not contained in written documents. He makes the point that if this were the case, the OBOS would have failed to comply with the State Records Act. My concern is that in the first Bennett letter, the General Manager did not appear to give these allegations the careful consideration that they deserved. Mr Parsonage's point was well made. If the Lane letter's advice was true, the OBOS would indeed have failed to comply with the State Records Act. It would have been reasonable to expect the first Bennett letter to have clarified this issue by advising that in fact the OBOS did hold this information in written documents, as required by the State Records Act.

Instead, the first Bennett letter dismissed Mr Parsonage's concerns without addressing them directly, and demonstrated a disappointing lack of understanding of the obvious relationship between the State Records Act and FOI Act. The letter stated:

> 'In my view the giving of a notice [under section 28(1)(b) and section 23 of the FOI Act] does not entitle a reader to draw any inferences as to whether this Office is or is not compliant with its obligations under section 12(1) of the *State Records Act*. That having been said, I am confident that this Office does comply with its obligations under that subsection.
>
> Be the contents of section 14(1) of the *State Records Act* as they may, I fail to see their relevance in the context of an application under the *FOI Act*. In this context it is noted that the entitlement of members of the public to access to State Records is governed by Pt. 6 of the *State Records Act*.'

It is also of concern that each of the three subsequent letters to Mr Parsonage about the cut-off marks[29] refer only to documents that *could* be produced. In none of these letters is Mr Parsonage explicitly or implicitly advised that the documents actually existed. This course of conduct strongly suggests that the OBOS did not have sufficient understanding of the gravity of the allegations that Mr Parsonage had made regarding the proper keeping of records, or did not properly consider what he had written. Good administrative conduct requires the OBOS, when receiving letters from members of the public, and particularly HSC students, to properly consider and respond to what is being communicated.

[29] These letters are the Director's determination of the 'fresh' FOI application, the General Manager's internal review of that determination and the General Manager's response to Mr Parsonage's letter complaining about having to pay another $40 internal review fee.

15.4 The Lane letter provided no reasons to explain the OBOS's view

Section 28(2)(e), extracted in section 14.6 of this report, provides that if a determination is to the effect that access to a document is refused, reasons must be provided.

I recognise that the OBOS subsequently came to the view that the Lane letter was not in fact a determination. I do not agree with this view, for reasons I outline below. I am therefore of the view that Mr Parsonage had a statutory right to be provided reasons.

However, whether or not the Lane letter was technically a 'determination' under the FOI Act, good administrative practice requires an agency to provide a person whose interests are directly affected with cogent reasons that support and explain the decision. People can reasonably expect this level of transparency and accountability from government bodies.

In this case, the Director made two claims. The first was that the equipment usually available to the OBOS for retrieving or collating stored information could not be used to create documents containing some of the information sought. It would be reasonable for a person in Mr Parsonage's position to expect that the Director would have provided some explanation for how he came to this view. For example, to outline the inquiries he made, or the technical knowledge he had personally about the OBOS's computer system, that led him to believe that the documents could not be created. As Mr Parsonage expressed it in his subsequent letter of complaint (of 15 February 2007):

> 'A proper determination would include, at least, the various ways the information is filed, the equipment usually available to it for retrieving or collating stored information, and would itemise these judgements along [with] the documents requested.'

The second claim was that no marking documents existed that were any different to those available on the website. Again, it would have been reasonable for Mr Parsonage to expect the Director to outline, for example, the steps he had taken to look at the documents on the website and check that they were the same as the file copies.

All significant parts of the Lane letter are extracted in section 14.5. It is obvious that no explanations were provided to back up the Director's claims. Without reasons to support them, the claims were mere assertions and understandably gave rise to the suspicion that they were not reasonable nor based in fact. It is not surprising that Mr Parsonage subsequently complained about the failure to give reasons and expressed his suspicion that this meant there were greater systemic problems with the OBOS (in particular, a failure to comply with the State Records Act) and/or dishonesty on the part of the decision-maker.

The Director was given an opportunity to provide submissions on this proposed adverse comment. On this point he argued that 'Ms Lane's letter did contain reasons...[B]y arguing that they were inadequate, [your report] falls into error by also claiming they were absent. That said, I accept those reasons could and should have been better articulated.'

In my view, on no reading of the Lane letter could it be said that any reasons were given. It is true that words appeared under a heading of 'Reasons', but the substance of those words communicated only the decisions that had been made and provided no explanation or clarification of why. To use the word 'inadequate' to describe the complete absence of reasons would be highly inaccurate.

In light of what this report has uncovered (see sections 15.1, 15.2 and 15.3 above), I believe that one possibility is that no reasons were given because there were no valid reasons that could be given, either due to incompetence or a lack of transparency.

Another possibility is that the OBOS may have taken the view that reasons should only be provided where there is a statutory obligation to do so. This was the position expressed in the first Bennett letter, in which the General Manager states:

> '[T]his Office's correspondence to you of 6 February 2007 does not constitute a determination for the purposes of section 24(1) of the *FOI Act*...
>
> The result of this seems to me to be that...[that] correspondence...did not give you any entitlement to reasons of the kind referred to in section 28(2)(e)(ii) of the FOI Act.'

I would have serious concerns if this was widespread OBOS practice. However, the General Manager told us that this was not the OBOS's approach generally:

> 'Oh yeah in general yes I think we should [give reasons]...as far as we can. I mean we do work in an area where there's a lot of confidential information that needs to be protected but in the main yes I'm all for being open about what we do.'

15.5 Treating Mr Parsonage's request for an internal review as a 'fresh' FOI application on the basis that the Lane letter was not a determination

In my view the available evidence clearly establishes that the advice given in the Lane letter was wrong. In fact, documents containing the cut-off marks and marking guidelines (different from those publicly available) did exist, and documents containing the students' raw marks could be created. The OBOS was therefore in error in giving Mr Parsonage notice that no documents existed.

The internal review process is intended to give agencies a chance to correct such errors. At that time, the relevant law was the ADT case of *Cianfrano v Director-General, Department of Commerce*,[30] (the '**ADT *Cianfrano* decision**') which held that advice given under section 28(1)(b) nonetheless constituted a 'determination'.[31] This meant that at that time, despite the Lane letter being framed in terms of section 28(1)(b), the relevant case law would have required:

- the original decision-maker to ensure the Lane letter advised the applicant of his review rights,[32] and
- the internal reviewer to consider the Lane letter to be a determination.

Had the OBOS taken this approach when it received Mr Parsonage's letter protesting the Lane letter, this would have allowed the matter to be progressed. This was the OBOS's chance to correct the original error. The General Manager could have simply completed the internal review, as requested. That internal review could have simply stated that documents containing the cut-off marks had been found, but access would not be granted on the basis that clause 16 of Schedule 1 to the FOI Act applied. It could also have stated the General Manager's view that no document could be produced containing the schedule of students' raw marks and his view that there were no official marking guidelines different from those publicly available.

---

[30] (No. 2) [2006] NSWADT 195

[31] Although this ruling has since been overturned on appeal to the Supreme Court, at the relevant time it was the applicable law, and is directly relevant to this discussion. The Supreme Court decision is *Director-General, Department of Commerce v Cianfrano & Anor* [2007] NSWSC 849 (8 August 2007).

[32] This point is discussed in greater detail in section 15.6

Had this process been followed, Mr Parsonage could then have sought an external review of that substantive decision from the ADT or Ombudsman.

Instead, the General Manager did not follow this process and did not correct the error. In his of response, the General Manager advised Mr Parsonage that because the Lane letter was not a determination, he had no right to an internal review, but that because it had been discovered a document *could* be created containing the cut-off marks, his letter would be treated as a 'fresh' FOI application. While they refunded $10 of his $40 internal review fee, the actual impact of taking this approach was to charge Mr Parsonage an additional $30 to make a new FOI application that he never intended, and should not have been forced, to make. I am of the view that the OBOS should refund this $30 fee.

I have received no satisfactory explanation for why or what the OBOS had to gain by taking this complicated approach. On questioning, the General Manager admitted that:

> 'GM: The way you explained it seems sensible. As though, if that was the way of dealing with it we perhaps could've done that. I, I don't know...
>
> Q: Do you see what administratively the Office had to gain by choosing the more complicated path?
>
> GM: Oh no I can't, I can't see why. Umm we don't always make the right choices in, on things. I mean whether it was the right decision or the wrong decision, I don't know. It was just a decision was taken.'

I acknowledge that undertaking internal reviews is a function the General Manager performs rarely. I understand that a person in his position would need to rely on his legal and other advisers to guide his understanding of the more technical aspects of the FOI system. Accordingly, in considering this particular matter the General Manager obtained legal advice from the CSO and held discussions with other officers.

However, it is unclear why, in any of that advice, no one suggested to him that a straightforward approach could be taken. It is possible that no one was aware of the ADT *Cianfrano* decision or that the information was not communicated to the General Manager. If that is the case, I acknowledge that the General Manager may have not known how an internal review request of a section 28(1)(b) notice should be handled.

However, if that is the case, I would have some concerns about why no one was aware of that decision or why no one communicated that information to the General Manager. It seems reasonable to expect agencies to ensure they are up-to-date with the relevant case law (particularly if they are relying on contemporaneous legal advice), and have the capacity to make decisions relating to FOI applications according to the law.

When Mr Parsonage complained (in his letter dated 12 April 2007) about the need to pay another $40 for yet another internal review, the General Manager and the Director (because he was delegated the task of responding) had one further opportunity to consider this issue. In that letter Mr Parsonage made his point in the following way:

> 'Finally, I wish to mark that your agency inappropriately handled my request for an internal review as a s. 17 application. In your letter of 07 March 2007, you remarked that Mr Murphy's letter of 6 February did not "constitute a determination for the purposes of section 24(1) of the FOI Act". This implies that no determination was made and thus your agency would be taken to have refused access to the documents (s.24(2)). Your letter admits that some of the documents requested existed **and so my application was rightly made**.

> Later in that letter, you state that "In the circumstances, it seems to me that the most convenient course is to treat...your application as an initial application for access to a document of the kind just referred to." With all due respect, the most convenient course would have been to treat my application for an internal review as that. The determination I received on 30 March 2007 could have been written as an internal review of Mr Murphy's 6 February decision.' [emphasis added]

It seems reasonable that, faced with this argument, the OBOS would have sought legal advice about whether or not Mr Parsonage had a point. Some of the questions could have been:

(1) What do we do if we have, in error, given notification under section 28(1)(b) that no documents exist or can be created?

(2) If the applicant has no technical right to an internal review, what form should our advice that documents do in fact exist, take?

(3) What affect would this have on the applicant's appeal rights?

It appears that the OBOS may have sought legal advice on just these kinds of issues. However, as noted in chapter 7 of this report, the OBOS refused to disclose to me any of the legal advice it obtained in the course of dealing with Mr Parsonage's December 2005 and January 2007 applications. Although I have not therefore read the advice, it appears that the ADT *Cianfrano* decision was again overlooked by the OBOS and its legal advisers. Had the General Manager been aware of that decision, he would have seen that Mr Parsonage was correct, and the Lane letter should have been considered to be a determination, of which the first Bennett letter could have been the internal review.

One final concern I have is that the Lane letter looked exactly like other determinations made by the Office, in that it used the same bolded headings and the same general layout. Mr Parsonage quite reasonably understood it to be a determination under the FOI Act. Presenting it as if it were a determination, and then subsequently denying that it was one, had the effect of causing Mr Parsonage some confusion and dissatisfaction.

Mr Parsonage's grievances about the way his January 2007 application was handled, were in my view quite understandable.

15.6 The Director's decision to leave out the standard appeal rights paragraph from the Lane letter

In his memo to the then FOI Coordinator, Penny Lane, on 5 February 2007, the Director expressed his decision in terms of constituting a notice that no document existed under section 28(1)(b) of the Act, and explicitly directed Ms Lane to leave out the standard appeal rights paragraph.

Had the Director followed the law or the government policy that was applicable at that time, he would have ensured that the paragraph was retained, to ensure that Mr Parsonage was aware of his rights to seek both an internal and external review of advice given under section 28(1)(b) of the Act.

The ADT *Cianfrano* decision referred to in section 15.5 was the relevant law at that time. In that case, it was held that advice given under section 28(1)(b) nonetheless constituted a 'determination'.

In addition, the Premier's FOI Procedures Manual (3rd edition), which was the applicable policy at the time, stated:

> '**4.10.1.1 Documents which cannot be located**
>
> On occasion there will be applications made for specific documents which were known to exist but can no longer be located...
>
> In other instances documents may not be located because they have been lost or misplaced. In such cases...where after a reasonable search the documents cannot be found **the agency should advise the applicant of the circumstances and refuse access** on the grounds that the documents are documents which cannot be located.
>
> **If the matter is dealt with as a refusal the applicant has a right of review. If the applicant is simply advised that the documents are not held** by the agency under Section 28(1)(b) this is not a determination and in such circumstances **the applicant does not have a right of review**. [policy]' [emphasis added]

While the circumstances of this case were slightly different, in that the OBOS claimed that no documents could be *created*, the policy was clear that, if the applicant could not be provided with a document because there is no document (not because the document exists but is exempt, for example), then the agency should 'refuse access' *not* give notice under section 28(1)(b). In any event, the ADT *Cianfrano* decision made it clear that any attempt to use section 28(1)(b) would not take away an applicant's right to apply to the ADT for a review.

The Director was given an opportunity to provide submissions on this proposed adverse comment. On this point he argued that the Cianfrano decision did not apply at the time of his decision. In addition, because at that time the Cianfrano decision was on appeal to the Court of Appeal, if he had 'acted otherwise...[this] may have involved the loss of a jurisdictional argument that might have otherwise been open to the [OBOS] in the event that the matter ultimately found its way into the ADT.' The Director stated that 'as you are aware, it is common for those faced with the prospect of litigation to conduct themselves so as not to lose the right to raise a particular legal argument in proceedings that might eventually be commenced. Viewed fairly that is all that occurred here.'

The Lane letter contained the OBOS's original determination as to whether or not access to the documents sought would be granted to Mr Parsonage. These determination letters are the most common piece of correspondence drafted by an agency when handling FOI applications. We recommend that agencies fulfil their obligations under section 5 (objects) of the FOI Act by advising applicants of their statutory appeal rights in their determination letters. It strikes me as yet another example of the unusual approach the OBOS took in responding to Mr Parsonage's FOI applications, that they would consider they were 'facing the prospect of litigation' and needed to be so careful in drafting their determination so as 'not to lose the right to raise a particular legal argument in [future] proceedings.'

In this investigation I have found a number of other examples of practices that had a similar effect of possibly jeopardising applicants' ability to exercise their internal and external review rights. The OBOS's 'FOI Procedure' gives no clear guidance on the need for decision-makers to exercise their discretion in a way that preserves applicants' appeal rights wherever possible.

For example, in February 2008, the OBOS's FOI Coordinator had a conversation with a FOI applicant which she recorded in the following terms:

> 'Spoke to [name of FOI applicant] regarding his application for Internal Review. I discussed that his request...seemed to be asking for further explanation of the decision, I mentioned that we could provide him with further explanation without charge.

> Alternatively he could progress with the internal review and receive further explanation of the decision through this process. To progress with the internal review, the application fee would be charged.'

The FOI Coordinator did not record whether or not she had also explained that if the application fee was *not* paid, the applicant would probably lose his right to apply to the ADT or the Ombudsman for an external review under the FOI Act.

Another example occurred in 2005, when two applicants separately protested that the determinations they had received — refusing access to documents — failed to provide sufficient reasons for the decision. The then FOI Coordinator responded in the following way (writing identical letters to both applicants):

> 'Dear [name]
>
> I refer to your letter of [date] concerning the recent determination of your FOI request.
>
> **I note that your letter does not request an internal review of that determination. Rather, you request further elaboration of the decision-maker's reasoning for his decision.** In this regard, the decision-maker has advised me that the matters considered when determining your FOI request included:
>
> [matters]
>
> I hope this information is of assistance to you.' [emphasis added]

Nowhere in this letter is an explanation given to the applicant of the consequences that follow from requesting an internal review and paying the $40, or not doing this. Nowhere in this letter does the OBOS invite the applicant to take the course of action that preserves their appeal rights. Because applicants cannot be expected to have an in-depth understanding of the technical aspects of the FOI Act, it is an agency's responsibility to ensure that *at the very least* they do not risk misleading an applicant by not explaining the full picture to them.

In giving evidence, the Director confirmed that the OBOS informal practice seemed to be motivated by a desire to save people's money if that was possible. He said:

> '[W]e don't particularly want to charge people the $40 fee if we can save them the money. [And] from time to time it isn't so much that people want to lodge an internal review. Sometimes they simply don't understand the reasons given and that could be because the reasons weren't as informative as they could've been.
>
> I think it's their judgment whether or not it's genuine misunderstanding or whether they don't understand because they don't agree with it and if they had, if it was subject to internal review they might get a different outcome. We're not in the business of preventing people from requesting internal reviews nor in the business of trying to limit their rights to bodies such as the ADT or the Ombudsman. It's simply a way of resolving an issue without recourse to what is a fairly blunt instrument.'

The desire to save people's money is to be supported, but only if the OBOS gives applicants sufficient information so that they can make an informed decision and do not inadvertently give up their appeal rights. I generally agree with the views of the Commonwealth Ombudsman on this issue, quoted by Mr Parsonage in his complaint of 15 January 2007.[33]

It is my view that the FOI Procedure document for the OBOS should be amended to provide appropriate guidance in this area. In particular, whenever a letter expressing dissatisfaction

[33] See section 13.10 of this report.

with a determination is received without the payment of $40, the FOI Coordinator should be required to contact the applicant to fully discuss the option of paying $40 and the consequences of not doing so.

It is also my view that further training should be provided to all FOI Coordinators and FOI decision-makers about this issue.

15.7 Relying on Schedule 2 DET exemption (2nd internal review)

In an early attempt to resolve this matter informally, the Ombudsman case officer made a formal suggestion that the OBOS reconsider its position in relation to the information sought by Mr Parsonage. In that letter, the case officer observed in passing:

> 'I am satisfied that any document (whether about a particular subject or student) that contains 'cut-off marks' or raw marks would be considered to be an 'exempt document' according to the definition in section 6(1) of the FOI Act because it would contain matter relating to functions in relation to which the Department of Education and Training is, by virtue of section 9 and Schedule 2, exempt from the operation of the Act. As you know, section 25(1) provides that an agency may refuse access to a document if it is an exempt document.
>
> However, it is our long-standing view that section 25(1) in no way *compels* an agency to refuse access to a document *just because* it is an exempt document. Instead, in each case an agency should ask 'Is there any good and proper reason why these documents should not be released?' '

For the following reasons, I do not agree that any document containing cut-off marks or raw marks would necessarily be considered to be an 'exempt document' according to the definition in section 6(1) of the FOI Act on the basis of the Schedule 2 exemption relating to the Department of Training and Education Coordination (DETC).[34] In my view, the case officer was wrong in her interpretation of those provisions of the FOI Act.

I have doubts that the Schedule 2 exemption relating to the DETC could have any application to documents prepared not by the DETC in the performance of its functions, but to documents prepared by the OBOS in the performance of *its* functions. My interpretation of the definition of 'exempt document' in section 6(1) would cover only documents created pursuant to a function performed by the DETC itself, that is, documents created *by* the DETC. This might mean that if another agency held documents created by the DETC that fell within the Schedule 2 description, they could assert that those documents were 'exempt documents'. It certainly does not mean that the OBOS can claim the Schedule 2 exemption as if they were in the same position as the agency listed.

Nonetheless, I agree with the case officer that, even if the OBOS's interpretation of the Schedule 2 exemption relating to the DETC were to be correct, this does not prevent the OBOS from nonetheless releasing the documents to Mr Parsonage. For the reasons outlined earlier in this report, I believe the public interest would be served by the public release of a number of key pieces of information, including the cut-off marks.

[34] which I understand to be an outdated reference to the current Department of Education and Training.

16. SPECIFIC CONCLUSIONS ABOUT THE WAY THE DECEMBER 2005 APPLICATION WAS HANDLED

16.1 The OBOS could have clarified how many FOI applications had been made

It appears that the OBOS came to the view that Mr Parsonage was trying to make 50 applications because of the way he went about organising the so-called class action (by asking each student to pay $10 if they wanted to know their own marks), and because in each of the 'FOI Permission forms' the students stated:

> 'I hereby grant you permission to seek the following documents on my behalf through an application under the FOI Act...
>
> I understand that this correspondence entitles you, being the agent acting on my behalf, to inspect these documents should they be disclosed.'

In an effort to clarify the situation, the OBOS wrote the Beevor letter, which explained that, because of the way the letters from the other students had been written, and because of the final paragraph of his letter, they believed he was acting as an agent for the other 49 students. This explanation was provided in the following terms:

> 'While, as has been mentioned above, your letter of 28 December 2005 purports to be an application for access to documents under the *Freedom of Information Act*, in my view it constitutes 50 applications under that statute. The first such application is made by you for access to the documents referred to in para. (A) and para. (B) of your letter of 28 December last. Subject to what follows, the remaining 49 applications are made by the persons numbered 1-7 (both inclusive) and 9-50 (also both inclusive) whose names are set out on pages 2 and 3 of your letter of 28 December 2005. That this [is] so is borne out by the fact that the numerous **letters** received from these persons under cover of your letter of 28 December **make it plain that those persons constituted you as their agent** for the purposes of making these applications. Further, in the **final paragraph** on the first page of your letter of 28 December 2005, in substance you undertake to OBOS that, should access to the documents referred to in para. (A) be granted to any of your principals, **such documents will be passed on by you to the principal** to whom they relate and to no one else. **Accordingly**, and again subject to what follows, **the result of the above is that you have been constituted as an agent for 49 disclosed principals** for the purpose of making applications on their behalf for access to documents under the *Freedom of Information Act*.' [emphasis added]

Mr Parsonage responded by advising that he had intended to make only one FOI application and that he had provided the 'permission forms' in the hope that they provided enough evidence to allow the OBOS to bypass the consultation provisions.

It is my view that the permission forms do not actually say this. However, it is also my view that it would have been reasonable for the OBOS to accept Mr Parsonage's explanation for what he had intended to do. There is nothing in the FOI Act that prohibits applicants from seeking information about other people. In addition, the OBOS could have contacted each of the other students to clarify *their* actual intentions. Alternatively, the OBOS could have, in processing Mr Parsonage's application, decided whether or not the other students needed to be consulted as part of that process.

It is my view that, even if Mr Parsonage was indeed trying to make 50 applications but not paying $30 for each, nonetheless *at least one* of those 50 applications had been validly made — the one described in the Beevor letter (dated 27 January 2006) as having been made in his own right:

> 'The first such application is made by you for access to the documents referred to in para. (A) and para. (B) of your letter of 28 December last.'[35]

I note that the Carroll letter also appeared to imply that *one* of the applications had been 'adequate', by stating that:

> 'The result is that I regard 48 of the 49 applications[36] now received by me as being inadequate in that the s. 17(c) application fee has not been received in respect of them.'

This application had been validly made under section 17 of the FOI Act, which relevantly provides:

> An application for access to an agency's document:
>
> (a) shall be in writing, and
>
> (b) shall specify that it is made under this Act, and
>
> (c) shall be accompanied by such application fee as the agency may determine, and
>
> (d) shall contain such information as is reasonably necessary to enable the document to be identified, and
>
> (e) shall specify an address in Australia to which notices under this Act should be sent, and
>
> (f) shall be lodged at an office of an agency,
>
> and may request that access to the document be given in a particular form referred to in section 27.

It could have been processed even if Mr Parsonage had, in fact, been trying to make other applications as well.

In giving evidence, the Director was asked whether Mr Parsonage's letter dated 28 December 2005:

- was in writing
- specified that it was made under the FOI Act
- was accompanied by an application fee
- contained such information as was reasonably necessary to enable the documents sought to be identified
- specified an address in Australia to which notices should be sent
- was lodged at an office of the OBOS.

He answered yes to each question. He stated that, despite this, he was still of the view that the applicant had tried to make 50 applications and the OBOS had acted appropriately.

[35] A further point to make is that it seems strange that the 'first such application', as expressed, seems to describe the very application that Mr Parsonage tried to make.

[36] By this stage, Mr Parsonage had provided permission forms for all but one of the 50 students listed, so the Carroll letter considered that 49 applications had been received, one in his own name and 48 'inadequate' ones.

The OBOS appears to have obtained advice that there was no legal *impediment* to treating it as such. The Murphy letter asserts that holding this view does not breach any provision of the FOI Act:

> 'When Ms Beevor's letter...is read in the light of the FOI Act interpreted according to proper canons of construction, I am of the view that the result that emerges is that her letter does not involve a breach of any provision of the FOI Act that confers a right upon members of the public. That is to say, having determined that what the Board had received was in fact several applications for information, Ms Beevor did no more than ask that the application fee sanctioned by relevant provisions of the FOI Act...be paid in respect of each such application.'

However, there was equally no legal impediment to the OBOS treating the letter as the one application Mr Parsonage intended it to be, or duly processing the one application that had been validly made. It is also unclear why, having confirmed (in the Carroll letter) that they would not process any of the applications unless Mr Parsonage advised which application to which to apply the application fee, that the OBOS did not subsequently refund his $30 application fee.

This office is of the view that public sector agencies should handle matters in a simple and straightforward manner if possible. Section 5 of the FOI Act (Objects) certainly expresses an intention that agencies should do this when people seek to use the FOI scheme.

I note that when the OBOS handled James King's FOI application in January 2005, it duly processed it even though it considered the application to be more complicated than usual. Similarly, when the OBOS previously received FOI applications for students' raw marks and the cut-off marks for certain subjects, it also duly processed them, even though ultimately it denied access to that information.

In this case, the OBOS could similarly have chosen to follow the Act in a straightforward fashion.

Ms Speers' briefing to DET clearly indicated that, since access to this kind of information was denied in the past, it was unlikely the OBOS would release it to Mr Parsonage. To process one of the 50 applications, the OBOS would only have had to perform a few simple administrative tasks, such as making a few minor amendments to any number of previous determinations, to respond to him. Mr Parsonage would have then had the right to request an external review of that determination from the ADT.

It seems possible that the OBOS did not take this approach precisely to prevent Mr Parsonage from exercising his rights in the ADT. The minutes of a Board meeting on 10 February 2004, provided to us by the OBOS in response to the section 18 notice to produce, stated that the OBOS had received legal advice that the ADT would be likely to order the release of a student's raw marks. It is quite possible that the OBOS may have been fearful that the ADT would take a similar approach in relation to the information Mr Parsonage sought.

I have further concerns about the OBOS's failure to better explain their view that he had tried to make 50 applications even when they had an opportunity to revisit that decision in January 2007. In the Murphy letter, rather than pointing out to Mr Parsonage any of the underlying facts that led the OBOS to take this view, the arguments were put forward about why section 5 was not a rule of law and why the OBOS had not breached any provisions of the FOI Act in taking this view. This totally missed the point of Mr Parsonage's grievance. I have concerns that the OBOS seems to have relied too much on a narrow legalistic view of this situation.

In its comments on a draft copy of this report, the OBOS wanted it clearly noted that it did not agree with the argument set out above.

16.2 The OBOS did not make any effort to settle the ADT matter

Participating in ADT proceedings is a costly and time-consuming exercise. The OBOS spent 10 months and an estimated $15,000 in legal fees on defending Mr Parsonage's appeal to the ADT. At the end of the process, the ADT made no finding supporting the OBOS's views or the way they had approached this matter. The ADT made no finding about whether or not the documents sought should be released under FOI. The ADT simply found that that it had no jurisdiction to look at the matter at all. The ADT accepted the OBOS's arguments on this point.

Public sector agencies should avoid becoming embroiled in costly legal proceedings if at all possible. Although this is not always possible, it is common practice to settle matters before the hearing date. In this case, there are a number of actions the OBOS could have taken to try to persuade Mr Parsonage to drop his legal proceedings and save all parties time and money.

For example, the OBOS could have:

- made a determination of the FOI application as originally lodged by Mr Parsonage or the FOI application as described by the OBOS in the Beevor letter as 'the first' application, or
- refunded Mr Parsonage's $30 on the basis that no application had been accepted by the OBOS that required processing, or
- treated Mr Parsonage's letter of 6 February 2006 as a request for an internal review and attempted to ask him to pay the $40 application fee to preserve his appeal rights, or
- contacted Mr Parsonage to tell him that he could ask for an internal review of the original determination (being the Beevor letter) 'out of time' and the OBOS has discretion to accept it (as per section 47(2)(d)(iii) FOI Act), or
- contacted Mr Parsonage to negotiate or try again to clarify with him the scope of the FOI application he had attempted to make, or
- contacted the other students to clarify what they meant by the statements on the FOI permission forms, or
- made other attempts to cooperatively settle the matter.

No one in the OBOS took any of these actions during the 10 months of ADT proceedings. I find it somewhat concerning that no one in the OBOS perceived the situation as a communication issue, which could very possibly be resolved through dialogue, instead of a contest, which only one party could win. It appears that the OBOS relies too heavily on the narrow perspective that its legal advisers would tend to have.

16.3 The person who made the original decision then reviewed that decision twice

Mr Parsonage complained directly to the OBOS twice about their view that he had made 50 applications and not one – the first was his letter of 6 February 2006 (responding to the Beevor letter); the second was his letter of 15 January 2007 (complaining about the Beevor and Carroll letters).

The same person who had made the original decision handled both complaints. In effect, the Director reviewed his own decision twice.

When asked whether he could see any conflict in reviewing his own decision, or whether he believed it might be difficult to be objective in doing so, the Director replied:

> 'First and foremost I don't see the conflict but you couldn't have a situation where you kept excising people out of the decision making process every time you wanted to bring a fresh set of eyes to it. We would simply run out of people...
>
> It might be desirable in some kind of circumstances but is it contrary to law? The answer to that's no unless there is a statute that says that you have to do it...
>
> Is it desirable that there be some kind of internal review process for every small "a" administrative decision that's made in an organisation? Well I don't know that that's correct. There are some administrative decisions which are so routine that the organisation would simply grind to a halt if people were permitted to have an internal review of every single one...
>
> Yes it's difficult [for a person to review their own decision] but that's often what senior executives find themselves doing...
>
> [In this situation I did not believe I had any conflict] to the extent that he provided an argument as to why he didn't agree with the first decision. I'm satisfied that I had regard to that and made a decision based on the relevant material before me.'

I have some concerns about the Director's views about this issue.

The OBOS has around 220 permanent members of staff. To offer people a review of a decision, there need only be two decision-makers — one person to make the original decision and another person to review that decision.

According to the OBOS's organisational chart, below the General Manager, apparently on the same level, sit three Directors:

- the Director, Corporate Services
- the Director, Assessment and Examination, and
- the Director, Curriculum.

This means that even for decisions made at a very high level, by any of the Directors, there would be two peers and one superior officer available to independently review the decision.

It seems reasonable to expect an organisation of over 200 people to establish systems that enable a fresh set of eyes review all significant decisions that affect members of the public. This would assist the OBOS to improve its decision-making and enhance its compliance with basic principles of administrative law as well as principles of good administrative practice.

In saying that it is not contrary to law for a decision-maker to review his or her own decision somewhat misunderstands the way administrative law works. A person who reviews his or her decision runs a greater risk of making a decision that is sufficiently deficient that the people affected could successfully seek review of that decision from a court, a tribunal or this office.

In this case, not only did the Director review his own decision but this was not made clear to the applicant. Had Mr Parsonage been aware that the Director was the decision-maker in both instances, he may reasonably have apprehended that the decision-maker might not have made his decision impartially. I discuss this issue in more detail in the following section, 16.4.

Also in this case, the response in the Murphy letter suffered from serious deficiencies. In particular, as discussed earlier, nowhere in the letter does he state the underlying facts on which the OBOS's view that Mr Parsonage had tried to make 50 applications was based. An

independent decision-maker would reasonably have evaluated this matter by firstly asking — Why is Mr Parsonage complaining? What are the reasons our view is correct and his view is wrong?

It is difficult to accept any proposition that the Director was able to have proper regard to Mr Parsonage's arguments when he clearly missed the point, twice.

It had been the General Manager's decision to ask the Director to respond to the complaint of 15 January 2007. He was asked if it had occurred to him at the time that he was actually asking a decision-maker to review his own decision for the second time, and if he considered that to be a potential problem. He responded:

> 'Well I certainly didn't at the time but I still think he would've handled that in a very objective sort of way.'

The General Manager acknowledged that, as a general principle, it may be hard for a person to objectively review his or her own decision. However, he said that in this case:

> 'I think [the Director] is a person of immense integrity. I don't think he would be influenced.'

He was asked if he could understand that Mr Parsonage might find it problematic that the Director had made the original decision and then reviewed it twice. He said:

> 'Oh yeah possibly, yeah sure. But I still would maintain [the Director] is a person who acts with complete integrity.'

In our experience, whether or not a person acts with complete integrity, they are unlikely to be able to impartially review their own decisions in the way another person can. They may find it difficult to put aside previously-formed views on the matter. At the very least, a reasonable observer would perceive that a decision-maker could not be completely fresh or objective in their consideration of the matter.

In this case, it seems unequivocal that such a perception would exist. Mr Parsonage made a number of intemperate claims that Ms Beevor held immature views and Mr Carroll was incompetent. In the Murphy letter the Director simply stated 'I reject such allegations and observations.'

Whether or not the rejection of those claims is objectively valid, the fact that the Director was rejecting allegations that, in effect, he *himself* held immature views and was incompetent, undermines the credibility of that rejection. An objective observer could reasonably question whether or not those claims were properly considered by the decision-maker.

16.4 The letter was written as if the first two decisions had been made by Ms Beevor and Mr Carroll

To compound the problem, the Murphy letter was drafted as if the original decision had been made by Ms Beevor and then had been reviewed by Mr Carroll.

The Director has advised that:

> 'It is...common for senior officers to draft letters for subordinate officers, particularly in the circumstances which prevailed here.'

I recognise drafting letters for others to sign is common practice in agencies. However, in over 30 years of investigating government agencies, we have only ever come across the practice of letters being drafted by subordinates for superior officers to approve and sign. This practice enables subordinates to be guided and developed in their writing skills, and saves the

superior officer time. In this case, both letters were drafted by the Director (a very senior officer in the OBOS) for subordinate officers to sign. In practice, this would seem to give those subordinate officers little discretion to disagree with the views expressed or replace them with their own. It therefore makes very little sense to purport that the views in the Beevor and Carroll letters were actually the views of Ms Beevor and Mr Carroll.

It is one thing to draft a letter for another person to sign. It is quite another to misrepresent how decisions were actually made. Two such statements in the Murphy letter follow:

> '...you criticise Ms Beevor for not consulting with you before writing to you as she did on 27 January 2006. This **may well have been because** she did not entertain any doubt that what had been received by the Board was 47 applications and not one.
>
> ...it seems to me that the time that elapsed between receipt of your letter of 6 February 2006 and Mr Carroll's response of 22 February 2006 is entirely consistent with **him having given consideration to the points that you raised** in your letter of 6 February 2006.'

The statement about Ms Beevor is somewhat concerning. It implies the Director is speculating about what 'may well have been' in her head at the time. At the time someone needed to consider the issue of consulting with Mr Parsonage, Ms Beevor was not even aware of the matter. She only became aware on 27 January 2006, the day she signed the Beevor letter. Up until then, the Director and the FOI Coordinator, Sarah Dooley, had been handling the matter.

Given the confusing and legalistic way in which the Beevor letter was drafted, and given the FOI Coordinator's responsibilities are purely administrative, it appears unlikely that Ms Beevor understood what had been written sufficiently to adopt the views as her own. I also find it concerning that the OBOS would expect this of an officer in her position.

The statement about Mr Carroll is even more concerning. The statement implies that Mr Carroll spent around 10 working days contemplating Mr Parsonage's points and coming to a point of view about them. Mr Carroll did not even spend one day doing this. He received the letter drafted by the Director for his signature on the same day he sent it to Mr Parsonage. The actual reason why the OBOS took two weeks to respond was because they were waiting for legal advice from the CSO. The OBOS sent the Carroll letter the very day the advice was received.

While this practice of having the Director draft letters for the FOI Coordinator to sign may have been in accordance with the OBOS's FOI procedure, this relates to FOI determination letters, which make it clear that the FOI decision-maker is not the FOI Coordinator. The Beevor and Carroll letters were very different. Arguably, the OBOS's FOI procedure document was not applicable in these cases.

Taking this approach had the effect of misrepresenting the process that had actually occurred internally. The result was that Mr Parsonage did not know that the first decision had been reviewed by the same person who made it, twice. As I have already observed, if he had known, he may reasonably have apprehended that the decision-maker might not have made either of those decisions impartially, and may have sought to take legal steps to remedy the situation.

The Director was asked why he wrote the Carroll and Murphy letters in a way that continued the illusion that the previous decisions had been made by two different people. He responded:

> 'I don't think it was an illusion...The fact that decisions get conveyed by other people other than decision makers is common administrative practice...

> My understanding is that there's no statutory requirement that as a generalised requirement that the identity of the decision-maker needs to be revealed to people other than in cases where it's a reviewable decision and it's a requirement to identify the decision-maker.
>
> I think it's open to someone to make [the] inference [that if a letter was signed by Ms Beevor she was the decision-maker] but that's not the only inference they could make.'

When the Director was asked whether, from Mr Parsonage's perspective, he could see any problem with how the Murphy letter conveyed the impression that in fact Ms Beevor and Mr Carroll had considered and made the earlier two decisions, he replied:

> 'I can't see a problem with it if because I can't see any problem with the way the facts were dealt with. I'm having difficulty kind of dealing with the concept that in the end the person most capable of sending Mr Parsonage a response that could address each of his concerns shouldn't be the person who writes that response and in this case that's me.'

The Director freely admitted that he was the decision-maker on all three occasions. He said that he could not understand why anyone would have a problem with this. The fact that the Director was the same decision-maker was never disclosed to Mr Parsonage. In fact, it was explicitly concealed from him. The Director was given an opportunity to make submissions on this proposed adverse comment. He submitted as follows:

> 'The...practice of letters being drafted by persons other than the signatory is common and...the Office's procedure was that FOI related letters were issued under the signature of the FOI Coordinator. It is also common for the language of such letters to be in the first person. It is also common for senior officers to draft letters for subordinate officers, particularly in the circumstances which prevailed here. That is, as the evidence held by your office shows, both signatories were relieving in the role of FOI Coordinator and were inexperienced in dealing with such issues. Finally, it is common for senior officers to use such experiences to train inexperienced staff.
>
> The...speculation about what Mr Parsonage may have thought or may have done is unsubstantiated. The proposition that I understood 'at a conscious or subconscious level' that Mr Parsonage 'would perceive there to be a problem' and that I for that reason 'sought to conceal it' is not fair. The factors in the preceding paragraph more than adequately explain my conduct in this matter rather than attributing it to deceptive conduct. Indeed, as the evidence before you shows, I take full responsibility for the decisions conveyed in the letters. That said, I take the point that it would have been better for my role to have been made plain.'

Whether or not the Director intended to be deceptive, it is clear that the effect of writing the Murphy letter in a way that continued the illusion that the previous decisions had been made by two different people, was that the OBOS provided Mr Parsonage with misleading information about who had made those previous decisions.

16.5 The Murphy letter inappropriately interpreted the ADT decision as support for the way this matter had been handled

I have some concerns about the Director's attempt to interpret and represent the Tribunal member's decision as somehow supporting, or not being critical, of the OBOS's decisions and conduct. The Murphy letter claimed that:

> 'Judicial Member Montgomery was in no way critical of Ms Beevor's conclusion that what had been provided to the Board was in reality multiple applications and not a single application...

> In numerous places...you make allegations imputing improper motives both to Ms Beevor and to Mr Carroll, and also you accuse the former of an immaturity of view and the latter of incompetence. Not only do I reject such allegations and observations, but I also permit myself the observation that nowhere in Judicial Member Montgomery's determination of 10 January 2007 is there any criticism made in respect of the way in which the Board or its officers conducted itself or themselves in dealing with your application that was received by it on 4 January 2006.'

In actual fact, the Tribunal member did not express his views on whether or not Mr Parsonage's letter was actually 50 applications. Neither did he express views on the way the OBOS and its officers handled Mr Parsonage's application.

It is therefore difficult to understand the relevance of either of these statements to the Director's rejection of Mr Parsonage's accusations that Mr Beevor held an immature view and Mr Carroll was incompetent.

The issue of how the OBOS handled this matter is not the kind of issue usually considered by the ADT. These issues are generally left to the Ombudsman to evaluate. It is clear from this report that there were numerous problems with the way this matter was handled, contrary to the opinion expressed in the Murphy letter.

17. GENERAL CONCLUSIONS

17.1 Opposition to some of the activities of the boredofstudies.org.au website was counter-productive

It appears that since the boredofstudies.org.au website was established, the OBOS has been wary of and challenged by some of its activities. The students on that website have been very vocal in their view that they should be able to view their own raw marks, and share those marks with others.

Up until the beginning of 2005, the OBOS was still willing to release students' own raw marks to them. After it received 14 almost identical applications, following the 2004 HSC, all from students who appeared to the OBOS to have some association with the website, the OBOS stopped releasing this information altogether, even to students with an indirect link to the website or who denied they were part of any campaign.[37] When asked why the OBOS had released the information in 2003, the Director said:

> 'Well basically because at that point we didn't realise that it was a campaign. That's, you know we had the view then as we have the view now that it's not particularly useful. In fact it's misleading and it was only once we started to see the whole mosaic start to appear and be published on the website that it became evident to us that what they were doing was using the raw marks to map the cut scores.'

It is also appears that the OBOS perceives that it is engaging in an ongoing 'battle' with those students over this issue of raw and cut-off marks, in which the student soldiers change from year to year. In his evidence, the Director characterised the situation as follows:

[37] One applicant's brother was a regular contributor, but the applicant explicitly told the Office he only wanted the information for personal reflection. Another applicant, the only one to whom the Office had written 'The decision-maker has formed the view that you may be involved in the campaign of determining and then publicly disclosing the HSC cut scores', was a website contributor but strenuously denied this claim.

> 'It appears to have almost been a baton change as each kind of cohort of HSC students have gone along. They've tended to always be able to find people associated with the website willing to carry on the battle to try to get the raw scores. It started back in 2003 with James King. He's one of the founders of that site and it would appear that it's resurfaced from time to time...
>
> They were quite candid in the fact that was a campaign and what they were using the raw marks for — their ultimate purpose — was to calculate the cut scores and hence our concern...
>
> The relevance of [previous FOI applications for similar information] is that establishes a pattern and it's the pattern that we're concerned about which leads to the adverse impact on the conduct of the HSC. That's entirely consistent with the earlier decisions where we didn't detect a pattern and allowed students to have access. So the fact that, and again it's an accepted principle within FOI that there is a thing called the mosaic effect and if there's a pattern forming then it's reasonable for you to have regard to [the fact] that it's not merely a single application in isolation.'

It appears that the OBOS has adopted this approach because they believe it is an effective way of preventing people from accessing information that they believe should not be in the public domain.

But the FOI system already includes a mechanism through which agencies can deny people access to information and documents. Agencies can legitimately use that mechanism without resorting to other means of deflecting students' attempts to access information, that run counter to fundamental principles of good administrative practice.

It appears that, up until it received Mr Parsonage's December 2005 application, the OBOS did follow the mechanism set up in the FOI system. For example, in considering the application from *Ragerunner*, who sought access to the cut-off marks for his 2003 HSC subjects in May 2004, the OBOS's determination was that those marks would not be released on the basis of clause 16 of Schedule 1 to the FOI Act and the following reasons were given:

> 'the specific information sought by you is a confidential aspect of the annual HSC marking program for the reason that its wider availability would compromise the integrity of the marking program in future years. Accordingly, the decision-maker has determined that the disclosure of this information is contrary to the public interest.'

After they received Mr Parsonage's December 2005 application, the OBOS perceived that in some way the 'campaign' had escalated and taken on new intensity. The Director observed:

> 'I would say in this particular case and this was quite exceptional in that we hadn't had anything like that before. Here we had what appeared to us to be 50 applications and the applicant was saying that it was only one and the applicant had therefore only attached a $30 fee for one...
>
> My preliminary view was that he was attempting to have 50 applications for the price of one and he was trying to mount a legal argument that we should consider it as a class action. He was trying to construct this concept of a class action in terms of FOI and so I thought it was quite deliberate...
>
> What was clearly being sought was to pursue the concept of a class action. He was trying to run 50 applications for the price of one.'

On the day Mr Parsonage posted his 'call to action', the OBOS sought legal advice from the CSO. They had not yet received any FOI application, yet the request was described as being

'for legal advice concerning FOI applications that seek information concerning HSC candidates' raw marks'. The Director could not remember why the advice was sought.[38]

The philosophy underpinning the FOI Act is that agencies will consider each FOI application on its merits, starting with a view that government documents and information should be released to the public if at all possible.

It is unclear for what purpose the OBOS sought this legal advice. It seems unlikely to me this request would have been for advice on how to release the information, given the OBOS's position since the 2004 HSC. Because the OBOS has refused to show us any of the legal advice it sought or obtained from the CSO, we are left to speculate about what possible purpose the OBOS had in seeking legal advice about a FOI application that had not yet been received.

The request for legal advice also further indicates that the OBOS perceived that this 'class action' posed a peculiar problem for them, as far as the FOI Act was concerned. In his letter to our office of 12 March 2008, the Director complained:

> 'it would appear that no acknowledgement has been given [by the Ombudsman's office] to the contribution made to the difficulties in handling [Mr Parsonage's FOI] application by the concerted and continuing campaign by persons, including Mr Parsonage, associated with the boredofstudies.org website.'

Having completed this investigation, it is still unclear how this so-called 'campaign' caused the OBOS so much difficulty in handling Mr Parsonage's applications.

If the difficulty is the amount of resources the OBOS expended in responding to Mr Parsonage's numerous letters, in my view it was the OBOS's approach to this matter that caused them so much work. Every letter Mr Parsonage wrote identified a number of deficiencies in the way the OBOS had handled the matter. This report vindicates Mr Parsonage on almost every point. Every one of his letters expressed frustration and sometimes disbelief at the OBOS's actions. This report explains why those feelings were justified.

In my view, the OBOS's opposition to the website's stated intention to calculate or otherwise obtain and publish and cut-off marks led it to make a number of decisions relating to Mr Parsonage's correspondence that were not only contrary to principles of good administrative practice but contrary to its own interests. The Director states that he took the information on the website into account only where it was relevant to the particular decision. However, numerous pages of the website were printed out at times during which he was considering certain decisions (such as the decision that the December 2005 application was 50 separate applications, not one) where the relevance of the website is not clear. While the Director may believe that he did not formally take that information into account when making his decisions, it certainly appears from the file that the information was part of the background material he considered at the time.

Taking a combative approach is also not a good way of maintaining civil and functioning relationships with one of the key stakeholder groups in the OBOS's work — students. For the HSC to be effective, the students must have confidence in the system. Students engaging in this so-called 'campaign' are actually doing nothing more than wanting to understand why

[38] In its comments on a draft copy of this report, the OBOS pointed out that the Director was asked this question over two and a half years after the advice was sought and this is why he could not remember. I note that in those comments, the OBOS did not provide any explanation for why the advice was sought.

they were awarded their final results. For the reasons I have outlined, students should be given sufficient information to gain such an understanding. This does not seem too much to ask..

I find it of concern that the OBOS went to such lengths — and made so many poor decisions — in an effort to keep confidential the information that students need to fully understand their final results.

The OBOS's approach meant that it took almost 15 months[39] for the OBOS to provide Mr Parsonage with a substantive decision on his application, and that only dealt with one of the three pieces of information he had requested.

It may appear that the OBOS's actions were in one way successful in preventing Mr Parsonage and his boredofstudies.org.au cohorts from accessing the information for over a year. However, it was those actions in themselves that led both Mr Parsonage and this office to suspect that there were other issues about the OBOS's operations, quite separate from the issue of whether or not that information should be publicly released, that were of concern.

Only through the failures in processes did our office become concerned enough to explore the underlying reasons why the OBOS has made these poor decisions and counter-productive choices. As I have already discussed, having gathered the evidence and explored the underlying issue, I am of the view that all of the information associated with the marking process should be made publicly available.

This is not the result the OBOS would have wanted.

It is true that even if the OBOS had simply followed the FOI process, Mr Parsonage would probably have sought both an internal and external review of their decision. However, if the OBOS had handled this matter according to proper processes, or if they had reconsidered their stance after our informal discussions with them, they might have avoided spending the estimated $51,000 in legal fees spent as a result of this investigation.

One of our central roles is to uncover poor administrative practice and thereby help agencies learn from their mistakes and identify ways they might improve the way they serve the public. In this case, I hope the OBOS recognises that they should have handled this kind of challenging situations better.

In its comments on a draft copy of this report, the OBOS wrote that it 'accepts the need to improve some elements of its practices and has already taken steps to do so.' I commend the OBOS for these actions.

17.2 The way the OBOS handled Mr Parsonage's complaints and arguments

As I have already alluded to, I have serious concerns about the manner in which the OBOS communicated with Mr Parsonage. It is not appropriate to treat *any* member of the public as an enemy engaged in a 'campaign' that somehow threatens the OBOS and the system it administers, much less a stakeholder seeking information to explain how decisions are made that significantly affect the interests of numerous individuals.

All interactions with the public, positive and negative, should be treated as opportunities to listen, learn and determine if the agency can do its job better. Public sector agencies have an

[39] Between 4 January 2006 (when the Office received his December 2005 application) and 26 March 2007 (the date the FOI Coordinator sent a determination letter to him, denying access to the cut-off marks on the basis of clause 16 Schedule 1).

obligation to be courteous and respectful to all members of the public, even those whom they perceive as troublemakers.

Complainants are not opponents against which agencies need to score points. Even if their complaint is not justified (not the case here), very often the agency has the ability to help address the complainant's dissatisfaction by better communicating or explaining whatever it was that gave rise to the complaint. If a complaint is justified, the agency is given an opportunity to identify how it might improve its approach to the matter.

In Mr Parsonage's case, it appears that the way the OBOS communicated with him was rooted in its view that anyone associated with the boredofstudies.org.au website was an 'enemy'.

In every one of Mr Parsonage's letters he criticised the OBOS and its officers. In his letter of 15 January 2007 he complained about the way the December 2005 application had been handled. In his letter of 12 February 2007 he complained about the way the January 2007 application had been handled. In each of his requests for internal review, he articulates clearly and simply the logical flaws and other deficiencies in the OBOS's reasoning and decisions. He may have made a few errors in the way he expressed his interpretation of the FOI Act, but this is understandable, given his rudimentary understanding of more technical aspects of the law. He used terms such as 'rule of law' that have a peculiar legal meaning, to mean something slightly different — a lay person's literal understanding of what that phrase might mean.

None of that really mattered because, as this investigation has established, most of his criticisms were justified. In most cases, his reasoning is entirely correct.

The OBOS missed a number of opportunities to recognise the poor decisions that it had made, all along the way. Instead, it took a defensive and overly fastidious approach, correcting Mr Parsonage's misstating of the law but failing to respond to his underlying criticisms.

Most of the letters responding to Mr Parsonage were legalistic, repetitive and long-winded. Most of them did not adequately respond to his clearly-expressed arguments.

For example, Mr Parsonage was entirely correct in reasoning that documents containing cut-off marks *must* exist. Yet nowhere in the first Bennett letter does the General Manager acknowledge that the first decision-maker made a mistake and, in fact, for exactly the reasons Mr Parsonage put forward, of course those documents do exist. In such a case, it would seem reasonable that the OBOS acknowledge that Mr Parsonage's grievance was justified. An apology may have been appropriate in the circumstances.

Mr Parsonage also put forward simple and sound reasons why the marking guidelines on the Board's website could not be the only 'official' marking guidelines — in the sense that there must be other documents that were kept as official records of answers or guidance used by markers at the time of marking. Yet the first Bennett letter simply stonewalls him, by reiterating the original advice that no such documents exist. The letter made no attempt to demonstrate to Mr Parsonage that anyone had considered his evidence or arguments or inquired further into the issue, or gave any other reasons to support the position.

17.3 The Director performs two conflicting roles

The Director is both the FOI decision-maker and the Chief Information Officer (CIO). The Records policy says access to information by outsiders must be cleared with the CIO. The CIO's responsibilities would include to protect sensitive information from being released. The FOI decision-maker's responsibilities would include maximising the access that the public

have to information. Having the same person performing both of these functions may raise a conflict of duties, whether real or perceived.

In the OBOS comments on a draft copy of this report, the General Manager advised that 'while I do not accept that there was any genuine conflict of duties involved in this matter, I accept that the perception of such a conflict could be formed. Consequently, I have decided to assign responsibility for making original decisions and internal review decisions under the FOI Act to officers with a better functional relationship with the documents typically requested by FOI applicants. This will remove the Director and the General Manager from such decisions and enable them to independently review any complaints.'

I am encouraged by this decision.

Chapter 7: Concerns about the way the OBOS responded to intervention by the Ombudsman

18. ISSUES RELATING TO THE WAY THE OBOS AND THE BOARD RESPONDED TO OUR INVOLVEMENT IN THIS MATTER

18.1 Introduction

The way the OBOS has responded to our requests for information and other correspondence during the course of this investigation has been of some concern. In this chapter I make observations about issues of particular concern.

In its comments on a draft copy of this report, the OBOS argued that this chapter deals with conduct that is not the subject of the investigation and, as such, is not relevant and should be removed.

There is no restriction on this office making observations and findings about conduct of the agency under investigation that arises out of, and relates to, the investigation. In this case, the first issue of particular concern is directly related to the substantive issue of the existence of marking documents that contained sample answers. The conduct of the OBOS in responding to our informal attempts to resolve this aspect of the complaint is therefore to my mind clearly relevant.

18.2 The OBOS did not admit it held marking documents different from those publicly available

From the evidence available to me, I have serious concerns about the quality of the OBOS's response to our preliminary inquiries of 2 October 2007. At that stage of the complaint process, one primary goal is to gather further information to help us decide whether or not there may have been wrong conduct that we need to formally investigate, or there is some way of addressing what we may see as legitimate concerns raised by a complainant and resolving the matter.

In my experience, our inquiries can be an effective trigger for an agency to realise the seriousness of a complainant's grievance and recognise how the actions of the agency could be improved.

In this case, Mr Parsonage had already articulated his grievances to the OBOS on a number of occasions. By the time he complained to the Ombudsman, the OBOS was well aware of at least the following allegations made by him:

- the OBOS's advice that the information about students' raw marks could not be provided in a document had to be wrong, otherwise there was something wrong with the OBOS's computer systems that stored this kind of information
- the OBOS's advice that no official marking criteria any different from that publicly available had to be wrong, otherwise the OBOS was not keeping proper records, and
- the OBOS's decision that the cut-off marks should not be released on the basis of clause 16 of Schedule 1 to the FOI Act was not properly reasoned.

It seems reasonable to expect that, on receiving our inquiries, the OBOS would have taken steps to ensure that it provided us with accurate information and also to ensure that in fact Mr Parsonage's complaints were not justified.

Instead, their response seems to indicate that no such review was undertaken and once again the OBOS failed to take an opportunity to identify possible errors so they could be remedied.

In particular, it is of some concern that the OBOS failed to recognise or admit that marking guidelines existed that were different from those on the Board's website.

To explore the issue of the alleged missing marking documents, the Ombudsman case officer asked for 'reasonable detail of the searches which [had] been made for the documents that the applicant claims to exist.' The OBOS's response (of 30 October 2007) was:

> 'It is difficult to answer your question because it is predicated on the assumption that Mr Parsonage requested documents, when in fact he largely sought information. That distinction made, I have been the Office's designated original decision-maker of FOI applications for the 12 years I have been employed by the Office. I am the Office's Chief Information Officer and I relied on my extensive knowledge of what classes of documents are held by the Office in determining the application. Having sought advice and evaluated advice as to the processes necessary to produce a documents containing the information sought by Mr Parsonage, I then confirmed my understanding in certain respects with the Office's former Director, Examinations, the Director, Assessment and Reporting and Principal Project Officer.'

The Ombudsman case officer also asked for a detailed report on:

> 'The most likely explanation for the official marking criteria (including the correct answers in science and mathematics courses), where different from the publicly available marking guidelines:
>
> i) not being found, or
>
> ii) not existing, or
>
> iii) what happened to these documents, if it seems certain they no longer exist...'

In its response the Director wrote:

> 'The problem with this component of Mr Parsonage's request was that he used different words to describe the same document, that is, when he asked for a document entitled the 'official marking criteria' which differed from the 'publicly available guidelines', the 'different' document does not exist.'

Finally, the case officer asked for the OBOS's '**views** on the applicant's reasons for believing official marking criteria, different from publicly available guidelines, exist or existed.'

In response, the Director wrote:

> 'Mr Parsonage's reason is outlined in his letter to Dr Bennett dated 15 February 2007. He cites 'anecdotal evidence from numerous markers that the criteria shown on the Board's website is a vastly simplified version of the criteria that is actually used'.

He did not provide the OBOS's views on Mr Parsonage's reasoning.

The OBOS had another opportunity to clarify the situation at the Director's meeting with the case officer in November 2007. The case officer brought with her a copy of the notes from the marking centre for a Mathematics course, printed out from the Board's website. In discussing this document with the Director, she pointed out that, as the document was obviously published *after* the exams were over, and terms such as 'correct solution' and 'correct answer' were used, with a specific mark to be allocated for each correct solution, it seemed clear that another document containing those correct solutions must exist. The Director indicated that

this may be the case, and that he may be willing to reconsider the matter in light of this argument.[40]

In the letter following up this meeting, dated 7 February 2008 and making a formal suggestion under section 52A of the FOI Act, the case officer made the following comments:

> 'As we discussed at the meeting, documents do exist that were used by markers *at the time of marking* to guide them in allocating marks. It seems to me that clearly these are the documents sought by Mr Parsonage.'

Had the Director indeed been unaware of the existence of any documents other than those on the Board's website, as he claims, then certainly after the November 2007 discussion and the section 52A suggestion letter, it would had seemed reasonable to expect that he would have conducted more searches to find the documents that the markers used at the time of marking, *which contained the answers*.

The Director was given an opportunity to provide submissions on this proposed adverse comment. On this point he stated that his recollection was that he had agreed at the November 2007 meeting Mr Parsonage may have been seeking access to what he referred to as 'marking schemes'. It is important to note that at that time no one from this office was aware of the different jargon used within the OBOS to describe different documents relating to marking, and certainly had no idea that 'marking schemes' did not mean the official marking documents containing close guidance as to what answers should be. The Director submits that, on this understanding of what the term referred to, he had attempted to locate the marking schemes, only to be told that they had been destroyed.

It is true that our office did not explicitly state that the OBOS should search for *either* the actual documents used by markers (that included answers) or the file copies of those documents. However, it seems that any reasonable person reading the case officer's explanation for what Mr Parsonage sought would have understood it to mean both actual or file copies of documents.

I also note that at no stage has the Director provided any explanation for why, in carrying out the section 52A re-determination, he simply passed on the advice that the marking schemes had been destroyed, without wondering whether that raised any concerns about the OBOS's compliance with the State Records Act. If, at that time, the Director had absolutely no knowledge about the kinds of documents generated during the marking process, then it would have seemed reasonable that he would make further inquiries to ensure that, if the 'marking schemes' had been destroyed then at least file copies would have been kept of key information in those 'schemes', such as sample answers. Given that one of the Director's roles was Chief Information Officer, it seems reasonable to expect that he would have had a thorough understanding of the OBOS's obligations under the State Records Act.

Further, it appears that the Director, on being told the marking schemes had been destroyed, did not wonder if he may have asked the officer too narrow a question. He also did not apparently make any further inquiries of that officer, or any other officer, about whether any *other* documents were kept by the OBOS that contained sample answers.

[40] I note that when giving evidence, the Director stated that he did not recollect what had been shown to him at this meeting. However, those discussions were confirmed in our letter of 7 February 2008, and in his response dated 22 February 2008 the Director makes no statements refuting what we claimed had been discussed at the meeting.

It appears that, apparently as a result of not following any of these lines of inquiries, the Director failed to find the file copy of the marking guidelines that had been signed off by each Chief Examiner and Supervisors of Marking.

Instead, he wrote to Mr Parsonage by letter dated 22 February 2008, advising that it appeared that Mr Parsonage was seeking access to what the OBOS referred to as 'marking schemes' but these documents were no longer held by the Office. The Director advised that, instead, he would give Mr Parsonage the notes from the marking centre for every 2005 HSC subject. This comprised a pile of documents approximately 10cms thick, and a copy was also provided to our office.

All of these documents can be printed from the Board's website and both Mr Parsonage and the case officer had made it clear to the OBOS that they were not the documents being sought.

The Director sent us a copy of his letter to Mr Parsonage, but initially sent a draft which read as follows:

> '[F]rom discussions with [the Ombudsman case officer], it appears that there may have been some form of ambiguity in section (B)(1) of your application. As this portion of your application was originally considered, it was taken to be a request for access to official marking criteria where different from official marking criteria that were publicly available. However, from discussions with Ms Choo it appears that from the words between the hyphens in section (B)(1) of your application you were seeking access to additional documents such as *[Insert description. Here I would put some form of generic description of the nature of the material on the Board's website]*. On that basis I have determined that you be given access to documents referred to as "Notes from the Marking Centre" in respect of those courses that were offered at the 2005 HSC and for which more than 1,000 candidates presented. Such documents are identified in Annexure [1] to this redetermination.
>
> From the discussions...that have been referred to above, **it may have been that by section (B)(1) of your application you were also seeking access to documents referred to by this Office as "Marking Schemes"** in respect of those subjects that were offered at the 2005 HSC and for which more than 1,000 candidates presented. **Marking schemes are not held by this Office beyond the relevant marking period** which, in the case of the 2005 HSC, would have concluded in about *[insert approximate date. My intention here is that it ought to be made clear to Parsonage that the Board's ceasing to hold marking schemes ante-dated his applications]*. As such documents are no longer held by this Office it is not possible, for the purpose of your application, to make any determination as to whether or not access to them might have been granted.' [emphasis added]

On two occasions — after receiving our preliminary inquiries in October 2007 and our section 52A suggestion in February 2008, that documents be searched for and found — it would seem reasonable to expect the OBOS to have made some attempt to evaluate Mr Parsonage's claim that there must be another marking document, different from the one on the website.

At best, the OBOS's actions indicate that at no stage after we became involved did anyone undertake even the most cursory inquiry into his claim, by looking at the file containing the master set of marking guidelines to check if they were the same as the documents on the website.

As I have stated earlier in this report, in my view if such an inquiry had not been made by the Director, the General Manager or any other person in the Office, when they were making their decisions about Mr Parsonage's January 2007 application, this was unreasonable.

It is hard for me to believe that such an inquiry would still not have been made even after we became involved.

The evidence leads me to assume that a much more likely explanation is that the OBOS did not want to publicly release the marking documents that contained the answers to questions, and were of the view that denying their existence might be an effective way of achieving this. It appears to me that the OBOS sought to mislead both Mr Parsonage and our office to achieve this goal.

The Director has submitted that any claim that he misled our office or Mr Parsonage is untrue. However, he did not provide any satisfactory explanation for how or why he made his section 52A redetermination, including his decision to send both Mr Parsonage and our office copies of the notes from the marking centre for every 2005 HSC subject when he could have had no doubt that these were precisely *not* the documents Mr Parsonage wanted. It is of some concern that he would waste the time of the officer who had to do all the printing and/or photocopying to provide those documents. The Director was asked to explain why he did this and he responded:

> 'No I guess if I can just explain. What I didn't understand you to mean that was that we were to exclude them for example. Sometimes if we get requests for information for documents sometimes we will still provide documents to the applicant that we know the applicant already has because it's complete, okay?...
>
> And so while to my understanding Mr Parsonage might have had access to the Marking Guidelines that were on the website I didn't understand what was being asked of me that I should exclude those.'

Our section 52A suggestion letter made it clear that the notes from the marking centre (documents written *after* the end of marking) were not what Mr Parsonage sought, in advising that it was those 'documents...that were used by markers at the time of marking to guide them in allocating marks [that were] the documents sought by Mr Parsonage.'

I also find it difficult to see how the OBOS did not anticipate that advising both our office and Mr Parsonage that they now understood that Mr Parsonage wanted the so-called 'marking schemes' but they no longer held those marking schemes, would cause *at the very least* much confusion about the OBOS's compliance with the State Records Act. In the context of that letter, it appeared that the OBOS was using the term 'marking schemes' to mean the documents used by the markers at the time of marking, but it did not clarify that 'marking schemes' did *not* mean the file copy of the marking guidelines required to be kept as State archives (see discussion at section 7.1).

The evidence seems to strongly suggest that insufficient thought was given to the decision to claim that the OBOS no longer held the marking schemes, and that seemed to be what Mr Parsonage had requested. If this was indeed a genuine error of judgment and process, I find this to be unreasonable. It certainly had the effect of misleading both this office and Mr Parsonage.

At our meeting with the General Manager and the Director following the service of my investigation notice, on 29 April 2008, the General Manager was asked why such important documents as the answers to examination questions were not kept as official records. His reply was that of course the OBOS kept them.

It was only from that discussion that it became clear that the terms 'marking scheme' and 'marking guidelines' had different meanings to the OBOS.

In our section 18 notice I required the OBOS to answer the question: 'where are the so-called 'marking schemes' for the 2005 HSC exam papers?' The OBOS tried to explain the inconsistency between the letter advising that the marking schemes were what Mr Parsonage sought (and they were no longer held) and the General Manager's advice that proper records were kept of the marking guidelines used at the time of marking, in the following way:

> 'As discussed at [the] 29 April 2008 meeting...these documents only have a limited use. The 'marking schemes' no longer exist in the form in which they existed as working documents during the 2005 marking period. That said, key information contained in the 'marking schemes' has been preserved in the relevant marking guidelines, the Notes from the Marking Centres and individual student scripts retained for research purposes.'

It also seems possible that the OBOS was disingenuous in the way it read Mr Parsonage's application to access the 'official' marking criteria. It seems possible they considered the marking guidelines on their website to be the latest 'version' and therefore the only 'official' version of those marking guidelines. It was quite clear from all of Mr Parsonage's correspondence, and our section 52A suggestion letter, that what Mr Parsonage sought was a version of marking documents that contained the *answers* to exam questions. In my view, it is reasonable to assume he used the word 'official' to mean the record the OBOS was required to keep *by law*, and the OBOS certainly kept file copies of those documents in compliance with the State Records Act. As the OBOS described the marking process:

> 'After wide reading and pilot marking of student samples by the senior markers, minor adjustments may be made to marking guidelines, in consultation with both the Supervisor of Marking and the Chief Examiner.
>
> Any adjustments are made on the hard copy of the marking guidelines at the marking centre, and are initialled by the Chief Examiner and the Supervisor of Marking. **The signed-off version is the official version of the marking guidelines used at the marking centre**.' [emphasis added]

When the Ombudsman case officer held her very first meeting with the Director in November 2007, she was of the view that the issue concerning the marking documents was one that could be resolved quite easily, once they had had a chance to discuss the issue. Unfortunately, the OBOS did not take advantage of this opportunity and instead provided an explanation that brought its capacity to keep records in accordance with the State Records Act into question.

In my view the nature of the information sought by Mr Parsonage would have been clear to the OBOS and therefore the distinctions the OBOS sought to maintain between 'marking guidelines' and 'marking schemes' had the effect of misleading this office.

In its comments on a draft copy of this report, the OBOS argued that 'in the confusion about what Mr Parsonage was requesting, and given the complexity of the subject matter, it is more likely that those involved simply misunderstood what was being asked of them and that misunderstanding was mutual to both our offices.' As explained in this report, in my opinion the underlying issues and the documents Mr Parsonage sought are neither complex nor confusing.

18.3 The OBOS was uncooperative in our investigation

I have serious concerns about the approach the OBOS took when our office became involved in investigating this matter.

In its response to our preliminary inquiries and our formal notice of investigation and notice to produce, the OBOS began its correspondence by questioning our statutory authority and

powers. In both cases, it provided some of the information sought, yet characterised this as being more cooperative than they had to be. For example, their response to my notice to produce (of 4 June 2008) contained the following opening remarks:

> 'I refer to your section 13 investigation...A section 16 Notice received...sets out in five numbered paragraphs, so-called conduct that is said to be the subject of the section 13 investigation...
>
> The attached Schedule contains the Office's response to the 77 items of documents and information requested in your section 18 Notice...I think that it is appropriate to make some general observations.
>
> The Ombudsman is a creature of statute, and while it may be commonplace to say so, he must look to the statute creating his office or other statutes as the source(s) of powers that he may legitimately exercise. The concomitant of this is that for the actions of the holder of a statutory office to be legitimate, one must be able to point to a provision in a statute or statutory instrument authorising such actions. An inability to be able to point to such authority may cast doubts upon the actions of the holder of a statutory office.
>
> In the Office's view, the power to seek documents and/or information via a section 18 Notice is not open-ended. Rather, among other things, the documents and/or information that may legitimately be sought under such a Notice are, among other things, limited by the particular items of conduct that are identified as the subject of a section 13 notification and particularised in a notice given under section 16. Again, in the Office's view, the existence or non-existence of a connection between items of conduct that are identified as the subjects of a section 13 investigation and the contents of a section 18 Notice will affect the obligations of a public authority when dealing with a section 18 Notice.
>
> In the course of preparing the enclosed schedule, the Office has undertaken the task of attempting to ascertain the existence of a connection between each of the 77 items specified in your section 18 Notice and one or other of the grounds specified in your section 16 Notice. Having undertaken this task, there have been numerous instances in which the Office has been unable to discern any [such] connection...In some instances the absence of any such connection has been glaring. In addition, the Office has formed the view that there are a number of instances in which it is highly doubtful that any connection exists between items sought in your section 18 Notice and the grounds specified in your section 16 Notice.
>
> So much having been said, and in an effort to provide a higher degree of co-operation than might otherwise be required of it, you will see from the attached schedule that in numerous instances the Office has provided information or copies of documents notwithstanding the absence of any connection...However, in a small number of these instances, the documents requested are a confidential aspect of the Board's HSC program and, unless satisfied that this confidentiality will be preserved or it is lawfully compelled, the Office will not release these documents.
>
> The Board, at its meeting on 3 June 2008, endorsed the Office of the Board of Studies' response...'

In its detailed response to a number of requirements,[41] the OBOS wrote:

> 'While it would seem that this request is not relevant to any of the five grounds specified in the section 16 Notice dated 7 April 2008, the Office does not consider that

[41] Listed in Annexure D

> providing the requested material poses any risk to the integrity of the HSC program. Accordingly, this material is enclosed.'

In response to a number of other requirements,[42] the OBOS provided most of the documents (except information relating Mr Parsonage's marks for his English (Advanced) exam and documents over which it claimed legal professional privilege[43]) but made the following comment:

> 'In the Office's view, the documents sought in this item do not fall within the scope of any of the five grounds specified in the section 16 Notice...and, accordingly, this request for documents cannot be validly made the subject of a section 18 Notice. In addition, the Office believes that the unauthorized disclosure of these confidential documents, and the information contained therein, would adversely affect the exercise of the Board's functions under the Education Act by posing unacceptable risks to the conduct and integrity of the HSC program.'

In order to make any recommendation outlined in section 52(6) of the FOI Act, the Ombudsman must be able to make an independent evaluation of the documents over which an exemption has been claimed. It has been our long-standing practice to require agencies to produce those documents for our consideration.

Section 52(6) of the FOI Act relevantly provides that:

> (6) In a report under section 26 of the Ombudsman Act 1974 of an investigation of a determination made by an agency under this Act, the Ombudsman may recommend:
>
> (a) that the public release of the document concerned would, on balance, be in the public interest even though access has been duly refused because it is an exempt document...

The investigation notices stated clearly that one aspect of the investigation was the handling of Mr Parsonage's December 2005 and January 2007 FOI applications and related complaints.

It is of some concern that the OBOS was unable to find any connection between this aspect of the investigation and the requirement that they produce the very documents the subject of those applications — the cut-off marks, the marking documents and the schedule of raw marks.

As this report makes clear, all of the other requirements that the OBOS questioned (about the HSC Consultative Committee, the judges and the processes for requesting reviews of marks) related to an exploration of the reasons they articulated for claiming that those documents were exempt under clause 16 of Schedule 1 to the FOI Act.

It was of also of some concern that, on this basis, the OBOS refused to comply with the requirement to produce documents by providing the list of Mr Parsonage's marks and ranking for his English (Advanced) Exam. It is an offence under section 37 of the Ombudsman Act to fail comply with a lawful requirement made under that Act, including under section 18.

[42] Also listed in Annexure D

[43] This issue is discussed later in this report.

Those sections relevantly provide that:

> **18 Public authority to give information etc**
>
> (1) For the purposes of an investigation under this Act, the Ombudsman may require a public authority:
>
> (a) to give the Ombudsman a statement of information,
>
> (b) to produce to the Ombudsman any document or other thing, or
>
> (c) to give the Ombudsman a copy of any document.
>
> **37 Offences**
>
> (1) A person shall not:
>
> (a) without lawful excuse, wilfully obstruct, hinder or resist the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's or officer's powers under this or any other Act,
>
> (b) without lawful excuse, refuse or wilfully fail to comply with any lawful requirement of the Ombudsman or an officer of the Ombudsman under this or any other Act, or
>
> (c) wilfully make any false statement to or mislead, or attempt to mislead, the Ombudsman or an officer of the Ombudsman in the exercise of the Ombudsman's or officer's powers under this or any other Act.
>
> Maximum penalty: 10 penalty units.

Section 37(1)(a) and (b) do contain the qualification 'without lawful excuse'. I am of the view that the OBOS's inability to draw a connection between requirements I included in the section 18 notice and the section 16 notice of investigation does not constitute a 'lawful excuse' to refuse to comply with the requirements of that section 18 notice.

I wrote to the OBOS by letter dated 16 June 2008 expressing my concerns about their failure to provide all of the information I had required and gave them one day to remedy the situation, which they did. However, in the response the General Manager made the following comments:

> '...you say something as to your understanding of the meaning of the words "lawful excuse" in section 37(1)(b) of the Ombudsman Act, and, in effect accuse the Office of without lawful excuse failing to provide you with information or documents in response to your section 18 Notice. You may take it that the Office does not agree with what appears to be your interpretation of these words. Moreover, to the extent that any such allegation is made against the Office, it is denied. Should it become appropriate or necessary to do so, the Office will elucidate upon its interpretation of those words and allegation.
>
> In its view, the Office's responses to each of the 77 items were responses that it was lawfully entitled to give. While notwithstanding the fact that in numerous instances the Office expressed the view that there was no connection between items contained in your section 18 Notice and the five categories of so-called conduct in your section 16 Notice, in most of them documents or information were provided. One such item was item 63...[which you assert contains material that] "comprise[s] samples of the information sought by Mr Parsonage in his FOI applications". While [Mr Parsonage's FOI applications] seek information related only to the 2005 HSC examination, item 63...is confined to marking schemes etc. "provided to markers to assist them in their marking of the 2007 HSC examination paper for General Mathematics".'

In its response to our section 52A suggestion letter, the OBOS had explicitly stated that it no longer held the 'marking schemes' for 2005. As a result, I deliberately asked for marking documents relating to a 2007 exam paper because I understood the OBOS to be asserting that relevant documents for the 2005 HSC were no longer held. At this stage I was not aware of the particular meaning the OBOS gave to the term 'marking schemes' and I was not aware that that the OBOS sought to draw some distinction between what it refers to as 'marking schemes' and 'marking guidelines'.

It is disappointing that the OBOS chose, once again, to take what appear to me to be a defensive, legalistic and uncooperative approach to our inquiries.

However, at my meeting with the Minister on 2 September 2009, she made it clear that she is strongly of the view that public sector agencies should cooperate with our office and advised that she had discussed the issue with the new President of the Board of Studies. The Minister advised that she had made her expectation clear to the Board of Studies that it was to adopt a different approach if our office made inquiries of it in the future. It is unfortunate that it was only when the Minister became involved in this matter that the views of this office have been considered in a constructive way. However, it is encouraging that this approach has now been taken on board.

18.4 The reaction of the Board to advice about the OBOS's failure to fully comply with Ombudsman requirements

I was of the view that the OBOS's failure to fully comply with my section 18 notice was conduct that should be brought to the attention of the Board. As I stated in my subsequent letter of 25 June 2008, clarifying my reasons for writing to the Board:

> 'The Board should expect the [Office] to provide it with the highest quality support. This includes ensuring that the Board and the [Office] comply with legal requirements imposed by investigative bodies such as our office. We shared our concerns about the [Office's] response to assist the Board in assessing the quality of advice that the [Office] has provided.'

I sent a copy of my letter to the OBOS (of 16 June 2008) to the Board. The Deputy President responded to me, by letter dated 19 June 2008, making the following comment:

> '[your letter to the Office] merely lists complaints and allegations concerning the Office's response to your Notice addressed to it under section 18 of the Ombudsman Act. I am confident that, in accordance with any applicable legal framework, the Office will be able adequately to deal with the matters raised by the letter that you have sent to it.
>
> That said, I might permit myself one observation, namely that, in correspondence addressed to third parties, it is a matter of some moment to allege or to imply infractions of the law by individuals or entities, especially where such allegations or implications may be based upon what are, so far as I am aware, untested interpretations of the meaning of a particular statutory provision.'

On 3 July 2008, the Deputy President wrote:

> 'I acknowledge receipt of your letter of 25 June 2008.
>
> I do not think that any useful purpose would be served by me providing a lengthy response to it. However, my present disinclination to provide such a response should not be construed as acceptance on my part (or on that of the Board) of either the correctness of assertions of fact contained in it, or concurrence in the opinions expressed in it.'

I find it concerning that the Board's view appears to have been less than open to considering wrongdoing on the part of the OBOS. While a close connection between the agencies is understandable, it would seem that part of the role of the Board is to keep the OBOS accountable for its actions — appropriate or otherwise. To properly perform this role, I would have expected that the Board would be open to external criticisms of the OBOS so that it could take steps to independently satisfy itself that the OBOS had acted appropriately.

However, as noted above, the Minister and the new President of the Board are to be commended for adopting a positive response to our inquiries. I am greatly encouraged by their advice that they will ensure that the Board adopts a very different approach to managing inquiries, communication and recommendations from our office in the future.

18.5 Legal professional privilege

It is argued that legal professional privilege assists the administration of justice by allowing communications between public officials and their lawyers to be kept confidential on the assumption that this will promote frankness and candour in communications between those officials and their lawyers.

However, the confidentiality created under legal professional privilege can also have the effect of reducing the accountability of public sector agencies and officials. Because the public sector exists to serve the public, and is therefore accountable to the public, any claim of privilege should be justified by its service to the public interest.

The appropriate use of the privilege is an issue that has a wider application. It should not be used by agencies to avoid accountability. Reliance on the privilege should be balanced against the public interest of transparency in decision-making and the agency being open when things may have gone wrong. Agencies have the discretion to waive privilege even if it applies.

Given the significant role played in this matter by advice obtained by the OBOS from the CSO, the OBOS's reliance on the privilege had the effect of reducing its accountability by significantly impeding our efforts to uncover the process by which decisions were made and views were developed, and the reasoning behind those decisions and views.

The OBOS refused to produce 66 documents on the basis of the privilege. A number of these documents were significant because legal advice was sought in response to each letter from Mr Parsonage as well as a number of other FOI applicants who sought similar information.

In giving evidence, the Director stated that:

> '[The Office] has a general policy of procuring legal advice for guidance in the execution of statutory power, and in circumstances which may result in litigation, to the intent that in the exercise of its statutory powers and otherwise, it acts lawfully...
>
> Q: Is it possible in this case that you went contrary to the legal advice that you were given?
>
> A:...what I can say is that the Office would never knowingly act unlawfully.'

Without access to the advice which the OBOS considered in coming to its decisions and views, the observations and conclusions I have made can, by necessity, only be based on an incomplete documentary trail recording what occurred.

It does not appear that there has been any meaningful consideration by the OBOS as to whether there was any genuine public interest to be served by claiming legal privilege. The OBOS has provided no explanation for how the public interest has been served by their

refusal to provide me with evidence without which a thorough understanding of this matter cannot be reached.

Instead, the OBOS appears to have claimed the privilege simply because they thought they could. When he was asked why the OBOS sought to rely on the privilege, the Director said:

> 'I guess it's a right which we possess which is recognised in law. I guess the question you're asking me is in my mind similar to being asked you know to justify the principles of procedural fairness or the rule of law...
>
> Well as I've already explained, it's a right and there's a number of public interest reasons which I don't readily have in my mind but there are a number of public interest reasons in favour of retaining the right of legal professional privilege and the Office has a policy of not waiving legal professional privilege unless compelled by law and I'm not in a position to change that policy.'

In its comments on a draft copy of this report, the OBOS wrote:

> 'Without any citation of text or authority it is said that any claim of legal professional privilege should be justified by its service to the public interest. No such rule of law exists.'

I find these comments concerning. The Director suggested that in this case, as in others, the OBOS will rely on legal privilege to avoid disclosure merely because it is a mechanism available, without any need to objectively consider whether that confidentiality is necessary and in the public interest. The OBOS infers that this position is justified because it is not a 'rule of law' that a claim of privilege should be in the public interest.

There are many principles of good administrative practice that are not rules of law, but which public sector agencies should be expected to uphold. In my opinion, one such principle is that these agencies should only rely on a legal 'privilege' for the purpose of avoiding accountability to a body set up by Parliament to scrutinise the conduct and integrity of public sector agencies where there is a valid public interest served by doing so, not just because they can.

In addition, I am of the view that it is possible that any privilege that might have applied to some of the documents had already been waived.

A court would ordinarily find that the privilege in a document has been waived by an agency when there has been a knowing and voluntary disclosure of the contents of the document by the agency to someone other than:

(1) its lawyer

(2) another party with whom it has a common interest in the proceedings, or

(3) an employee or agent of the agency or the lawyer when those agents are not authorised to disclose the contents of the document.[44]

In giving evidence, the Director explained that:

> 'The Office of the Board of Studies does not have in-house lawyers so hence it is **routine for letters to be drafted by the Office's legal advisor either in full or in part**. Again I would reiterate the view that legal advice is simply advice and that the

[44] *Bennett v Vice Chancellor, University of New England* [2002] NSW ADT 175 at 22, as outlined at paragraph 13.2.29 of the NSW FOI Manual (August 2007).

> views expressed in the letters are those of either the General Manager or myself in the event I'm the one who signs them...' [emphasis added]

In giving evidence, the General Manager advised that sometimes his officers would 'cut and paste' words from a legal advice:

> 'Q: Is it the practice of your staff or yourself to literally cut and paste from one electronic document provided by the Crown Solicitor's Office and drop it into, drop text into correspondence?
>
> A: Yeah look you know in some cases that would be. I mean I sent an email back to [the Assistant Ombudsman (General)] the other day with some text in it that had been drafted for me. The reason, I wanted to make sure you know what I was asking would've had that meaning. I mean I could've drafted something like that myself but I wanted to make sure that – yeah other cases I, some of the other emails I wrote myself but I'm never quite sure I'm asking the right questions or [whether] you're going to solicit the right answers.'

A number of the OBOS's letters to Mr Parsonage adopted legalistic tone and language. Given that those letters were signed by the Director or the General Manager, neither of whom is a lawyer, it seems at least possible that significant parts of those letters were drafted by the CSO. Those words would have formed part of documents containing 'legal advice' from the CSO.[45] It is even possible that some of that legal advice comprised draft letters for the signature of the General Manager, Director or another officer.

In my view it could well be argued that privilege had therefore been waived over those parts of any such legal advice, because the 'contents' that had been knowingly and voluntarily disclosed to Mr Parsonage. For this reason I believe it is arguable the OBOS did not have a legitimate basis on which to refuse to produce certain documents to us. [46]

18.6 The General Manager and Director's submissions on proposed adverse comment, and the OBOS's submissions on the draft report

The General Manager was informed of the substance of the grounds of proposed adverse comment in respect of him, and given an opportunity to make submissions, pursuant to section 24(2) of the Ombudsman Act. In his submission, he made the following statement:

> 'It appears to me from my reading of the material provided to me, that the Ombudsman has accepted the views put by Mr King and Mr Parsonage without question and hence, sees the Office's handling of the cases completely in an unfavourable light. This, I believe is unfair and unreasonable. I also consider the Ombudsman's stated view that raw marks should be released may well have influenced his perception of the way the matters were handled.'

The Director was given the same opportunity to make submissions. In his submission, he made the following statements:

[45] In its letter to this office of 25 June 2008, it provided a schedule of documents over which it claimed legal professional privilege, most of which were described as 'Request for legal advice...' or 'Provision of legal advice...'

[46] In its comments on a draft copy of this report, the OBOS requested that it be noted that it considers our argument to be a 'novel proposition' with which they did not agree.

'[Your] remarks go, in my view, to the lack of impartiality and due process that has characterized this investigation from the outset...

Further general submission on the conduct the subject of investigation...

2.1 Bias/Reasonable apprehension of bias...

At the outset, the investigation was based on your office's pre-conceived beliefs that the Office's decision to consider the December 2005 applications as 50 applications rather than one application was incorrect and that the Office's decision to not release the cut-off marks was also incorrect. The instances where this is evident follow:

(a) The letter from your office dated 2 October 2007 refers to Mr Parsonage's January 2007 application as his 'second application' and later to 'both applications'. That is, at the outset your office has believed there were two applications rather than 51 applications. This suggests those involved with the investigation did not have an open mind on the subject.

(b) In the 29 November 2007 meetings and those meetings and correspondence that followed, your officers unequivocally accepted Mr Parsonage's views and consistently advocated them in preference to any attempt to accommodate the positions taken by the Office...

(c) ...Your office's letter of 7 February 2008 made numerous serious criticisms of the way in which the Office had dealt with Mr Parsonage's application of 11 January 2007...[and] sought assurances that in the future the Office would alter its approach to dealing with FOI Act applications generally...It is fair to say that [the OBOS's] responses did not provide the reassurances that your office had sought...

In my view the only available inference to be drawn...is that the reason the present investigation was undertaken was because...the Office did not provide Mr Parsonage with the information your thought it ought to have provided to him. In turn this leads me to conclude that the present investigation has been undertaken for a punitive and improper purpose. Moreover, it makes it plain that if the Office had provided Mr Parsonage with the information...you would not have investigated conduct that your office plainly thought merited severe criticism and your office would have acquiesced in the Office's refusal to embrace your suggestions...This conduct arguably has involved the partial exercise of official functions.

I can draw no other inference from these events other than that the preliminary investigation and the terms of the ensuing direction to make a section 52A redetermination was motivated by a lack of impartiality.

2.2 Denial of Procedural Fairness and Due Process

I am concerned that you have [not accorded me procedural fairness] and denied me due process. My reasons follow:

(a) ...[After I requested it] you provided me with a transcript of my section 19 evidence. The only reasonable inference was that it was provided on the basis of fairness to me. ..[This] only reinforced that as a matter of fairness I ought to have been provided copies of notes made by your officers at relevant meetings. The result of this is that the requests [I] made...have been dealt with in inconsistent ways and that I have been denied both procedural fairness in the technical sense and fairness in the commonly understood meaning of that word.

(b) The denial of due process has occurred on a number of occasions as follows:

> (i) Late in the afternoon on 1 September 2008, prior to my receipt of your summons dated 2 September 2008 to give evidence before you on 4 September 2008, I was telephoned...and told of the likely arrival of the summons the next day and was advised that I could only seek advice from my 'personal legal adviser' and not the Crown Solicitor's Office (CSO). [I was not told that] the summons [required] me to produce a substantial body of documents, including an identical set of documents which your office knew the Office had claimed legal professional privilege and had...refused to provide you on those grounds...
>
> (ii) ...Your office...advised me that you had denied my request for further time to prepare for my giving evidence on the basis that I was witness and not the subject of the investigation...Yet [you propose to make] adverse comment about me. I am naturally concerned that your decision denied me due process...
>
> (iii) You have ample evidence...[of] the Office's position that it attached legal professional privilege to various documents [you] sought...Yet...you required me to produce these very same documents under threat of prosecution if I failed to comply...This position caused me great anxiety and, in my view, in the circumstances amounted to oppressive conduct on your part...
>
> (iv) ...I raised concerns about the apparent attempt by your office to prevent me from seeking advice from the CSO in preparing my response to your letter dated 3 December 2008...[there was also] a similar attempt [by you] to prevent me seeking advice from the CSO prior to my giving evidence before you...I am concerned that your advice could have had the result that my capacity to respond to the highly prejudicial material in the Document would have been severely compromised in the absence of well briefed legal advice.'

In summary, the Director claims that this office:

(1) failed to be impartial and have an open mind

(2) undertook the investigation for a punitive and improper purpose

(3) failed to provide him with due process

(4) engaged in oppressive conduct.

In its comments on a draft copy of this report, the OBOS repeated that it 'remains concerned about the investigations not being conducted in an impartial manner, and considers that the manner in which the investigations were commenced and conducted have given rise to a reasonable apprehension of bias....[and] Mr Murphy and [the General Manager] have been denied procedural fairness and due process.'

Each of the Director's claims is based on either a misunderstanding or a misinterpretation of the process followed in the conduct of this investigation.

As this report sets out, the evidence on which I base my analysis of the relevant events largely came from the OBOS's own files, not from Mr Parsonage. In section 10.5, I outline in some detail the reasoning behind my view that all of the information Mr Parsonage requested should be released. I have arrived at this position through an objective evaluation of both Mr Parsonage's arguments in favour of release as well as the arguments presented by the OBOS against release. The information gathered through our formal investigative powers only served to confirm our earlier views set out in our section 52A letter of 7 February 2008.

A key role of the Ombudsman within the FOI system is to provide a third opinion where there is a dispute between the applicant and the agency about whether or not what was sought should be released. This is exactly what I have done in this matter. The FOI Act gives this office the power to communicate this 'third opinion' in the form of a recommendation to an agency under section 52A. Based on the information we had at that time, we also had significant concerns about the way in which Mr Parsonage's applications appeared to have been handled, and brought these to the OBOS's attention.

As outlined earlier in this report, the OBOS redetermined the application by stating that the OBOS referred to the documents he sought as the 'marking schemes' and the OBOS no longer held these documents. The OBOS's response to our concerns about the way the matter had been handled ended in the following way:

> 'As to your observations about how Mr Parsonage's application was handled, it would appear that no acknowledgement has been given to the contribution made to the difficulties in handling this application by the concerted and continuing campaign by persons, including Mr Parsonage, associated with the boredofstudies.org website. Nonetheless, I have noted your suggestions as to how Mr Parsonage's application may have, in hindsight, have been better handled by the Office.'

When our recommendations are rejected, it is common practice to re-assess the known facts and determine if there is sufficient evidence of maladministration to warrant the use of our investigative powers to take the matter forward on a more formal basis. As this report makes clear, at the time of that decision, the evidence showed that we needed to clarify a number of serious issues, including whether or not the OBOS complied with the State Records Act in relation to the answers to HSC exam questions, and whether or not there were sound reasons for denying access to the information sought.

As part of the investigation, we held section 19 hearings. The purpose of these hearings is to gathering verbal evidence from witnesses under oath. At the time of each hearing, no adverse comment, formal finding or recommendation had been made.

The report of our investigation includes formal findings and recommendations. These are made only in relation to a person or agency who is the subject of the investigation. A person who is not the subject of investigation will not be made the subject of a formal finding. However, certain observations may be made in an investigation report about individual witnesses or people connected with the matters, which could be considered to be critical of their conduct or decisions.

To be fair to those about whom such criticisms are made, section 24(2) of the Ombudsman Act requires the Ombudsman to advise any person about whom the Ombudsman proposes to make such adverse comment, of the substance of the grounds of that comment, and give them opportunity to make submissions. This is their opportunity to correct the record, if the investigative conclusions are based on factual or other errors. Section 24(2), or the principles or procedural fairness generally, do not require that people the subject of proposed adverse comment be given all material held by an investigating body that relates to them. All that is required is that they be given the substance of the proposed adverse comment. In this case, we went much further and provided all text that related to the officers in question, setting out in

full the basis for the proposed adverse comment, as well as a full transcript of their formal interviews.[47]

Investigations under the Ombudsman Act are an inquisitorial process. They are conducted in the absence of the public. The Ombudsman has wide discretion in deciding what information will be provided to parties to an investigation. Information will only be revealed if this helps us uncover the truth. In this case, the Director was provided with the grounds on which I proposed to make adverse comment. He was given, and took, the opportunity, to provide a different perspective on the meetings at which he was present. He was fully able to provide this response without seeing the investigators' notes about those meetings.

A person about whom the Ombudsman intends to make an adverse comment is given an opportunity to respond *before* any such adverse comment is made to the person's employer (the agency). This process recognises that the person's interests may not be identical to the interests of the agency. The Director perceives as unfair my suggestions during this investigation that he seek his own independent legal advice, rather than seeking advice from his employer's legal advisers (the CSO). As I explained as the relevant times, the material was provided to the Director in confidence to protect *his* privacy as well as to protect the integrity of the evidence. For this investigation, the Director was considered to be a party separate to the OBOS. In my view, the same lawyer representing different parties to an investigation would have a conflict of interest, and may not be able to act in the best interests of each party. Different parties to an investigation having the same lawyer also carries some risk to the integrity of that investigation.

As part of an inquisitorial process, we make all attempts to gather as much relevant and accurate evidence as is available. As outlined in this report, in our view, a number of key decisions were flawed notwithstanding they were made on the basis of legal advice. In order to properly understand the basis for these decisions, we required the OBOS to produce a number of documents over which they claimed legal professional privilege. At any stage in the process, the OBOS could have changed its mind and decided to waive that privilege and provide the documents to us. Requiring the production of those documents at two points in the investigative process is a legitimate use of our powers, and gave the OBOS more than one opportunity to cooperate with our investigation fully.

[47] The transcript of the General Manager's evidence was provided after he provided his personal comments on our proposed adverse comment, but before the OBOS provided its comments on the draft copy of this report.

Chapter 8: Findings and Recommendations

19. FINDINGS

19.1 I find that the OBOS's failure to have a person with sufficient knowledge, skills and experience, in relation to the FOI Act and the relevant case law and government policy, to make an appropriate determination in relation to the December 2005 or January 2007 applications, was unreasonable. (s. 26(1)(b) of the Ombudsman Act)

19.2 I find that the handling of the December 2005 application was unreasonable, based on irrelevant considerations and partly on a mistake of law. (s. 26(1)(b), (d) and (e) of the Ombudsman Act)

19.3 I find that the handling of the January 2007 application (including the handling of the 'fresh' FOI application) was unreasonable, based on a mistake of law and based on irrelevant considerations. In particular, I find that the OBOS's actions in not treating the Lane letter as a determination were based on a mistake of law. (s. 26(1)(b), (d) and (e) of the Ombudsman Act)

19.4 I find that the denial of access to the documents sought in the January 2007 application constituted conduct of the OBOS for which reasons should have been given but were not given. (s. 26(1)(f) of the Ombudsman Act)

19.5 I find that the handling of Mr Parsonage's complaint of 15 January 2007 about the way his December 2005 application had been handled was unreasonable and otherwise wrong. (s. 26(1)(b) and (g) of the Ombudsman Act)

19.6 I find that the handling of Mr Parsonage's complaint, made at the end of his request for an internal review in a letter dated 12 April 2007, about having to pay another $40 internal review fee, was unreasonable and otherwise wrong. (s. 26(1)(b) and (g) of the Ombudsman Act)

I note that in its comments on a draft copy of this report, the OBOS stated that it does not agree with the generality of these findings with respect to the application of the law. However, during consultation on 2 September 2009, the Minister and the President of the Board of Studies accepted our findings. I welcome this positive and constructive response.

20. RECOMMENDATIONS

I make the following recommendations:

20.1 I recommend that the OBOS refunds Mr Parsonage $30, being the application fee he paid with the December 2005 application that was not processed.

20.2 I recommend that the OBOS refunds Mr Parsonage $30 for the additional 'fresh' FOI application that he was taken to have made in his letter dated 15 February 2007.

20.3 I recommend that the OBOS provides Mr Parsonage with a written apology for the inconvenience and expense that he has suffered as a result of the OBOS's poor handling of his FOI applications and complaints.

20.4 I recommend that the OBOS pays Mr Parsonage compensation for the out-of pocket expenses, inconvenience and bother that he has suffered as a result of the OBOS's poor handling of his FOI applications and complaints.[48]

20.5 I recommend that, within 10 working days of the date of this report, the OBOS provide Mr Parsonage with copies of the master set of the marking guidelines for every 2005 HSC subject with more than 1000 candidates. These are the documents that include information under the headings 'sample answer/answers could include' and that were used during the marking process.[49]

20.6 I recommend that, within 10 working days of the date of this report, the OBOS provide Mr Parsonage with copies of records of the sets of cut-off marks, that were approved by the HSC Consultative Committee, for each course in the 2005 HSC exams with more than 1000 candidates.[50]

20.7 I recommend that if, on being consulted, Mr Parsonage indicates he still wishes to receive it, then the OBOS should, within a timeframe to be negotiated with him, provide him with the information described as Part (A) of his FOI application dated 15 January 2007 (which was described in this report as 'students' raw marks').[51]

---

[48] I note that in its comments on a draft copy of this report, the OBOS did not accept recommendations 20.1, 20.2, 20.3 or 20.4, stating that:

- The December 2005 applications were processed.
- The approach taken at that time was 'reasonable, if not, ideal.'
- While both the OBOS and Mr Parsonage may have chosen to conduct this matter in a different way with the benefit of hindsight, the OBOS's actions were 'reasonable and undertaken in good faith based on the information available at the time.'
- The money Mr Parsonage may have collected for the 49 individuals who joined his class action could amount to up to $490.

However, at the consultation on 2 September 2009, the Minister and the President of the Board of Studies accepted these recommendations.

[49] I note that in its comments on a draft copy of this report, the OBOS partially accepted this recommendation. It advised that the OBOS is currently preparing an improved set of guidance notes based on the 2008 HSC marking program. It also advised that it did not believe undertaking such an exercise for Mr Parsonage alone and for the 2005 HSC program would be an effective or economic use of its scarce resources.

However, at the consultation on 2 September 2009, the Minister and the President of the Board of Studies accepted this recommendation.

[50] I note that in its comments on a draft copy of this report, the OBOS stated that the Board's policy on this matter and the reasons for it preclude it from agreeing to this recommendation.

At the consultation on 2 September 2009, the Minister and the President of the Board of Studies agreed to provide only the cut-off marks related to the borderline just below Mr Parsonage's results in the subjects he sat. The President stated that he should take to the Board any decision to release anything beyond that. However, he agreed to propose to the Board that cut-off marks for the other 2005 subjects be released as part of a general change in policy about the release of cut-off marks on request.

[51] I note that in its comments on a draft copy of this report, the OBOS stated that the Board's policy on this matter and the reasons for it preclude it from agreeing to this recommendation.

However, at the consultation on 2 September 2009, the Minister and the President of the Board of Studies accepted this recommendation.

20.8 I recommend that the FOI procedures document for the OBOS be reviewed to include specific guidance that a determination letter must be *sent* (placed in an Australia Post mailbox) no later than the 21st day after a FOI application is received by the OBOS.

20.9 I recommend that the FOI procedures document for the OBOS be reviewed, in light of the observations made in this report, to include specific guidance about what actions should be taken by the FOI Coordinator when a letter is received from a FOI applicant expressing dissatisfaction about the determination they have just received.

20.10 I recommend that the OBOS arranges for all FOI Coordinators and FOI decision-makers to attend training on this issue and on FOI generally.

20.11 I recommend that the OBOS arranges for all senior officers and any other officers who may be required to respond to complaints to attend training in complaint-handling.

20.12 I recommend that the Board disseminates, through an appropriate forum (eg the Board Bulletin), an article first published in the Board Bulletin Vol 9, No. 6 (September 2000) entitled 'Setting standards for the new HSC' and an article first published in the 2002 HSC update newsletter 6 entitled 'Aligning HSC results to standards of achievement'. Although both articles are currently available on the Board's website, the Board should draw better attention to them to assist understanding of the system.

20.13 I recommend that the Board considers changing the current clerical recheck system, or establishing a new disclosure and reconsideration system, as described in chapter 3 of this report, under which students can make an application for at least 6 months after they receive their final results.

20.14 I recommend that the Board considers publishing on its website each year a version of the marking guidelines for each subject that includes the 'sample answer/answers could include' sections for each individual question.[52]

20.15 I recommend that the Board considers establishing a system (separate from the FOI system) whereby students can access the cut-off marks for any subject examined in any year, on request.[53]

20.16 I recommend that the Board amend the Handbook for Judges to explicitly require that judges are not, at any stage in the process of setting the cut-off marks for a particular subject, to take into account any knowledge (however acquired) about cut-off marks recommended or approved for that subject in previous years.[54]

---

[52] I note that in its comments on a draft copy of this report, the OBOS accepted recommendations 20.8 – 20.14 inclusive.

[53] I note that in its comments on a draft copy of this report, the OBOS stated that the Board's policy on this matter and the reasons for it preclude it from agreeing to this recommendation.

However, at the consultation on 2 September 2009, the Minister and the President of the Board of Studies accepted this recommendation.

[54] I note that in its comments on a draft copy of this report, the OBOS accepted this recommendation.

21. REQUEST TO PROVIDE REPORT

Pursuant to section 26(5) of the Ombudsman Act, I request that by 9 October 2009 the OBOS notify the Ombudsman of any action taken or proposed in consequence of this report.

Chris Wheeler

Deputy Ombudsman

Annexures

A Details of our inquiries and investigation

B The costing document

C The Consultative Committee Recommendation

D Section 18 notice requirements to produce that the OBOS claimed were not connected to the section 16 investigation notice

Annexure A: Details of our inquiries and investigation

On 2 October 2007 the case officer made written preliminary inquiries with the Office of the Board of Studies pursuant to section 13AA of the Ombudsman Act. We received the OBOS's response on 30 October 2007, enclosing copies of the OBOS's files relating to the December 2005 and January 2007 applications.

In an attempt to clarify some issues and discuss how the matter might be resolved, the case officer (and a colleague) met with the Director on 29 November 2007. Following that discussion and the Christmas break, the case officer wrote to the OBOS on 7 February 2008 setting out our concerns about how the applications had been handled and making a formal suggestion, pursuant to section 52A of the FOI Act, as to how the January 2007 application could be redetermined. Section 52A relevantly provides that an agency may review a determination in accordance with a written suggestion made by the Ombudsman in the course of a preliminary inquiry referred to in section 13AA of the Ombudsman Act.

As is our usual practice, the case officer requested that this redetermination be completed within 14 days of 7 February. A failure to meet this deadline means that the agency is deemed to have refused access to the documents sought (this is the effect of the interaction between section 52A(2) and section 34(6)).

In the same letter the case officer also made a suggestion, pursuant to section 31AC of the Ombudsman Act, that the Board consider changing their approach for future HSC examinations by automatically releasing the 'cut-off marks' for each course and each student's raw marks together with their final (aligned) marks. Section 31AC relevantly provides that the Ombudsman may, at any time, make such comments to a public authority, with respect to a complaint relating to the authority, as the Ombudsman thinks fit.

She sought advice on this suggestion within 28 days.

On 26 February, the OBOS wrote advising they had redetermined the matters, and enclosed their letter to Mr Parsonage dated 22 February 2008. That letter advised Mr Parsonage that a redetermination had been made and the result was that access was to be refused to all the documents sought.

On 14 March, we received a letter from the OBOS providing their views on the suggestion relating to the automatic release of cut-off marks and students' raw marks.

After considering the OBOS's response, the information Mr Parsonage provided and the OBOS's files relating to his FOI applications, I had concerns about the reasonableness of the OBOS's decisions, the way in which those decisions had been communicated to Mr Parsonage and the way in which the OBOS had handled our inquiries and suggestions. Consequently I decided to commence a formal investigation pursuant to section 13 of the Ombudsman Act. On 8 April 2008, I issued notices of investigation under section 16 of the Ombudsman Act to Dr John Bennett, General Manager of the Office of the Board of Studies and Dr Brian Croke, Deputy President of the Board of Studies.

I also required the OBOS and the Board to give statements of information and produce further documents, pursuant to section 18 of the Ombudsman Act, by 9 May 2008

I decided to issue separate but related section 16 and 18 notices to the OBOS and the Board because I was not clear what types of documents and records would be the responsibility of the OBOS to keep and which would be the Board's responsibility. I was also not clear which

body was responsible for making determinations under the FOI Act and decisions relating to the handling of FOI matters.

On 23 April, I received a letter from the General Manager of the OBOS requesting an extension to 4 June, which was granted. The General Manager also requested to meet with myself and the case officer personally to discuss the matter. That meeting took place on 29 April. Because one major issue was clarified at the meeting, I was able to give further details (by letter dated 1 May) about how they might comply with certain items in the section 18 notice.

Also on 23 April, I received a letter from the Deputy President of the Board of Studies advising that the information and documentation I had required was held by the Office, and that he had asked the OBOS's General Manager to respond on behalf of the Board.

On 13 May, two case officers attended a meeting with the OBOS's Director, Assessment and Examinations, the Chief Project Officer, Examinations and the Chief Assessment Officer, Assessment and Reporting Branch. At the meeting a number of issues were discussed and a demonstration of one of the OBOS's computer systems (the Examinations System) was provided.

The OBOS and Board both provided responses to the section 18 notices on 4 June.

On 16 June I wrote to the OBOS expressing our concerns about their lack of response to certain requirements in the section 18 notice. I gave them one day to comply with clauses 17 and 24 of the notice and until 25 June to make a formal written request to have certain requirements of our notice set aside because of legal professional privilege.

The following day I received further documents from the OBOS in compliance with clauses 17 and 24 of the section 18 notice. On 26 June I received a letter from the OBOS enclosing a schedule of documents which the OBOS stated were subject to legal professional privilege. I wrote to the OBOS on 2 July inviting them to reconsider their claim of privilege, asking for a response by 17 July. On 17 July, the OBOS replied that it stood by its claim.

On 16 June I had also written to the Board to advise them that I had concerns about the OBOS's response to the section 18 notice. On 20 June I received a letter from the Deputy President of the Board, expressing concerns about my advice and my views. I replied on 25 June clarifying my position and the Deputy President wrote again on 4 July acknowledging receipt of that letter.

After analysing all the available information I decided to test some of the evidence through conducting hearings under oath pursuant to section 19 of the Ombudsman Act. I conducted two hearings during September 2008, obtaining evidence from the General Manager and the Director, Corporate Services.

Other evidence reviewed as part of the investigation included the boredofstudies.org.au website and the website of the Board (www.boardofstudies.nsw.edu.au), including the Board's annual reports and a number of journal articles describing the standards-referenced framework which has been used in relation to HSC marks since 2001. A review was also done of the OBOS's records relating to a number of FOI applications it had received since 2001.

On 3 December 2008, documents containing extracts of a summary of evidence and provisional conclusions were provided to the General Manager and the Director. They were given an opportunity to comment on the accuracy of the matters set out, as it was proposed that certain adverse comments would be included about their conduct.

After considering their response, a document containing my preliminary findings and recommendations was provided to the OBOS on 12 March 2009.

After considering their response, a draft report was provided to the Minister for Education and Training on 23 June 2009.

The Minister requested that we consult with her. The first consultation took place on 15 July 2009. The second, at which we also met with the President of the Board of Studies, was held on 2 September 2009.

Annexure B: The costing document

This page has been intentionally left blank.

Annexure C: 2005 Consultative Committee Recommendation Aboriginal Studies (15000) Final

This page has been intentionally left blank.

Annexure D: Section 18 notice requirements to produce that the OBOS claimed were not connected to the section 16 investigation notice

In the OBOS's response to my section 18 notice, it complained that there were 'numerous instances' where they could see no connection between the conduct being investigated and the information being sought. In particular, it could not find any relevant connection in relation to the following requirements:

Policy documents

- Please provide a copy of any policy or other document which governs the operations of the HSC Consultative Committee.

Files containing the final approved cut-off marks

- Please provide a copy of the file that contains records of the sets of cut-off marks for each course in the 2005 HSC exams that were approved by the HSC Consultative Committee.
- If these documents are not held together in the one file, please provide a copy of the records of the sets of cut-off marks for each course in the 2005 HSC exams that were approved by the HSC Consultative Committee.
- Please provide a copy of the file that contains records of the sets of cut-off marks for each course in the 2005 HSC exams that were recommended by the respective teams of judges to the HSC Consultative Committee.
- If these documents are not held together in the one file, please provide a copy of the records of the sets of cut-off marks for each course in the 2005 HSC exams that were recommended by the respective teams of judges to the HSC Consultative Committee.

Mr Parsonage's raw marks

- For the English (Advanced) examination sat by Mr Parsonage in the 2005 HSC, please provide his:

  (a) examination mark

  (b) assessment mark

  (c) total weighted mark

  (d) raw marks attained in each question

  (e) weighted marks attained in each question

  (f) pre-moderated assessment mark (raw school assessment mark)

  (g) initial moderated assessment mark

  (h) state rank in the course.

Judges and the HSC Consultative Committee

- Please provide a copy of the Judges Training Manual and any other documents that guide judges in their work in recommending cut-off marks.
- Do the judges have to sign any commercial, performance, confidentiality or other agreement in taking on this responsibility? If so, please provide a copy of an example of such an agreement.

- Please provide a copy of any document which outlines the restrictions that are placed on judges, members of the HSC Consultative Committee and any other people who have access to final approved cut-off marks, relating to how that information may be recorded, used or distributed.
- Please provide a copy of any document outlining the process by which judges are selected from year to year.
- Please provide a copy of any policy or other document that outlines the process and criteria by which the HSC Consultative Committee scrutinises judges' decisions as to the appropriate cut-off marks for each particular subject?

Marking documents

- Please provide a copy of the marking scheme and any other documents provided to markers to assist them in their marking of the 2007 HSC examination paper for General Mathematics. (see note below)
- Please provide a copy of the policy or any other document outlining the policies and procedures relating to handling applications for a recheck of the clerical procedures.
- Please provide a copy of the policy or any other document outlining the policies and procedures relating to handling requests from principals for an explanation of an individual student's or a group's results where the performance of the individual or group does not fall within expectations.

Note: I asked for marking documents relating to a 2007 exam paper because the OBOS had asserted that relevant documents for the 2005 HSC were no longer held. At this stage I was not aware of the particular meaning the OBOS gave to the term 'marking schemes' and I was not aware of a different set of documents that the OBOS refers to as 'marking guidelines'.