

Redacted Determination

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

Applicant	Mr Algimantas Snarskis
Agency	Adelaide Hills Council
Ombudsman reference	2017/09234
Agency reference	IC17/21228; OC17/15531
Determination	The determination of the agency is reversed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to:
 1. For period 1 July 2014 to 30 June 2015 please provide in respect of each area postcode the number of property inspections made by the Council FPOs under the FES Act 2005.
 2. For period 1 July 2014 to 31 December 2014 please provide in respect of each area postcode the number of properties section 105F notices were issued by Council FPOs under the FES Act 2005.
 3. For period 1 January 2015 to 30 June 2015 please provide in respect of each area postcode the number of properties section 105F notices were issued by Council FPOs under the FES Act 2005.
 4. Request to inspect [Employee 1] Council FOI diary for period 30 October 2014 to 1 December 2014 inclusive.
 5. Show the exact location of the common boundary fence firebreak in aerial map of [the address] in October 2014 on [the owners] side of the fence for:
 - a) 5 metre wide strip as near as practical to the perimeter of the allotment;
 - b) within 5 metres of the boundary.
 6. Show the exact location of the common boundary fence firebreak in aerial map of [the address] on [the owners] side of the fence:
 - a) for period 1 July 2015 to 30 June 2016;
 - b) for period 1 July 2016 to 30 June 2017.
 7. The Fire Prevention Course Book regarding the Administration of s 105F Notices states that for efficient operation and to reduce opportunity for Review it is important to maintain:
 - a) Accurate ratepayer data base;

- b) Accurate map with ownership details.
- c) Well maintained filing system with details of:
 - i) Notices issued;
 - ii) Inspection records;
 - iii) Correspondence;
 - iv) Previous history.

You are therefore requested to provide me all Council data as supporting evidence of activity and directed to be maintained by the SA Country Fire Service as set out in 7(a) (b) (c) (i) (ii) (iii) above.

Background

- 2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

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

Provisional determination

- 4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 5 December 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
- 5. The agency responded to my provisional determination on 15 December 2017, indicating that it did not intend to make any further submissions.
- 6. The applicant did not provide submissions in response to my provisional determination.
- 7. Accordingly, this determination is in the same terms as my provisional determination.

Relevant law

- 8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
- 9. Section 18 of the FOI Act relevantly provides:

18—Agencies may refuse to deal with certain applications

(1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

(2) An agency must not refuse to deal with such an application without first endeavouring to assist the applicant to amend the application so that the work involved in dealing with it would,

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

if carried out, no longer substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

...

(5) An agency that refuses to deal with an application under this section must forthwith cause written notice of that fact to be given to the applicant.

(6) Such a notice must specify—

(a) the reasons for the refusal; and

(b) 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.

10. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
11. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Issues in this review

12. The agency determined to refuse access to documents within the scope of items 1-3 in reliance on section 18(1) of the FOI Act.
13. The agency determined that no documents exist within the scope of items 4-6. I do not have the power under the FOI Act to review the question of whether an agency's searches were sufficient.²
14. The applicant has indicated that he wishes to withdraw item 7 of his application.³
15. Therefore the issue to be considered in this review is whether the work involved in dealing with items 1-3 of the application would substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions, as required by section 18(1).
16. In considering the agency's determination, I must also consider whether the agency has complied with section 18(2).

Consideration

17. The agency provided the following information in its notice of determination:

With regards to items 1, 2 and 3, I have determined to refuse access to the documents that fall within the scope of your application. The reasons I have refused access are summarised in the attached document schedule and are explained in more detail below:

- this request is framed as a request for summarised information rather than documents
- under the "fair reading" directions for FOI access, the request made under these points should be interpreted as a request for access to documents rather than collated or summarised information. A complete release of all property inspections in every postcode would be onerous and an unreasonable diversion of the agency's resources. This would ordinarily meet the Exemption Clause 6 (Documents affecting personal affairs) as found in Schedule 1 in the Freedom of Information Act, but a consultation process with each person concerned (as per s26(3)(a)) would be onerous and an unreasonable diversion of the agency's resources (as per s18(1))
- alternative access to these records (i.e. supervised inspection of the relevant databases and/or electronic records) is impossible, given the amount of personal and identifying information in each record (see also exemptions in the point above), and a redaction of

² *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

³ Email from the applicant to my Officer dated 5 October 2017.

this information in said documents would be onerous and an unreasonable diversion of the agency's resources (as per s18(1))

- on balance, this satisfies Clause 6, and as such the release of this personal information is contrary to the public interest.
18. The agency's determination is problematic as it purports to "refuse access to documents" and discusses exemption clause 6, while also purporting to rely on section 18(1). The agency's schedule, however, clarifies that the agency intended to rely on section 18(1).
 19. Therefore in effect, the agency has not refused access to documents, but has refused to deal with items 1-3 of the application as per section 18(1).
 20. The agency also appears to consider that the fact that dealing with the application would be onerous means that the public interest criterion for clause 6 has been met. I advise that this is an erroneous interpretation of exemption clause 6.
 21. In his application for external review, the applicant provided the following submissions:

Re items 1, 2 and 3 -
I submit that the data sought is readily available as the Council computer software has this very search report facility. The information sought can be produced at a push of a few computer buttons.

The scope of the application
 22. The applicant requested that the council provide the number of property inspections, and the number of section 105F notices issued, in respect of each postcode within the council boundaries.
 23. The agency interpreted the applicant's request as a request for all documents held in relation to property inspections, and copies of the section 105F notices. The agency then determined that it would substantially and unreasonably divert the agency's resources if the agency were to deal with the application.
 24. I have considered whether the agency's interpretation of the scope of the application is correct.
 25. I accept that the agency does not already hold a physical document which lists the number of property inspections and section 105F notices issued, broken down into postcode areas. Internal correspondence from agency officers indicates that consideration was given to whether the application was requesting that the agency create a new document, which the agency is not required to do under the FOI Act.
 26. It appears that the agency considered that, on a literal interpretation of items 1-3, no documents would fall within the scope of the application. Therefore, the agency appears to have made the well-intentioned decision to interpret the application for access broadly in order to capture documents within the scope of the application. However, the agency interpreted the application so broadly that it then considered that to process the application would substantially and unreasonably divert its resources.
 27. Section 4(1) of the FOI Act defines a document to be 'anything in which information is stored or from which information may be reproduced'.
 28. Section 4(4) of the FOI Act states that 'an agency is taken to hold a document if the agency has an immediate right of access to the document'.

29. Section 4(5) of the FOI Act states that where an agency holds information in computer storage, and a particular document is capable of being produced by the computer on the basis of information so stored, the agency is to be taken to hold that document.
30. On the information available, it appears that the agency is able to extract the relevant information from the computer and generate a report which would provide the applicant with the numbers he is seeking access to.
31. Therefore my view is that the agency's interpretation of the scope of the application is incorrect. The applicant has sought access to documents which, as per section 4(5) of the FOI Act, the agency is taken to hold.
32. The reasoning provided by the agency in its determination as to why it would be onerous to deal with the application is therefore insufficient, as it assumes that the agency must deal with a large number of documents and consult with a large number of interested parties.

Has the agency satisfied section 18(2)?

33. Before making a determination to refuse to deal with an application under section 18(1), an agency must endeavour to assist the applicant to amend the application in accordance with section 18(2).
34. It is a question of fact as to whether the agency has endeavoured to assist the applicant to amend the application so that dealing with it would not substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions. In assessing the agency's endeavours I consider the following questions are relevant:
 - has the agency advised the applicant that it intends to refuse to deal with the application under section 18(1)?
 - has the agency, as far as is reasonably practicable, given the applicant information to assist him in making an application which would remove the grounds for refusal?
35. The agency's FOI officer contacted the applicant by telephone on 14 July 2017. The agency can provide no written record of this telephone conversation, and the applicant cannot provide any information as to the discussion that took place.
36. The agency has advised that the closest documented evidence of the discussion was an email received from the applicant outlining his concerns with the phone call. The email was sent to the agency on 9 August 2017 and states that:

I make reference to your telephone call on 14 July 2017.

I feel very uncomfortable about the telephone call you made.

On such important issues as Freedom of Information it is very important to ensure that there is no misinterpretation of information sought or provided verbally.

Therefore I respectfully request that if you have a query regarding my request for information...then put it in writing and I will provide you with a prompt response.

37. There appears to be no evidence that the agency corresponded with the applicant in writing regarding the scope of the application, following receipt of his email.
38. The agency's determination dated 8 August 2017 states:

With regards to point 7, as per your phone conversation with [the agency's FOI officer] on the 14th July 2017, you specified that the final point was included as a clarifying point to assist with the provision of aerial maps under points 5 and 6, and you did not require a copy of our records in relation to the Course Book.

39. On 11 August 2017 the applicant emailed the agency with the following response:

I make reference to your advice dated 8 August 2017 and posted on 9 August 2017...It is now abundantly clear that there has been a misunderstanding. At no time did I withdraw request for point 7.

40. I have also considered an internal agency email, sent from the agency's FOI officer to another officer on 14 July 2017. The email states:

My main point of concern is what he is asking for under point 7. I will also call Mr Snarskis to clarify what he is asking for in the final point.

41. On the available evidence, it appears that the phone conversation on 14 July 2017 was restricted to clarifying the intent and scope of item 7. There is no evidence that items 1-3 were discussed, nor that the applicant was advised that the agency intended to refuse to deal with items 1-3.
42. My view is that the agency has not fulfilled its obligations under section 18(2) to assist the applicant to reduce the scope of the application. Consequently, the agency was not empowered to refuse to deal with the application under section 18(1).

Has the agency satisfied section 18(1)?

43. For completeness, I have considered whether, notwithstanding that the agency has misinterpreted the scope of the application and has not fulfilled its obligations under section 18(2), it was justified in refusing to deal with the application.
44. When an agency is making a decision about the impact that processing an application would have on its resources, it can take into account the resources involved in:
- identifying, locating and collating documents
 - deciding whether to give or refuse access to documents, or give access to redacted documents
 - consulting interested parties about documents
 - making copies of documents.

This list is not exhaustive and additional relevant factors relating to resources required to deal with an application can also be considered.

45. My Office has made enquiries with the agency requesting an estimate of how many hours it would take to deal with the application and the cost to the agency of dealing with the application.
46. The council's response indicated that, contrary to its determination, it now considered the scope of the application to extend only to extracting information from its computer system in order to provide the numbers sought by the applicant.
47. Regarding the number of hours it would take the agency to deal with the application, the agency indicated that:

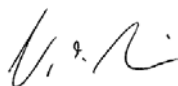
Council estimates it would have taken approximately 8 hours to create the information requested by Mr Snarskis. Please note to complete the request made by Mr Snarskis would have required the diversion of administrative staff in Regulatory Services area from regular duties. Currently, administrative resourcing within Regulatory Services area is limited to 4 days a week, or 0.8 FTE. Tasks undertaken by administrative staff need to be prioritised daily given demand far exceed resources available. Alternatively, Council would have had to explore seconding administrative assistance from elsewhere within Council. If this were the case an element of training would have been required in Regulatory Services systems and processes.

In either case, the time spent creating the records requested by Mr Snarskis would have been at the expense of other tasks or delayed them.

48. The agency further indicated that it would cost approximately \$300 to deal with the application.
49. I note that the provision of the numbers sought by the applicant in items 1-3 in document form is unlikely to attract exemptions, and it appears that no interested party consultation would be required.
50. I do not consider that eight hours of work by one administrative employee can be considered to substantially divert the agency's resources from their use by the agency in the exercise of its functions. The agency has indicated that the administrative staff members already prioritise tasks, as daily demand far exceeds the resources available. I do not consider that understaffing of administrative staff can be relied upon by the agency as a reason not to process an FOI application due to the need to divert a single staff member for one day.
51. Therefore, while my view is that the agency was not empowered to refuse to deal with the application as it failed to comply with section 18(2), I also comment that it does not appear that the agency has met the requirements of section 18(1).

Determination

52. In light of my views above, I reverse the agency's determination.



Wayne Lines
SA OMBUDSMAN

21 December 2017

APPENDIX

Procedural steps

Date	Event
13 July 2017	The agency received the FOI application dated 11 July 2017.
8 August 2017	The agency determined the application.
6 September 2017	The Ombudsman received the applicant's request for external review.
9 October 2017	The Ombudsman advised the agency of the external review and requested submissions and documentation.
10 November 2017	The agency provided the Ombudsman with its submissions and documentation.
5 December 2017	The Ombudsman provided the parties with his provisional determination.
15 December 2017	The agency provided a response to the Ombudsman's provisional determination.