



### **Agency sufficiency of search of documents not reviewable under the FOI Act**

The Ombudsman recently completed an External Review under the *Freedom of Information Act 1991 (FOI Act)* on an application by Dr El Shafei (the applicant) to the Central Adelaide Local Health Network (the agency). The applicant raised concern about a refusal of access to certain documents. These matters were subsequently resolved through agency cooperation. However, the applicant was also of the view that the agency possessed further documents within the scope of his application which had not been located. Specifically, he believed there were deleted emails which could be accessed through an email inbox restoration. In his External Review, the Ombudsman considered the question of sufficiency of search. The Ombudsman considered that while it was reasonable to believe permanently deleted emails which fell within the scope of the application might have existed, the agency's searches to locate documents within scope had been reasonable in the circumstances of the case.

The applicant then applied to the South Australian Civil and Administrative Tribunal (**SACAT**) requesting a review of the Ombudsman's determination. SACAT considered the FOI Act and concluded that the Ombudsman had the power to review a 'determination' of an agency, but that the wording of the FOI Act did not create a power to review the question of whether an agency's searches were sufficient, as this was not a 'determination'. Consequently, the Ombudsman had no jurisdiction to consider the question of sufficiency of search, using his powers under the FOI Act.

The consequence of this decision (which can be read in full at *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 - <http://www.austlii.edu.au/au/cases/sa/SACAT/2017/5.html>) is that the Ombudsman will henceforth consider any questions of sufficiency of search using his powers under the *Ombudsman Act 1972*. Issues regarding sufficiency of search will be processed as complaints, separately from the FOI External Review process, and will be assessed to determine whether the agency has acted in a way that is unreasonable, unlawful or wrong within the meaning of the *Ombudsman Act 1972*.