

OmbudsmanSA

Determination

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

Applicant	Mr Kelvin Bissett
Agency	Department for Health & Ageing
Ombudsman reference	2014/04455
Agency reference	FOI2014-00031
Determination	The determination of the agency is reversed.

REASONS

Application for access

- By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access to the following information held by the agency's 'Pregnancy Outcomes Statistics Unit':
 - For 2012, Summary Perinatal Data, Public & Private Acute Maternity Hospitals, for each hospital for:
 - Babies Admitted to NICU,
 - Mothers Receiving Pain Relief During Childbirth,
 - Breastfeed "at some stage" and
 - Mothers with 3rd or 4th Degree Tear.
 - For 2012, Mothers by Method of Birth, Public and Private Acute Maternity Hospitals, by percentage for each hospital for:
 - Vaginal Non-Instrumental Spontaneous,
 - Vaginal Non-Instrumental Induced,
 - Forceps,
 - Vacuum,
 - Caesarian [sic].
 - For 2012, Average Length of Stay for Liveborn Babies Discharged Home, Public & Private Acute Maternity Hospitals for each hospital. Average Length of Stay (days).
 - For 2012, Neonatal Death Rate, Public and Private Acute Maternity Hospitals for each hospital. Liveborns who die within 28 days of birth, rate per 1,000 births.
 - For 2012, Neonatal Costs as at June 2012, Public Acute Hospitals, for each hospital:
 - Neonatal Cots - Level 2 (SCN),
 - Neonatal Cots - Level 3 (NICU) and
 - Total Neonatal Cots.
- In support of his application, the applicant included tables that Queensland Health released to him in early 2014,¹ covering the statistical areas to which he sought 'access in South Australia for 2012, or preferably the 2012-13 financial year by hospital'.

¹ According to the tables, the data was extracted on 9 January 2014 and 'are preliminary, subject to change.' In addition, the data for private hospitals appears to have been combined.

Background

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

Jurisdiction

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

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 7 October 2014. I informed the parties that subject to my receipt and consideration of submissions from them I proposed to reverse the agency's determination as I was not satisfied that the agency holds any documents within the scope of the application.
6. Neither the agency nor the applicant provided submissions in response. Accordingly, I have made this (my final determination) in the same terms as my provisional determination.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
8. The FOI Act defines a document as 'anything in which information is stored or from which information may be reproduced'.³ In addition:
 - (4) An agency is taken to hold a document if the agency has an immediate right of access to the document.
 - (5) Where—
 - (a) an agency holds information in computer storage; and
 - (b) 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.⁴
9. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
10. 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.

² *Freedom of Information Act 1991*, section 12.

³ *Freedom of Information Act 1991*, section 4(1).

⁴ *Freedom of Information Act 1991*, sections 4(4) and 4(5).

Issues in this review

12. During the external review, and after more detailed discussions with some of its technical experts, the agency submitted that it does not hold any documents within the scope of the application. This is in contrast to both its original determination and its determination following internal review.
13. Originally, the agency purported to defer access to a document under section 21 of the FOI Act.⁵ In its notice of determination, the agency explained:
- ... that data, including that which you have requested, is currently being validated, and will be represented as aggregated data in the yet to be finalised *Pregnancy Outcomes in South Australia 2012 Report [the report]*, which is produced under Part 5 of the *Health Care Regulations 2008*... [and] is expected to be tabled in Parliament in the second half of 2014...
14. When applying for internal review, the applicant made it clear that the information he was 'seeking is not the report itself... It is [a] request for very specific information...'
15. Following internal review, the agency concluded that it held one document within the scope of the application. It claimed that document was exempt as a document:
- affecting personal affairs (clauses 6(1) and 6(3a))
 - containing confidential material (clause 13(1)(b), with reference to regulation 26 of the *Health Care Regulations 2008* and the definition of 'confidential information' in section 63 of the *Health Care Act 2008*)
 - subject to contempt etc (clause 17(c)).⁶
16. It is my role to consider, on the evidence provided to me, whether there are reasonable grounds to believe that any documents within the scope of the application are held by the agency. If so, I must then consider:
- whether the agency's searches to locate such documents have been reasonable in the circumstances
 - in the event that any such documents are located, whether the agency has justified its determination to refuse access to them.

Parties' submissions

Agency's submissions

17. By letter dated 21 July 2014, the Crown Solicitor's Office (CSO) provided detailed submissions in support of the agency's claim that it does not hold any documents within the scope of the application for access. The submissions included the following:
- the agency does not hold data in the same way as Queensland
 - the agency treated the application as a request for documents containing the requested information
 - when the application was made:
 - [the agency] did not hold any physical written document that contained the [requested] information... The only way information on pregnancy outcomes for the year 2012 was held by the agency at that time was on individual forms filled out for every birth and provided to the agency by the relevant health provider ... and in an SQL database in which that information was entered
 - the information held by the agency for 2012 was incomplete when the applicant applied for access and internal review
 - the SQL database holds the relevant information 'via the use of numerical codes'

⁵ Notice of determination dated 10 April 2014. *Freedom of Information Act 1991*, section 21, sets out the circumstances in which an agency may defer access to a document.

⁶ Notice of determination dated 20 May 2014.

- information is usually cross-checked, and errors and omissions rectified, before any information is extracted from the SQL database
 - 'computer language programming commands' need to be applied to the data to extract it from the SQL database:
 - The system does not have menu commands in the way most modern windows software operates, but requires an expert user to write specific commands or queries using relevant computer language which are then applied to the database to produce the desired results
 - programming requests for data that the agency regularly requires to be extracted from the SQL database generally exist, but new requests would require new programming commands to be written
 - the agency 'does not generally, and has not previously been required to produce the particular statistical information' sought by the applicant; to do so 'would require an expert officer to write new specialised commands'
 - once information is extracted from the SQL database it may be exported to Excel and then subsequently exported to Word; titles and descriptions may then be added to the Word version
 - section 4(5) of the FOI Act 'only refers to documents that are able to be produced by the computer hardware and software programs that the agency holds at the time of the request' (on this point the agency referred to *Collection Point Pty Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 104, at [52] in particular)
 - reports produced from the SQL 'database and exported to Excel will generally require some further manual editing to make them legible to an ordinary user'
 - cross-checking and amendment of the source data had only recently been completed for 2012
 - 'reports produced from the [SQL] database prior to the relevant checks and amendments being completed would not, in fact be the relevant statistical information for 2012, but would be some sort of subset of that information'
 - the agency claimed that the following documents are outside the scope of the application for access:
 - the document considered on internal review, because it:
 - 'was created for the purposes of the internal review'
 - is a draft produced using incomplete data, that was edited by relevant officers in Excel and Word
 - a document provided to Ombudsman SA on 1 July 2014, because it was produced following the commencement of the external review, and following 'the creation of new commands'.
18. During the meeting on 1 July 2014, the agency and the CSO submitted that:
- the initial deferral determination was for a document that did not yet exist
 - the SQL database is designed to be used in conjunction with other programs
 - the agency provides summary documents to health units (**summary documents**), but these have not been produced yet⁷
 - the report is produced to provide context to two other reports required to be submitted to Parliament
 - requested data is released in the report, albeit not at the hospital level
 - codes for the hospitals included on the document provided to my office during the meeting may not even be known to the hospital
 - producing the document provided to my office during the meeting was time consuming and set the agency back by a week in its preparation of the report.
19. I understand that the agency's epidemiology branch does not have the information requested in items 1(c), 5(a), 5(b), and 5(c) of the application for access.⁸

⁷ This was in response to a question from one of my legal officers, based on information received from the agency on 18 June 2014.

20. By email dated 24 September 2014 the agency provided further information about the summary documents, and one example from 2011⁹:

- a summary document is only provided to obstetric hospitals 'with 110 or more births for the year'
- the information contained in the summary documents is based on the SQL database:

Each year the commands/programming are modified as required to adjust the report according to changed definitions and reporting conventions. Running the 2011 program on the 2012 data, for example, would not produce a complete and reliable report. I also note that in the SQL database, hospitals are not flagged by name, only by ID number, and that this information must thus also be translated each year before it can be of any general use... the raw statistics have to be analysed and interpreted (including explanations of terms etc.) to ensure that they can be properly understood.

- the agency is in the process of constructing the 2012 summary documents.

Applicant's submissions

21. In his internal review application the applicant made a number of submissions,¹⁰ including the following:

... The statistics are straightforward and pose no threat to your agency...

The refusal to release the requested documents appears indicative of an agency that is resistant to the idea of government transparency and, more specifically, the Objects of the SA FOI Act. It seems the agency believes the rights provided by the SA FOI Act should be subordinate to SA Health and Agency's media strategy for when information be [sic] made public...

The point that some or all of the information I am requesting may be in a future report should not remove it from the reach of the SA FOI Act...

... [Y]our agency's decision to refuse access falls well short of the levels of disclosure elsewhere. Queensland Health ... provide[d] identical information following an identically-worded request ... on February 6, 2014...

Nine Network Australia has a long-standing commitment to using FOI laws to enhance the quality of its news coverage for its viewers...

I submit hundreds of applications every year under relevant FOI laws with the Commonwealth and states, including since July 1, 2013 South Australia. We generally have co-operative relationships with agencies and provide ample opportunity for agency representatives to comment prior to any news stories based on released documents being broadcast. However, we expect all agencies to take their obligations to open government under FOI laws seriously. Where there is clear obstruction, Nine News will pursue external review mechanisms vigorously...

22. In an email to my office dated 4 August 2014 following receipt of a summary of the agency's submissions dated 21 July 2014,¹¹ the applicant offered the following submissions:

... I am somewhat surprised, however, at the extent of the effort invested by DHA in seeking to make this as difficult as possible. This process should have led to the release of a straightforward, uncontroversial statistical information dataset about maternity wards.

⁸ Such information does not appear to be required under the *Health Care Regulations 2008*, regulation 22 and Schedule 2, Part 1.

⁹ The agency has provided the example from 2011 to my office on a confidential basis.

¹⁰ This was following the agency's determination to defer access to a document.

¹¹ The CSO's submissions dated 21 July 2014 were labelled 'confidential'. At the CSO's request I provided an advance copy of my email to the applicant to the agency and CSO.

I have been involved in the FOI process in a number of states and territories for more than 10 years. Nowhere have I seen a jurisdiction where agencies are as noncompliant with their Act's primary object than SA - even the paranoid Victorian public service looks like an open book in comparison. There is a desperate need for cultural change in FOI processes and attitudes.

I note it was made clear to me at the time of the decision by the DHA that the information dataset would be released in some form to the SA state parliament later this year and that was the reason my request should be dismissed. Now it appears this is not the case...

23. During discussions with one of my legal officers, the applicant submitted that:
- he is an experienced FOI applicant, and the sort of information he has applied for 'is bread and butter'
 - agencies should promote the availability of this sort of information and do all they can to provide relevant documents
 - the argument that the FOI Act concerns documents not information has been argued before; most things are in computer storage now
 - South Australia 'is a very dark place'; the culture is to throw obstacles in the way, and there is cultural resistance to providing documents; agencies are not prepared to go out of their way
 - South Australians deserve the same transparency as everywhere else.

Consideration

Preliminary issues

24. The FOI Act is about the public's right to access 'documents' held by an agency.
25. In my view, the approach taken by the agency to search for documents containing the requested information is sound. In the context of the FOI Act, the distinction between documents and information is important.
26. An agency holds documents that are in its physical possession. In addition, an agency is taken to hold documents to which it has an immediate right of access¹² and documents capable of being produced by a computer on the basis of information held by an agency in computer storage.¹³ An agency is not otherwise required to produce a document to satisfy an application under the FOI Act. Whether an agency wishes to do so is a matter of policy.
27. Only documents that:
- existed and to which the agency had an immediate right of access and
 - were capable of being produced using existing computer hardware and software programs on the basis of information held by the agency in computer storage when the agency received the access application, are within its scope.¹⁴

Are any of the identified documents in scope?

28. Having regard to submissions provided by, or on behalf of, the agency I am satisfied that the following documents are outside the scope of the application for access:
- the document considered on internal review
 - the document provided to Ombudsman SA on 1 July 2014
 - summary documents for 2012.

¹² *Freedom of Information Act 1991*, section 4(4).

¹³ *Freedom of Information Act 1991*, section 4(5).

¹⁴ *Re Radar Investments Pty Ltd and Health Insurance Commission* [2004] AATA 166 and *Collection Point Pty Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 104.

29. I accept that when the application for access was made such documents did not exist, and were not capable of being produced using existing computer hardware and software programs on the basis of information held by the agency in computer storage.
30. I understand that the agency held some but not all of the forms provided by individual hospitals when the application was made. Hospitals are required to provide pregnancy outcome information to the Minister in accordance with the *Health Care Regulations 2008*.¹⁵ This covers most, but not all, of the information sought in the application for access.¹⁶ My understanding is that the pregnancy outcome information is provided to the agency's epidemiology branch for inputting into the SQL database and for use in producing reports. Whether or not the agency had an immediate right of access to the outstanding forms when the application was made, is arguable; although I consider the argument would be more persuasive with respect to the Minister than the agency.
31. The application for access is very prescriptive. It seeks aggregated figures; a percentage; and the rate per 1000 births for a whole year of the relevant categories of information. Having regard to these terms, I am not satisfied that the individual forms are within the scope of the application for access in any event.

Are there reasonable grounds to believe that any other documents are within scope?

32. The FOI Act does not prescribe the manner in which questions concerning the sufficiency of the agency's searches to locate documents within the scope of an access application are to be resolved.
33. The District Court has stated that a search for documents must be 'reasonable and sufficient'.¹⁷
34. The Queensland Information Commissioner considers that a two-stage test is warranted:
- a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency...; and if so,
 - b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstance of a particular case.¹⁸
35. This approach was considered and followed in a decision of the New South Wales Administrative Decisions Tribunal.¹⁹ In that decision, Judge O'Connor said that when an applicant contends that an agency has failed to perform a sufficient search, the applicant must first put some credible material or submissions before the tribunal to satisfy it that there is an arguable case that documents of the kind requested exist.²⁰
36. Adopting the two-stage test preferred by the Queensland Information Commissioner, the first step for me to consider is whether there are reasonable grounds to believe that any documents within the scope of the application exist and are held, or taken to be held, by the agency.
37. I am not persuaded that there are in this instance. In saying this, I have had regard to the terms of the application and the submissions from the parties.

¹⁵ *Health Care Regulations 2008*, regulation 22 and Schedule 2, Part 1.

¹⁶ There does not appear to be an obligation under the *Health Care Regulations 2008*, regulation 22 and Schedule 2, Part 1 to provide the information requested in items 1(c), 5(a), 5(b), and 5(c) of the application for access.

¹⁷ *Akritidis v Police Commissioner* [1998] SADC 291 (Unreported, South Australian District Court, Judge Robertson, 23 April 1999), 20.

¹⁸ *Shepherd v Department of Housing, Local Government & Planning* (1994) 1 QAR 464 [19].

¹⁹ *Cianfrano v Director General, Department of Commerce and Anor (No 2)* [2006] NSWADT 195. This decision is available via <http://www.austlii.edu.au> accessed on 15 September 2014. Note, however, that the citation refers to *Cainfrano*.

²⁰ *Cianfrano v Director General, Department of Commerce and Anor (No 2)* [2006] NSWADT 195 [69].

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38. My understanding is that the *Pregnancy Outcome in South Australia* report scheduled to be tabled in South Australian Parliament later this year will include statistical information in many of the categories to which the applicant seeks access, but not per hospital.²¹ Based on previous reports, the only data that is reduced to a hospital level concerns race. This data is outside the scope of the application for access.
39. I accept that in order for the agency to provide some or all of the requested data at the hospital level for 2012, additional codes would need to be written, and any document produced as a result would be outside the scope of the application for access. This is so even if it would be a relatively simple process.
40. Further and in any event, I accept that when the application for access was made the agency had not received all of the relevant information and its statistical data was therefore incomplete.

Determination

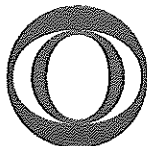
41. In light of my views above, I reverse the agency's determination following internal review. I am not satisfied that the agency holds any documents within the scope of the application.



Megan Philpot
ACTING SA OMBUDSMAN

22 October 2014

²¹ This is consistent with reports tabled in previous years. See for example *Pregnancy Outcome in South Australia 2011*, <http://www.sahealth.sa.gov.au/wps/wcm/connect/71a4600041ffdc9957dbdf8b1e08c6d/13103.1-Pregnancy+Outcomes+Report-FINAL.pdf?MOD=AJPERES&CACHEID=71a4600041ffdc9957dbdf8b1e08c6d> accessed on 5 August 2014.



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APPENDIX - 2014/04455

Procedural steps

Date	Event
On or about 23 January 2014	The agency received the FOI application dated 23 January 2014.
10 April 2014	The agency advised that data was being validated, and would then be aggregated, reported (in the <i>Pregnancy Outcomes in South Australia 2012 Report</i> under Part 5 of the <i>Health Care Regulations 2008</i>) and tabled in parliament (in the latter half of 2014). The agency deferred access. ¹
6 May 2014	The agency received the internal review application dated 1 May 2014.
8 May 2014 ²	The agency acknowledged the application for internal review.
20 May 2014	The agency refused access to the only document it had identified.
23 May 2014	The Ombudsman received the application for external review by email.
28 May 2014	The Ombudsman advised the agency of the external review and requested submissions and documentation.
18 June 2014	The agency provided some of the requested documentation.
1 July 2014	A representative of the agency and the agency's solicitor met with officers of Ombudsman SA. The agency provided additional information and submissions.
21 July 2014	The agency's solicitor provided further submissions on behalf of the agency by email.
4 August 2014	Ombudsman SA provided a summary of the agency's submissions to the applicant by email.
5 August 2014	An officer of Ombudsman SA discussed the review with the applicant.
26 August 2014	Ombudsman SA sought a response from the applicant about whether he wanted to proceed with the external review.
	The applicant responded by telephone.

¹ *Freedom of Information Act 1991*, section 21.

² The letter incorrectly refers to 8 April 2014, however.

26 August to 2 September 2014	Ombudsman SA communicated with the parties about ways to progress the matter.
15 September 2014	Ombudsman SA requested additional information from the agency.
24 September 2014	Ombudsman SA received additional information from the agency by email.
7 October 2014	The Acting Ombudsman issued her provisional determination.
14 October 2014	The agency advised Ombudsman SA that it had no further submissions to make by email.