

Determination

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

| | |
|---------------------|---|
| Applicant | Hon Mark Parnell MLC |
| Agency | Environment Protection Authority |
| Ombudsman reference | 2013/06815 |
| Agency reference | 05/21205 |
| Determination | The determination of the agency is confirmed. |

REASONS

Background

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access to:

A copy of any correspondence (or filenotes, emails, minutes, memos or any other documentation describing communication) with Bespoke Approach, and/or Kevin Foley, and/or Ian Smith, and/or Alexander Downer, and/or Nick Bolkus concerning the operations of the Nyrstar smelter in Port Pirie.

Background

2. The procedural steps relating to the application and the external review are set out in the appendix to this determination.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
4. I have exercised my discretion under section 39(4) of the FOI Act to extend the time for making an application for external review.

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 17 October 2013. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
6. The agency provided submissions in response. I have considered these submissions in my reasons below.

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.¹
8. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Issues in this review

9. The agency claims it has been unable to locate any documents that relate to the applicant's request.
10. In my letter notifying the agency of my external review I specifically requested that where documents have not been provided to the applicant because they cannot be located, the agency provide statutory declarations from relevant staff attesting to:
 - the nature of specific searches which have been conducted and how those searches were conducted
 - the full name of any electronic databases which have been searched along with a brief description of the contents of these databases
 - the agency's reference numbers for any paper files searched
 - confirmation regarding whether or not the documents requested were found as a result of the searches conducted.

Consideration

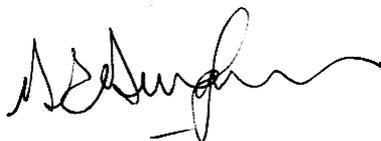
11. The FOI Act does not prescribe the manner in which an agency must search for documents within the scope of an application. The District Court has stated that a search for documents must be 'reasonable and sufficient'.² It is my role in an external review to determine, on the evidence provided to me, whether an agency has conducted a reasonable search for documents in the circumstances.
12. On 5 August 2013, the agency requested an extension of time in order to respond to my notification of external review. My office granted an extension until 12 August 2013.
13. The agency provided its response on 9 August 2013, advising that it had 'undertaken a further search of records and had again been unable to locate any documents that relate to the applicant's request'.
14. The agency attached to its response a series of emails between officers requesting that searches be undertaken and the resultant replies.
15. Despite being granted an extension upon request, the agency did not provide any statutory declarations attesting to actual searches conducted for documents within the scope of the review. The emails the agency attached to its response were not accompanied by any further information, such as explanations of the searches which were conducted by agency staff. The agency did not specifically address any of my requests for detail in my notification of external review.
16. I expressed the view in my provisional determination that this scant response from the agency, particularly as it was provided after an extension of time, was most unsatisfactory. I noted that on the basis of the information provided by the agency, I

¹ Section 12.

² *Akritidis v Police Commissioner* [1998] SADC 291 (23 April 1999) at 20.

was not satisfied that the agency has conducted a reasonable search for the documents.

17. In its subsequent response to my provisional determination the agency has provided a series of statutory declarations from each of the officers who were requested to undertake searches by the agency's FOI unit. In each of these statutory declarations, agency officers attest that no documents were located. Further, the agency has advised that detailed searches were conducted of the Integrated Information System (IIS) database, the Complaints and Reports of Environmental Significance (CARES) database, and it has provided a screenshot of the search of the Recfind system.
18. I comment that the agency appears to have misunderstood my request for statutory declarations from 'relevant staff'. In this case, it is likely to have been sufficient to provide a statutory declaration from a staff member within the FOI team attesting to the specific detail and results of the database and Recfind searches, rather than providing statutory declarations from each of the 20 officers emailed with requests to conduct searches.
19. This misunderstanding may have contributed to the agency's view that my request for statutory declarations was 'not usual'. In fact, it is not an uncommon request that agencies provide statutory declarations in cases where the sufficiency of the searches conducted for documents is likely to be at issue.
20. I am satisfied that the agency has conducted reasonable searches for documents and that no documents within the scope of the application have been located.
21. In light of my views above I confirm agency's determination pursuant to section 39(11) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

5 November 2013

APPENDIX

Significant procedural steps

| Date | Event |
|-----------------|---|
| 19 April 2013 | The agency received the FOI application dated 18 April 2013. |
| 19 May 2013 | The agency failed to determine the application within the 30 day period required by the FOI Act, ³ and is deemed to have refused access to the documents. ⁴ |
| 24 May 2013 | The agency received the internal review application dated 24 May 2013. |
| 8 June 2013 | The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ⁵ |
| 12 July 2013 | The Ombudsman received the applicant's request for external review dated 12 July 2013. |
| 16 July 2013 | The agency provided the applicant with a determination stating that 'it has been unable to identify any documents' within the scope of the application. |
| 22 July 2013 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 5 August 2013 | The agency requested an extension until 12 August 2013 to provide response to the Ombudsman. |
| 7 August 2013 | The agency provided the Ombudsman with its submissions and documentation. |
| 17 October 2013 | The Ombudsman provided the agency and applicant with a provisional determination. |
| 31 October 2013 | The agency provided submissions on the Ombudsman's provisional determination. |

³ *Freedom of Information Act 1991*, section 14(2).

⁴ *Freedom of Information Act 1991*, section 19(2).

⁵ *Freedom of Information Act 1991*, section 29(5).