

Determination

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

Applicant	[The applicant]
Agency	Minister for Sustainability, Environment and Conservation
Ombudsman reference	2017/00863
Agency reference	16SEC801897
Determination	The determination of the agency is varied.

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:

My complete file held by the RSPCA containing all information in relation to [date of inspection]. Animal Cruelty Report [number].¹

2. On [date], RSPCA inspectors and an RSPCA veterinary surgeon attended the applicant's property in response to an animal cruelty complaint. Following this, he was charged with ill-treatment of [animals], contrary to section 13(1) of the *Animal Welfare Act 1985*. On [date] he pleaded guilty to these charges at the [court's location] Magistrates Court.

Background

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

Jurisdiction

4. The agency failed to 'actively' determine the application for access or internal review within the timeframes required by the FOI Act.
5. On 27 October 2016 it was therefore deemed to have confirmed its original deemed determination refusing access to the documents.²
6. Section 39(3)(b) of the FOI Act provides that an application for external review must be made within 30 days after the date of the determination. I received the application for

¹ The applicant indicated that he sought access to copies, by way of inspection, and in another form, although he has not specified which other form he requires the documents in.

² *Freedom of Information Act 1991*, sections 29(5) and 19(2).

external review on 25 January 2017.³ I should have received it by 28 November 2016.⁴ The application for external review was therefore made approximately two months late.

7. Pursuant to section 39(4) of the FOI Act, I have exercised my discretion to extend the time for making the application.
8. In saying this, I have had regard to the following factors:
 - the delay in the agency's decision-making process arose due to its decision to obtain legal advice
 - the agency did not advise the applicant of his external review rights
 - the applicant contacted the agency on a couple of occasions to check on the progress of his internal review application
 - the applicant explained that his delay in applying for external review was due to the agency's advice that a determination would be forthcoming; he eventually sought external review because he became frustrated by the ongoing delays
 - the agency's issuing of a belated determination to give access to some of the documents⁵
 - the merits of the external review application (discussed below)
 - the agency has not objected to me granting an extension.⁶

Provisional determination

9. My Deputy provided her tentative view about the agency's determination to the parties, by her provisional determination dated 28 August 2017. She informed the parties that subject to her receipt and consideration of submissions from the parties she proposed to vary the agency's determination.
10. The agency and the complainant both advised that they accepted the variation proposed in the provisional determination. To date, neither the applicant nor the RSPCA have responded to the provisional determination. Accordingly, this determination is in the same terms as the provisional determination.

Relevant law

11. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁷
12. 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.
13. I intend to consider whether the documents to which the applicant has been refused access are exempt as documents affecting personal affairs (clause 6(1)); internal working documents (clause 9(1)); or documents subject to legal professional privilege (clause 10(1)).⁸

³ This occurred when a legal officer telephoned the applicant in response to a message he had left with my Office on 24 January 2017.

⁴ *Freedom of Information Act 1991*, section 39(3) and *Acts Interpretation Act 1915*, section 27(2).

⁵ *Freedom of Information Act 1991*, section 19(2a).

⁶ The agency did not raise any objections in response to the provisional determination, or when one of my legal officers first sought the agency's views about this issue.

⁷ *Freedom of Information Act 1991*, section 12.

⁸ I intend to consider clause 10(1) even though the agency has not claimed it. I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29]. The agency also claimed parts of some documents exempt as documents affecting business affairs (clause 7(1)(c)), but the applicant no longer seeks access to these parts.

14. The relevant parts of these clauses provide:

Clause 6(1)

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

Clause 9(1)

- (1) A document is an exempt document if it contains matter—
- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) would, on balance, be contrary to the public interest.

Clause 10(1)

A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

15. Section 20(4) provides that if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give the applicant access to a copy of the document to this limited extent.
16. Under section 48, the onus is on the agency to justify its determination ‘in any proceedings’. This includes the external review process.
17. 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.

Documents in issue

18. The agency identified 164 documents within the scope of the application.
19. When the applicant applied for external review, the agency was deemed to have refused him access to all documents.⁹
20. During the course of the external review, however, the agency determined to:
- release documents 1 to 110, 113, 114, 116 to 118, 121 to 124 and 130 to 162 in full
 - partially release documents 112, 115, 120, 163 and 164.¹⁰
21. At the same time, the agency claimed that documents 112, 115, 120, 163 and 164 are partially exempt, and documents 111, 119 and 125 to 129 are exempt in their entirety.
22. During a discussion with one of my legal officers on 9 May 2017, the applicant advised that he did not seek access to the redacted information in documents 112, 115 and 163.¹¹ I therefore intend to exclude them from further consideration.

⁹ *Freedom of Information Act 1991*, sections 14(2), 19(2) and 29(5).

¹⁰ As permitted by the *Freedom of Information Act 1991*, section 19(2a).

¹¹ My legal officer confirmed this by letter to the applicant dated 9 May 2017. The redacted information in these documents consists of a veterinary pathologist’s direct telephone number and part of a credit card number.

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23. Accordingly, documents 111, 119, 120, 125 to 129, and 164 are in issue for the purpose of my review (**documents in issue**).

Issues in this review

24. It is for me to consider whether the agency has justified its determination to refuse access to the documents or parts of the documents in issue.

Submissions

The agency

Documents 120 and 164

25. Documents 120 and 164 are the 'Cruelty Complaint Summary'. They are duplicates of one another.
26. The agency claims that the name and contact details of the person who made the report to the RSPCA (**the complainant**), along with some of the comments/notes, on page 1 are exempt under clause 6(1). In its notice of determination, the agency merely asserted that it would be 'unreasonable' to disclose such information. During a discussion with one of my legal officers, an agency representative added that the RSPCA relies on information provided by complainants, and the agency is concerned that disclosing identifying information would deter people from providing similar information in the future.

Documents 111, 119 and 125 to 129

27. Document 111 is titled 'Brief [number] Overview', and comprises two pages.
28. Document 119 is a two-page 'Prosecution Brief'.
29. Document 125 is a two-page 'Prosecution Memo'.
30. Document 126 is a one-page 'Adjudication of Brief'. It consists of three separate communications [dates].
31. Documents 127 and 128 are emails, totalling two pages and one page, respectively.
32. Document 129 comprises two pages of typed notes titled '[Location] [animal] Visit'.
33. Prior to the provisional determination, the agency described all of these documents as 'internal communications between RSPCA officers' and claimed that they were exempt under clause 9(1). The agency submitted that their disclosure 'would be contrary to the public interest as it would inhibit frankness and candour in future internal RSPCA communications about prosecutions'.

The applicant

34. The applicant is attempting to gather evidence to support his claims that [witness' name and title] witness statement [date], created for the purpose of the applicant's prosecution, is factually incorrect in two material particulars. [Particulars of claimed errors in the statement.]

35. He believes that evidence to support these claims exists, or should exist, and would exonerate him of the charges he pleaded guilty to, or mitigate his responsibility for them.
36. On 25 July 2017 the applicant advised my Office that two of the documents in issue (documents 111 and 129) were provided to him during the prosecution process. He recalls one having been attached to the veterinary pathologist's report and receiving the other when attending court. [Name] MP's office subsequently emailed copies of documents 111 and 129 to my Office on the applicant's behalf.

Interested parties

37. The agency consulted five interested parties.¹² Only two of the interested parties are relevant for the purpose of the review, namely the RSPCA and the complainant.¹³
38. The agency consulted the RSPCA about various documents. At that time, the RSPCA advised that it had no further comments to make about the documents about which it was consulted, noting that the majority had probably been released to the applicant previously. In subsequent communications with my Office, the RSPCA has stressed the importance of preserving the confidentiality of complainants' identities. In so doing, it commented that:

It is a foundation trust held by the public towards the RSPCA and if broken would certainly undermine our efforts in enforcing the Animal Welfare Act.

39. The complainant was consulted about document 120 (which is duplicated in document 164). The complainant consented to the release of information revealing the substance of the complaint, believing in the importance of doing so. The complainant objected to the release of information that could identify them, however. On 31 July 2017, during a discussion with a legal officer, the complainant maintained this view. In response to the provisional determination the complainant confirmed that they are not opposed to two additional sentences (namely the first and seventh sentences of the entry [date] (timed 4:23pm)) being released to the applicant, however.

Consideration

Clause 10(1)

40. Although not claimed by the agency, I intend to consider the application of clause 10(1).
41. Clause 10(1) allows an agency to refuse an applicant access to a document where the document would be able to be withheld from disclosure in any hypothetical legal proceedings on the grounds of legal professional privilege.
42. In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court decided that a document is privileged from production in legal proceedings if it is a confidential communication between a client and their solicitor that was created for the dominant purpose of obtaining or giving legal advice; or if it is a confidential communication made for the dominant purpose of use, or obtaining material for use in, pending or anticipated legal proceedings.¹⁴

¹² I note that not all of the numbers accorded to the consultation documents reflect the document numbers listed in the schedule to the internal review determination. The majority of the consultation documents are not in issue in any event.

¹³ The remaining three interested parties, Gribbles Veterinary Pathology, [name] MP, and [solicitor], were consulted about documents that are no longer in issue. Gribbles Veterinary Pathology was consulted about document 112, and [MP] and [solicitor] were consulted about correspondence between them and the RSPCA.

¹⁴ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49.

43. Dominant has been held to mean a 'ruling, prevailing or most influential' purpose.¹⁵
44. In *R v Bunting*, the Supreme Court remarked that '[t]he privilege attaches to confidential communications within such a [legal practitioner/client] relationship notwithstanding that the practitioner is a salaried employee.'¹⁶ Whether such a relationship gives rise to the privilege is a question of fact, but '[i]t must be a professional relationship which secures to the advice an independent character notwithstanding the employment.'¹⁷
45. I am satisfied that documents 125, 127 and 128 represent confidential communications made for the dominant purpose of obtaining material for use in pending or anticipated legal proceedings. In saying this, I have borne in mind the contents of the communications and note that the RSPCA's former in-house legal counsel, Mr Ronan O'Brien, is a recipient of each.
46. In addition, I am satisfied that two of the three communications within document 126, namely [the oldest two communications, by date], represent confidential communications between a client and their in-house solicitor, created for the dominant purpose of obtaining and then giving legal advice. In reaching this conclusion I have had regard to the contents, authors and sequence of these communications, as well as their relationship to another document under review. In addition, I note that Mr O'Brien was first admitted to the Supreme Court of South Australia in 2009, and holds a practising certificate.¹⁸
47. In my view, documents 125 to 128 are exempt under clause 10(1).
48. I do not consider partial release, as envisaged by section 20(4) of the FOI Act, to be practicable in relation to documents 125, 127 and 128, and therefore do not intend to consider the claims of exemption raised by the agency with respect to these documents.
49. With respect to document 126, having regard to its contents, I am not satisfied that the heading and subheading at the top of the page, or the remaining communication [the most recent communication, by date], (**the residual parts of document 126**) would be privileged from production in legal proceedings. I will therefore consider whether the residual parts of document 126 are exempt below.

Clause 6(1)

50. The agency claims that parts of documents 120 and 164 are exempt under clause 6(1).
51. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act. The term has also been held to involve 'matters of private concern to an individual'¹⁹ and the 'composite collection of activities personal to the individual concerned'.²⁰ The definition specifically excludes 'the personal affairs of a body corporate'.
52. I am satisfied that in the context in which it appears, the complainant's name and contact details, as well as the final six lines of the entry [date] (timed 4:23pm), concerns their personal affairs. In my view, it may be possible to identify the complainant from the substance of the final six lines of the entry [date] (timed 4:23pm).

¹⁵ *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49, 64-65.

¹⁶ *R v Bunting and Others* [2002] 84 SASR 378, [8] (Martin J), citing *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and *Waterford v Commonwealth* (1987) 163 CLR 54. In *R v Bunting* the Supreme Court considered communications involving the Director of Public Prosecutions and DPP practitioners.

¹⁷ *R v Bunting and Others* [2002] 84 SASR 378, [9] (Martin J), citing *Waterford v Commonwealth* (1987) 163 CLR 54, 62 (Mason and Wilson JJ).

¹⁸ Search conducted via https://www.lawsociety.sa.gov.au/LSSA/Community/Practitioner_Listing.aspx on 12 September 2017.

¹⁹ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

²⁰ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

53. I am not satisfied that the name of the person who received the complaint concerns their personal affairs. That person was clearly acting in a professional capacity, whether as a volunteer or an employee. Nor am I satisfied that the remaining redacted information in the entry [date] (timed 4:23pm), namely the first and seventh sentences, concerns the personal affairs of the complainant. Such information only concerns the applicant and his [animals]. I do not consider that it would be possible to identify the complainant from this information.

54. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:

... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.²¹

55. In addition, unreasonableness has 'as its core, public interest considerations'.²²

56. Public interest considerations relevant to documents 120 and 164 are:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness of the RSPCA's, and by extension the agency's, decision-making processes, and the accountability of their staff
- the ongoing relevance of the claimed exempt information to the applicant
- individuals receiving fair treatment in accordance with the law, and having access to what is recorded about them.
- information previously disclosed to the applicant
- the conclusion of the applicant's prosecution

Contrary to disclosure:

- objections to disclosure raised by the agency, the complainant and the RSPCA
- the conclusion of the applicant's prosecution, and the expiration of appeal periods
- fulfilling the objects of the FOI Act, including the preservation of personal privacy (the FOI Act generally does not restrict the use of information once it is released)
- the possible effect that disclosure would have on future potential complainants.

57. The RSPCA is, no doubt, heavily reliant on members of the public bringing to its attention concerns about the welfare of animals so that it may investigate such concerns. The RSPCA has submitted that its practice is never to disclose complainants' details in such matters. In my view, the disclosure of information identifying the complainant could reasonably be expected to deter people from raising concerns in the future. In my view this is a paramount consideration in relation to documents 120 and 164. As such, I am satisfied that it would be unreasonable to release information that would or could identify the complainant in this instance.

²¹ *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

²² *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 438.

58. Accordingly, I am satisfied that documents 120 and 164 are exempt under clause 6(1). I nevertheless consider that it would be practicable to release them after redacting the complainant's name and contact details and the final six lines of the entry [date] (timed 4:23pm) in accordance with section 20(4) of the FOI Act.

Clause 9(1)

59. The agency claims that documents 111, 119, 126 and 129 are exempt as internal working documents (clause 9(1)).
60. I accept that these documents contain opinions and advice obtained in the course of the RSPCA's decision-making processes, about whether to lay charges and which charges to lay.
61. To justify a claim that a document is exempt pursuant to clause 9(1), it must be shown that it satisfies paragraphs (a) and (b) of clause 9(1).
62. The scope of clause 9(1)(a) is wide, particularly given the words 'that relates to'.
63. The 'opinion, advice or recommendation' must nevertheless have been obtained, or the 'consultation or deliberation' must have taken place, 'in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency'.
64. Having considered the contents of the documents claimed exempt under this clause, I am satisfied that they all contain matter that relates to:
- an opinion, advice or recommendation that has been prepared or recorded; or
 - a consultation or deliberation that has taken place, in the course of, or for the purpose of the RSPCA Inspector's decision-making functions.
65. It is therefore necessary to consider whether the RSPCA Inspector is an agency within the meaning of the FOI Act.
66. The term 'agency' is defined in section 4(1) of the FOI Act as follows:

agency means—

- (a) a Minister of the Crown; or
 - (b) a person who holds an office established by an Act; or
 - (c) an administrative unit of the Public Service; or
 - (d) South Australia Police; or
 - (e) a council; or
 - (f) an incorporated or unincorporated body—
 - (i) established or continued in existence for a public purpose by an Act; or
 - (ii) established or continued in existence for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations); or
 - (iii) subject to control or direction by the Governor, a Minister of the Crown or other instrumentality or agency of the Crown or a council (whether or not the body is established or continued in existence by or under an Act); or
 - (fa) a regional development assessment panel or a council development assessment panel constituted under section 34 or 56A of the *Development Act 1993*; or
 - (g) a person or body declared by the regulations to be an agency,
- but does not include an exempt agency...

67. The office of an inspector is established by section 28 of the *Animal Welfare Act 1985*. Accordingly, my view is that an inspector appointed under section 28 of the *Animal Welfare Act 1985* is an agency within the meaning of the FOI Act by virtue of an inspector being a person who holds an office established by an Act.
68. I will now consider whether the disclosure of documents 111, 119 and 129, and the residual parts of document 126, would, on balance, be contrary to the public interest.
69. In so doing, I have had regard to the submissions referred to above and the following public interest factors:
- In favour of disclosure:*
- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness of the RSPCA's, and by extension the agency's, decision-making processes, and the accountability of their staff
 - the ongoing relevance of the claimed exempt information to the applicant
 - individuals receiving fair treatment in accordance with the law, and having access to what is recorded about them.
 - information previously disclosed to the applicant
 - the conclusion of the applicant's prosecution
 - with respect to document 129, promoting the health and well-being of animals
- Contrary to disclosure:*
- objections to disclosure raised by the agency
 - the possibility that disclosure may inhibit frankness and candour in the future (although I consider this risk to be slight given the obligations imposed on legal practitioners and prosecutors,²³ and the Minister's capacity to impose conditions on RSPCA inspectors²⁴)
 - the conclusion of the applicant's prosecution, and the expiration of appeal periods.
70. In my view, the public interest in openness and accountability, along with the ongoing relevance of the information to the applicant, are persuasive factors in this matter, and outweigh the factors against disclosure. I have also borne in mind information that has previously been disclosed to, or provided by, the applicant during the on-site inspection of his [animals] on [date], in response to his FOI applications, or during the prosecution process, or that is general or routine in nature.
71. I note that the general queries and comments in the final paragraph of document 129 are consistent with promoting the health and well-being of animals. In my view, there is a public interest in promoting the health and well-being of animals, and this is a further persuasive factor in favour of disclosure.
72. In my view, documents 111, 119 and 129, and the residual parts of document 126, are not exempt under clause 9(1). They should be released.
73. With respect to document 126, I consider that it would be practicable to release it after redacting the communications [the oldest communications, by date] (which I consider to be exempt under clause 10(1)), in accordance with section 20(4) of the FOI Act.

²³ *Legal Practitioners Act 1981* and *Australian Solicitor Conduct Rules*.

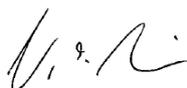
²⁴ *Animal Welfare Act 1985*, section 28.

Comments

74. During the course of the review, the applicant raised concerns about either the Minister's record-keeping or the adequacy of the Minister's searches for documents within the scope of his FOI application for access.
75. I do not have jurisdiction to consider the adequacy of an agency's searches for documents under the FOI Act.²⁵
76. I am disappointed at the RSPCA's reluctance to provide a completely unredacted version of document 120 (duplicated as document 164) to my Office for the purpose of this external review. Despite repeated requests having been made of the RSPCA by both the agency and my Office, it took more than a month for the RSPCA to comply. This unnecessarily delayed my external review.

Determination

77. In light of my views above, I vary the agency's determination to enable:
- documents 111, 119 and 129 to be released in full
 - documents 120 and 164 to be released after redacting the complainant's name and contact details and the final six lines of the entry [date] (timed 4:23pm)
 - document 126 to be released after redacting the communications [the oldest communications, by date].



Wayne Lines
SA OMBUDSMAN

14 September 2017

²⁵ *El Shafei and Central Adelaide Local Health Network* [2017] SACAT 5 (13 April 2017), available at <http://www5.austlii.edu.au/au/cases/sa/SACAT/toc-E.html>.

APPENDIX - 2017/00863

Procedural steps

Date	Event
30 August 2016	The agency received the FOI application dated 26 August 2016.
30 September 2016	The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
12 October 2016	The agency received the internal review application dated 11 October 2016.
27 October 2016	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
25 January 2017	The Ombudsman received the applicant's request for external review by telephone.
25 January to 27 February 2017	By telephone, Ombudsman SA liaised with the agency and the applicant about the status of the applications.
27 February 2017	The agency made a belated determination. ⁴
22 March 2017	The applicant confirmed, by telephone, that he remained aggrieved following the agency's belated determination.
24 March 2017	The applicant provided documentation in support of his application for external review.
31 March 2017	Ombudsman SA advised the agency of the external review, in writing, and requested submissions and documentation.
13 April 2017	The agency provided the Ombudsman with its submissions and documentation.
2 May 2017	Ombudsman SA clarified how the applicant remained aggrieved following the agency's belated determination.
9 May 2017	The applicant narrowed the scope of the external review by excluding documents 112, 115 and 163.
10 July to 15 August 2017	By emails and telephone, Ombudsman SA sought additional information from the agency and the RSPCA.

¹ *Freedom of Information Act 1991*, section 14(2).

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

³ *Freedom of Information Act 1991*, section 29(5).

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

11 July 2017	By telephone, Ombudsman SA sought and received additional information from the applicant.
	By telephone, Ombudsman SA received additional information from the agency.
25 July 2017	By telephone, the applicant provided additional evidence.
27 July 2017	By email, Mr Adrian Pederick MP's office provided additional evidence on behalf of the applicant.
31 July 2017	Ombudsman SA spoke with the complainant by telephone.
16 August 2017	Ombudsman SA received additional documentation from the RSPCA, by email.
28 August 2017	The Deputy Ombudsman issued her provisional determination.
31 August 2017	By email, the agency advised that it accepted the variation proposed in the provisional determination.
4 September 2017	By telephone, the complainant advised that they accepted the variation proposed in the provisional determination.