

Determination

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

Applicant	[the Applicant]
Agency	Northern Adelaide Local Health Network
Ombudsman reference	2018/06349
Agency reference	18FOI-0450
Determination	The determination of the agency is confirmed.

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:

Any and all documents (including but not limited to physical, electronic, or written advice and briefs, minutes, emails and any other correspondence) from any health entity to the Minister or the Minister's Office referring to the proposal for a High Dependency Unit at Modbury Hospital, from 18 March 2018 to 18 May 2018.
2. By letter dated 25 May 2018, the agency's principal officer advised the applicant of her determination to extend the time within which it would otherwise have had to deal with the application until 31 July 2018. The applicant has sought an external review of that determination.

Background

3. For ease of reference, procedural steps relating to the application and the external review 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 18 July 2018. 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 applicant provided submissions in response. I have considered these submissions in this 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.¹
8. Section 14(2) of the FOI Act provides:

An application must be dealt with as soon as practicable (and, in any case, within 30 days) after it is received.
9. However, section 14A of the Act provides that, in certain circumstances, the principal officer of an agency may extend the 30 day time limit prescribed in section 14(2). Section 14A relevantly provides:
 - (1) The principal officer of an agency that is dealing with an application may extend the time within which the application would otherwise have to be dealt with under section 14 if satisfied that -
 - (a) the application is for access to a large number of documents or necessitates a search through a large quantity of information and dealing with the application within that period would unreasonably divert the agency's resources from their use by the agency in the exercise of its functions; or
 - (b) the application is for access to a document in relation to which consultation is required under Division 2 and it will not be reasonably practicable to comply with Division 2 within that period.
 - (2) An extension under subsection (1) must be for a reasonable period of time having regards to the circumstances.
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 issue in this review is whether the agency has justified its determination to extend the time for dealing with the applicant's access application.

Consideration

13. It appears from her letter notifying the applicant of her determination that the agency's principal officer extended the time for dealing with the application on the basis of subsection (1)(a) of section 14A. She wrote:

Given the extensive searches which will need to incur (sic), it will not be possible to complete your application within the statutory 30 (calendar) day limit.

...

I have determined that it is not practicable to deal with your application in the normal time period and I have therefore determined to extend the time in which this agency has to deal with your application by a further forty-two days, that is, until **31 July 2018**.

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

14. Despite this letter being dated 25 May 2018 the applicant did not receive it until 7 June 2018. Notwithstanding this delay, I note that 7 June 2018 falls within the 20 day period permitted for making a section 14A determination.²
15. I received the applicant's application for external review on 15 June 2018.
16. On 28 June 2018 my Office wrote to the agency's principal officer and Ms Horgan³ of the agency, notifying them of the application for external review and requesting the provision of certain information by 5 July 2018. Among the information sought was submissions in support of the agency's determination.
17. The agency's principal officer did not respond to my request until 11 July 2018. On that day I received the following submissions from her:

There was a significant amount of activity following the March 2018 election, generating a significant amount of documentation covering a range of Northern Adelaide Local Health Network (NALHN) infrastructure, services and activities. It was on this basis that it would be necessary to search through all of these documents to ascertain if any part of them contained information relating to the proposed High Dependency Unit, that an extension in the time to respond was granted.

On 21 May, 2018 when [the Applicant's] FOI requests were received, NALHN had already received 88 requests that month (6 requests for each working day). In total, NALHN received an unprecedented amount 149 requests in May 2018 and 56 applications received in April 2018 were yet to be determined. As well as processing and determining FOI applications, NALHN's two (2) full-time FOI officers also responded to summons, subpoenas and SAPOL requests for information from Modbury Hospital as well as coordinating responses to request for information under S.19 and S.21 of the Children's Protection Act for all NALHN sites. As a result, at the time [the Applicant's] requests were received, the NALHN FOI officers were already at capacity.

In light of the amount of documents to search through and the significant amount of FOI requests received in May and still outstanding from April, to deal with [the Applicant's] request within 30 days would have unreasonably diverted NALHN's resources. In particular, as they relate to the resources available for processing FOI applications.

18. On 13 July 2018 my Office emailed the agency, asking:
 - for an estimate of the 'significant amount' of documentation generated between 17 March and 18 May 2018
 - whether it would be necessary for the agency to search through all such documentation to ascertain whether it relates to a high dependency unit at Modbury Hospital.
19. On 18 July 2018 the agency advised that 2,225 documents had been created during the relevant period. While it would not have been necessary to search through all these documents to locate those that fall within scope of the application, the agency had 'anticipated a substantial post-election flow' between itself, the Department for Health and Wellbeing and Office of the Minister for Health and Wellbeing.
20. In my view the agency has not justified its determination to extend the time for dealing with the application by a period of 35 days. In reaching this view I have taken into account the following:
 - the application is for access to documents generated over a relatively short two month period
 - the application seeks access to documents concerning a single subject matter

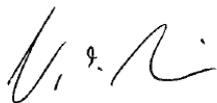
² Section 14(A)(3) of the *Freedom of Information Act* provides that an extension must be effected by giving written notice of the extension to the applicant within 20 days after the application is received.

³ In her letter to the applicant, the agency's principal officer had nominated Ms Horgan as the agency's contact person.

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- it is reasonable to expect that the agency would keep electronic records of most, if not all, documents it holds and that those records could be electronically searched to ascertain whether they fall within scope of the access application
 - while the agency has provided an estimate of how many documents were generated during the relevant period, it has conceded that it would not be necessary to search through all those documents to ascertain whether they fall within scope of the application
 - I am not satisfied that the application is for access to a large number of documents or necessitates a search through a large quantity of information within the meaning of section 14A(1)(a).
21. While I accept that the agency received a large number of access applications during April and May 2018 and appreciate that it might be operating under resource constraints, the applicant should not have to bear the delay caused by this. Section 14A of the FOI Act does not permit an agency to extend the time for dealing with a particular application on the basis that it lacks sufficient resources to process the number of access applications it receives.
22. The resolution of this matter has been delayed for a number of reasons including:
- the agency's delay in sending the applicant notice of the section 14A determination
 - my Office's delay in notifying the agency of the application for external review
 - the agency's delay in providing me with submissions and information.
23. In my provisional determination I expressed the view that these delays had had the combined effect of rendering this external review largely redundant. I observed that by the time my review would be finalised, the extended date of 31 July 2018 would almost have been reached.
24. In his submission in response to my provisional determination, the applicant stated that he believes it is important for me to send a message to agencies that, where an extension of time determination has not been justified, it will not be confirmed by me even if the time is short. The applicant fears that if I do not send such a message, there will be an incentive for agencies to 'count down the clock' until it does not matter whether they have justified the section 14A determination, or not.
25. While there is some strength in the applicant's general proposition, there is no evidence before me that establishes that in this particular case the agency has acted in bad faith, or gives me grounds for rejecting the agency's submission that its FOI team has been overwhelmed by the number of access applications it received following the general election. I remain of the view that it would achieve very little if I were to determine to reverse or vary the agency's determination and require it to make a determination on one of the two working days remaining between the date of this determination and 31 July 2018. In fact, such a determination might be counterproductive by placing the agency in a position where it would be deemed to have refused access to the documents. The applicant would then be required to make an application for internal review to obtain access.
26. For these reasons, despite the fact that I am not satisfied that the agency has justified its determination, I remain of the view that there would be little utility in reversing or varying the same. I therefore expect the agency to provide the applicant with its determination by 31 July 2018.

Determination

27. In light of my views above, I confirm the agency's determination.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

27 July 2018

APPENDIX

Procedural steps

Date	Event
21 May 2018	The agency received the FOI application dated 18 May 2018.
28 May 2018	The agency's principal officer determined to extend the time within which the agency would otherwise have had to deal with the determination.
15 June 2018	The Ombudsman received the applicant's request for external review dated 14 June 2018.
28 June 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
11 July 2018	The agency provided the Ombudsman with its submissions and documentation.
13 July 2018	The Ombudsman sought further information from the agency.
18 July 2018	The agency provided the Ombudsman with further information.
18 July 2018	The Ombudsman issued a provisional determination and invited submissions from the parties.
19 July 2018	The applicant provided the Ombudsman with submissions.