



OmbudsmanSA

Determination

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

Applicant	The Hon David Pisoni MP
Agency	Department for Communities and Social Inclusion
Ombudsman reference	2012/04658, 2012/04659, 2012/04660, 2012/04661
Agency reference	DCSI/12/01011, DCSI/12/01012, DCSI/12/01009, DCSI/12/01010
Applicant reference	DP12/0032, DP12/0031, DP12/0030, DP12/0029
Determination	The determination of the agency is reversed.

REASONS

Background

1. In four applications under the *Freedom of Information Act 1991* (**the FOI Act**) received by the agency on 2 March 2012, the applicant requested access to:

DCSI/12/01011 The supporting speech material (CDs, tapes or USBs etc) for all speeches provided to the Premier, Government Ministers or the representatives for all Chinese associations or organisation events between 1 January 2011 and 31 January 2012.

DCSI/12/01012 The supporting speech material (CDs, tapes or USBs etc) for all speeches provided to the Premier, Government Ministers or the representatives for all East Turkistan/Uighar associations or organisation events between 1 January 2011 and 31 January 2012.

DCSI/12/01009 The supporting speech material (CDs, tapes or USBs etc) for all speeches provided to the Premier, Government Ministers or the representatives for all Greek associations or organisation events between 1 January 2011 and 31 January 2012.

DCSI/12/01010 The supporting speech material (CDs, tapes or USBs etc) for all speeches provided to the Premier, Government Ministers or the representatives for all Italian associations or organisation events between 1 January 2011 and 31 January 2012.

2. In a letter dated 26 April 2012, accredited FOI officer of the agency, Mr David Cunnew wrote to the applicant and stated:

I acknowledge that your applications were not determined within the timeframe required under the Act and in accordance with section 19(2)(b) the agency is taken to have refused access to the requested documents. However, had a determination been made within the statutory timeframe access to the requested information would have been refused in accordance with the provisions of section 20(1)(b) of the Act.

3. The applicant requested an internal review of these determinations, by application received by the agency on 8 May 2012.

4. The principal officer of the agency, Ms Joslene Mazel, then 'reversed' the determination on 17 May 2012 (**the agency's determination**).
5. In relation to files DCSI/12/01011, DCSI/12/01009 and DCSI/12/01010 the agency's determinations stated:

As advised by the Accredited FOI Officer on 28 April 2012, your application was unfortunately not determined within the statutory time-frame, thus resulting in a "deemed refusal" in accordance with Section 19(2)(b) of the Act.

...

I have determined to reverse the original 'deemed refusal' and make a fresh determination to refuse access to the requested records. I affirm that the information you have requested is publically available and my determination to refuse access is therefore made in accordance with Section 20(1)(b).

6. In relation to file DCSI/12/01012, the agency's determination stated:

I have therefore determined to reverse the original 'deemed refusal' and make a fresh determination to refuse access on the grounds that the requested records are not held by the agency. It is likely of course that you can obtain the requested information in this language from the public sources previously mentioned.

External review

7. By applications dated 19 June 2012, the applicant requested my external review of the agency's determinations under section 39 of the FOI Act.
8. By letter dated 22 June 2012, I notified the agency of my review. I requested all relevant documents, including additional evidence and argument which the agency considered justified its determinations, in light of the provisions of section 48 of the FOI Act.

Provisional determination

9. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 15 August 2012. I informed the parties that subject to my receipt and consideration of submissions from the parties, I proposed to reverse the agency's determination pursuant to section 39(11) of the FOI Act.
10. The agency responded to my provisional determination in a letter dated 5 September 2012. I have considered the agency's response in my reasons for my determination.

Relevant provisions of the FOI Act

11. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
12. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and

- (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy;...

13. Section 3A(1) states that the parliament has intended:

- (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
- (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.

14. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'¹ Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.

15. Under section 48 of the FOI Act, the onus is on the agency to justify its determination 'in any proceedings'. In my opinion, this includes the external review process.

16. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act; and in my opinion, it is equally applicable in an external review.

17. 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.

The documents

18. On 1 August 2012 I received copies of the documentation relevant to my external review.

19. In relation to DCSI/12/01011 (Chinese), the agency located four documents within the scope of the application, namely:

- document 1: audio CD 'Greetings in Chinese (Cantonese)'
- document 2: accompanying booklet 'Greetings in Cantonese (Chinese)'
- document 3: audio CD 'Greetings in Chinese (Mandarin)'
- document 4: accompanying booklet 'Greetings in Mandarin (Chinese)'

20. In relation to DCSI/12/01012 (East Turkistan/Uighar), the agency did not locate any documents within the scope of the application.

21. In relation to DCSI/12/01009 (Greek), the agency located two documents within the scope of the application, namely:

- document 5: audio CD 'Greetings in Greek'
- document 6: accompanying booklet 'Greetings in Greek'

¹ *Freedom of Information Act 1991*, sections 4 and 20(1)(a).

22. In relation to DCSI/12/01010 (Italian), the agency located two documents within the scope of the application, namely:

document 7: audio CD 'Greetings in Italian'
document 8: accompanying booklet 'Greetings in Italian'

The agency's submissions

23. According to the agency's letter to the applicant dated 26 April 2012:

In scoping your applications it was considered that you are seeking access to resources containing common greetings and phrases in the Greek, Italian, Chinese and East Turkistan/Uighar languages. There are many publically available sources of common greetings and phrases in these and other languages. For example, this type of information can be found in public libraries, bookshops and on the Internet.

24. At internal review, the agency relied on section 20(1)(b) of the FOI Act, which provides:

20—Refusal of access

- (1) An agency may refuse access to a document—
- (a) ...
 - (b) if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative instrument other than this Act, whether or not inspection of the document is subject to a fee or charge; or

25. In its submissions to my office dated 27 July 2012, the agency stated:

The following illustrates and supports DCSI's position that access to the information should be refused because it can be accessed readily by other means. An internet search for '*free translation*' reveals many such services available on-line. *Google Translate* is an excellent example of such a service. This application can be accessed on-line via a PC or downloadable free of charge to certain mobile telephones (*i-phones* for example), and it enables the user to quickly and easily translate from English to other languages and vice versa. DCSI assumes that Mr Pisoni would have access to computers and suitable mobile telephones in his capacity as a Member of Parliament. He would therefore have the capacity to obtain greetings and phrases in other languages directly and without difficulty.

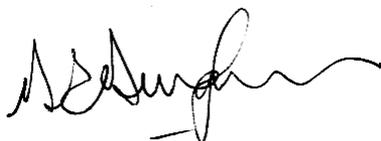
26. In response to the agency's submissions, in my provisional determination I stated:

24. I find it difficult to accept a claim that the applicant was merely 'seeking access to resources containing common greetings and phrases in the Greek, Italian, Chinese and East Turkistan/Uighar languages.' On the face of the applications, it is clear that the applicant sought access to specific documents, namely the 'supporting speech material.'
25. I find the agency's reasons for its determination puzzling. The fact that the agency searched for and located documents relevant to the FOI request indicates recognition that the applicant sought specific documents. However, the determination appears to ignore this, and purports that the applicant sought only general information, which would be available online.
26. Section 20(1)(b) does not apply in circumstances where information within a document may be obtained through a 'Google' search. This section is relevant to documents covered by Part 2 of the FOI Act or some other legislative instrument. It does not apply to the 8 documents subject of this review as they are not documents covered by Part 2 of the FOI Act.
27. In an email dated 7 August 2012, Mr Andrew Adams of my office also enquired with Mr Cunnew, as to whether the documents are usually and currently available for purchase, and therefore need not be released by the agency in accordance with section 20(1)(c) of the FOI Act.

28. In an email dated 14 August 2012, Ms Helen Fournakis, former project manager for the 'Greetings Language Project' stated:
- I wish to confirm that the ESP Production House no longer exists and the phrase booklets and accompanying Audio CDs are not listed on the TAFE shop Training Resources. Our understanding is that this product is not commercially available or currently available for purchase.
29. On this basis, I am satisfied that the documents are not usually and currently available for purchase in accordance with section 20(1)(c) of the FOI Act.
30. Further, I do not consider that any of the documents contain exempt matter pursuant to Schedule 1 to the FOI Act, nor has the agency claimed any exemptions.
27. I also noted in my provisional determination that the documents appear to have been published by ESP Production House. In light of this, I considered whether releasing the documents would involve an infringement of copyright.
28. Having not been immediately satisfied that the release would involve an infringement of copyright, and noting that section 22(2)(c) of the FOI Act provides that access to documents may be given in a manner that avoids such an infringement; I asked the agency to inform me of whether the release of these documents would involve an infringement of copyright.
29. In a letter dated 5 September 2012, the agency informed me of the following:
- Our investigations into this matter indicate that copyright in this case rests with the State Government. The material contained within the audio CDs and their accompanying booklets was produced as part of a joint project between Multicultural SA and the Department of Further Education, Employment, Science and Technology (DFEEST) in 2005. At the time, Educational Services and Programs (ESP House), which is mentioned in the booklets, was a unit within DFEEST. It is now part of TAFESA and is known as the TAFE Learning Resource Solutions.
- There was no party external to government involved in the preparation of the material and DCSI is therefore of the view that the release of the documents in their current form would not infringe copyright. As such it is not necessary to consider release in some other format to address any copyright issues.
30. On this basis, the documents should be released to the applicant.

Determination

31. In light of the above, I reverse the agency's determination pursuant to section 39(11) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

7 September 2012