

Determination

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

Applicant	The Honourable Michelle Lensink MLC
Agency	Minister for Education and Early Childhood Development
Ombudsman reference	2013/00685
Agency reference	12MECD4270
Determination	The determination of the agency is reversed.

REASONS

Background

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) received by the agency dated 3 December 2012, the applicant requested access to:

I request access to all correspondence, reports, memoranda, emails and any other relevant documents which refer directly or indirectly to Mr David Pisoni MP.
2. Accredited FOI officer of the agency, Ms Areti Lauriello made a determination on 28 December 2012 to refuse to deal with the application, pursuant to section 18(1) of the FOI Act.
3. The applicant requested an internal review of this determination on 4 January 2013.
4. The Principal Officer of the agency, the Hon. Grace Portolesi then confirmed the determination on 19 January 2013 (**the agency's determination**).
5. On 21 January 2013, the Government changed a range of Ministerial portfolios. The Minister for Education and Child Development changed from the Hon. Grace Portolesi MP to the Hon. Jennifer Rankine MP.

External review

6. By letter dated 17 January 2013, the applicant requested my external review of the agency's determination under section 39 of the FOI Act. The applicant provided copies of correspondence between her office and the agency.
7. My Senior Legal Officer, Ms Justine Simpkins notified the agency of my review by phone call on 1 February 2013. She spoke with the Accredited FOI Officer, Ms Lindsay Pitkin, who confirmed that the only correspondence on the file were the letters provided

to my office by the applicant.¹ Ms Pitkin confirmed that there was no record of telephone or email exchange with the applicant regarding the scope of the application.

Relevant provisions of the FOI Act

11. Section 18 of the FOI Act provides (relevantly):

18—Agencies may refuse to deal with certain applications

(1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

(2) An agency must not refuse to deal with such an application without first endeavouring to assist the applicant to amend the application so that the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

...

(5) An agency that refuses to deal with an application under this section must forthwith cause written notice of that fact to be given to the applicant.

(6) Such a notice must specify—

- (a) the reasons for the refusal; and
- (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.

...

(8) A refusal to deal with, or to continue to deal with, an application under this section is a determination for the purposes of this Act.

13. 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. The agency has identified 'in excess of 1095 documents' and estimates the processing time for the application would be more than 76 hours.

The agency's submissions

19. The agency's determination indicates 'substantial resources would be required in identifying, locating, collating and processing and determining documents'. The agency determined the estimated time to deal with the application would constitute an 'unreasonable diversion of resources'.

¹ These letters were the application, dated 3 December 2012, the original determination, dated 28 December 2012, the internal review application dated 4 January 2013 and the agency's determination of 19 January 2013.

The applicant's submissions

20. The applicant submits:

At no stage, either by telephone call, email or hard copy letter has the Minister's office sought to negotiate to narrowing the scope of the request or seek an extension of time in which to complete it.

21. The applicant advised my office by email on 18 January 2013 that it would be prepared to revise the scope of the application to:

I request access to all emails which refer directly or indirectly to Mr David Pisoni MP from the 21 October 2011 to the present day excluding any email correspondence from MediaMonitoring3@sa.gov.au.

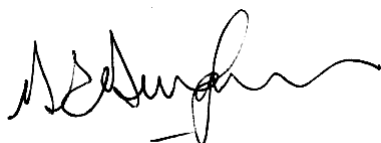
Consideration of the submissions and the agency's determination

22. The agency did not first endeavour to assist the applicant to amend the application so that the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions. This step is required under section 18(2), before refusing to deal with the application. Accordingly, it was not open to the agency to refuse to deal with the application under section 18(1) of the FOI Act.

23. In light of this, I consider it would be reasonable for the agency to recommence dealing with the application, with the timeframes under the FOI Act restarting as of the date of my determination. If the agency considers that dealing with the application would result in a substantial and unreasonable diversion of its resources, it should first assist the applicant to amend the application.

Determination

24. In light of the above, I reverse the agency's determination pursuant to section 39(11) of the FOI Act. The agency is to recommence processing the application under the FOI Act.



Richard Bingham
SA OMBUDSMAN

4 February 2013