

Determinations

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

Applicant	Mr Andrew Garrett
Agency	Department of the Premier and Cabinet
Ombudsman references	2014/08666; 2014/08667
Agency references	DPC14/1529; DPC14/1564
Determinations	The determinations of the agency are confirmed.

REASONS

Applications for access

1. The Legal Practitioners Conduct Board (**the LPBC**) was established under the *Legal Practitioners Act 1981 (the LP Act)*. The LPBC was an agency under the FOI Act but became defunct after 30 June 2014 by reason of the *Legal Practitioners (Miscellaneous) Amendment Act 2013 (the Amending Act)*. Pursuant to the Amending Act the LPBC was replaced by the Legal Practitioners Conduct Commissioner (**the LPCC**) with effect from 1 July 2014. The LPCC is an 'exempt agency' for the purpose of the FOI Act.¹
2. By applications under the *Freedom of Information Act 1991 (the FOI Act)* the applicant requested access from the agency to:

Reference number	Application for access
DPC14/1529 OSA 2014/08666	A list [of and] a copy of any document or thing relating to the establishment of the LPCC and the reasons why it became an allegedly exempt agency, and A list of and a copy of any document or thing related to the National Productivity enquiry into access to justice and in particular the reasons why South Australia has the highest per capita complaints against Lawyers [the first application].
DPC14/1564 OSA 2014/08667	A list of and a copy of any document or thing related to the creation of the LPCC, the changes to the Legal Practitioners Act 1981 (SA) and the reasons why the LPCC is now an exempt Agency [the second application].

Background

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

Jurisdiction

4. These external reviews are within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

¹ *Freedom of Information Act 1991*, Schedule 2 (1a).

Provisional determination

5. I provided my tentative view about the agency's determinations to the parties, by my provisional determinations dated 20 April 2015. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determinations.
6. By email dated 1 May 2015 the agency advised that it did not intend to make any submissions in response to my provisional determinations. To date, the applicant has not provided a response to my Office.
7. Accordingly, I make these final determinations in the same terms as my provisional determinations.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
9. 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.
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 these reviews

12. During the external reviews, the applicant narrowed the scope of the first application to:

A list [of and] a copy of any document or thing relating to the establishment of the LPCC and the reasons why it became an allegedly exempt agency.
13. As such, it was not necessary for me to consider the second part of the first application.
14. In addition, on 24 November 2014 the applicant clarified that:

he is only seeking documents relevant to the legislative amendments. He is not interested in documents relevant to the physical changes necessitated by the legislative amendments. As such, the applications may be interpreted as relating to documents created prior to 3 October 2013 (the date that the *Legal Practitioners (Miscellaneous) Amendment Act 2013* was assented to).

Regarding the ... [second] application for access, ... [he] is seeking access to:

- any document or thing related to the creation of the LPCC
- any document or thing related to the changes to the *Legal Practitioners Act 1981* (SA)
- any document or thing related to the reasons why the LPCC is now an exempt agency.³

² *Freedom of Information Act 1991*, section 12.

³ Ombudsman SA provided this clarification by email to the agency, and copied to the applicant, dated 24 November 2014 (resent to the applicant on 25 November 2014), following a conversation between one of my legal officers and the applicant.

15. The agency has interpreted the further application as an application for access to documents about amendments to the LP Act ‘that relate to the creation of the LPCC and why it became an exempt agency’.⁴
16. The agency has claimed that it holds no documents within the scope of the two applications (as narrowed) (**the narrowed applications**).
17. The sufficiency of the agency’s searches for documents within the scope of the narrowed applications is in issue in my reviews.

Submissions

The applicant

18. The applicant has indicated to my Office that the Victorian equivalent of the LPCC is an ‘agency’ under Victorian legislation.

The agency

19. By letter dated 2 February 2015, the agency made the following submissions:

No documents have been discovered that meet the criteria of the [narrowed applications] ... DPC has had discussions with the LPCC regarding the extent to which the LPCB was involved in the creation of the LPCC and changes to the LP Act. While the LPCB contributed to discussions around changes to the Act, none of these related to the creation of the LPCC or the LPCC being an exempt agency. It is more reasonable to expect that either the Office of the Attorney-General or the Attorney-General’s Department may hold documents on this matter, if such documents exist.

20. I understand that the applicant applied to the Attorney-General for documents under the FOI Act in the same or similar terms as the second application made to the agency, which resulted in a determination dated 1 September 2014 about two documents.
21. The agency has advised that searches for documents were limited to those conducted by the LPCC. State Records was not asked to undertake any specific searches due to the extensive searches undertaken by the LPCC and the LPCC’s understanding that ‘there isn’t any Board information from recent years that has gone to State Records that can’t be accessed, or at least identified, through our own systems and the types of searches ... carried out’ by his Executive Assistant.
22. The LPCC initially asked his Principal Legal Officer and Executive Assistant, both of whom were previously long-term employees of the LPCB, ‘whether “the Board was ever asked to make any submissions to Government in relation to the amending legislation?”’ In response, his Principal Legal Officer advised that she recalled ‘that the Board did make submissions... [which] may have been attached to the Director’s report in one of the Agendas.’ The LPCC then asked his Executive Assistant to make relevant searches and enquiries.
23. The LPCC’s searches revealed nine documents for consideration (**the nine documents**).⁵ The agency claims that none of the nine documents, however, relate either to the creation of the LPCC, or to the reasons why the LPCC is now an exempt agency under the FOI Act, and are therefore outside the scope of the narrowed

⁴ It did so following a discussion between one of my legal officers and the agency’s FOI Team Leader on 2 December 2014.

⁵ The documents are dated 3 February 2011; 7 March 2011; 31 March 2011; 11 April 2011; 6 May 2011; 1 June 2011; 20 June 2011; 22 June 2011; and 11 April 2012. The LPCC provided these documents, and his views about them, to the agency by email dated 27 November 2014. The agency provided a copy of that email to my Office on 3 February 2015. The agency provided the attachments to the email, the nine documents, on 17 February 2015.

applications. Indeed, only the 2012 document relates to the Amending Act. The agency provided copies of the nine documents for my Office's consideration.

24. On 10 April 2015, my Office received a memo addressed to the LPCC from his Executive Assistant describing the searches she had conducted in an attempt to locate documents within the scope of the applications. They may be summarised as follows:
- searches of the Network ('H') drive and Confidential ('G') drive via her computer
 - searches of the LPCB Director's agenda folders (on the 'H' and 'G' drives), which revealed an agenda item for a meeting on 7 May 2012. That item indicated 'Submissions to the Attorney General' were attached, and prompted her to search the related folder. It was there she found the agenda item with the attachment. The attachment is one of the nine documents⁶
 - searches of an administration file named 'Amendments to the LPA' cited in the footer of the attachment referred to immediately above
 - further searches in relation to earlier Bills
 - searches of the 'H' and 'G' drives using the words 'reform', 'submissions' and 'Bill', which revealed three of the nine documents⁷
 - searches of the administration file where copies of the three documents referred to immediately above were filed, which in turn revealed another six of the nine documents.⁸

Consideration

25. It is my role to consider, on the evidence provided to me, whether there are reasonable grounds to believe that any documents within the scope of the narrowed applications exist and are held by the agency. If so, I must then consider whether the agency's searches to locate such documents have been reasonable in the circumstances.⁹
26. The FOI Act does not prescribe the manner in which questions concerning the sufficiency of the agency's searches to locate documents within the scope of an access application are to be resolved.
27. The District Court has stated that a search for documents must be 'reasonable and sufficient'.¹⁰
28. The Queensland Information Commissioner considers that a two-stage test is warranted:
- a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency...; and if so,
 - b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstance of a particular case.¹¹
29. This approach was considered and followed in a decision of the New South Wales Administrative Decisions Tribunal.¹² In that decision, Judge O'Connor said that when an applicant contends that an agency has failed to perform a sufficient search, the

⁶ Dated 11 April 2012.

⁷ Dated 3 February 2011; 20 June 2011; and 11 April 2012 (another copy).

⁸ Dated 7 March 2011; 31 March 2011; 11 April 2011; 6 May 2011; 1 June 2011; and 22 June 2011.

⁹ *Akritidis v Police Commissioner* [1998] SADC 291 (Unreported, South Australian District Court, Judge Robertson, 23 April 1999), 20; *Shepherd v Department of Housing, Local Government & Planning* (1994) 1 QAR 464 [19], followed in *Cianfrano v Director General, Department of Commerce and Anor (No 2)* [2006] NSWADT 195 [69]. This decision is available via <http://www.austlii.edu.au> as at December 2014. Note, however, that the citation refers to *Cainfrano*.

¹⁰ *Akritidis v Police Commissioner* [1998] SADC 291 (Unreported, South Australian District Court, Judge Robertson, 23 April 1999), 20.

¹¹ *Shepherd v Department of Housing, Local Government & Planning* (1994) 1 QAR 464 [19].

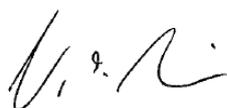
¹² *Cianfrano v Director General, Department of Commerce and Anor (No 2)* [2006] NSWADT 195.

applicant must first put some credible material or submissions before the tribunal to satisfy it that there is an arguable case that documents of the kind requested exist.

30. Adopting the two-stage test preferred by the Queensland Information Commissioner, the first step for me to consider is whether there are reasonable grounds to believe that any documents within the scope of the narrowed applications exist and are held by the agency.
31. The applicant's applications for external review were underpinned by 'deemed' determinations refusing him access to any documents within the scope of his applications for access.¹³ The agency's searches for documents were undertaken during the course of my external reviews. They consisted of enquiries and searches made by the LPCC. The LPCC located the nine documents. The agency is of the view that they are outside the scope of the narrowed applications, however.
32. Only one of the nine documents (dated 11 April 2012) refers to the *Legal Practitioners (Miscellaneous) Amendment Bill 2012* and the 'Legal Conduct Commissioner'. That said, it does not discuss the creation of the LPCC, or to the reasons why the LPCC is now an exempt agency under the FOI Act. The remaining eight documents relate to earlier proposals to change the way the legal profession was regulated. Some of these documents refer to draft legislation dating back to 2006 and 2007. I am satisfied that the nine documents are outside the scope of the narrowed applications for access, and therefore my external reviews.
33. I have had regard to the terms of the narrowed applications for access; the parties' submissions; the results of the agency's searches to date; and the contents of the nine documents.
34. I am not persuaded that there are reasonable grounds to believe that the agency holds any documents within the scope of the narrowed applications for access.
35. It seems likely that another agency or agencies (such as the Attorney-General, the Attorney-General's Department, or both¹⁴) would hold relevant documents.

Determinations

36. In light of my views above, I confirm the agency's determinations.



Wayne Lines
SA OMBUDSMAN

18 May 2015

¹³ *Freedom of Information Act 1991*, sections 19(2) and 29(5).

¹⁴ The Attorney-General and the Attorney-General's Department are separate agencies: *Freedom of Information Act 1991*, section 4(1) definition of 'agency'.

APPENDIX - 2014/08666; 2014/08667

Procedural steps

Date	Event
20 July 2014	The agency received one of the FOI applications by email (references: DPC14/1529; OSA 2014/08666).
23 July 2014	The agency received the other FOI application by email (references: DPC14/1564; OSA 2014/08667).
August 2014	The agency failed to determine the applications within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
25 September 2014	The agency received the internal review applications by email.
October 2014	The agency failed to determine the applications within the statutory time frame, and is taken to have confirmed the original determinations. ³
25 October 2014	The Ombudsman received the applicant's requests for external review by email.
28 October to 4 November 2014	Ombudsman SA sought and received clarification from the applicant about terms of the applications for access.
4 November 2014	The Acting Ombudsman acknowledged the applications for external review and provided the applicant with an opportunity to correct any misunderstanding about their scope.
12 November 2014	Having received no corrections from the applicant, the Acting Ombudsman requested documents and submissions from the agency about the narrowed applications.
24 November to 25 November 2014	Ombudsman SA sought and received further clarification from the applicant as to the scope of his applications for access, and confirmed the applicant's clarifications with the agency and applicant, by email.
3 February 2015	The agency provided the Ombudsman with its submissions and documentation.
17 February 2015	Ombudsman SA requested and received additional documents from the agency.
31 March 2015	Ombudsman SA requested additional submissions from the agency.

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).

10 April 2015	Ombudsman SA received additional submissions from the agency.
20 April 2015	The Ombudsman issued his provisional determinations and provided copies to the parties.
1 May 2015	The agency advised Ombudsman SA that it did not intend to make any submissions in response to the provisional determinations.