



Determination

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

Applicant	Ms Alison Sandy
Agency	Department of the Premier and Cabinet
Ombudsman reference	2020/02624
Agency reference	DPC20/0249
Determination	The determination of the agency is reversed.

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:

I am specifically seeking documents such as ministerial briefings and attachments, reports, audits, reviews and correspondence, invoices and receipts relating to bugs/covert listening devices. I expect documents captured to include information about security sweeps, the discovery, protocols, and the purchase/acquisition of bugs/covert listening devices. Please exclude duplicates, documents that have already been publicly released and media releases/statements/reports. In relation to correspondence, please limit searches to just the Department Chief Executive and Deputy Chief Executive. Please note I do not consent to documents being deemed irrelevant without consultation. In the event that emails are captured, please only include the final thread of the conversation. Timeframe: Since 1 January, 2018.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 6 January 2021. I informed the parties that subject to

my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.

5. The agency provided substantial submissions in response which I have considered in this determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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.
8. In refusing access to the document in issue, the agency has relied upon clauses 4(2)(iii), (v) and (vi) of Schedule 1 of the FOI Act which provide:

4—Documents affecting law enforcement and public safety

- (2) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - (iii) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law); or
 - (v) to endanger the security of any building, structure or vehicle; or
 - (vi) to prejudice any system or procedure for the protection of persons or property; and
 - (b) would, on balance, be contrary to the public interest.

9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. 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

11. The agency identified one document within the scope of the application.
12. The agency has referred to the document only as 'Report' noting that identifying the document with any greater degree of specificity would make its determination exempt. It is unclear to me how revealing the name of the document could reasonably be expected to result in any of the outcomes specified in any subsection of clause 4.

Issues in this review

13. Having regard to the agency's determination and submissions, and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regard to the one document in issue in this external review.

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

Agency's submissions

14. In response to my provisional determination, the agency provided submissions on multiple points. For clarity, I have considered each broad category of submissions separately.

Issue of scope

15. In my provisional determination I expressed my view that the FOI Act does not allow for an agency to claim portions of a document to be out of scope. Rather, it is my view that once an agency has identified a document as being within scope, it may only refuse whole or partial access to that document in accordance with section 20(4) of the Act.
16. The agency submits that this approach is incorrect, and that for me to consider the entire document in my external review would be an error of law. In support of its position, the agency submitted that:
1. the practice of deeming parts of documents to be beyond scope is well established in South Australia and if such a practice were not permissible, agencies and external review authorities would be placed in the position of devoting time and resources to consider material that the applicant did not seek access to
 2. section 20(4) does not include 'irrelevancy' as a ground for refusing partial access to a document as a claim that documents are irrelevant is simply a claim that the agency does not hold a document falling within the scope of the access request
 3. a refusal to release a document that does not fall within the scope of an access application is not a determination, nor is the initial step of identifying whether a document is a relevant document
 4. only documents that are relevant to an access application can be subject of a determination to give or refuse access
 5. in some other jurisdictions, the relevant FOI legislation expressly authorizes the deletion of irrelevant material from documents
 6. I take into consideration a quoted decision of the New South Wales Administrative Decisions Tribunal which recognized that an agency may redact irrelevant content from a document for the purpose of responding to an access request
 7. The identification of the parts of a document which are relevant to an access request is an anterior step to making a determination and therefore does not amount to a refusal for the purposes of sections 19 and 20 of the FOI Act.
17. I have numbered the above submissions for ease of addressing same.
18. I first take a moment to note that it is not clear whether the agency's position is that the information claimed to be within scope is a standalone document which is the only document in issue, or whether the agency accepts that the document in issue is the entire report, but contends that it is able to redact portions of the document on the basis of scope.
19. In its initial submissions to this Office dated 18 August 2020, the agency has stated that the 'document' is the extract of the report. Submissions 2-4 above appear to support this approach. However, the agency has more recently provided substantial submissions, including dot points 1, 5 and 6 above, conceding that the document is actually the entire report but also asserting that an agency may redact portions of a document on the basis of scope. The agency has also repeatedly used language which would indicate that the agency concedes that the relevant standalone document is the report. For example, stating that the 'entire document' or 'the balance of the document' is not within scope.

20. Regardless of this inconsistency, I have addressed each of the agency's submissions. I have first addressed dot points 2-4 collectively, followed by the remaining submissions.
21. In relation to dot points 2-4, although I do not disagree with the conclusions put forward by the agency, I disagree with the presumption underlying those submissions. These particular submissions assume that the portion of the report claimed to be within scope is a standalone document, which can be appropriately severed from the remainder of the report.
22. I accept that the definition of 'document' is broad and can be open to more than one interpretation. I will use the example of an email with an attachment. The email and attachment could be characterised as collectively being one document, however I also accept that the two elements of the email could clearly be severed, with the email and attachment each being characterised as separate documents. However, in my view and based on the limited information provided by the agency, the report in issue can be distinguished from such circumstances.
23. The agency has, on multiple occasions, referred to the report as being the 'entire document' or 'full document' and the portion claimed to be within scope as 'an extract'. Additionally, regardless of the wording used by the agency, there is no evidence before me that the report comprises multiple distinct parts, for example the report and annexures, which could be characterised as distinct documents. Even if it were the case that the report were comprised of discrete sections, it seems highly unlikely that the portion claimed to be within scope would constitute the entirety of one of those parts.
24. Accordingly, I am not satisfied that the extract can be characterised as a standalone document, and I am certainly not satisfied that the extract alone existed as a document held by the agency at the time the access application was made.
25. In relation to dot point 1, the fact that a certain practice is 'well established' does not necessarily mean that the practice is correct, nor should it prevent an incorrect practice from being corrected. I acknowledge that previously I have taken the approach that I could not review portions of a document that an agency has claimed to be beyond scope, however, further consideration of the terms of the FOI Act, particularly in light of the matter of *El Shafei v Central Adelaide Local Health Network*,² led me to revise this approach.
26. I accept that my revised approach may, at times, require agencies to consider material not explicitly sought by an applicant but again, this does not necessarily mean that the approach is incorrect. My views are formed based on the specific wording of the FOI Act which, in my view, does not allow for a document to be partially out of scope.
27. In any event, even if I were to accept an alternative interpretation of the FOI Act which allows for an agency to redact portions of a document on the basis of scope, I would then be obliged to apply section 22 of the *Acts Interpretation Act 1915* which states:

22—Construction that would promote purpose or object of an Act to be preferred
(1) Subject to subsection (2), where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.
28. The objects of the FOI Act include promoting openness in government by ensuring that information concerning the operations government is readily available to members of the public, and by:

² [2017] SACAT 5.

(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 privacy³

29. I do not consider that restricting partial access to a document held by government on the basis of scope can be characterised as being consistent with the public interest, and in fact consider that to do so would be contrary to the objects of the FOI Act which clearly favour disclosure of government documents.
30. In relation to the agency's submission that in other jurisdictions the relevant FOI legislation expressly authorises the deletion of irrelevant material from documents, I consider that this actually adds weight to my approach. Noting that such express provisions appear in other legislation, it would appear that the absence of such a provision in the SA FOI Act is intentional.
31. The agency requested that I consider the following quote from the NSW Administrative Decisions Tribunal decision of *White v New South Wales Dept of Education and Training (White)*:

A document may be a single document from the managerial perspective of an agency, but can, in our view, properly be severed when responding to an access request, depending on the terms of the request, reasonably construed. It is permissible for the agency to say - we have a long document with one part that bears on the subject-matter of your request.⁴

32. Although the decision of the NSW Administrative Decisions Tribunal is clearly not binding in South Australia, I consider it appropriate to contemplate the approach taken and reach my own conclusion. By way of passing comment, I note that the agency did not afford the applicant the same consideration in its internal review determination, in which it stated:

Finally, I note your reference to a determination made on a similar request in New South Wales. I am sure you will appreciate why I have not taken into account a decision reached on a different document/s, under different circumstances, in a different jurisdiction.

33. I have reviewed the decision in *White* and note that the relevant provisions of the then operational *Freedom of Information Act 1989* (NSW) were similarly worded to the equivalent provisions of the SA FOI Act. Despite this similarity, it is my view that, in light of other applicable legislation in South Australia, the approach taken in *White* is not an appropriate application of the SA FOI Act. In particular, I again note section 22 of the *Acts Interpretation Act 1915* referenced above.
34. I also note that in 2009 the *Freedom of Information Act 1989* (NSW) was repealed and replaced by the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**). Section 74 of the GIPA Act now provides:

74 Deletion of information from copy of record to be accessed

An agency can delete information from a copy of a record to which access is to be provided in response to an access application (so as to provide access only to the other information that the record contains) either because the deleted information is not relevant to the information applied for or because (if the deleted information was applied for) the agency has decided to refuse to provide access to that information.

³ *Freedom of Information Act 1991*, section 3.

⁴ [2009] NSWADTAP 72 at [16].

35. If the correct interpretation of the *Freedom of Information Act 1989* (NSW) was that an agency was able to redact portions of a document not considered to be within scope, I query why it was deemed necessary to include section 74 in the GIPA Act.
36. Finally, I refer to dot point 7 of the agency's submissions. The submission that the identification of the parts of a document which are within scope is an anterior step to making a determination would indicate that the agency considers it appropriate to create new documents after having received an access application for the purpose of responding to same.
37. In my view this is not consistent with the intention of the FOI Act. The FOI Act grants a right for persons to be given access to an agency's documents, I consider that this means any documents held by the agency at the time the access application was made.
38. If it were accepted that documents created subsequent to the access application being lodged could be considered to be within scope, arguably agencies could be required to continue undertaking further searches for new documents within scope throughout the progression of the FOI matter.
39. In light of the above, I was not persuaded by the agency's submissions to alter my views in relation to the issue of scope.
40. In its submissions dated 10 February 2021, the agency stated that if I remained of the view that the entire report is in issue in my external review, it requested the right to make further submissions in relation to exemptions applying to the remainder of the document.
41. Although I consider that such submissions should have been provided together with the submissions dated 10 February 2021, I nevertheless advised the agency that I was not persuaded by the agency's submissions on scope and requested that any further submissions in relation to the exemption of the remainder of the document be provided within a seven day period.
42. On 19 February 2021 the agency reiterated its view that I may only review the extract of the report claimed to be within scope. The agency did not provide any further submissions in support of this position and did not provide any submissions in relation to exemptions applying to the remainder of the document. Accordingly, I maintain the views expressed in my provisional determination that the entire report is in issue in my external review.

Extract of the report claimed to be within scope

43. The agency has acknowledged my comment on the paucity of the agency's submissions and has provided further submissions in support of its position that the portion of the document (**the extract**) is exempt pursuant to clauses 4(2)(a)(iii), (v) and (vi).
44. I have addressed the agency's further submissions in the body of this determination as much as I am able whilst bearing in mind my obligation to avoid disclosing information that the agency considers to be exempt.⁵
45. I note that the agency has taken issue with the way in which I have referred to the extract in my provisional determination, stating that the mere description of 'an event', as utilised in my provisional determination, is exempt. I disagree that my use of the

⁵ *Freedom of Information Act 1991*, section 39(15).

term 'event' discloses the contents of the extract. In any event, my obligation under section 39(15) of the FOI Act is to avoid disclosing such information.

46. Section 39(13) of the FOI Act requires that upon making an external review determination, I must notify the parties of my determination and the reasons for my determination. I do not consider that I can characterise the extract any more vaguely than 'an event' without failing to provide the applicant with reasons for my determination and therefore failing to adhere to section 39(13).
47. Having said this, due to the agency's concerns, I am willing to make my consideration of the agency's further submissions brief and provide further explanation directly to the agency by way of a cover letter. Although this is not my ordinary practice in conducting an external review, I do not consider that the applicant will be disadvantaged by not receiving my further consideration as I maintain my view that the report should be released in its entirety.

Comment on the agency's conduct

48. In its submissions dated 10 February 2021, the agency stated that it rejects my characterisation of its conduct in the course of my external review as being unreasonable as:

Your office was not provided with access to the full document because, as an out of scope document, it does not fall within the scope of your review powers, which are restricted by section 39(5)(a) of the Act to the 'subject matter' of the application.

49. The above does not persuade me to remove or alter the comment included in my provisional determination for multiple reasons.
50. Firstly, my comment on the agency's conduct was not made simply because the agency did not provide my Office with a copy of the full report. Even if I were to omit the portions of my comment which relate to this refusal of access, substantial portions of my comment would remain.
51. Secondly, part of my comment was made noting that the agency not only refused to provide me with a copy of the entire report, but also refused to provide me with a copy of the extract. The agency has only ever been agreeable to my Legal Officer viewing the extract either at the agency's premises or at my Office.
52. Finally, access to the entire report was not only requested on the basis of the entire report being within scope. My Legal Officer also requested access to the entire report on multiple occasions for the purpose of providing context to the extract.
53. In its further submissions dated 19 February 2021, the agency provided further submissions regarding my comment on its conduct:

Given the comment in the provisional determination as to DPC's co-operation with your office, I would also like to note the steps my officers have taken to provide your office with access to and information about the relevant parts of the document for the purpose of your external review. On 18 August 2020 your officers were invited to view a copy of the in-scope portion of the document at the State Administration Centre. Your office replied on 4 September to accept this offer and make arrangements. However, your office subsequently wrote to my predecessor on 23 October to advise that you were not content with the form of access being proposed. Ultimately, after further consideration on your office's part, on 15 December DPC officials arranged for your officer to view the in-scope portion of the document on a laptop and to make such notes as she saw fit. At that meeting an officer of DPC also provided an overview of the general nature of the document's contents orally.

54. I consider that this chronology of events omits several crucial points. My Office's acceptance of 4 September 2020 to view the document at the agency's premises was given following multiple emails between the agency and my Legal Officer. The emails sought further information regarding the nature of the extract to determine whether viewing the document was an appropriate alternative to a copy being provided to this Office.
55. Noting the agency's strong objection to providing my Office with a copy of the document, it was ultimately decided that the document could be viewed by my Legal Officer in the interest of progressing my external review.
56. On 22 October 2020, in the course of arranging a time for my Legal Officer to view the extract, the agency advised that any person attending the agency's premises must have baseline security clearance. This requirement had not previously been communicated to my Office.
57. Noting that no person within my Office meets this requirement, it became apparent that it would not be possible for my Office to obtain access to the document in the manner proposed by the agency. This was the basis for my letter dated 23 October 2020 in which I reiterated my view that I am entitled to a copy of the document for the purpose of conducting my external review.
58. In relation to the agency's submissions regarding the attendance of the agency's officials at my Office on 15 December 2020, I am advised that my Legal Officer was only permitted to take notes after requesting to do so, and was only given a very brief overview of the nature of the document after multiple requests for further information.
59. In summary, I am not persuaded to remove or alter my comment on the agency's conduct as included in my provisional determination.

Consideration

60. The agency has made clear that it considers the document in issue to be highly sensitive and has disclosed minimal information about the document in its determination. Although I do not necessarily agree with this approach by the agency, I am again mindful of my obligation to avoid disclosing information that the agency considers to be exempt.⁶
61. The agency has advised that an extract from a report is within scope of the application, but that the balance of the document is outside the scope of the request.
62. The FOI Act deals with access to 'documents'⁷ rather than information. Section 13(d) requires an application for access to contain such information as is reasonably necessary to enable 'the document to be identified'. A document is therefore within scope if it is identified as coming within the terms of the application. On identifying the document, section 19(1)(a) requires the agency to determine whether access to 'the document' is to be given or refused, in whole or part (Section 20(4)).
63. Any redaction of the document, is a refusal of access and therefore a determination which is reviewable by me. Section 20 of the FOI Act provides the various circumstances in which an agency may refuse access to a document, but does not allow for an agency to refuse access partially to a document on the basis of scope.⁸

⁶ *Freedom of Information Act 1991*, section 39(15).

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

⁸ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 [26]

64. The question of whether the agency has identified all documents within the scope of an application for access or whether the agency holds a document so identified is beyond the remit of my external review, because it is not a determination;⁹ however, any refusal of part of a document that has been identified as coming within the terms of an application is a determination. I consider that an agency's refusal of access to a part of a document is reviewable regardless of the basis of that refusal.
65. In further support of this, section 20(4) states that an agency must not refuse to give access to a document to a limited extent if it is practicable to provide a version of the document from which the exempt material is deleted [emphasis added]. Exempt material should be differentiated from out of scope material. In my view, this indicates that an agency does not have discretion to refuse partial access to a document on the basis of scope rather than exemption.
66. Accordingly, unless the remaining portions of the report are otherwise exempt, I have discretion to confirm, vary or reverse the agency's determination to refuse access to the entire report. Unfortunately this requires me to make a determination in relation to a document which I have not viewed in its entirety.
67. Following lengthy debate between myself and the agency, my Legal Officer was able to view the portion of the document that the agency claims to be exempt. My Legal Officer then made a further request to the agency to view the document in its entirety. By email dated 16 December 2020 the agency made clear that access to the document would not be granted in any form. In light of previous correspondence in this matter and further events which have transpired since the issuing of my provisional determination, I am satisfied that the agency will not negotiate on this matter.
68. Although viewing the document in its entirety would clearly be beneficial, it is not absolutely essential for me to conduct my external review.¹⁰
69. I have first considered the extract that the agency has claimed to be exempt. The agency has claimed the extract to be exempt pursuant to clauses 4(2)(a)(iii), (v) and (vi).
70. In its initial submissions to this Office the agency merely used the wording of these clauses to claim that they apply. It did not provide any explanation as to how disclosure of the extract could reasonably be expected to result in any of the outcomes specified in clauses 4(2)(a)(iii), (v) and (vi).
71. I advised in my provisional determination that, having reviewed the extract, it was unclear to me how disclosure could reasonably be expected to lead to those results. The extract refers to a past event in extremely minimal terms. Neither the contents of the extract, nor the submissions of the agency indicate any particular importance of that event.
72. Were it the case that the extract specified the dates of future events of a similar nature, or provided any kind of details as to the process of the event, I would likely be satisfied that the extract is exempt. However the content of the extract is entirely distinguishable from such examples.
73. In my provisional determination, I concluded that absent any contextual information or meaningful explanation from the agency, I was not satisfied that the first limb of any of the claimed exemption clauses are met.

⁹ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

¹⁰ *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [160].

74. In its submissions to this Office dated 10 February 2021, the agency provided further explanation as to how it considered clauses 4(2)(a)(iii), (v) and (vi) to be applicable to the extract. As outlined above, I will address those further submissions briefly and in broad terms in this determination, but will provide further explanation of my consideration to the agency by way of a covering letter.
75. In essence, the agency has further submitted that disclosure of the extract could allow a person to draw wider inferences which could be harmful. I do not consider that disclosure of only the extract could reasonably be expected to lead to such an outcome.
76. I therefore maintain my view that the first limbs of the three claimed exemption clauses are not met.
77. In my provisional determination I noted that although it was not necessary for me to consider the public interest test, I considered it appropriate to briefly address the agency's submissions in that regard. The factors contrary to disclosure that the agency had identified essentially repeated the adverse effects that clause 4 anticipates could reasonably be expected following disclosure. Accordingly, I concluded that, as I was not satisfied that the first limb of any subsection of clause 4(2)(a) is met, those factors were not persuasive.
78. On 10 February 2021, the Attorney-General informed me that she had assessed what the public interest required in the circumstances. The Attorney-General's assessment was that the public interest favours withholding the extract from release in light of the security implications surrounding the content. Section 39(9) of the FOI Act requires that I uphold the Attorney-General's assessment unless I am satisfied that there are cogent reasons for not doing so.
79. With respect to the Attorney-General, I do not consider it necessary to assess whether there are cogent reasons to depart from her assessment. Merely establishing that disclosure of the extract would be contrary to the public interest does not, by itself, attract the exemption of clause 4. The extract cannot be exempt unless each aspect of the claimed exemption clauses are satisfied. I have already concluded that this is not the case.
80. I turn now to consider the remainder of the report. The agency has not contended that the content is exempt, nor has it provided some other reason under section 20 for which it may be refused.
81. As outlined above, the agency stated in its submissions dated 10 February 2021 that, if I were not persuaded to alter my view regarding the issue of scope, the agency requested the opportunity to provide further submissions as to the exemption of the remainder of the document. The agency was afforded such an opportunity but failed to provide any such submissions.
82. Having regard to the minimal contextual information before me, I can speculate as to the type of information which may be contained within the report. However, this is speculation only. The agency has not provided any clear indication as to the contents of the report, nor any information which may indicate that the report should be exempt.
83. Section 48 requires that if an agency wishes to contend that a document should not be released, it bears the onus of providing me whatever material it considers justifies its determination.¹¹

¹¹ *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [163]

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84. As the agency has not done so, despite multiple requests from my Office, it is my view that the report should be released in its entirety.

Comment

85. In light of the circumstances of this external review, I consider it appropriate to comment on the conduct of the agency.¹² I emphasise that my view of the agency's conduct is not part of the reasoning for my determination.

86. Section 39 of the FOI Act deals with external reviews by the Ombudsman. Subsection (7) provides:

The agency and the applicant must cooperate in the process proposed by the relevant review authority for the purposes of the conduct of a review under this section ... and must do all such things as are reasonably required to expedite the process.

87. In my view the agency has failed to comply with section 39(7). In reaching this conclusion, I consider it appropriate to briefly outline the early events of this external review.

88. Upon receiving the applicant's application for external review, my Legal Officer notified the agency of same and requested that the documents in issue be provided to my Office together with the agency's submissions and any other relevant information or documents.

89. The agency advised by letter dated 18 August 2020 that it would not provide me with a copy of the document in issue due to its security classification. The agency instead invited an official from my Office to view the document at the agency's premises. Although I was agreeable to this alternative option, this did not eventuate as the agency required the official attending from my Office to have baseline security clearance. Such clearance is not held by any person within my Office.

90. Following this I again wrote to the agency requesting that a copy of the document be provided to my Office. I specifically referred to the agency's legislated obligation to cooperate in the external review process as proposed by me.¹³

91. The agency responded expressing its views that it was not restricting access to the document in a manner which prevented me from fulfilling my functions. The agency further proposed a second alternative form of access; that an agency official attend my Office with an electronic copy of the document to be viewed in the official's presence.

92. In the interest of progressing this matter, I agreed to the proposed alternative. Subsequently on 15 December 2020 agency officials attended my Office and allowed my Legal Officer to view the portion of the document determined to be exempt. I understand that during this meeting my Legal Officer made enquiries as to the nature and context of the document that the portion had been extracted from. The agency officials provided minimal information in response, advising that it could not provide any further detail due to the sensitivity of the document.

93. As outlined above, following this meeting my Legal Officer requested to view a copy of the document in its entirety. The agency made clear in its response that it was not agreeable to this. In refusing access to the remainder of the report, the agency stated that:

¹² *Freedom of Information Act 1991*, section 39(16).

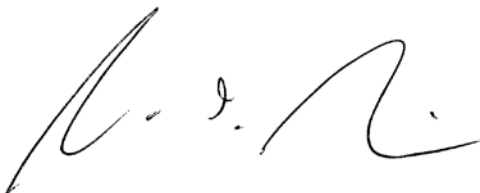
¹³ *Freedom of Information Act 1991*, section 39(7).

DPC considers that the requirements laid out in Federal security legislation not to share, transmit or allow someone to view the information override the powers granted to the Ombudsman under the FOI and Ombudsman Acts.

94. My Legal Officer queried which Federal legislation the agency was referring to but received no response. Regardless of the legislation referred to, the basis of this argument is unclear to me given that the agency had already allowed my Legal Officer to view the extract.
95. Throughout my external review, my Legal Officer has made multiple further requests to view the entire report, not only to consider the exempt status of the report, but to obtain context for the extract. The agency has refused all forms of access to the entire report.
96. In my view, the agency's conduct in this external review has been unreasonable, specifically:
- refusing to provide my Office with a copy of the document in issue
 - refusing to allow access in any form to the entirety of the report
 - failing to provide a clear legal basis for those refusals
 - failing to provide sufficient explanation and contextual information to allow me to conduct my external review, despite being requested to do so
 - causing further delays to an already complicated matter by requesting a further opportunity to provide submissions regarding the exemption of the report, but then failing to do so when such an opportunity was granted.
97. While I acknowledge that the agency may have been restricted in relation to the extent of information it could include to the applicant, I see no reason that the agency could not have provided more thorough submissions to my Office. I reach this conclusion specifically noting that, as the agency saw fit to provide more thorough submissions in response to my provisional determination, it is unclear why such submissions could not be provided to me in the first instance.
98. I also consider that the agency's secretive conduct is entirely disproportionate to the extract in particular. I reach this conclusion noting that the extract does not appear to be properly exempt.
99. In light of my comment regarding the agency's conduct, it is my view that it is in the public interest to publish my final determination pursuant to section 39(14) of the FOI Act.

Determination

100. In light of my views above, I vary the agency's determination such that the entire report be released in full.



Wayne Lines
SA OMBUDSMAN

24 February 2021

APPENDIX 1

Procedural steps

Date	Event
4 February 2020	The agency received the FOI application dated 4 February 2020.
5 March 2020	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
11 May 2020	The agency purported to issue a belated determination.
20 May 2020	The agency received the internal review application dated 20 May 2020.
22 May 2020	The agency confirmed the determination.
21 June 2020	The Ombudsman received the applicant's request for external review dated 21 June 2020.
11 August 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
26 August 2020	The agency provided the Ombudsman with its submissions and advised that it would not be providing a copy of the document in issue.
15 December 2020	The agency attended at the Ombudsman's Office with an electronic copy of the document for viewing by the Ombudsman's Legal Officer.
6 January 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
10 February 2021	The agency provided partial submissions in response to the provisional determination.
12 February 2021	The agency was given a further seven days to provide any further submissions it wished to make.
19 February 2021	The agency provided further submissions in response to the provisional determination.

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

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