



Determination

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

Applicant	Senator Rex Patrick
Agency	SA Forestry Corporation
Ombudsman reference	2020/05758
Agency reference	2020/329
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:
 - a. The total volumes of log being exported internationally by ForestrySA (or a third party without log processing facilities) from the Mount Lofty Ranges in FY16/17 through 19/20.
 - b. The volume of log by grade exported internationally by ForestrySA (or a third party without log processing facilities) from the Mount Lofty Ranges in FY16/17 through 19/20.
 - c. The destination countries to which logs are being exported internationally by ForestrySA (or a third party without log processing facilities) from the Mount Lofty Ranges and the volume directed at each country in FY16/17 through 19/20.
 - d. Any proposals or planning documents, be they draft, final or otherwise, that go to the use of the Mount Lofty Ranges log beyond 30 June 2022.

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 22 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 applicant advised via email dated 12 February 2021 that he had no further submissions to make. The agency provided further submissions by email dated 11 February 2021 which I have considered in the body of 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. The following clauses of Schedule 1 of the FOI Act are relevant to my external review:

7—Documents affecting business affairs

- (1) A document is an exempt document—
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

16—Documents concerning operations of agencies

- (2) A document is an exempt document if—
 - (a) it relates to an agency engaged in commercial activities; and
 - (b) it contains matter the disclosure of which could prejudice the competitiveness of the agency in carrying on those commercial activities.
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. Section 14(2) of the FOI Act requires agencies to deal with applications within 30 days after they are received. Section 19(2)(b) provides that if an agency fails to determine an application within 30 days after receiving it, it is to be taken to have determined the application by refusing access to the documents sought. However, section 19(2a) of the FOI Act provides that 'nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and such a determination is to be taken to have been made under this Act)'.¹
12. In my view, section 19(2a) only has operation when an agency fails to determine an application within 30 days after it is received and has no operation once an applicant

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

has sought an internal review. It should also be noted that section 19(2a) only permits agencies to make belated determinations 'to give access to a document' and cannot be utilised to refuse access. I have therefore treated the agency's purported determination on internal review as submissions from the agency.

13. In its purported determination the agency provided a table relating to the volume of exported log. The table appears to have been specifically produced by the agency in response to the FOI application. Accordingly, as the table is not a 'document', it cannot be in issue in my external review. In any event the agency has not claimed any part of the table to be exempt.
14. The agency identified one document within the scope of the application and has determined the document to be partially exempt.

Issues in this review

15. 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.

Application for external review

16. In his application for external review and subsequent submissions provided to this Office on 27 November 2020, the applicant has identified several issues. For completeness I consider it appropriate to briefly address those issues.
17. The applicant has raised issues relating to sufficiency of search and the agency's interpretation of the scope of his FOI application. These matters have been addressed as a separate complaint matter.²
18. The applicant also requested that I check the correctness of the raw data in the table produced by the agency, and conduct further searches for documents falling within the scope of the FOI application. In my letter to the applicant dated 15 January 2021 I advised that it is not my role to do either.
19. As canvassed above, in the context of an external review I may only confirm, vary or reverse an agency's determination.

Consideration

20. The agency has claimed portions of the document in issue to be out of scope, however it is my view that the entire document is in issue.
21. The FOI Act deals with access to 'documents'³ 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)).
22. 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

² My Office's reference number for this complaint is 2020/06387.

³ *Freedom of Information Act 1991*, section 12.

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.⁴

23. 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;⁵ 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.
24. 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.
25. Accordingly, it is my view that the portions of the document claimed to be out of scope are in issue in my external review and should be released unless they are otherwise exempt.
26. The agency has claimed the document to be partially exempt on the basis of clauses 7(1)(c) and 16(2). In my view the agency has not fulfilled its obligation under section 48 to justify its determination. The agency has not provided any explanation as to how disclosure of the document could reasonably be expected to have an adverse effect on its business affairs or to prejudice the future supply of such information to the Government or an agency. Similarly, the agency has given no explanation as to how disclosure would prejudice the competitiveness of the agency in carrying on its commercial activities.
27. Having said this, I note that the agency has provided the following submissions in relation to the public interest test required by clause 7(1)(c):

In favour of the public interest:

- Meeting the objects of the FOI Act favouring access to documents including:
 - Promoting openness and accountability in Government
 - Ensuring optimal use of public resources
 - The importance of transparency and openness and the interest that the public has in the decision-making processes of Government.

Contrary to the public interest:

- Disclosure of this information would reveal detail which is considered commercially sensitive to ForestrySA
- The release of this information could result in a competitive disadvantage to ForestrySA and third parties, and potentially jeopardise future business planning
- If third parties cannot be assured of confidentiality by Government with respect to communications relating to their commercially sensitive information, this would have the potential to harm business relationships with Government and hamper future dealings with agencies for the betterment of South Australia.
- Disclosure of this information would be expected to prejudice the future supply of information to Government, as the level of trust in handling such information would be substantially diminished.

⁴ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 [26]

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

28. Although the above was submitted specifically in relation to the public interest test, I can speculate as to the adverse effects of disclosure anticipated by the agency based on the factors considered to be contrary to the public interest.
29. I note that portions of the information to which the agency has refused access relate to 'agreements' between the agency and third parties, indicating that there may be contracts in place.
30. Clause 7(3) specifically prohibits the applicability of clause 7(1) to a contract entered into by an agency. Although the document in issue is not a contract itself, I consider it relevant that clause 7(3) indicates a clear Parliamentary intention that the kind of information which might be in such a contract should not be exempt.
31. It is not clear to me why the redacted information should be considered commercially sensitive. Additionally, I do not consider it appropriate that a third party be assured that its dealings with government will be confidential. Rather, there is a general expectation that government contracts and agreements will be disclosed to the public. In my view there is a strong public interest in transparency around an agency's dealings with other third parties.
32. In my provisional determination, I stated that:

Additionally, I query the competitiveness of the activities undertaken by the agency. I note from the agency's website that most of its timber is sold to regional domestic markets. I am unsure what other South Australian agencies or corporations might be a realistic competitor to the agency.

Although I am satisfied that the document in issue relates to the commercial affairs of the agency and that some portions also relate to the business affairs of other third parties, based on the limited submissions from the agency, it is unclear to me how the requirements of clause 7(1)(c)(ii)(A) or clause 16(2)(b) are met. I acknowledge that the agency has stated that release of the information could result in a competitive disadvantage to Forestry SA and third parties but it is unclear to me how this could reasonably be expected to occur.

Noting that the agency does not appear to have undertaken any consultation, I intend to consult with the third parties named within the document.

33. None of the third parties named within the document provided submissions objecting to disclosure of the document. Accordingly, I maintain my view that the document is not exempt pursuant to clause 7(1)(c) insofar as it relates to the business affairs of those third parties.
34. In response to my provisional determination the agency reiterated its position that portions of the document are exempt pursuant to clause 16(2) submitting that:

ForestrySA does not have other South Australian agency or corporation competition directly. Rather, it is ForestrySA's commercial relationships with potential customers and suppliers that ForestrySA considers critical to the "competitiveness of the agency."

ForestrySA considers that releasing this information... would adversely affect the negotiating power it holds with customers, and likely the competition existing between customers.
35. In my view, this is not a correct application of clause 16(2). 'Competitive' is defined as 'relating to, characterized by, or based on competition'.⁶ The agency has advised that it does not have any direct competition in relation to the particular commercial functions

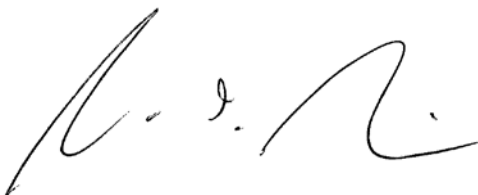
⁶ *Merriam-Webster* (online at 26 February 2021) 'competitive' (def 1).

in issue. It is nonsensical for the agency to assert that disclosure would prejudice the agency's competitiveness whilst simultaneously advising that the agency has no direct competition.

36. Having said this, I consider that the possibility that disclosure could adversely affect the agency's negotiating power with its customers is relevant to the applicability of clause 7(1)(c). In light of the agency's recent submissions, I am satisfied that the information which remains in issue relates to the commercial affairs of the agency and that disclosure could reasonably be expected to have an adverse effect on those affairs. I now turn to consider the public interest test.
37. In response to my provisional determination the agency did not provide any further submissions regarding the public interest test. I have considered the submissions which I addressed in my provisional determination, and have assessed whether any further factors may be relevant in light of the agency's more recent submissions.
38. Whilst I accept that disclosure may negatively affect the agency's negotiating power, I query the severity of this possible outcome, again noting that the agency has no direct competition in relation to the relevant commercial functions. Customers do not have the option of simply going to a competitor rather than the agency.
39. Regardless, I do not consider that the agency's negotiating power being negatively affected would necessarily be contrary to the public interest. In this case, the agency's customers are members of the public - the interests of those customers contribute to the public interest.
40. I also consider that there is significant public interest in ensuring that government agencies which engage in commercial functions are not inappropriately obtaining revenue from those functions.
41. In light of the above, and absent any further public interest submissions from the agency, I am satisfied that the factors favouring disclosure outweigh those contrary to disclosure.

Determination

42. In light of my views above, I reverse the agency's deemed refusal such that the document in issue be released in full.



Wayne Lines
SA OMBUDSMAN

26 February 2021

APPENDIX 1

Procedural steps

Date	Event
30 September 2020	The agency received the FOI application dated 25 September 2020. The application was received via a transfer from the Department of Primary Industries and Regions.
30 October 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
3 November 2020	The agency received the internal review application dated 3 November 2020.
17 November 2020	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
18 November 2020	The agency purported to issue a belated determination varying its deemed refusal.
18 November 2020	The Ombudsman received the applicant's request for external review dated 18 November 2020.
19 November 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
10 December 2020	The agency provided the Ombudsman with its submissions and documentation.
22 December 2020	The agency was requested to provide an unredacted copy of the documents in issue.
23 December 2020	The agency provided the requested documents.
22 January 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
11 February 2021	The agency provided submissions in response to the provisional determination.
12 February 2021	The applicant advised that he had no further submissions to make.

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).