



## Determination

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

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| Applicant           | Ms Bernadette Mulholland                     |
| Agency              | Department for Health and Wellbeing          |
| Ombudsman reference | 2020/04824                                   |
| Agency reference    | FOI2020-00046                                |
| 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:

All costs paid to private law firms/contractors by the Agency(including LHNs) on all employment matters relating to SA Health/LHN employees in the last two years relating to Enterprise Bargaining, individual dismissals, industrial dispute, work health and safety, industrial, bullying and harassment and discrimination. Any costs associated with workers compensation disputes are not required. Include the name of the law firm/contractor, the matter, the Department and/or LHN and the amount paid for each matter to date. Itemised costs are not required only total amount. All costs paid to Minter Ellison, EMA Legal and Arnold Bloch Leibler by the Agency and or LHN broken down into matters and cost for each matter and Department and/or LHN. Itemised costs are not required only total amount. All costs paid by the Agency/Department/CALHN relating to the Visvanathan v DHA (2020) SAET 132 matter (from commencement of the dispute). Including all costs paid to private law firms; costs attached/paid to the Crown Solicitors Office; Ms Frances Nelson QC and Mr B Garnaut. Identification of the Agency individuals/positions who provided the instructions to incur the costs and what Agency individuals/positions authorised the costs. Itemisation of the costs are not required. The time period is the duration of dispute up until the published decision

2. On 2 December 2020 the applicant and agency agreed to revise the scope of the FOI application to:

For the 2 year period prior to date of application lodgment, the total costs (not broken down into individual cases) for industrial matters confined to Medical Officers paid by the Department for Health and Wellbeing to Minter Ellison, EMA Legal, Arnold Bloch Leibler, private law firms and CSO for the Visvanathan case specified in the application.

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## Background

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

## Jurisdiction

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

## Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 12 February 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.
6. The applicant advised via email dated 12 February 2021 that she supported my provisional determination and publication of my final determination. The agency provided further submissions via email dated 5 March 2021 which I have considered in this determination.

## Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
8. 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.
9. Clause 6(1) of Schedule 1 of the FOI Act is relevant to my external review. Clause 6(1) provides:

**6—Documents affecting personal affairs**

(1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

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.

## Documents in issue

12. The agency did not determine the applicant's FOI application or internal review application within the statutory time frames and is deemed to have refused access to all documents.<sup>2</sup>

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<sup>1</sup> *Freedom of Information Act 1991*, section 12.

<sup>2</sup> *Freedom of Information Act 1991*, sections 19(2), 29(5)

13. Upon being requested to provide the relevant documents and submissions to this Office, the agency provided submissions detailing its position in regard to the documents found to be within scope. The agency advised that on 15 January 2021, it identified six documents within the revised scope of the application. The agency further advised that it did not consider the documents to be exempt, albeit noting that portions of the documents were considered to be out of scope. I accept this as the agency's revised position.
14. On 9 February 2021 the agency provided this Office with a copy of its belated internal review determination and advised that same would be provided to the applicant. The purported internal review determination identified only one document as being within scope. Upon being prompted for clarification by my Legal Officer, the agency confirmed that it no longer considered documents 1-5 to be within scope.
15. It is entirely unclear to me on what basis the agency has revised its view regarding scope and, in any event, I do not consider that the agency can do so.
16. In the context of my external review I may confirm, vary or reverse an agency's determination.<sup>3</sup> The agency's submissions to this Office dated 21 January 2021 clearly state that the agency identified six documents within scope. I am satisfied that the agency's identification of those six documents was not merely an administrative error as specific submissions were provided for each document. Accordingly, I consider that the agency's deemed refusal determination relates to those six documents and this is the determination that I may confirm, vary or reverse.
17. Although I do not accept the agency's change of mind regarding scope, I have taken into account the additional submissions provided in relation to the one document addressed in the purported internal review determination.

#### Issues in this review

18. Having regard to the agency's 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 deemed refusal in regard to the six documents in issue in this external review.

#### Agency's submissions

19. In response to my provisional determination, the agency submitted that although it initially identified six documents as being within scope, in light of the agreed amended scope of the application, the agency considered that documents 1-5 no longer fell within the scope of the application.
20. I am not inclined to accept this submission as the agency identified the initial six documents as being within scope more than a month after the scope of the application was amended.
21. The agency has also provided submissions in response to my comment on the agency's unreasonable conduct, stating:

Processing of the application was undertaken by the A/Assistance Liaison Officer...

The A/Assistant Liaison Officer returned to his substantive position in mid December 2020, unfortunately this resulted in the omission of documents and submissions being

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<sup>3</sup> *Freedom of Information Act 1991*, section 39(11).

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provided by the response date of 15 December 2020 and resulted in the emails of 5 January 2021 and 12 January 2021 not being responded to.

22. Although my Legal Officer's correspondence was addressed to the Acting Assistant's Liaison Officer, it was actually sent to the agency's general positional inbox. Accordingly, I am not satisfied that the agency's submissions appropriately justify its failure to respond to that correspondence.
23. The agency has also requested that I take into consideration that it is dealing with a large volume of FOI applications with limited resources over the Christmas and New Year period. The agency also submits that it continues to make every effort to meet the legislative requirements of the FOI Act.
24. Again, I am not satisfied that these submissions justify the substantial delays caused by the agency. Given the small number of documents found to be within scope and the applicant's willingness to co-operate with the agency, I see no reason why this matter could not have been resolved sooner.

### Consideration

25. The agency has submitted that all six documents are partially out of scope. It is my view that the entirety of the documents remain in issue in my external review.
26. The FOI Act deals with access to 'documents'<sup>4</sup> 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)).
27. 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.<sup>5</sup>
28. 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;<sup>6</sup> 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.
29. 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.
30. Accordingly, it is my view that the portions of the documents claimed to be out of scope are in issue in my external review and should be released unless they are otherwise exempt.

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<sup>4</sup> *Freedom of Information Act 1991*, section 12.

<sup>5</sup> *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 [26]

<sup>6</sup> *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

31. I note that in the agency's purported internal review determination, the agency has stated that document 6 is partially exempt pursuant to clause 6(1), however from the information before me it is unclear which portions of the document the agency refers to.
32. The determination states simply:

I have determined the disclosure of the document would involve the unreasonable disclosure of information concerning personal affairs, and therefore the documents are partially exempt by virtue of Schedule 1, Clause 6(1)...
33. Not only does this description fail to identify the relevant portion/s of the document, I believe it falls far short of the agency's obligation to justify its determination pursuant to section 48 of the FOI Act. Additionally, the document is not marked in any way which indicates which portions of the document the agency considers to be exempt.
34. Having reviewed the documents in issue, I am not satisfied that clause 6(1) has any applicability to any of the documents. Insofar as individuals are named or referred to within the documents, the information appears to relate to those peoples' professional affairs rather than their personal affairs.
35. Accordingly, on the evidence before me, I am unable to conclude that any part of the documents in issue are exempt.

#### Comment

36. In light of the circumstances of this external review, I consider it appropriate to comment on the conduct of the agency.<sup>7</sup> I emphasise that my view of the agency's conduct is not part of the reasoning for my determination.
37. I first note the agency's conduct leading up to the external review, in particular the agency's response to the application for internal review. By email dated 21 September 2020, the agency advised the applicant that it did not hold any records which fell within the scope of the FOI request, but then proceeded to advise that to review and provide the documentation as requested would be an unreasonable diversion of the agency's resources. On this basis the agency requested that the applicant narrow the scope of her application.
38. The two points communicated by the agency to the applicant are clearly contradictory. If the agency held no documents within scope, it was required to notify the applicant of same in accordance with section 23(1)(b) of the FOI Act. The agency's request that the applicant narrow the scope of her application instead indicates that the agency intended to rely upon section 18(1), noting that section 18(2) states that an agency must not refuse to deal with an FOI application without first endeavouring to assist the applicant to amend the application.
39. In the application for external review the applicant advised that, in response to the agency's email dated 21 September 2020, she had attempted to contact the agency on three separate occasions with a view to discussing a narrowed scope. On each occasion the applicant was advised that the relevant FOI officer was unavailable. To my knowledge the agency made no effort to return the applicant's calls.
40. Although the agency did not ultimately rely upon section 18(1), I consider it relevant to note that, in light of the above, I do not consider that the agency could be said to have endeavoured to assist the applicant in amending the scope of the application in accordance with section 18(2).

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<sup>7</sup> *Freedom of Information Act 1991*, section 39(16).

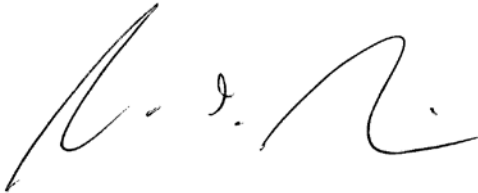
41. In the application for external review the applicant advised this Office that she was prepared to work with the agency to narrow the scope of her access application. In light of this and with a view to ascertaining whether the matter could be settled, on 6 October 2020 my Legal Officer contacted the agency and enquired whether the agency remained agreeable to working with the applicant. The agency advised that it was and agreed to liaise directly with the applicant.
42. Between 6 October 2020 and 30 November 2020 my Legal Officer made regular contact with the agency requesting updates. The responses provided by the agency were vague and did not indicate that any effort was being made to progress or prioritise this matter. Many of the responses from the agency simply indicated that the relevant FOI officer was awaiting further information, but neglected to provide any kind of realistic timeframe for a response.
43. On 1 December 2020 my Legal Officer advised the agency that, having been notified by the applicant of a lack of response to her, it appeared that the matter could not be settled. The agency was requested to provide the relevant documents and submissions on the same day. The agency subsequently advised on 2 December 2020 that the applicant had agreed to a narrowed scope.
44. In my view, the agency's actions were not compliant with section 39(7) of the FOI Act which states:

(7) 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 (including any attempt of the relevant review authority to effect a settlement between the participants), and must do all such things as are reasonably required to expedite the process.
45. The agency committed to working with the applicant via email dated 7 October 2020, but then made little to no effort to do so for the following two months. The timing of the scope being amended indicates that the agency was only prompted to progress this matter in response to being requested to provide the relevant documents and submissions to me.
46. The agency was requested to provide the relevant documents and submissions to this Office by 15 December 2020. This date lapsed without any contact from the agency. My Legal Officer sent follow up emails to the agency on 5 January 2021 and 12 January 2021, both of which received no response.
47. The relevant documents and submissions were eventually provided on 21 January 2020 following direct involvement from my Manager of Information and Audit. The agency did not provide any explanation for its lack of response.
48. Between the agency's failure to prioritise working with the applicant to amend the scope of the application, and the failure to respond to my Legal Officer's correspondence, my external review has been delayed by three and half months. In my view this kind of delay is entirely unreasonable.
49. Finally, as already canvassed above, the agency purported to change its views regarding scope by its belated internal review determination on 9 February 2021. In my view this was neither appropriate nor reasonable.
50. 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.

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**Determination**

51. In light of my views above, I reverse the agency's determination such that the six documents identified in the correspondence to this Office on 21 January 2021 be released in full.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines  
**SA OMBUDSMAN**

9 March 2021

## APPENDIX 1

### Procedural steps

| Date              | Event   |
|-------------------|---|
| 10 August 2020    | The agency received the FOI application dated 9 August 2020.  |
| 9 September 2020  | The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup> |
| 10 September 2020 | The agency received the internal review application dated 10 September 2020.  |
| 24 September 2020 | The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>                           |
| 2 October 2020    | The Ombudsman received the applicant's request for external review dated 2 October 2020.  |
| 6 October 2020    | The Ombudsman advised the agency of the external review and attempted to facilitate a discussion between the agency and applicant regarding scope                                 |
| 1 December 2020   | The Ombudsman requested submissions and documentation from the agency   |
| 21 January 2021   | The agency provided the Ombudsman with its submissions and documentation.   |
| 27 January 2021   | The agency was requested to provide the documents to the applicant in line with its submissions to the Ombudsman  |
| 9 February 2021   | The agency provided a purported belated internal review determination to the Ombudsman and advised that same would be provided to the applicant.                                  |
| 12 February 2021  | The Ombudsman issued his provisional determination and invited submissions from the parties.  |
| 12 February 2021  | The applicant provided submissions in response to my provisional determination.   |
| 5 March 2021      | The agency provided submissions in response to my provisional determination.  |

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).