



Determination

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

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| Applicant: | Mr Peter Kerin |
| Agency: | SA Police |
| Ombudsman reference: | 2020/05667 |
| Agency reference: | 20/0337 |
| Determination: | The determination of the agency is varied. |
| Date of Ombudsman's determination: | 6 April 2021 |
| Issues considered: | Substantial and unreasonable diversion of agency resources Whether agency endeavoured to assist applicant to amend application |
| Exemption clauses relied upon: | N/A |
| Legislation considered: | <i>Freedom of Information Act 1991</i> |

Terms of the original application:

1. All and any seized materials that continue to be retained by the SA Police Department that were seized by the SA Police Department from my place of residence at 106A Rose Terrace, Wayville in April, 2010. Pleasenote that the lead/primary detective in April, 2010 was Brevet Sgt. Roberto Della Sala {as his rank then was} to whom I have recently spoken and who directed me to make this FOI application. As well as physically inspecting any 'hard copy' documents and other materials, in particular I ask that you facilitate access to me (in company with a computer technical expert/technician) to all and any computer hard drives that were seized by the SA Police Department in April, 2010 and of which the SA Police Department is still in possession.
2. All of the exhibits that were either 'tendered' or 'marked for identification' before either or both, firstly, His Honour David J, in October, 2012 and, secondly, His Honour Blue J. in December 2013 in the matter of R. vs Peter Kerin being SCCRM 280 / 2012. I ask that you facilitate my access to the above particularised exhibits together with and in the company of, initially, at least 1 of my advisers.

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:
 1. All and any seized materials that continue to be retained by the SA Police Department that were seized by the SA Police Department from my place of residence at 106A Rose Terrace, Wayville in April, 2010. Pleasenote that the lead/primary detective in April, 2010 was Brevet Sgt. Roberto Della Sala {as his rank then was} to whom I have recently spoken and who directed me to make this FOI application. As well as physically inspecting any 'hard copy' documents and other materials, in particular I ask that you facilitate access to me (in company with a computer technical expert/technician) to all and any computer hard drives that were seized by the SA Police Department in April, 2010 and of which the SA Police Department is still in possession.
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Background

2. The agency failed to deal with the application within the statutory 30 day period, nor did its principal officer utilise the power available pursuant to section 14A of the FOI Act to extend this period. Consequently, by virtue of section 19(2)(b) of the FOI Act, the agency was taken to have determined the application by refusing access.
3. Following its deemed refusal determination, the agency purported to issue a belated determination to the applicant in which the agency dealt with the access application in two parts.
4. In relation to the first dot point of the access application, the agency advised it had identified one document within scope and provided partial access to the document. In relation to the second dot point, the agency advised that dealing with the application would, if carried out, substantially and unreasonably divert the agency's resources from use in the exercise of its functions and, on that basis, refused to deal with the latter portion of the application.
5. The applicant applied for an internal review, providing submissions in response to the applicant's purported determination. The agency again failed to determine the application for internal review within the statutory 14 day period. The agency was therefore, for the purposes of the FOI Act, taken to have determined the application by refusing access.¹
6. Once again, the agency purported to issue a belated internal review determination, confirming its original belated determination.
7. The applicant then applied to this Office for an external review, advising that he only sought a review of the agency's refusal to deal with the second portion of his access application.

¹ *Freedom of Information Act 1991* section 29(5).

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

Jurisdiction

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

Provisional determination

10. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 18 March 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
11. By email dated 24 March 2021 the applicant provided submissions in response. A hard copy of the applicant's response was later received by this Office on 29 March 2021.
12. The applicant submitted that he is supportive of the views expressed in my provisional determination, but reiterated his view that dealing with his application should be a straightforward process as it simply requires the retrieval of the archived (and already located) documents and the agency advising him to make arrangements to view the documents.
13. In my provisional determination I advised the applicant that the agency is required to undertake further work between obtaining the documents and providing the applicant with access to same, namely, the agency must consider the contents of each document and determine whether any portion of the documents are exempt.
14. The right to access documents pursuant to the FOI Act is not absolute. Access to information is subject to the provisions of the FOI Act and the exemption clauses contained in Schedule 1. I therefore reiterate to the applicant that, notwithstanding my views that the agency has not justified its reliance upon section 18(1), the work required by the agency to deal with the FOI application is more substantial than anticipated by the applicant.
15. By email dated 30 March 2021, the agency advised that it had no further submissions to make.
16. In light of the above, this determination is in the same terms as my provisional determination.

Relevant law

17. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
18. An agency may refuse to deal with an application in limited circumstances. Section 18 of the FOI Act relevantly provides as follows:

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

- (1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.
 - (2) An agency must not refuse to deal with such an application without first endeavouring to assist the applicant to amend the application so that the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.
19. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
20. 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 this review

21. I am of the view that I have the same scope in an external review as does the agency in dealing with the initial application.³ Accordingly, although the agency failed to make a determination or internal review determination and was taken to have refused access to any documents in issue, I may nevertheless consider the agency's purported reliance upon section 18(1).
22. The issues to be considered in this review are:
- whether the agency has complied with section 18(2)
 - whether the work involved in dealing with the application would substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions, as required by section 18(1).

Consideration

Whether the agency complied with section 18(2)

23. In order to rely upon section 18(1), I must first be satisfied that the requirements of section 18(2) have been met.
24. It is a question of fact as to whether the agency has endeavoured to assist the applicant to amend the application so dealing with it would not substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions. In assessing the agency's endeavours I consider the following are relevant:
- has the agency advised the applicant that it intends to refuse to deal with the application under section 18(1)?
 - has the agency, as far as is reasonably practicable, given the applicant information to assist in making an application which would remove the grounds for refusal?
25. I note from the agency's submissions to this Office that, by letter dated 19 September 2020, the agency advised the applicant that it intended to refuse to deal with the application under section 18(1).

³ *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 at [129].

26. In that letter, the agency requested the following of the applicant:

I ask that you amend, by narrowing, this part of your application, so that the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert this agency's resources. In a bid to assist you to amend your request it is suggested that you examine the transcript of proceedings to identify specific documents you seek access to. You would then be able to cross reference against your document holdings to produce a narrowed list of documents.

27. Although the agency has suggested how the access application may be narrowed, it has not provided the applicant with any indication as to the extent of amendment required to remove the grounds for refusal. This effectively meant that the applicant could have narrowed the scope of his access application as requested, but that the agency would maintain its reliance upon section 18(1).

28. Having said this, I do not consider this to be fatal to the agency's reliance upon section 18(1) noting that the agency did provide some guidance to the applicant as to how the scope of the application may be narrowed. Additionally, I note that the applicant failed to respond to the agency's request, despite being given almost a month to do so.

29. Accordingly, I am satisfied that the agency fulfilled its obligations under section 18(2).

Whether the requirements of section 18(1) are met

30. Upon being requested to provide the relevant documents and submissions to this Office, the agency advised in its email dated 18 November 2020 which attached the requested documents, that it had no further submissions to make. Accordingly, in determining whether the agency has justified its determination pursuant to section 48, I am guided by the explanation provided in the agency's belated determinations.

31. In its letter dated 19 September 2020, the agency stated that:

SAPOL employees have spent over two (2) hours conducting preliminary enquiries and examining documents. It is pointed out that documents 'marked for identification' before His Honour David J. in October 2012 were unable to be located. Documents 'marked for identification' in the matter of *R. vs Kerin being SCCRM 280/2012* have been discovered. It should be noted that sentencing exhibits were not located. There are a large number of documents and significant consultation is required to be undertaken in accordance with Section 26 and 27 of the FOI Act 1991. I consider that the work involved in dealing with this part of your application would unreasonably divert this agency's resources to continue to deal with this part of your application.

32. The agency provided no further explanation for its reliance upon section 18(1) in either its belated determination or belated internal review determination, but reiterated that it refused to deal with the second portion of the access application.

33. In both his application for internal review and subsequent application for external review, the applicant advised of his views that dealing with the second portion of the access application should be a straightforward process as it simply requires the retrieval of the archived (and already located) documents and the agency advising him to make arrangements to view the documents.

34. I advise the applicant that, in dealing with his access application, the agency is required to undertake further work between obtaining the documents and providing the applicant with access to same.

35. The agency is required to consider the contents of each document and determine whether any portion of the documents are exempt pursuant to any exemption clause in

Schedule 1 of the FOI Act. The agency is also required to undertake consultation in accordance with sections 26 and 27 of the FOI Act if any of the documents relate to the personal or business affairs of another person.

36. The applicant has stated that:

I fail to see why any SAPOL employees had to spend any time “conducting preliminary enquiries and examining documents” in circumstances where I can see no reason why I would be denied anything but **full and unrestricted access** to **all and any exhibits** that were either formally ‘tendered at’ or ‘marked for identification during’ the course of either or both of my October, 2012 and December, 2013 Supreme Court trials.

37. Presumably the applicant’s belief that he should be given full access to the documents in issue is based on the nature of the documents being sought. The applicant is seeking access to documents tendered during court proceedings to which he was a party. Accordingly, the applicant was entitled to receive a copy of those documents as part of the proceedings, in accordance with section 131 of the *Supreme Court Act 1935*.

38. However, the current access application has been made pursuant to the FOI Act and therefore any access granted must be given in accordance with the provisions of the FOI Act. The fact that the applicant may be, or may have previously been, entitled to a copy of the documents in other circumstances, does not displace the provisions of the FOI Act.

39. Accordingly, although the fact that the applicant may have previously viewed the documents may be relevant to the agency’s consideration of whether the documents are exempt, this alone does not allow disclosure of documents which are otherwise exempt.

40. When an agency is making a decision about the impact that processing an application would have on its resources, it can take into account the resources involved in:

- identifying, locating and collating documents
- deciding whether to give or refuse access to documents, or give access to redacted documents
- consulting interested parties about documents
- making copies of documents.

This list is not exhaustive and additional relevant factors relating to resources required to deal with an application can also be considered.

41. The agency has not provided any indication as to the number of documents likely to be in issue, however it has provided a copy of an exhibit list which, presumably, encompasses all of the documents sought by the applicant. Based on this list, and a number of internal agency emails sent on 9 September 2020, it would appear that all documents in issue can be easily identified and located. It would also appear that the number of documents in issue is not excessive.

42. The agency has not indicated the estimated number of hours required to deal with the access application, the likely consultation requirements or any anticipated difficulties in processing the application. Additionally, I am unsure of the relevance of the agency’s statement that it has already spent two hours conducting preliminary enquiries and examining documents. The reference to two hours of work speaks to whether the agency may request an advance deposit, but has little bearing on the applicability of section 18(1).

43. In light of the above, I am not satisfied that the agency has justified its reliance upon section 18(1), nor am I prepared to apply section 18(1) in my external review, particularly noting:
- the limited justification provided by the agency
 - the likelihood of clause 11(b) being clearly applicable to several documents in issue
 - the fact that many of the documents have at some point have been accessed by the applicant.

Applicant's submissions

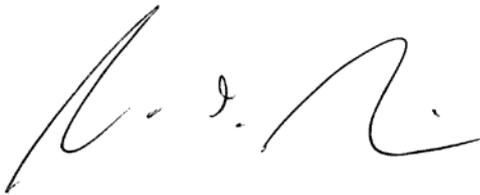
44. In his application for external review, the applicant submitted that:

For all of the above reasons I respectfully submit that it would be both unfair and unreasonable for the SAPOL FOI unit to issue a 'Notice of Advanced Charges' in accordance with sections 17 and 53 of the FOI Act..

45. Although I understand that a Notice of Advance Charges has not yet been issued to the applicant, I advise the applicant for future reference that I am unable to review an agency's decision to request an advance deposit. I may however review the amount of the advance deposit.

Determination

46. In light of my views above, I vary the agency's determination insofar as the agency has refused to deal with the second portion of the access application.



Wayne Lines
SA OMBUDSMAN

6 April 2021

APPENDIX 1

Procedural steps

| Date | Event |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 17 August 2020 | The agency received the FOI application dated 17 August 2020. |
| 16 September 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 |
| 19 September 2020 | The agency requested that the applicant amend the scope of his application in accordance with section 18(2). |
| 16 October 2020 | The agency purported to issue a belated determination. |
| 17 October 2020 | The agency received the internal review application dated 17 October 2020. |
| 31 October 2020 | The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³ |
| 2 November 2020 | The agency purported to issue a belated internal review determination refusing to deal with the application. |
| 13 November 2020 | The Ombudsman received the applicant's request for external review dated 13 November 2020. |
| 19 November 2020 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 23 November 2020 | The agency provided the Ombudsman with its submissions and documentation. |
| 18 March 2021 | The Ombudsman issued his provisional determination and invited submissions from the parties. |
| 24 March 2021 | The applicant provided submissions via email in response to the provisional determination. |
| 29 March 2021 | A hard copy of the applicant's submissions was received by the Ombudsman. |
| 30 March 2021 | The agency advised it 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).