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Determination

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

Applicant:	Mr Eberhard Frank
Agency:	Adelaide Hills Council
Ombudsman reference:	2021/06161
Agency reference:	FOI 19 - 2020/21
Determination:	The determination of the agency is confirmed.
Date of Ombudsman's determination:	24 January 2022
Issues considered:	Substantial and unreasonable diversion of agency resources
Exemption clauses relied upon:	N/A
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

I require a copy of all information, whether spoken, recorded, in writing on paper or electronically or recollected by memory or can be retrieved from memory, which played any part in the Adelaide Hills Council's process of arriving at a decision, and of the decision itself, to provide consent for road closures of public road for the purpose of car rallies. Specifically I refer to the decision passed on May 26, 2020.

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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 require a copy of all information, whether spoken, recorded, in writing on paper or electronically or recollecting by memory or can be retrieved from memory, which played any part in the Adelaide Hills Council's process of arriving at a decision, and of the decision itself, to provide consent for road closures of public road for the purpose of car rallies. Specifically I refer to the decision passed on May 26, 2020.

Background

2. The agency received the FOI application on 26 February 2021. On 19 March 2021 the agency's principal officer purported to extend the time to deal with the FOI application pursuant to section 14A of the Act. Noting that section 14A(3) requires that the applicant be given written notice of an extension of time within 20 days after the application is received, the extension determination was made one day out of time and was therefore invalid.
3. In light of the purported extension of time being invalidly imposed, on 28 March 2021 the agency was deemed to have made a determination to refuse access to the documents sought.¹
4. On 27 July 2021 the agency issued a belated determination to the applicant, purporting to rely on section 18(1) to refuse to deal with the FOI application. The applicant was incorrectly advised that, if they were aggrieved by the determination, they could apply for an external review. The applicant did so on 9 August 2021.
5. Upon reviewing the documents and submissions provided by the agency I noted that the extension of time had been invalidly imposed. Accordingly, the determination in issue is the deemed refusal determination made on 28 March 2021. Noting that a deemed refusal determination is liable to internal review, I formed the view that my jurisdiction to conduct an external review would not be enlivened until an internal review had been conducted. I informed the parties of my view by letter dated 29 September 2021.
6. The applicant subsequently lodged an out of time application for an internal review of the agency's deemed refusal determination. The agency exercised its discretion to accept this application and subsequently made a valid internal review determination refusing to deal with the FOI application in accordance with section 18(1) of the FOI Act. It is this internal review determination which is the subject of my external review.
7. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

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

¹ *Freedom of Information Act 1991*, section 19(2).

Provisional determination

9. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 17 December 2021. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
10. By email dated 20 December 2021 the agency advised that it had no further submissions to make.
11. By email dated 9 January 2022 the applicant provided submissions in response to the provisional determination. I do not consider it necessary to repeat these submissions in full, but have summarised the key points as follows:
 - no attempt has been made to ascertain why the applicant is seeking access to the requested information
 - the provisional determination appears to 'hold [the applicant] responsible' as he failed to refine his application in accordance with section 18(2)
 - the work required to deal with the FOI application is less than anticipated by the agency as consultation with external parties should not be required and the application specifically related to a decision made about the 2021 event
 - the agency does not 'welcome FOI applications' and uses strategies specifically to make it difficult for applicants to hold the agency to account.
12. I advise the applicant that the right to access documents under the FOI Act is not dependent upon an applicant having an appropriate reason to request access. It is therefore not usual practice to enquire why particular documents have been sought. Further, although a person's motivation in seeking access to documents may be relevant to the applicability of certain exemption clauses or a consideration of whether the application constitutes an abuse of process, it is unclear what relevance this may have to whether dealing with the application would unreasonably and substantially divert an agency's resources.
13. Where an applicant fails to narrow the scope of their FOI application in accordance with section 18(2), this may certainly be relevant, however the agency is still required to establish that dealing with the application would substantially and unreasonably divert its resources. In the circumstances, I am satisfied that the agency has done so.
14. In relation to external consultation, I advise the applicant that in dealing with an FOI application the agency must follow the consultation requirements imposed by the FOI Act. Of particular relevance, sections 26 and 27 of the FOI Act prevent the agency from determining to release any document which concerns personal or business affairs without first taking reasonable steps to obtain the views of the relevant person or business. Although the applicant may not have specifically sought access to external documents, it is likely that many of the documents in issue would nevertheless require the agency to conduct consultation prior to determining that the documents can be released.
15. Additionally, although the FOI application may be limited by reference to a decision about the 2021 event, I note that the applicant has provided me with two extensive lists of the kinds of documents he had expected to receive. It is clear that, even though the FOI application is limited to a particular decision, it nevertheless captures a significant number of documents.
16. Finally, I advise the applicant that I have not witnessed any evidence of the agency utilising 'strategies' or attempting to avoid dealing with FOI applications. To the

contrary, it appears to me that the agency has made significant effort to respond to the applicant's many FOI applications in a thorough manner.

17. In summary, I am not persuaded by the applicant's submissions to depart from the reasoning expressed in my provisional determination. Accordingly, this determination is in the same terms as my provisional determination.

Relevant law

18. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
19. An agency may refuse to deal with an application in limited circumstances. Section 18 of the FOI Act relevantly provides as follows:
- (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.
20. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
21. 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

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 agency has complied with section 18(2).
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:

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

- 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 documents and submissions provided to this Office that, by letters dated 19 March 2021 and 3 June 2021 the agency requested that the applicant refine the scope of their application. The first correspondence advised that the agency's request was pursuant to section 18(2), and the later correspondence quoted section 18(1). I am satisfied that the agency provided reasonable notice to the applicant that it intended to rely upon section 18(1).
26. In the letter dated 19 March 2021 the agency stated that:
- your request is broad, ambiguous, asks questions, seeks access to memories of individuals or access to information that are not documents held by the Council or otherwise do not exist.
- The scope of the application could be refined and narrowed by:
- defining a specific date range for the information
 - deleting parts of the request;
 - rephrasing the requests (i.e. referencing specific documents and removing request to access to memories); and/or
 - removing questions that do not relate specifically to records that may be held by the Council.
- Jody Atkins, Team Leader Information Management is happy to assist you in narrowing the scope of the FOI application if required.
27. In the letter dated 3 June 2021 the agency referred the applicant to the suggestions in its previous letter and reiterated that its FOI officer would be happy to assist the applicant in narrowing the scope of the application if required.
28. I note that in addition to providing clear examples of how the FOI application could be appropriately refined, the agency provided an explanation as to why the FOI application in its original terms was considered to be problematic. I am satisfied that this information was sufficient for the applicant to refine the scope of their application in some other way if the examples provided by the agency were not desirable.
29. Additionally, the agency extended an invitation to the applicant to assist them in narrowing the scope of the application if required. Despite the applicant advising on 15 April 2021 that they declined to narrow the scope of the FOI application, the agency afforded the applicant a further opportunity to do so. The applicant again declined on 9 July 2021.
30. I am satisfied that the steps taken by the agency are more than sufficient to discharge its obligations under section 18(2).

Whether the requirements of section 18(1) are met

31. As a preliminary matter, I note that the applicant has requested that the agency provide information which can be recollected or retrieved from memory, as well as answers to several questions.

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32. 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' and section 4(4) states that an 'agency is taken to hold a document if the agency has an immediate right of access to the document.'
 33. Clearly information contained only in the form of memory cannot be characterised as being a document, and certainly not a document that the agency has an immediate right of access to. Although I accept that information contained within memory could be duplicated in a document, I am mindful that an agency cannot be compelled to create a new document for the purpose of responding to an FOI request.
 34. Accordingly, for the purpose of considering whether dealing with the FOI application would substantially and unreasonably divert the agency's resources, I consider that the request to information which can be recollected or retrieved from memory can be disregarded.
 35. In relation to the questions contained within the FOI application, although an agency cannot be compelled to answer questions in the course of responding to an FOI request, I consider that it is reasonably open to an agency to conclude that any document which may go towards answering such a question can fall within the scope of an FOI request. Whether or not an agency opts to treat questions within an FOI application in this manner is a matter for the agency to decide.
 36. In this particular instance the applicant has emphasised that the document annexed to the FOI application forms an integral part of the application and must be treated as such. It is within this annexure that the various questions appear.
 37. Noting the applicant's emphasis that the questions form part of the FOI application, as well as the applicant's repeated refusal to refine the questions to target specific documents, it is my view that it was reasonably open to the agency to attempt to identify documents which may respond to those questions. It therefore follows that it was reasonably open to the agency to consider the effort and resources required to locate such documents in determining whether dealing with the application would substantially and unreasonably divert the agency's resources.
 38. For section 18(1) to be relied upon, the diversion of the agency's resources must be substantial and unreasonable. It is not sufficient in itself that the agency would expend significant resources to process the application. More than this, it must actually divert resources from the agency's ordinary functions in a substantial and unreasonable manner.
 39. I note that section 18(1) requires that the likely diversion of resources must 'appear' to the agency. It does not follow that I must find that the agency was factually correct at this point, but simply that it appeared so to the agency on a reasonable basis.
 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.

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

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

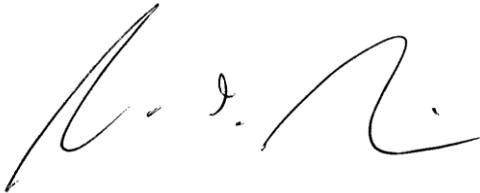
41. The agency submits that the estimated time to deal with the application is in excess of 217 hours. In support of this submission, the agency has provided an estimated breakdown of time required for each of the steps identified above. It is clear that the agency has given consideration of the work required to complete each step in responding to an FOI application.
42. The agency estimates that the identification, location and collation of documents will take a minimum of 76 hours. Noting the breadth of the FOI application, the likelihood that the documents will be held in various locations and the likelihood that there will be a large number of documents in issue, I consider this estimation to be reasonable.
43. In forming my view that there will likely be a large number of documents in issue, I note that the applicant has specified that they expect their application to capture, inter alia, legislation, policies, guidelines, plans, internal requirements, emails, notes and various other types of correspondence in both written and electronic form.
44. I am also mindful that many of the questions posed by the applicant are broad and do not clearly relate to specific documents, and accordingly, it may take the agency sometime to identify documents that may be relevant to those portions of the FOI application.
45. The agency further estimates that consultation with third parties will take a minimum of 100 hours. Bearing in mind that the agency estimates there will be in excess of 150 parties required to be consulted with, and noting that the agency may be required to consider 150 consultation responses, I consider that this work would likely take far longer than 100 hours.
46. The consultation process includes the unique collation and provision of relevant documents to each third party, may require work to obtain contact details of third parties, and includes the consideration of the responses received. The current estimate of 100 hours affords the agency only 40 minutes for each consultation process with each third party.
47. Additionally, and of particular relevance to my consideration, the agency submits that in order to respond to the FOI application it would be required to engage a temporary FOI Officer to ensure this matter could be processed without ceasing all other FOI-related work in the interim.
48. The costs associated with engaging a temporary FOI Officer would be borne by the agency, and it is noted that the agency's existing FOI Officer would be required to train and assist the temporary staff member, particularly in relation to use of the agency's information storage systems.
49. In light of the above, I am satisfied that the work involved in dealing with the FOI application would, if carried out, unreasonably and substantially divert the agency's resources in the following ways:
 - the agency's existing FOI Officer would be required to spend almost six weeks working on only this matter, and this is noted to be a conservative estimation. The agency's FOI resources would therefore be substantially and unreasonably diverted from other FOI matters
 - alternatively, the agency would be required to divert its financial and management resources to the recruitment and engagement of a temporary FOI

Officer. Due to the estimated number of hours required to deal with this application, the anticipated cost would not be insignificant

- it is highly likely that other agency staff will be required to spend a substantial amount of time responding to discovery requests, as well as providing opinions as to the possible exempt status of the documents.

Determination

50. In light of my views above, I confirm the agency's determination to refuse to deal with the FOI application.



Wayne Lines
SA OMBUDSMAN

24 January 2022

APPENDIX 1

Procedural steps

Date	Event
26 February 2021	The agency received the FOI application dated 26 February 2021.
19 March 2021	The agency's principal officer purported to extend the time to deal with the FOI application pursuant to section 14A. The extension of time was not valid as the determination was made more than 20 days after receipt of the application. .
28 March 2021	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
27 July 2021	The agency issued a belated determination. The applicant was incorrectly advised he was entitled to apply for an external review as the determination was made by the agency's principal officer.
9 August 2021	The Ombudsman received the applicant's request for external review dated 9 August 2021.
11 August 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
19 August 2021	The agency provided the Ombudsman with its submissions and documentation.
29 September 2021	Upon reviewing the documents and submissions from the agency the Ombudsman formed the view that his jurisdiction to conduct an external review was not enlivened and advised the parties of same. The determination in issue was the deemed refusal determination, which was therefore subject to internal review. As no internal review had been conducted, the Ombudsman could not conduct an external review.
4 October 2021	The agency received the internal review application.
15 October 2021	The agency varied the determination.
17 October 2021	The Ombudsman received the applicant's request for external review dated 17 October 2021.
19 October 2021	The Ombudsman advised the agency of the external review and confirmed that it was not necessary for the agency to provide the same documents and submissions again, but invited the agency to provide further submissions if it wished to do so.
17 December 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.

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

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

20 December 2021	The agency advised that it had no further submissions to make.
9 January 2022	The applicant provided submissions in response to the provisional determination.