



Determination

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

Applicant:	Senator Rex Patrick
Agency:	Department for Health and Wellbeing
Ombudsman reference:	2021/06514
Agency reference:	FOI2021-00106
Determination:	The determination of the agency is reversed.
Date of Ombudsman's determination:	12 January 2021
Issues considered:	Agency's obligation to justify determination No exemption claimed
Exemption clauses relied upon:	N/A
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

1. Any COVID-19 directions or agreements (whether it be with the AFL or individual clubs) that permits/facilitates the border crossings and the conduct of AFL training/games in South Australia when other COVID-19 directions would otherwise prevent such activity.
2. The most recent COVID management plan associated with such a direction or agreement.
3. Any SA health advice that grounds any directions or agreements.

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. Any COVID-19 directions or agreements (whether it be with the AFL or individual clubs) that permits/facilitates the border crossings and the conduct of AFL training/games in South Australia when other COVID-19 directions would otherwise prevent such activity.
 2. The most recent COVID management plan associated with such a direction or agreement.
 3. Any SA health advice that grounds any directions or agreements.

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 have not issued a provisional determination in relation to this external review, as is my standard practice in conducting reviews under the FOI Act. I have proceeded directly to issuing a determination on the basis that both parties have had an opportunity to provide their submissions relevant to this review, and their respective positions appear clear and fixed. Considering that the substantial issue in this matter is beyond my jurisdiction under the FOI Act, I do not consider that the parties require any further opportunity to make submissions in any event.

Relevant law

5. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
6. 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.
7. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
8. 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.

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

Documents in issue

9. The agency failed to determine the application for access and application for internal review within the statutory timeframe, and was taken to have refused access to all documents within scope of the application for access.²
10. In response to this external review, the agency submitted that no documents were found within scope of the application for access.
11. As a result there are no documents in issue in this review.

Issues in this review

12. Having regard to the agency's and applicant's submissions, it is for me to determine whether to confirm, vary or reverse the agency's deemed refusal of access to documents within scope of the application for access.

Consideration

13. On 21 December 2021 the agency provided its submissions to my Office. As part of its submissions, the agency advised me that it does not hold any documents within scope of the application for access.
14. On 22 December 2021 I advised the applicant that as no documents were found within scope of his application for access, I declined to proceed with the external review.
15. I further advised the applicant that if he had reason to believe that the agency's claim was incorrect or unreasonable, he should raise the issue as a formal complaint with the agency and, if the matter could not be resolved, he may then wish to lodge a complaint with my Office pursuant to the *Ombudsman Act 1972*.
16. Through correspondence with my Legal Officer on 6 January 2022 and 11 January 2022, the applicant expressed dissatisfaction with my approach.
17. On 11 January 2022 the applicant made the following statements:

I have requested that the Ombudsman conduct a review of a deemed refusal by an agency, not a review of a formal response from an Agency that the requested documents do not exist...

...

I ask that the Ombudsman continue his review until such time as he, as the decision maker in this view, is personally satisfied no documents exist...

[emphasis by applicant]

18. I accept that, as the agency failed to deal with the application for access and application for internal review within the statutory timeframe, that the agency was taken to have made a determination to refuse access to all documents within scope of the application for access.
19. As a result my jurisdiction is enlivened and pursuant to section 39(11) of the FOI Act, I may confirm, vary or reverse the agency's determination.

² *Freedom of Information Act 1991*, sections 19(2) and 29(5).

20. Under section 48 the agency has an onus to justify its determination. As the agency has not put forward any justification for its deemed refusal for access, I am not satisfied that the refusal of access should stand.
21. However, the agency has informed me that it has found no documents in scope.
22. The applicant's submissions to my Office on 6 January 202 indicate that he has reason to believe the agency's submission, that it does not hold documents, is incorrect.
23. Regardless of the reasons that the applicant has for doubting the agency's claim and whether or not those reasons are correct, I do not have jurisdiction to pursue the issue with the agency in an external review pursuant to the FOI Act.
24. I refer to the following observation by Executive Member Stevens from *El Shafei v Central Adelaide Local Health Network (El Shafei)*.³

The basic jurisdiction of the Ombudsman under section 39 of the FOI Act is to review a determination made by the agency. On the analysis above, this does not include a claim by the agency that it does not hold a document. It does not include a review of the adequacy of an agency's search for documents.

...

... the outcomes open to the Ombudsman under section 39(11) are to confirm, vary or reverse the determination. There is no power to order the agency to conduct further search or to remit the matter to the agency for further consideration as one might expect if there was a review of sufficiency.⁴

25. I concur with Executive Member Stevens views and there are no cogent reasons for me to depart from it. At the same time I accept that this position where I cannot determine the sufficiency of an agency's search for documents in the course of an external review is far from ideal and I have on several occasions raised with the government and the Parliament the need for the Act to be amended to address this deficiency, but to no avail.
26. Therefore, the position is that, whilst my jurisdiction is enlivened and I may exercise my power to confirm, vary or reverse the agency's deemed refusal pursuant to section 39(11), I have no power to direct the agency to conduct further searches or to direct the agency to reconsider its submissions that it holds no documents.
27. I am aware that, pursuant to sections 39(5)(a) and (b) of the FOI Act, if it appears to me that the agency has failed to properly sort or compile documents relevant to a review, or if the agency has failed to undertake relevant consultations, I may utilise my powers under the *Ombudsman Act 1972*, which includes the powers of a commission as defined in the *Royal Commissions Act 1917*, to require the agency to sort or compile documents or to undertake consultations.
28. However the power under sections 39(5)(a) and (b) of the FOI Act is limited to the sorting or compiling of documents, or for the undertaking of consultation. This power does not extend to a power to direct the agency to conduct further searches or to direct the agency to reconsider its submissions that it holds no documents.

³ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

⁴ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 [30, 33]

29. For completeness, I note the following observation by Executive Member Stevens from *El Shafei*.

These findings do not mean that there is no means to challenge a claim that an agency does not hold a document or to examine the sufficiency of searches conducted. The Ombudsman has broad powers under the provisions of the *Ombudsman Act 1972* to investigate any “*administrative act*”. This is a concept broadly defined. The Ombudsman would be entitled under that Act to carry out an investigation very similar to that conducted in this case. The same purpose would be served. However, the remedies available are those prescribed in the *Ombudsman Act*. They are not those available on a review under the FOI Act. It is preferable, in my view, if the processes under the two Acts are kept separate and distinct.⁵

30. As previously advised, I recommend to the applicant that if he wishes to dispute the agency’s claim that it holds no documents within the scope of his application for access, he ought to consider following the agency’s complaint handling procedures and then if dissatisfied with the agency’s response, he may lodge a complaint with me pursuant to the Ombudsman Act.

Determination

31. In light of my views above, I reverse the agency’s determination to the effect that access is given to all documents found within scope, bearing in mind however that the agency claims that there are no documents within scope and, if that is correct, my determination has no practical effect for the applicant.



Wayne Lines
SA OMBUDSMAN

12 January 2022

⁵ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 [36].

APPENDIX 1

Procedural steps

Date	Event
16 August 2021	The agency received the FOI application dated 2 August 2021.
15 September 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
6 October 2021	The agency received the internal review application dated 6 October 2021.
20 October 2021	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
27 October 2021	The Ombudsman received the applicant's request for external review dated 27 October 2021.
28 October 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
21 December 2021	The agency provided the Ombudsman with its submissions and documentation.

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).