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Determination

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

Applicant:	Ms Rebecca Puddy
Agency:	Department for Health and Wellbeing
Ombudsman reference:	2022/01051
Agency reference:	FOI2021-00052
Determination:	The determination of the agency is reversed.
Date of Ombudsman's determination:	15 June 2022
Issues considered:	Deemed refusal of access Agency's obligation to justify determination Unreasonable conduct of party
Exemption clauses relied upon:	N/A
Legislation considered:	<i>Freedom of Information Act 1991</i>

Terms of the original application:

- Any communication between SA Health and Hitaf Rasheed regarding quarantine or COVID-19 travel exemptions, between 1 March 2020 and 31 May 2021; - Any documents, including but not limited to reports, minutes, emails and briefs, that mention Hitaf Rasheed, created between 1 March 2020 and 31 May 2021; - Any documents, including but not limited to reports, minutes, emails and briefs, relating to travel exemptions and Events SA or Tourism SA, created between 1 March 2020 and 31 May 2021. I advise that I am not interested in media releases or copies of media articles that are already publicly available.

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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:
 - Any communication between SA Health and Hitaf Rasheed regarding quarantine or COVID-19 travel exemptions, between 1 March 2020 and 31 May 2021; - Any documents, including but not limited to reports, minutes, emails and briefs, that mention Hitaf Rasheed, created between 1 March 2020 and 31 May 2021; - Any documents, including but not limited to reports, minutes, emails and briefs, relating to travel exemptions and Events SA or Tourism SA, created between 1 March 2020 and 31 May 2021. I advise that I am not interested in media releases or copies of media articles that are already publicly available.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.
3. This is the second determination I have had to issue in relation to the application for access. I previously issued a determination on 24 December 2021 in matter 2021/04327. I have attached a copy of my determination in matter 2021/04327 to this matter, as it forms part of the relevant background to my considerations in this external review.

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. In light of my previous determination and due to the circumstances of the matter that I will address under my consideration of the agency's deemed determination, I have foregone my standard practice of issuing a provisional determination in this matter.
6. Given the substantial time the agency has had to deal with the application for access and multiple opportunities it has been afforded to cooperate with my Office in the course of this external review, I do not consider the agency will be prejudiced by my decision to forgo a provisional 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.¹
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.

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

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. The agency failed to respond to the application for access and applications for internal review within the statutory timeframes, and was taken to have refused access to all documents within scope of the application for access.
12. To date, the agency has not made any submissions that would justify its refusal of access to the documents within scope of the application for access.

Issues in this review

13. Having regard to the agency's submissions and the exemption clauses provided in Schedule 1 of the FOI Act, the issue for me to determine is whether to confirm, vary or reverse the agency's determination in regard to the documents in issue in this external review.

Consideration

14. In considering whether I should confirm, vary or reverse the agency's deemed determination to refuse access to documents, it is necessary for me to comment on the procedural history of this matter and also to comment on the agency's conduct.
15. I have commented on the agency's poor handling of FOI matters on numerous occasions in past matters.
16. However, even by the agency's own standards I consider its conduct in this matter can only be described as beyond deficient, and it would be remiss of me not to comment on it.
17. The applicant lodged her initial application for access on 1 June 2021.
18. At first instance, the agency failed to respond to the application for access and application for internal review within the legislated timeframe, and was taken to have refused access to documents within scope of the application. This led to the applicant seeking an external review with my Office on 18 August 2021.
19. Following the application for external review, what followed was a protracted exchange over the course of four months between my Office and the agency in an attempt to obtain documents and submissions. The exchange between my Office and the agency is set out in detail in my determination in matter 2021/04327.
20. The agency never provided documents in the course of the external review in matter 2021/04327, and after extensive delays it provided sparse submissions indicating its view that the application for access should be refused to be dealt with on the basis of section 18(1).
21. I was not satisfied by the agency's submissions and issued a determination reversing its reliance on section 18(1). The agency was afforded another 30 days to deal with the application for access.

22. Following my determination in matter 2021/04327, the agency once again failed to determine the application within a 30 day timeframe, and failed to determine the application for internal review within the statutory timeframe. The applicant subsequently applied for another external review.
23. The agency was informed of the applicant's subsequent application for external review on 2 March 2022 by the Manager, Information and Audit of my Office (**the Manager**).
24. Again, a protracted series of exchanges occurred between the Manager and the agency.
25. The last correspondence received from the agency was on 27 May 2022, which indicated a determination by the agency was intended to be sent the following week.
26. A further follow up enquiry was made by the Manager on 9 June 2022. No response has been received.
27. At this stage, the agency has had over one calendar year to deal with the initial application for access. Over the course of the past year, the agency has been taken to refuse access to the documents within scope of the application for access on four separate occasions. The agency has also been afforded ample opportunities to liaise with my Office.
28. To date, the agency has not provided any justification for its refusal of access to the documents or any compelling reasons for the excessive delays. The level of torpidity demonstrated by the agency in its handling of this matter is simply baffling.
29. In light of the agency's continued delays and continued failures to provide my Office with any material or submissions, I am minded to reverse the agency's determination to the effect that all documents found within scope ought to be disclosed in full.
30. I remind the agency that under section 48, it bears the onus of justifying its determination, in any proceedings.
31. The onus borne by the agency in justifying its determination under the FOI Act was addressed by the Supreme Court in the matter of *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor (APY Lands)*.²
32. In that matter, the Supreme Court considered, amongst other things, whether it was legally reasonable for me to make a determination without having viewed the documents in issue.
33. The Supreme Court determined that based on the facts of the matter, it was not legally unreasonable for me to make a determination to reverse the agency's determination without having viewed the documents in issue.
34. I consider the following passage by Hinton J to be of particular importance:

Something more should be said about s 48 of the FOI Act. In my view, an external review is a proceeding for the purposes of s 48. Implicitly, the burden in s 48 is not simply persuasive but evidential; accepting this, it is for the agency to put all information necessary to justifying a determination before the Ombudsman. Failure to do so does not necessarily frustrate an external review or mean that the Ombudsman must resort to the powers contained in the *Royal Commissions Act 1917* (SA). But it will impact upon the

² *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162.

discharge of the burden. That is to say, if an agency fails to put all information necessary to justify a determination before the Ombudsman then it risks the review being determined on the basis of what was before the Ombudsman. If the determination is adverse to the agency, it cannot complain.³

35. I consider the view put forward by Hinton J establishes a clear expectation that in an external review, it is for the agency to place all information before me, both evidential and persuasive, that would justify its determination. The agency has not placed any information before me that would justify its determination to refuse access to the documents in issue.
36. Under section 39(5)(a) of the FOI Act, if it appears to me that an agency has failed to properly sort or compile documents, I may use my investigative powers conferred on me by the *Ombudsman Act 1972*, including the powers of a commission as defined in the *Royal Commissions Act 1917*.
37. However, as observed by Hinton J in *APY Lands*, this power is permissive,⁴ and I have no duty to proceed to conduct an investigation.
38. As clearly set out in Hinton J's above observations, a failure by an agency to put all information before me ought not to frustrate an external review, or require me to use my powers under the *Royal Commissions Act 1917*. The consequence of an agency's failure to put the information before me simply means that the agency will risk failing to meet its onus under section 48.
39. In the circumstances of this matter, I do not consider it reasonable for me to have to use coercive powers to obtain documents where the agency has failed to respond to reasonable requests of my Office, despite it being given ample opportunities to do so.
40. As such, I am determining this matter based on what the agency has put before me, or rather the lack thereof.
41. I am aware that in the years following the decision in *APY Lands*, there has been a decision of the South Australian Civil and Administrative Tribunal (**SACAT**) that stands in direct contradiction to the reasonings set out by Hinton J.
42. In the matter of *Department of the Premier and Cabinet v Seven Network (Operations) Ltd (Seven Network)*⁵, Hughes J considered an external review by me that determined to reverse an agency's determination without having viewed the document in issue.
43. Hughes J considered that it was an error for me to determine that the document was not exempt without having viewed the document, and made the following observations:

It was not open to the Ombudsman to draw such a conclusion based on the agency's failure to provide the document or any argument as to why the document (properly defined) was exempt. The role conferred upon the Ombudsman is that he determine whether a document is exempt and if necessary to use the powers conferred to gather the requisite information so that a decision can be made, rather than to rely on the submissions put by the agency. In so saying, the placement of the onus of establishing the basis for its determination is not overlooked. Section 48 provides: [citation of section 48 in full]

...

This must be understood as the burden between the FOI applicant and the agency. It is consistent with the Ombudsman's powers (both as set out in s 39 of the FOI Act and under the *Ombudsman Act 1972*) that the Ombudsman is authorised to obtain the

³ *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [162].

⁴ *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [157].

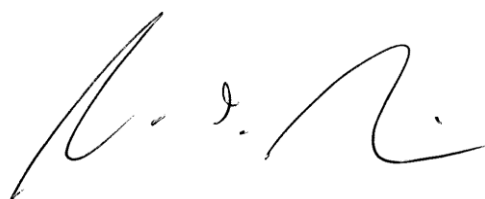
⁵ *Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [2021] SACAT 60 (28 July 2021).

necessary information required to make a decision to affirm, vary or reverse the agency's determination.⁶

44. In considering the decisions of *APY Lands* and *Seven Network*, there is a clear contradiction in the analysis of the powers and functions available to me in the course of an external review, and what obligations I have in the event that an agency fails to comply with reasonable requests of my Office or to discharge its onus under section 48.
45. In *Seven Networks*, Hughes J stated her view that the role conferred upon me is to determine whether a document is exempt,⁷ and it appears to be her contention that I must do so absent a claim of exemption by the agency.
46. This is in direct contradiction to the decision of Hinton J in *APY Lands*, where it was stated that the FOI Act does not burden me with having to determine, independent of a contention raised by the agency, whether a document is exempt.⁸
47. To the extent that the two decisions are incongruous, I consider that the decision of the Supreme Court must be treated as the correct authority, having regard to the Supreme Court's status as the higher judicial body.
48. Respectfully, I also do not consider that the decision of *Seven Networks* established any cogent reasons for me to depart from the existing authority on the operation of section 48 or on my obligations in the course of an external review, noting as well that no reference was made to the decision of *APY Lands* or Hinton J's reasonings.
49. The agency has not provided any justification for its deemed refusal of access to documents and has failed to discharge its onus under section 48.
50. As a consequence, I am not satisfied that any of the documents within scope of the application for access are exempt documents, and accordingly those documents should be disclosed in full.

Determination

51. In light of my views above, I reverse the agency's determination.



Wayne Lines
SA OMBUDSMAN

15 June 2022

⁶ *Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [2021] SACAT 60 (28 July 2021) at [53 - 54].

⁷ *Department of the Premier and Cabinet v Seven Network (Operations) Ltd* [2021] SACAT 60 (28 July 2021) at [53].

⁸ *Anangu Pitjantjatjara Yankunytjatjara v Ombudsman & Anor* [2019] SASC 162 at [166].

APPENDIX

Date	Event
1 June 2021	The agency received the FOI application dated 1 June 2021.
2 July 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
2 August 2021	The agency received the internal review application dated 2 August 2021.
16 August 2021	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
18 August 2021	The Ombudsman received the applicant's request for external review dated 18 August 2021.
23 August 2021	The Ombudsman advised the agency of the external review and requested submissions and documentation.
10 December 2021	The agency provided the Ombudsman with its submissions and documentation.
15 December 2021	The Ombudsman issued his provisional determination and invited submissions from the parties.
20 December 2021	The agency advised that it had no further submissions to make.
24 December 2021	The Ombudsman issued his determination
23 January 2022	The agency failed to determine the application within the 30 day period required by the Ombudsman's determination, and is deemed to have refused access to the documents.
8 February 2022	The agency received the subsequent internal review application dated 8 February 2022.
22 February 2022	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination.
23 February 2022	The Ombudsman received the applicant's request for external review dated 23 February 2022.
2 March 2022	The Ombudsman advised the agency of the external review and requested 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).