



Determination

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

Applicant:	XXXXXX
Agency:	Department for Correctional Services
Ombudsman reference:	2022/04667
Agency reference:	CEN/21/0332(7); CEN/21/0332(12); CEN/21/0332(13)
Determination:	The determination of the agency is confirmed, the effect of which is that the agency has refused to deal with the FOI application.
Date of Ombudsman's determination:	28 November 2022
Issues considered:	Abusive pattern of conduct Substantial and unreasonable diversion of agency resources
Exemption clauses relied upon:	N/A
Legislation considered:	<i>Freedom of Information Act 1991</i>

REASONS

Application for access

1. By three applications under the *Freedom of Information Act 1991 (the FOI Act)* the applicant requested access from the agency to:

All emails sent and received by the Department for Correctional Services regarding myself, [applicant's name]

2. Each application is identically worded save for the time frame applied. The cumulative time frame of all three applications spans from 5 May 2020 to 5 January 2021.

Background

3. The applicant initially lodged one FOI application in the terms above, spanning the entire period of 5 May 2020 to 5 May 2021. Following correspondence from the agency, the applicant subsequently lodged three separate applications, separating the initial time frame into smaller periods and omitting four months of the initial timeframe.
4. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

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

Provisional determination

6. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 23 September 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
7. Pursuant to section 39(5)(c)(ii) of the FOI Act, on 13 October 2022 the agency requested that I suspend my external review to allow the parties an opportunity to explore whether this matter could be partially or fully settled. By letter dated 17 October 2022 I formally advised the agency that my external review would be suspended for a period of two weeks, recommencing on 1 November 2022.
8. On 1 November 2022 the agency provided submissions in response to my provisional determination. The agency advised that it had revised its view such that it now submits that section 18(1) be applied in lieu of section 18(2a). Having formed the view that the agency's additional submissions are persuasive, I considered it appropriate to issue a revised provisional determination to afford the parties an opportunity to comment on my revised views.
9. I provided my revised tentative view about the agency's determination to the parties, by my revised provisional determination dated 4 November 2022. 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 10 November 2022 the agency advised that it had no further submissions to make. I did not receive a response from the applicant. Accordingly, this determination is in the same terms as my revised provisional determination.

Relevant law

11. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
12. An agency may refuse to deal with an application in limited circumstances. Section 18(1), (2) and (2a) of the FOI Act relevantly provides:
 - (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.
 - (2a) An agency may refuse to deal with an application if, in the opinion of the agency, the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information.
13. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
14. 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

15. The agency initially made submissions to this Office to the effect that the three applications in issue enliven section 18(2a) of the FOI Act. Accordingly, the initial issue to be determined in this external review was whether the applications were part of a pattern of conduct that amounts to an abuse of the right to access or were made for a purpose other than to gain access to information.
16. Having considered the agency's purported initial determination, internal review determination and further submissions, I issued my provisional determination proposing to reverse the agency's determination. In response to my provisional determination the agency advised its revised view that I ought to confirm the determination to refuse to deal with the applications on the basis of section 18(1).
17. As such, the issues I must now consider 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).
18. That said, I confirm that for completeness I have repeated my assessment of section 18(2a) as set out in my provisional determination, before then addressing the agency's revised submissions.

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

Consideration

Application of section 18(2a)

19. Under section 12 of the FOI Act 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'. The latter part of that phrase makes clear that the right to access documents is not absolute.
20. Section 18(2a) of the FOI Act allows an agency, or in this case an external review authority, to refuse to deal with an application where, in its opinion, 'the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information'.
21. Section 18(2a) serves to strike a balance between the right of access on the one hand and the resources utilised by an agency in dealing with an application in certain circumstances.
22. In *Gabrielsen v Nurses Board of SA (Gabrielsen)*,² Her Honour Judge Simpson was of the view that in order to satisfy section 18(2a) of the FOI Act the agency/external review authority need only be:

of the (subjective) opinion that the application ... was part of a pattern of conduct that amounted to an abuse of the right to access, or was made for a purpose other than to obtain access to information.³
23. Her Honour was of the view that the agency/external review authority's opinion need not be necessarily right, but must be:

reasonably open on the material facts underlying the reasons given for the opinion - that it is not open to criticism on the basis of overlooking relevant material, or taking into account irrelevant or inaccurate factual material or because it was subject to illogicality in reasoning or was capricious or irrational.⁴
24. I consider that, to properly assess the current circumstances, it is necessary for me to briefly address the background which led to the applicant lodging the 3 FOI applications the subject of this review.
25. On 10 May 2021 the applicant lodged an initial FOI application in the same terms as the current 3 applications, but requesting a date range of 5 May 2020 to 5 May 2021. On 17 May 2021, pursuant to section 18(2) of the FOI Act, the agency requested that the applicant narrow the scope of his application as dealing with it in its original terms would substantially and unreasonably divert the agency's resources.
26. In relation to this correspondence, the agency submits to this Office that:

On 17 May 2021, the Department sent the applicant correspondence and advised that his request was deemed too large in scope, and he was asked to amend the scope and provide a response by 14 June 2021. Pursuant to section 18 of the FOI Act, the Department provided him with an example of how the scope could be narrowed (emails between specific DCS Units) to allow him to receive the documents so it would not substantially and unreasonably divert the agency's resources from their use by the Department in the exercise of its functions. In the same correspondence the applicant was also advised of the provisions of section 18(2a) of the FOI Act.

² *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008).

³ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [21]; owing to the lack of reference to 'reasonable'.

⁴ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [25].

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27. I consider it appropriate to directly address these submissions as it is my view that they speak to whether the agency has overlooked relevant material or taken into account inaccurate material.
28. I first note that the return date of 14 June 2021 may have been confusing to the applicant, depending on his familiarity with the provisions of the FOI Act. Noting that the initial FOI application was received on 14 May 2021, the agency was deemed to have made a determination to refuse access to the documents sought on 13 June 2021, resulting in a nonsensical outcome of the applicant being expected to amend an application after it had already been determined.
29. Secondly, I acknowledge that the agency provided the applicant with an example as to how his application might be amended, however I query whether the one example provided is sufficient to satisfy the requirements of section 18(2). The agency provided the following advice to the applicant:

The Department requests that you consider reducing the scope of the documents you want access to. For example, you might consider changing your request to all emails to and from SMU in regard to your most recent case review (9 September 2020 until 5 August 2020 [sic]).

30. The amendment suggested by the agency reflects a substantial change to the initial application, such that I consider it could in fact be characterised as an entirely new application rather than an amendment to the initial application. The proposed amendment changes:
 - the date range from 12 months to 1 month
 - the email recipients from agency staff to only members of the Sentence Management Unit
 - the topic of the emails from the applicant to a single case review.
31. Additionally, the agency did not provide any explanation of how or why dealing with the original application would substantially and unreasonably divert the agency's resources. I consider that this placed the applicant at a disadvantage where if the suggested changes provided by the agency were not satisfactory to the applicant, he was essentially expected to guess what kind of other amendment might be suitable to the agency.
32. Section 18(2) requires that an agency must endeavour to assist the applicant to amend their application. The applicant was afforded no opportunity to discuss the agency's correspondence, or work together with the agency to amend the application.
33. The agency has submitted to this Office that:

Between 31 May 2021 and 7 June 2021, three applications [CEN/21/0332(7), (12) and (13)] were received from the applicant. There was no indication that each of them was a response to the Department's request to narrow the scope of the initial application and as such the Department considers these as separate applications. These applications again contained the same request ("*All Emails*") as his previous application but with a timeframe of between 3 and 4 months respectively between May 2020 to January 2021. It appears that the applicant had chosen to disregard the Department's suggestion of a narrowed scope for his previous application [CEN/21/0332(2)] and instead chosen to pursue the original request for "*All emails...*". Although the requests were for the same topic but for smaller timeframes, they still amounted to almost the original timeframe (of between May 2020 to January 2021 [sic]) and these applications were also deemed too large in scope.

34. In light of my consideration above, and particularly noting the paucity of the information provided to the applicant by the agency, as well as the timing of the 3 applications

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being lodged almost immediately after the applicant was requested to narrow the scope of his initial application, I do not agree that 'it appears that the applicant has chosen to disregard the Department's suggestion of a narrowed scope...'

35. The applicant clearly wishes to access all emails about himself across a period of time. Absent any proper explanation of why that request was problematic, and presented with only one suggested alternative which the applicant was clearly unhappy with, I consider that the more likely explanation for the applicant's 3 subsequent applications is merely that he believed that splitting up his application was an acceptable way to narrow the scope such that each application was appropriate.
36. Additionally, the agency's statement that the 3 applications in issue are 'separate applications' rather than a revision of the first application, would appear to be in conflict with the statement that the applicant disregarded the agency's request and instead chose to pursue the original request, the latter submission indicating the agency's acknowledgment that the 3 applications were lodged in response to the request that the applicant narrow the scope of the first matter.
37. As outlined above, the agency submits that at the time of requesting the applicant to narrow the scope of his initial application he was advised of the provisions of section 18(2a) of the FOI Act. Having reviewed the copy of this correspondence provided to my Office, this submission is incorrect. No reference was made to section 18(2a).
38. Although section 18(2a) does not require an applicant to be forewarned that the agency may rely on that section, I consider that this submission again speaks to whether the agency has taken into account inaccurate material.
39. I also reject the agency's submission that the 3 new requests amounted to 'almost' the original timeframe. The first FOI application requested documents between 5 May 2020 and 5 May 2021; a 12 month period. The three applications in issue collectively span from 5 May 2020 to 5 January 2021, a timeframe more than 30% shorter than the original timeframe. Again noting that the applicant was requested to narrow the scope of his application with very little information, I consider it would have been reasonable for the applicant to believe this was an appropriate reduction of scope.
40. Having addressed the events which preceded the applicant lodging the 3 FOI applications in issue, I also consider it appropriate to address the events which followed.
41. On 15 June 2021, pursuant to section 18(2), the Department sent the applicant correspondence requesting that he narrow the scope of each of the 3 FOI applications in issue. The agency has again incorrectly stated that the applicant was advised in that correspondence of the provisions of section 18(2a). The applicant then subsequently lodged 13 FOI applications cumulatively spanning the same amount of time as the first FOI application, about which the agency states:

It is submitted that on examination of the application dates for the thirteen requests, it appears the applicant has sought to frustrate the FOI process by submitting multiple applications in separate individual correspondence in the hope that the individual applications would escape the censorship of the FOI unit and be processed individually.

42. It is my view that this submission reflects the agency having considered irrelevant material in making its determination. The determination relates to the 3 prior FOI applications, not the subsequent 13 applications. I consider that any inference which might be drawn about the applicant's behaviour after he had lodged the applications in issue, is irrelevant to a consideration of whether those 3 applications form part of a problematic pattern of conduct.

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43. I acknowledge that the agency belatedly determined these 3 applications long after the further 13 applications had been lodged, however this was due to error by the agency. The applicant should not be prejudiced by the agency's failure to issue a belated determination until more than 12 months after the applications were lodged.

44. I now turn to consider the way in which the agency dealt with the 3 FOI applications the subject of this review. The agency submits that:

Secretary, Department of Treasury and Finance v Kelly found that were an applicant submits many small request it is similar to one voluminous request that was aggregated on the basis of the commonality of the requests. This is considered exploitive of the concept of Freedom of Information generally.

45. I accept that in the matter of *Secretary, Department of Treasury and Finance v Kelly* the Victorian Supreme Court of Appeal concluded that, where an applicant lodges multiple access requests which share a commonality, an agency is entitled to aggregate the requests and treat them as being one larger access request,⁵ although I query the basis of the agency's conclusion that the lodging of multiple applications in such a way is considered to be 'exploitative'. The Victorian Supreme Court of Appeal made no such observation and I have queried this submission by the agency in numerous previous matters. It is unclear why the agency continues to include this statement in its submissions without explanation.

46. In *Gabrielsen* Her Honour Judge Simpson observed that:

The expression 'pattern of conduct' itself implies a number of applications of series of events.⁶

47. I agree, and therefore query why the agency would opt to treat the 3 applications as one when it intended to rely upon section 18(2a). By treating the 3 applications in issue as one, the agency has given itself the task of having to justify why it considers essentially only 2 separate requests to amount to a series of events.

48. The agency's submissions clearly indicate that it believes that by lodging the 3 applications in issue, the applicant is simply pursuing his original application albeit in a different fashion. If this were the case, the agency should have dealt with the 3 applications in the same way it proposed to deal with the initial application. That is, it should have made a determination refusing to deal with the applications on the basis of section 18(1).

49. That said, the agency instead relied upon section 18(2a) in its determination. Accordingly, I must be satisfied that there are sufficient grounds for me to reasonably form the view that the applicant's applications are 'part of a pattern of conduct that amounts to an abuse of the right of access or ... [are] made for a purpose other than to obtain access to information'

50. Whilst each case will depend upon its own facts,⁷ in *Gabrielsen* the agency was entitled to rely on the following factors:

- whether it was the last of a number of requests which could be regarded as excessive according to reasonable standards;

⁵ *Secretary, Department of Treasury and Finance v Kelly* [2001]

⁶ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [44].

⁷ 'There may be other relevant factors in different cases': *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [43].

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- whether the nature and scope of any of the total number of requests were identical or similar;
 - whether the timing of the requests appeared to be connected to other proceedings;
 - whether the requests appeared to be intended to accomplish an objective other than to gain access to documents;
 - whether an inference could be drawn from the behaviour generally of the appellant that he had a purpose other than to gain access to documents, bearing in mind that the purpose of the pattern of conduct is more likely to be established by inference, rather than by a statement from the applicant.⁸
51. I do not consider that the 3 applications were the last of a number of requests which could be regarded as excessive, especially noting that the initial application was not actively determined by the agency. I also draw the agency's attention to the wording of whether the application was the last of a number of requests, again reinforcing that the agency was not permitted to consider the 13 subsequent applications lodged by the applicant in relying upon section 18(2a).
52. I accept that the cumulative nature of the 3 requests is similar to the initial FOI application, although as outlined above the scope is reduced by more than 30%. I also again advise my view that the applicant likely lodged the 3 similar applications reasonably believing this to be an appropriate way to respond to the agency's lacking request to narrow the scope of the initial request.
53. In regard to whether the intention of the applications was to accomplish an objective other than to gain access to documents, the agency submits that the applications demonstrate an intention to 'tie up the resources' of the Department. I disagree. Rather, I consider that the applicant has demonstrated a clear intention to gain access to documents about himself. This is evident in the content of the FOI applications, and the fact that the applicant has pursued this information despite the issues which have arisen.
54. In light of the above, I am not satisfied that it was reasonably open to the agency to form the opinion that the applicant has demonstrated a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information. Accordingly, the current three applications cannot form part of such a pattern of conduct.
55. I note that the circumstances of this matter are substantially similar to those in one of my previous external reviews concerning the same applicant and agency.⁹ In that matter I addressed and rejected many of the same submissions put forward by the agency in this matter, and ultimately reversed the agency's reliance upon section 18(2a).
56. Noting that the applicant in fact raised this with the agency upon internal review, it is unclear to me why the agency made the same submissions again and declined to address the applicant's submission in its internal review determination, or otherwise explain why this matter should be differentiated from my previous external review.

⁸ *Gabrielsen v Nurses Board of SA* [2008] SADC 51 (Unreported, SA District Court, Judge Simpson, 2 May 2008), [41].

⁹ My reference 2021/04655.

Whether the agency complied with section 18(2)

57. In order to rely upon section 18(1) I must first be satisfied that the agency has complied with section 18(2).
58. 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?
59. As outlined above, on 15 June 2021 the Department sent the applicant correspondence requesting that he narrow the scope of each of the 3 FOI applications in issue. For the reasons already canvassed, I am not satisfied that correspondence was sufficient for the agency to have discharged its obligations under section 18(2).
60. The agency also made a further attempt to comply with section 18(2) after consideration of my provisional determination. On 17 October 2022 the applicant was advised of a scheduled phone linkup with the agency's FOI team to discuss the scope of his three applications. On 18 October 2022 a telephone meeting between the applicant and the agency took place. I am advised that during that phone call, the agency:
- explained the work required to deal with the three applications in their original terms and advised that the work would be substantial
 - outlined the ways in which the agency could identify documents falling within scope
 - advised that dealing with the applications in their original terms would likely take up to six months to complete
 - requested that the applicant consider:
 - identifying specific units within the agency of interest
 - identifying specific documents of interest
 - split up the requests across various Units and lodge those requests in a staggered fashion to afford the agency longer than 30 days to deal with the applications completely
 - offered the applicant an opportunity to consider the agency's suggestions and engage in a further discussion at a later date.
61. I am advised that the applicant declined to consider or adopt any of the amendment suggestions put forward by the agency, nor did he raise or query any other kind of amendment. The applicant confirmed that the three applications are to remain in their original terms.
62. It is clear to me that the agency appropriately explained to the applicant the barriers to processing the applications in their original terms, and made appropriate suggestions as to how the applications could be amended such that section 18(1) would no longer be applicable. I also acknowledge that the agency gave the applicant advanced notice of the meeting and an opportunity to consider amendment options and continue that meeting at a later date.
63. I am satisfied that the additional steps taken by the agency in October 2022 were sufficient to comply with section 18(2).

Whether the requirements of section 18(1) are met

64. The agency has provided submissions estimating both the amount of time and money which would be required to deal with the applications in their original terms. It is noted that the monetary amounts appear to have been calculated based on the fees prescribed in the *Freedom of Information (Fees) Notice 2022 (the Notice)*.
65. In my view, it is the time estimates rather than the monetary estimates which I should give the most weight to in considering whether section 18(1) is applicable. Section 18(1) requires me to consider whether dealing with the application would divert the agency's resources. The estimated monetary amounts are based on what the Notice states an agency is entitled to claim in dealing with an FOI application. There is no indication that those monetary figures actually represent resources that the agency has, or that any such monetary resources were intended for another purpose and hence would be 'diverted' if put towards dealing with the three subject applications.
66. I accept that the amount the agency would be entitled to claim for dealing with the application is not irrelevant to my consideration, however I consider it is merely indicative of the amount of time and work required of the agency to deal with the applications.
67. The agency has advised that the discovery of documents relevant to the three applications could be achieved in one of two ways: requesting that every agency employee conduct a search of their own emails, or requesting that the agency's IT department conduct one agency-wide search. The latter is clearly preferable in my view as this avoids the need for multiple discovery requests and responses, and allows for searches of emails sent or received by former employees.
68. The agency has advised:
- Advice received from the IT team is that dependant on the search criteria utilised (a basic and advanced search), identification of DCS emails through the Mimecast Recovery system has populated 3 different totals of emails captured (Annexure 7). The three searches undertaken returned the following number of messages:
- an advanced search returned 598 messages using the search "[applicant's full name]" or "[applicant's prisoner ID number]" for the specified time frame;
 - a basic search returned 1233 messages using the search "[applicant's full name]" or "[applicant's prisoner ID number]" for the specified time frame; and
 - an advanced search returned 31,933 using the search "[applicant's surname]" and "[applicant's prisoner ID number]" for the specified time frame.
- The IT team have advised that they are unsure as to why the irregularities in the import of the data has occurred for the first 2 searches and this will need to be discussed with the Mimecast developers. Due to the complexity of the word searches used, the 3rd search has captured every email with the name "[applicant's surname]" in it (which could include other prisoners with the same last name, and employees or external parties with the same last name who have sent emails to the Department or external third parties) or possibly any phone number with [applicant's] ID sequence. This has indicated that the Mimecast Recovery system is not a reliable tool for the extraction of all the emails within scope of the application and this could potentially increase the work in dealing with the three applications in issue.
69. I have disregarded the result of 31,933 documents being identified for the reasons identified by the agency: the omission of the applicant's first name in the search will skew the results such that they include emails about people other than the applicant.
70. As to the discrepancy between the first two searches, despite the agency's submissions, I query whether the second 'basic' search was in fact conducted for the

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relevant timeframe. A brief internet search regarding the functionality of Mimecast reveals that a date restriction on searches is only available for the advanced search function. In a basic search, or by default in an advanced search where a timeframe is not specified, the search will span all items over the last 12 months.

71. Annexed to the agency's submissions is an email chain between the agency's FOI Unit and its IT department. Having reviewed those emails, I note that when advising the results of the first advanced search it was confirmed that a timeframe of 5 May 2020 to 5 January 2021 had been applied. Conversely, when the results of the subsequent basic search were conveyed, there was no mention of that timeframe. Noting the restriction against applying a timeframe to a basic search, presumably the basic search result actually identified emails spanning 24 October 2021 to 24 October 2022, being the 12 months prior to the search.
72. I consider that this would explain why the basic search yielded more results as it searched a timeframe of 12 months rather than 8, and to my knowledge the applicant has had more dealings with the agency in the last 12 months than in the relevant timeframe.
73. As such, I have disregarded the results of the basic search and have proceeded on the basis that the result of the advanced search likely provides the most accurate indication as to how many documents fall within scope of the applications, being 598. Noting the agency's comments that a search might return documents containing phone numbers matching the applicant's ID sequence, this number might be lower still.
74. The agency submits that it would take an IT staff member approximately nine hours to extract the emails from the first two searches, download the data to a Personal Storage Table and send the data to the FOI team for processing. Noting that the 598 messages account for approximately a third of the files identified in the first two searches, and it is only those documents which need to be extracted, I consider that it is reasonable to estimate that the discovery and extraction process would take approximately three hours rather than nine.
75. Following the discovery and extraction process, the agency estimates that it will take 272.25 hours for one FOI accredited officer to deal with all three of the applications based on the following:
 - on average, each document is anticipated to span three pages
 - on average, half of the emails are anticipated to contain attachments
 - on average, each attachment is anticipated to span five pages
 - an FOI accredited officer will take two minutes to read, assess and redact each page
 - it is estimated that 15% of the documents will require consultation and that four consultation requests can be sent per hour.
76. My first observation is that the estimate of 272.25 hours was calculated based on the agency considering 1233 documents rather than 598. I therefore intend to recalculate the total number of hours after determining whether the basis for the agency's calculations are reasonable.
77. Although the agency has not provided any evidence to support the averages set out above, I do not consider the estimates to be unreasonable. Even if the agency has slightly overestimated the number of pages per document and/or the number of attachments, I consider that this is balanced by an underestimation of two minutes to read, assess and redact each page.

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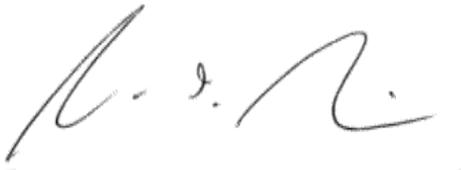
78. As to the consultation required, based on the potential 'interested parties' that the agency has identified, it seems unlikely that the formal consultation requirements of sections 25-28 of the FOI Act would be enlivened. That said, I accept that it may be appropriate for the agency to conduct an informal consultation with certain parties to best inform itself as to whether the documents are exempt.
79. If I accept that 15% of the documents will require consultation, this equates to approximately 90 documents. Contrary to the agency's submissions, I do not agree that this would require 90 separate consultation requests. The agency identified six interested parties; I see no reason why the documents cannot be collated such that each party is only consulted once. I am satisfied that the agency's estimate of being able to send four consultation requests per hour is appropriate, in addition to a further 30 minutes per consultation for the purpose of collating the documents as needed. On this basis, I consider that 45 minutes to send each consultation request is appropriate.
80. Although the agency does not appear to have factored this in, I also consider it reasonable to afford the agency additional time to consider the consultation responses and make any changes to redactions as it considers appropriate. Absent any submissions from the agency about this, I am inclined to conclude that an hour per consultation response would be appropriate.
81. In light of the above, I would amend the agency's calculations as follows:
- 598 documents spanning three pages each = 1,794 pages
299 attachments spanning five pages each = 1,495 pages
Estimated total number of pages = 3289
- Discovery and extraction of the documents by the IT department = 3 hours
Two minutes to read, assess and redact each page = 109.63 hours
Six consultation requests allowing 45 minutes per consultation = 4.5 hours
One hour to consider each of the six consultation responses = 6 hours
Estimated time to deal with the applications = 123.13 hours or 16.42 days
82. Although this total falls far short of the agency's estimate, I am nevertheless satisfied that the requirements of section 18(1) are met. Bearing in mind that dealing with the applications will largely only take place during business hours, ensuring that the applications are dealt with within 30 days would require one of the agency's accredited FOI officers to work exclusively on these applications for over three weeks, almost the entirety of the 30-day period.
83. As the agency has outlined, its FOI team deals with a high volume of FOI applications as well as non-FOI related work on a daily basis. It is my understanding that the FOI team consists of five or less people. To essentially take one person offline for over 16 days would amount to a 20% reduction in resources to undertake the functions of dealing with other FOI applications and non-FOI related work. I am satisfied that this would be unreasonable.

Determination

84. In light of my views above, I confirm the agency's determination to refuse to deal with the access application but clarify that the basis of this determination is section 18(1) rather than section 18(2a).

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85. I acknowledge that this is a disappointing outcome for the applicant after having waited more than a year since lodging the three FOI applications. I remind the agency of the importance of prompt and open communication with applicants, whether that be by way of acknowledging receipt of applications with appropriate advice as to how an applicant might progress an application in the absence of a response, or by attempting to resolve or partially settle matters at an early stage.

A handwritten signature in blue ink, appearing to read 'W. Lines', enclosed in a thin blue rectangular border.

Wayne Lines
SA OMBUDSMAN

28 November 2022

APPENDIX 1

Procedural steps

Date	Event
14 May 2021	The agency received an FOI application from the applicant dated 10 May 2021.
17 May 2021	The agency requested that the applicant narrow the scope of his FOI application pursuant to section 18(2) of the FOI Act.
31 May 2021	The agency received the first FOI application dated 24 May 2021.
4 June 2021	The agency received the second FOI application dated 31 May 2021.
15 June 2021	The agency received the third FOI application dated 7 June 2021.
15 June 2021	The agency separately requested that the applicant narrow the scope of the first, second and third FOI application pursuant to section 18(2) of the FOI Act.
30 June 2021	The agency failed to determine the first application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
4 July 2021	The agency failed to determine the first application within the 30 day period required by the FOI Act, ³ and is deemed to have refused access to the documents. ⁴
15 July 2021	The agency failed to determine the first application within the 30 day period required by the FOI Act, ⁵ and is deemed to have refused access to the documents. ⁶
29 June 2022	The agency purported to issue a belated determination cumulatively refusing to deal with all three FOI applications.
13 July 2022	The agency received the internal review application dated 2 July 2022.
21 July 2022	The agency varied its deemed refusal determinations such that it refused to deal with all three FOI applications.
17 August 2022	The Ombudsman received the applicant's request for external review dated 7 August 2022.
24 August 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 14(2).

⁴ *Freedom of Information Act 1991*, section 19(2).

⁵ *Freedom of Information Act 1991*, section 14(2).

⁶ *Freedom of Information Act 1991*, section 19(2).

7 September 2022	The agency provided the Ombudsman with its submissions and documentation.
23 September 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.
13 October 2022	At the agency's request, the Ombudsman suspended his external review to allow an opportunity for a settlement to be negotiated. ⁷
1 November 2022	The agency provided submissions in response to the provisional determination.
1 November 2022	The Ombudsman recommenced his external review.
4 November 2022	The Ombudsman issued his revised provisional determination and invited submissions from the parties.
10 November 2022	The agency advised that it had no further submissions to make.

⁷ *Freedom of Information Act 1991*, section 39(5)(c)(ii).