



Determination

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

Applicant:	Ms Isabel Dayman
Agency:	SA Police
Ombudsman reference:	2022/06730
Agency reference:	23-0407
Determination:	The determination of the agency is varied, the effect of which is that the documents in issue are partially exempt on the basis of clause 12(1).
Date of Deputy Ombudsman's determination:	27 March 2023
Issues considered:	Whether disclosure constitutes an offence
Exemption clauses relied upon:	12(1)
Legislation considered:	<i>Freedom of Information Act 1991</i> <i>Police Complaints and Discipline Act 2016</i>

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 specifically seek access to:

1. A list of proved and/or admitted breaches under the Police Complaints and Discipline Act 2016 for the years 2019, 2020 and 2021, including:
 - i. Details of the misconduct, and the officer's age, gender, rank, and branch/section.
 - ii. The penalty applied.

I refer you to Gordon Barrett QC's April 2020 report on the operation of the PCD Act, which found the disclosure of such information would be lawful under the legislation. I do not seek the identities of the individual officers.

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.
4. The applicant had previously requested that the Ombudsman conduct an external review of a determination by the agency to refuse to deal with her FOI application on the basis of non-payment of an advance deposit. Upon reviewing the information provided to me, the Ombudsman noted the relevant events as follows:
 - on 19 August 2022 the agency received the FOI application
 - on 14 September 2022 the agency requested an extension of time until 4 October 2022 to deal with the FOI application
 - on 29 September 2022 the agency requested payment of an advance deposit by 14 October 2022
 - on 20 October 2022 the agency purported to determine to refuse to deal with the FOI application on the basis of non-payment of the advance deposit.
5. The first thing to note is that there was no formal extension of time imposed under section 14A of the FOI Act. The email of 14 September 2022 was not sent within 20 days of receipt of the application,¹ nor did it comply with the requirements of an extension notice.² Parties are of course entitled to negotiate an informal extension of time, however this will not affect the timeframes imposed by the FOI Act or an applicant's right of review. As such, when the agency failed to make a determination by 18 September 2022, it was deemed to have made a determination refusing access to the requested documents.³
6. Having already been taken to have determined the FOI application on 18 September 2022, the agency did not have jurisdiction to make a further determination, nor in my view was it entitled to request payment of an advance deposit.

¹ *Freedom of Information Act 1991*, section 14A(3).

² *Freedom of Information Act 1991*, section 14A(4).

³ *Freedom of Information Act 1991*, section 19(2).

7. I consider that an agency may only request payment of an advance deposit in the period between receipt of an FOI application and its determination. Section 17(1) permits an agency to request payment of an advance deposit when the cost of dealing with an application is likely to exceed the application fee. After 18 September 2022 the FOI application had already been dealt with by way of a deemed determination and, unless and until the applicant requested an internal review, there was no further action required by the agency.
8. For completeness, I also advise that in my view an agency may not request payment of an advance deposit upon internal review. Part 3 of the FOI Act contains three Divisions which can cumulatively be seen as setting out a chronology for dealing with an FOI matter, with section 24 specifying that Division 1 has effect subject to the provisions of Division 2. It can be seen that Divisions 1 and 2 cumulatively relate to the manner in which an agency must deal with a new FOI application, whilst Division 3 relates to the internal review process. Noting that section 17 appears within Division 1, my view is that an agency may only request payment of an advance deposit before a determination is made under section 19.
9. This interpretation is also consistent with the purpose of section 17, namely to allow an agency to recoup the costs of dealing with an FOI application in advance. By the time an internal review has been requested, the application has already been dealt with and the agency is doing no more than reviewing whether its original determination was correct.
10. In light of the above, I consider that the agency did not validly request payment of an advance deposit, and therefore the purported determination of 20 October 2022 was similarly invalid as:
 - there was no proper request for payment of an advance deposit and therefore no failure to pay
 - the agency was already deemed to have made a determination and therefore did not have jurisdiction to make a further determination.
11. Based on his assessment which I have replicated above, the Ombudsman advised the applicant that his jurisdiction to conduct an external review was not yet enlivened, but the FOI application could be progressed through an internal review.
12. The applicant subsequently applied for an internal review which the agency was deemed to have finalised upon the expiration of the legislated 14-day period to deal with the application.⁴ The applicant then applied for an external review and it is that application which is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

13. The Ombudsman provided his tentative view about the agency's determination to the parties, by his provisional determination dated 13 February 2023. The Ombudsman informed the parties that subject to receipt and consideration of submissions from the parties he proposed to confirm the agency's determination.
14. That said, the Ombudsman also requested that, pursuant to subsections 45(1) and (3) of the *Police Complaints and Discipline Act 2016* (the **PCD Act**), the Commissioner consider granting authorisation for the requested information to be disclosed to the applicant under the FOI Act. The Ombudsman foreshadowed that if such authorisation

⁴ *Freedom of Information Act 1991* s 29(5)

were to be granted, disclosure would no longer constitute an offence and therefore would not be prohibited by clause 12(1).

15. In response to the Ombudsman's provisional determination the applicant submitted that the Commissioner ought to grant authorisation for disclosure of the requested information in order to demonstrate that the agency prioritises community trust in the standard of policing. The applicant also submitted that authorisation would be consistent with the "Commissioner's Message" on the agency's website which indicates that the police service should operate in a transparent manner, including in its dealings with the community.
16. Pursuant to the Ombudsman's request, the Commissioner provided a response to the provisional determination advising:

I have considered my position and have determined I will release the requested documents to the Applicant, pursuant to section 45 of the Act. However, to prevent the disclosure of the identity of the sanctioned employee, the document SAPOL will release to the Applicant will only include the relevant breach of the Code of Conduct, employee rank and the sanction imposed. For clarity, I have attached the relevant document I intend to disclose to the Applicant.

17. I have considered the Commissioner's response in greater detail in this 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.⁵
19. 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.
20. The following clause of Schedule 1 of the FOI Act is relevant to my external review:

12—Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.

21. Insofar as the agency has relied upon clause 12(1), section 45(1) of the PCD Act is relevant to my review:

45—Confidentiality

- (1) Except as required or authorised by this Act or by the Commissioner, the ICAC or the OPI, a person who is or has been engaged in the administration of this Act must not, directly or indirectly, disclose information in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment or investigation under this Act.

Maximum penalty: \$2 500 or imprisonment for 6 months.

22. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

⁵ *Freedom of Information Act 1991* s 12.

23. 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

24. The agency did not determine the applicant's FOI application or internal review application within the statutory time frames and is deemed to have refused access to all documents.⁶
25. Upon being requested to provide the relevant documents and submissions to this Office, the agency provided submissions detailing its position in regard to the documents found to be within scope.
26. The agency identified six documents within the scope of the application.

Issues in this review

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

Consideration

28. At the request of the Ombudsman's Legal Officer, on 30 November 2022 the agency provided a number of documents and submissions requested for the purpose of conducting my external review. Upon reviewing the provided documents, it was noted that this Office had not been provided a copy of the documents in issue and a further request was sent to the agency asking for a copy of same.
29. The agency subsequently advised that, due to an erroneous understanding that the agency could refuse to deal with the FOI application on the basis of non-payment of an advance deposit, the agency had not previously identified the documents falling within scope. The agency further advised that the process of extracting the relevant information into a document as anticipated by section 4(5) of the FOI Act would be an onerous task and therefore requested that the Ombudsman consider making his determination in the absence of the documents in issue.
30. On 9 December 2022 the Ombudsman's Legal Officer advised the agency that there was insufficient information before the Ombudsman to properly assess the agency's claim of exemption. The agency was therefore again requested to provide a copy of the documents in issue. On 23 December 2022 the agency did so.
31. Having reviewed the documents in issue, the Ombudsman was provisionally satisfied that their disclosure would constitute an offence against section 45 of the PCD Act, and that the documents were therefore exempt in full. That said, the Ombudsman also had regard to the applicant's submissions regarding a report of Mr Gordon Barrett QC dated 17 April 2020.
32. In November 2019 Mr Barrett was appointed by the Attorney-General to undertake the review contemplated by section 48 of the PCD Act. The resulting report included 35 recommendations, one of which was:

⁶ *Freedom of Information Act 1991* s 19(2); s 29(5)

OFFICIAL

There be no repeal of section 46 of the PCD Act.

Amend section 26 of the PCD Act to include subsection (5) in the following or similar terms:

- (5) Subject to this Act the Commissioner must, as soon as is reasonably practicable, after action is taken under subsection (1) release a public media statement outlining details of the officer's proved or admitted misconduct, their age, gender, rank, branch/section, the penalty applied, and any other details the Commissioner deems relevant.

- 33. The Ombudsman advised that whilst he did not agree with the applicant's submission that Mr Barrett's report concluded that disclosure of the requested information would be lawful under the current provisions of the PCD Act, certainly the report indicates that disclosure ought to be made lawful to ensure accountability and consistency with other jurisdictions.
- 34. Noting that the applicant has advised that she does not seek disclosure of the identities of any officer about whom there has been proved or admitted misconduct, disclosure of the requested information to the applicant would be consistent with Mr Barrett's recommendation.
- 35. As outlined above, the Ombudsman therefore requested that the Commissioner consider granting authorisation for the disclosure of the requested information. The Commissioner has now authorised disclosure of portions of the documents, namely the relevant breach of the Code of Conduct, employee rank and the sanction imposed. Authorisation to disclose the officer's age and gender has not been granted.
- 36. I do not consider that disclosure of the officer's age and gender would be sufficient to reveal their identity. Additionally, it is noted that Mr Barrett's recommendation specifically identified that those details should be made available to the public. That said, I acknowledge that I am not permitted to determine disclosure of the information which has not been authorised by the Commissioner.⁷
- 37. Accordingly, although I am of the view that the Commissioner ought to have authorised disclosure of the entirety of the requested information, I vary the agency's determination such that the documents will be partially released to the applicant.
- 38. I consider it appropriate to briefly note that the manner in which the agency intends to give effect to this determination is not, in my view, in keeping with what the FOI Act requires. Together with his response to the Ombudsman's provisional determination, the Commissioner attached a copy of the document the agency intends to provide to the applicant. It is noted that the provided document differs from the documents the agency identified as falling within scope of the FOI application.
- 39. Whilst I accept that the newly provided document is a 'cleaner' version in that it simply omits the exempted information rather than redacting it, to properly give effect to this determination the agency should provide the applicant with redacted copies of the six documents already identified as falling within scope.

⁷ *Freedom of Information Act 1991* s 39(12).

Determination

40. In light of my views above, I vary the agency's determination such that the documents in issue are partially exempt on the basis of clause 12(1) in accordance with the Commissioner's authorisation.

A handwritten signature in black ink, appearing to read 'Steven Strelan', with a stylized, cursive script.

Steven Strelan
DEPUTY OMBUDSMAN

27 March 2023

APPENDIX 1

Procedural steps

Date	Event
19 August 2022	The agency received the FOI application dated 19 August 2022.
18 September 2022	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
29 September 2022	The agency purported to request payment of an advance deposit.
20 October 2022	The agency purported to determine to refuse to deal with the FOI application on the basis of non-payment of the advance deposit.
11 November 2022	The agency received the internal review application dated 11 November 2022.
25 November 2022	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
28 November 2022	The Ombudsman received the applicant's request for external review dated 27 November 2022.
28 November 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
23 December 2022	The agency provided the Ombudsman with its submissions and documentation.
13 February 2023	The Ombudsman issued his provisional determination and invited submissions from the parties.
27 February 2023	The applicant provided submissions in response to the provisional determination.
24 March 2023	The agency provided submissions in response to the provisional determination.

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

² *Freedom of Information Act 1991* s 19(2).

³ *Freedom of Information Act 1991* s 29(5).