

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ms Vicki Chapman MP
Agency	Environment Protection Authority (the department)
Ombudsman reference	2013/00623
Agency reference	EPA05/20879
Date complaint received	17 January 2013
Issues	<ol style="list-style-type: none">1. Whether the department conducted an appropriate search for documents before transferring the complainant's application under the <i>Freedom of Information Act 1991</i> to the office of the Minister for Sustainability, Environment and Conservation2. Whether the department transferred the complainant's application in accordance with section 16 of the <i>Freedom of Information Act 1991</i>

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

- assessing the information provided by the complainant
- obtaining copies of the relevant documents from the department
- seeking a response from the department
- considering the *Freedom of Information Act 1991* (the FOI Act)
- providing the department and the complainant with my Provisional Report for comment
- preparing this report.

Responses to my provisional report

On 9 April 2013, the department's Accredited FOI Officer advised my office that the department would not be making any submissions in response to my provisional report. In addition, the complainant did not provide any submissions in response to my provisional report.

In light of this, I have proceeded to make this (my final) report in the same terms as my provisional report.

Background

1. By application under the FOI Act received by the department on 8 January 2013, the complainant requested access to:

All correspondence between the current Chair of the EPA Board, Ms Mia Handshin, and the Minister for Sustainability, Environment and Conservation.

2. On a handwritten file note dated 8 January 2013, it appears that the department's Senior Administration Officer - Public Information (**the Administration Officer**) wrote:

Rang minister's office + spoke with Kimberly. She or Lyn will ring back Thursday. They haven't received the same FOI request. We may transfer it to the Minister's office.

3. By email dated 10 January 2013 to the FOI Officer for the Minister for Sustainability, Environment and Conservation (**the Minister**), the Administration Officer wrote:

I am transferring the attached FOI from Vickie Chapman to you. I'll send you a copy of the transfer letter when Anton is back...

4. In a letter dated 14 January 2013, the department's Accredited Freedom of Information Officer (**the FOI Officer**) notified the complainant that:

I understand the subject matter of your application is more closely associated with the functions of the Minister for Sustainability, Environment and Conservation. I have therefore transferred your application to that agency's FOI Officer, Ms Lyn Metcalf.

5. By email to the FOI Officer dated 15 January 2013, the complainant's advisor queried:

I am unsure why you have transferred this application to the Minister as I would expect that EPA would retain this correspondence for their own records. Accordingly Ms Chapman requests the EPA continue to process the application.

6. In a response dated 16 January 2013, the FOI Officer wrote:

The FOI application was transferred under section 16 of the *Freedom of Information Act 1997*, which states:

16(1) An agency to which an application has been made may transfer the application to another agency if the document to which it relates -

- (a) is not held by the agency, but is, to the knowledge of the agency, held by another agency; or*
- (b) is held by the agency but is more closely related to the functions of the other agency.*

As you state the EPA may hold copies of the correspondence the subject of the application, but it is more closely related to the functions of another agency in that the Minister's office would make the final determination on the contents of any such correspondence and may also have directly corresponded with the current Chair, in which case the EPA may not have copies of those documents.

Having transferred the application I cannot continue to process it here. The responsibility for processing and responding to the application now resides with the agency the application was transferred to (in this case the Minister's office).

7. The complainant approached my office; and on 24 January 2013, I commenced a preliminary investigation of her complaint.
8. In my letter of notification to the department dated 24 January 2013, I wrote:

Ms Chapman MP complains that the agency inappropriately transferred an application made to the agency under the *Freedom of Information Act 1991 (FOI Act)* to the office of the Minister for Sustainability, Environment and Conservation.

Ms Chapman's application sought access to:

All correspondence between the current Chair of the EPA Board, Ms Mia Handshin, and the Minister for Sustainability, Environment and Conservation.

I understand that [the FOI Officer] wrote to Ms Chapman on 14 January 2013 to advise that her application had been transferred to the Minister's office as it was considered to be 'closely associated with the functions of the Minister for Sustainability, Environment and Conservation'. I understand that on 16 January 2013, the Accredited FOI Officer advised Ms Chapman's office that the application had been transferred pursuant to section 16 of the FOI Act..

It is not clear whether the agency conducted any searches for the documents requested by the applicant prior to transferring the application to the Minister's office, or provided copies of any documents it held, relevant to the application, to the Minister's office, as required by section 16(2).

I have decided to conduct a preliminary investigation of this complaint under section 18(1) of the *Ombudsman Act 1972*. My aim is to complete my investigation within four months.

To assist me in my investigation, please provide my office with the following by **7 February 2013**:

1. a copy of the relevant agency file relating to the way Ms Chapman's application was handled by the agency, including, but not limited to:
 - (a) copies of any correspondence or file notes recording communication between the agency and the applicant in relation to the application
 - (b) copies of any internal communications, or communications between the agency and any other party which are relevant to the application. This should include documentation showing consultations undertaken by the agency with interested parties and other agencies, and legal advice, for example
 2. advice as to whether the agency conducted searches for the documents relevant to Ms Chapman's application before transferring the application, and if not, reasons why.
9. By letter dated 7 February 2013, Dr Campbell Gemmill, Chief Executive Officer of the department, responded to my notice of preliminary investigation. I have considered the department's response below.

Relevant provisions of the Freedom of Information Act

10. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
11. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and

- (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...

12. Section 3A(1) states that the parliament has intended:

- (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
- (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.

13. Section 16 of the FOI Act states:

16–Transfer of applications

- (1) An agency to which an application has been made may transfer the application to another agency if the document to which it relates–
 - (a) is not held by the agency but is, to the knowledge of the agency, held by the other agency; or
 - (b) is held by the agency but is more closely related to the functions of the other agency.
- (2) An agency that transfers an application to another agency must, if it holds the document to which the application relates, forward a copy of the document to the other agency together with the application.
- (3) An agency that transfers an application to another agency must forthwith cause notice of that fact to be given to the applicant.
- (4) Such a notice must specify the day on which, and the agency to which, the application was transferred.
- (5) An agency is not required to include in a notice any matter if its inclusion in the notice would result in the notice being an exempt document.
- (6) An application that is transferred from one agency to another is to be taken to have been received by the other agency–
 - (a) on the day on which it is transferred; or
 - (b) 14 days after the day on which it was received by the agency to which it was originally made, whichever is the earlier.

Whether the department conducted an appropriate search for documents before transferring the complainant's application under the *Freedom of Information Act 1991* to the office of the Minister for Sustainability, Environment and Conservation

14. In my view, before transferring an application under section 16(1) of the FOI Act, an agency is first required to determine whether it holds any documents that fall within the scope of the application. This means conducting a reasonable internal search for such documents.

15. In its response to my notice of investigation, the department wrote:

In relation to point 2, the EPA conducted an internal search for documents that fell within the scope of the request. This was initially hampered by the absence, due to leave, of two key staff members who would have been able to identify the relevant documents held by the EPA. Rather than delay the transfer of the application to the Minister's Office, and

following discussions with that Office, it was decided to proceed with the transfer on 10 January 2013. Subsequent discussions with the relevant EPA staff on 15 January 2013, on their return from leave, indicated that there was one document held by the EPA that fell within scope of the request.

16. While the department stated that ‘the EPA conducted an internal search for documents that fell within the scope of the request’, as I understand it, the relevant document was not identified until 15 January 2013¹, some five days after the application was transferred to the Ministers office.
17. In my view, based on the information provided to my investigation, it appears that the department did not conduct a reasonable search for documents and was therefore not in a position to satisfy itself that the complainant’s application was more closely related to the functions of another agency before the application was transferred to the Minister’s office.
18. In relation to the department’s submission that its internal search for documents was ‘hampered by the absence... of two key staff members’, I comment that, in my view, staff absence is not a satisfactory justification for the department’s failure to adhere to its obligations under the FOI Act, and in particular section 16.

Opinion

19. In light of the above, my view is that the department’s failure to search for documents before transferring the complainant’s application to the Minister’s office was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Whether the department transferred the complainant’s application in accordance with section 16 of the *Freedom of Information Act 1991*

20. Section 16(3) of the FOI Act provides that when an agency transfers an application to another agency, it must notify the applicant of that fact. Section 16(4) states that a notice of transfer must specify the day on which, and the agency to which, the application was transferred.
21. It appears that while the department wrote to the complainant on 14 January 2013 to notify her that her FOI application had been transferred to the Minister’s office, the notice of transfer did not indicate the date of which the transfer was made (10 January 2013).

Opinion

22. In light of the above, my view is that the department acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.
23. In my view, the department’s failure to search for documents before transferring the application to the Minister’s office, in conjunction with its failure to advise the complainant of the date on which the transfer was made, may suggest a deficiency in understanding its obligations under the FOI Act. This could be remedied through training for the FOI unit staff within the department.

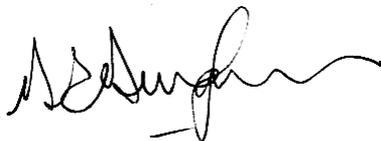
¹ Email from the Executive Officer of the EPA Board to the Administration Officer, EPA dated 15 January 2013.

Recommendations

24. To remedy the errors outlined above, under section 25(2) of the Ombudsman Act, I recommend that the department consider:
- reviewing its practices for transferring an application in accordance with section 16 of the FOI Act; and
 - providing additional training (or refresher training) for the FOI unit within the department.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the department report to me by 22 May 2013 on what steps have been taken to give effect to my recommendations above; and, if no such steps have been taken, the reason(s) for the inaction.



Richard Bingham
SA OMBUDSMAN

10 April 2013