

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Mr Michael McKinnon
Agency	Department of Treasury and Finance (the department)
Ombudsman reference	2012/09073
Agency reference	T&F11/0579
Date complaint received	8 November 2012
Issues	<ol style="list-style-type: none">1. Whether the department erred by not advising the complainant of his review and appeal rights under the <i>Freedom of Information Act 1991</i>2. Whether the department erred in its processing of the complainant's application under the <i>Freedom of Information Act 1991</i>3. Whether the department erred in making a 'determination' under section 19(2a) of the <i>Freedom of Information Act 1991</i> to refuse access4. Whether the department erred in its consideration of the scope of the complainant's application under the <i>Freedom of Information Act 1991</i>

Jurisdiction

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

Investigation

My investigation has involved:

- 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

By letter dated 26 February 2013, the Under Treasurer, Mr Brett Rowse wrote:

I have noted your report and provisional recommendations, and have no further comments to offer. As you have noted, the department has already addressed the requirement to notify applicants of their rights to review and appeal. The department has also taken a number of other steps and will continue to work towards improvements in its processes.

The complainant did not respond to my provisional report.

In light of the above, I have produced this (my final) report in the same terms as my provisional view.

Background

1. By application under the FOI Act received by the department on 12 April 2011, the complainant requested access to:

...documents produced in the last 2 years containing information about an expected growth in the number of poker machines over the (a) next five and (b) 10 years and the anticipated revenue arising from any such increase. I am also interested in any cost benefit analysis about pokie machines.

2. In a letter dated 14 April 2011, the Project Officer, FOI and Records Management for the department (**the Project Officer**) acknowledged the FOI application and informed the complainant that:

Your request is receiving attention and a reply will be forwarded to you as soon as possible.

3. On 14 April 2011, the Project Officer commenced searching for documents to satisfy the application.

4. On 19 April 2011, in an internal email, the Project Officer informed other departmental staff that:

I have received a call from Seven Network's FOI Office and was advised that the FOI application they submitted stated 'poker machines' instead of pokie machines.

They wish all parties dealing with this FOI application to be made aware and that the request should read:

'access to documents produced in the last 2 years containing information about (a) expected growth in the number of pokie machines over the (a) next five and (b) 10 years and the anticipated revenue arising from any such increase. I am also interested in any cost benefit analysis about pokie machines'

5. According to the department's records, it appears that by 1 June 2011, one document captured by the scope of the complainant's application had been located (**the document**).
6. The department failed to determine the application within the statutory timeframe of 30 days.¹ Therefore in accordance with section 19(2) of the FOI Act it was taken to have determined the application by refusing access.

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

- 7 Some 13 months later, by letter dated 27 June 2012, the Accredited FOI officer for the department (**the FOI officer**), then purported to determine to refuse access to the document on the following grounds:

As the agency did not determine the application within 30 days of receiving it, by the operation of section 19(2)(b) of the FOI Act, the agency is taken to have determined the application by refusing access.

Section 19(2a) of the FOI Act, provides that an agency may give access to a document on an application after the period within which it was required to deal with the application (and any such determination is to be taken to have been made under this Act).

A search of the Department's databases and information stores has identified one document that is within scope of your request.

Pursuant to Section 19(2a), I propose to refuse access to the document. I further advise that had the application not been determined to be refused by operation of Section 19(2)(b) of the FOI Act, my determination would have been to refuse access to the document under Schedule 1 of the FOI Act.

8. In a letter dated 5 July 2012, the complainant replied to the FOI officer and stated:

I am dismayed to receive your response to my FOI request as it is clearly inadequate and in breach of the agency's obligations under the Act. This only adds insult to injury given the application was lodged on 12 April 2011.

This is not a valid decision given you advise, pursuant to Section 19(2a), that you propose to refuse access. That section relates to the agency's options when it has failed to adhere to a statutory deadline. So you are proposing to refuse access pursuant to the claim that "nothing prevents an agency from making a determination to give access to a document after the period within which it was required to deal [sic] the application..."

This is simply nonsense. You cannot exempt documents on the basis that you have failed to adhere to the deadline but have the option of still making a decision.

9. The complainant's letter did not request an internal review of the department's determination under section 29 of the FOI Act.

10. In a response letter to the complainant dated 20 August 2012, the FOI officer wrote:

As discussed during our telephone conversation, I confirm that my determination incorrectly referenced the FOI Act. By way of clarification I advise as follows.

As your application was not determined within 30 days of receiving it, by the operation of section 19(2)(b) of the Act, the agency is taken to have determined the application by refusing access to the document to which it relates.

Section 19(2a) provides that nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and any such determination is to be taken to have been made under (the) Act).

A search of the Department's databases and information stores has identified one document that is within scope of your request.

I advise that if access to the document had not been taken to have been refused by the operation of section 19(2)(b), my determination would have been that the document is an exempt document under Schedule 1 of the Act.

Clause 5 of Schedule 1 of the Act provides:

- (1) A document is an exempt document if it contains matter-

- (a) the disclosure of which-
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
- (b) the disclosure of which would, on balance, be contrary to the public interest.

The document identified as within the scope of your application is a draft report prepared for the Select Council on Gambling Policy Working Group for the Council of Australian Governments (COAG) Select Council on Gaming Reform. The draft report was provided to members of the Working Group on a *COAG-In-Confidence* basis.

11. The complainant approached my office; and on 23 November 2012, I commenced a preliminary investigation of his complaint.

12. In my letter of notification to the department dated 26 November 2012, I wrote:

The complainant has taken issue with the way in which his FOI application was managed by your department.

To assist me in my investigation, please provide a detailed report to my office by 14 December 2012, and advise me of the following:

1. why was the department so delayed in determining the complainant's FOI application?
 2. what searches were conducted by the department to locate any relevant documents?
 - a. when were the department's searches completed?
 3. when did the department locate the relevant document?
 - a. was the COAG report the only document located by the department?
 - b. does the department consider that the COAG report falls within the scope of the FOI application?
 4. why did the department have no contact with the complainant between April 2011 and June 2012?
 5. why was the complainant not advised of his appeal rights in any of the correspondence sent from the department?
 6. does the department's standard FOI acknowledgement letter advise applicants of their appeal rights?
 7. in his memorandum dated 1 June 2011, the Deputy Under Treasurer included a proposed response to address the complainant's request for information. The Under Treasurer's response included facts and figures about gaming machines in South Australia; however it appears that this information was not relayed to the complainant. Why was this information not relayed?
 8. any further issues you consider are relevant to my preliminary investigation of this matter.
13. By letter dated 7 December 2012, Mr Brett Rowse, Under Treasurer, responded to my notice of preliminary investigation and addressed each of my questions in turn. I have considered the department's response below.
14. By letters dated 20 December 2012, I notified the complainant and department of my decision to conduct a full investigation of the complaint.

Relevant provisions of the Freedom of Information Act

15. 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’.
16. 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; ...
17. 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.
18. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are ‘exempt’. The term ‘exempt document’ is defined as ‘a document which is an exempt document by virtue of Schedule 1.’² Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusal of access.
19. Under section 48 of the FOI Act, the onus is on the agency to justify its determination ‘in any proceedings’.
20. To justify its determination, the agency must give reasons for its determination and show the findings on any material questions of fact underlying these reasons, together with a reference to the sources of information on which those findings are based. This is a requirement of an agency in the determination process under the FOI Act.
21. Section 14(2) of the FOI Act states:
- 14—Applications to be dealt with by certain persons and within certain time**
- (2) An application must be dealt with as soon as practicable (and, in any case, within 30 days) after it is received.
22. Sections 19(2) and 19(2a) of the FOI Act state:
- 19—Determination of applications**
- (2) If—
 - (a) —

² See *Freedom of Information Act 1991*, section 4 and section 20(1)(a).

- (i) the principal officer of an agency has, under section 14A, extended the period within which an application must be dealt with by the agency; and
- (ii) the agency fails to determine the application within the period as so extended; or

- (b) in any other case—an agency fails to determine an application within 30 days after receiving the application,

the agency is to be taken to have determined the application by refusing access to the document to which it relates for the purposes of the provisions of Division 3 and Part 5.

- (2a) However, nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and any such determination is to be taken to have been made under this Act).

23. Section 29(1) of the FOI Act states:

Division 3—Internal review

29—Internal review

- (1) Subject to subsection (5), a person who is aggrieved by a determination made by an agency under any other provision of this Part is entitled to a review of the determination.

Whether the department erred by not advising the complainant of his review and appeal rights under the *Freedom of Information Act 1991*

24. Based on the documents provided to my investigation, it appears that the complainant was not advised of his review and appeal rights under the FOI Act in any of the correspondence sent from the department.

25. Section 23(2)(b)(ii) of the FOI Act provides that a notice of determination must specify the rights of review and appeal conferred by the Act.

26. According to the department:

This was an oversight due to staff turnover. This was corrected in July 2011, when an acknowledgement letter template was developed to ensure that the relevant points are covered.

27. In my view, while in this instance the department erred by failing to advise the complainant of his review appeal rights, I am satisfied that the department's new acknowledgement letter template sufficiently addresses this issue for future applications. While this is helpful, I would also remind the department of its obligations in its notices of determination under section 23(2)(b)(ii) as set out above.

Opinion

28. In light of the above, my view is that the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Whether the department erred in its processing of the complainant's application under the *Freedom of Information Act 1991*

29. Pursuant to section 19(2) of the FOI Act, the department's 'deemed refusal' to grant access to the document is considered to be a determination for the purposes of Division 3 of the Act.
30. It follows that, where an agency fails to actively determine an application within the statutory timeframes, the onus to escalate the matter and apply for an internal review falls to the applicant under section 29 of the FOI Act.
31. The complainant did not apply for an internal review of the agency's 'deemed refusal'. However, as noted above, the department did not advise the complainant of his review and appeal rights.
32. To account for the delay in processing the application, the department informed me that:

At the time of Mr McKinnon's application, in April 2011, the Department of Treasury and Finance had in excess of 163 FOI applications awaiting determination. At the same time the department experienced turnover of staff in this area. The FOI officer responsible for assisting the Accredited FOI Officer Mr Alan Martin, left the department at the beginning of April 2011 and could not be replaced until July 2011. A Project Officer had commenced in the FOI area in January 2011, but was still relatively inexperienced at processing FOI applications. The replacement FOI officer, who started in July 2011, unexpectedly resigned in November 2011, at which time the department still had 190 applications awaiting processing and determination, despite Mr Martin having determined over 100 applications between April and November 2011.

The department was at that time in the process of recruiting two additional FOI officers, who commenced work in the first week of January 2012, and the department has since recruited a further FOI officer as team leader, from late August 2012. The department took these steps because of the significant increase in FOI applications since the 2010-11 financial year, from 105 applications the previous year to over 300 per year since then.

33. Further, to account for the fact that the department had no contact with the complainant between April 2011 and June 2012, the department submitted:

Delays in processing applications during this period were the result of the significant increase in numbers of FOI applications received limited number of staff available and staff turnover in the FOI area. Applicants who followed up their applications were advised of delays and assisted where possible.

34. While I can appreciate that the FOI unit within the department is managing an increased workload, in my view, the applicant should not have to bear what I consider is an inordinate delay caused by the department's internal management of the application.
35. In any event, in my view, the department's submissions as outlined above, do not justify its significant delay in processing the complainant's FOI application. I base this view on the fact that by 1 June 2011, the department had identified the document it considered fell within the scope of the application, and had determined its status as an exempt document under Schedule 1 to the FOI Act.
36. In a minute to the Project Officer dated 1 June 2011, the Deputy Under Treasurer, Mr Garry Goddard wrote:

Relevant officers in the Revenue and Economics Branch have performed a search of the Objective records management system, email correspondence and examined all relevant electronic and hard copy files.

All identified documents have been recorded in the summary table attached. An assessment as to whether each specific document is subject to an exemption under the *Freedom of Information Act 1991* is also included in the table.

No documents were found to address the first part of Mr McKinnon's request relating to documents containing information on the growth in the number of poker machines and anticipated revenue from any increase. However, it is possible that Mr McKinnon may really be looking for information on the Government's estimates of gaming machine revenue over the forward years. Accordingly, it may be appropriate to provide the following information in responding to Mr McKinnon's FOI request.

In relation to the second part of the request regarding cost benefit, one document was identified as is listed on the attached schedule of documents. The recommendation was prepared for the Select Council on Gambling Reform on a COAG-in-Confidence basis and is exempt from release on grounds of section [sic] (5)(1)(ii) documents affecting inter-governmental or local government relations.

The proposed information to be included in the response to Mr McKinnon is outlined below. All information is publically available.

37. It appears that much of the department's work in actively dealing with the FOI application was conducted by 1 June 2011. In light this, in my view, it is unacceptable that the department then took over a year to contact the complainant to advise him that the document would not be released.

Opinion

38. In light of the above, my view is that the agency acted in a manner that was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

Whether the department erred in making a 'determination' under section 19(2a) of the *Freedom of Information Act 1991* to refuse access

39. As noted above, in its purported 'determination' dated 27 June 2012, the department wrote:

A search of the Department's databases and information stores has identified one document that is within scope of your request.

Pursuant to Section 19(2a), I propose to refuse access to the document.

40. As acknowledged by the department in its letter dated 20 August 2012, the reference to section 19(2a) of the FOI Act above is incorrect. Section 19(2a) allows an agency to make a determination to *release* documents after the expiry of the statutory timeframe, rather than refuse access.
41. By failing to make an active determination within the 30 day statutory timeframe, in accordance with section 19(2) of the FOI Act, the department was taken to have determined the application by refusing access to the document. A 'deemed refusal' is considered to be a determination under the FOI Act and is subject to review or appeal.
42. In light of this, the department's letter dated 27 June 2011 has no status in law. In my view, it would be better described as belated submissions providing the department's views about the exempt status of the document, to justify the refusal of access.

43. Generally, such submissions may provide an applicant with further information to understand why the documents are not being released, and may assist the applicant to decide whether, and on what grounds, to seek an internal review. I note that under section 29(2)(e), the department is able to accept internal review applications outside the usual 30 day appeal period following a determination. In circumstances where a department provides belated submissions, I would expect it to be commensurately flexible in accepting a late internal review application.
44. While the department's letter dated 27 June 2012 incorrectly referenced section 19(2a) of the FOI Act, in my view, this mistake was adequately addressed by the department's subsequent letter dated 20 August 2012.
45. In my view, the department's 'deemed refusal' under section 19(2) of the FOI Act, is the relevant determination of which the complainant may seek an internal review.

Opinion

46. In light of my assessment above and on the basis of the evidence available, it appears that in making a determination under section 19(2a) of the FOI Act to refuse access, the department has not acted in a way that is unlawful, unreasonable or wrong within the meaning of the Ombudsman Act. In accordance with my powers to refuse to continue an investigation under section 17(2)(d) of the Ombudsman Act, I do not intend to investigate this issue further.

Whether the department erred in its consideration of the scope of the complainant's application under the *Freedom of Information Act 1991*

47. The department's letter to the complainant dated 20 August 2012 records:

The document identified as within the scope of your application is a draft report prepared for the Select Council on Gambling Policy Working Group for the Council of Australian Governments (COAG) Select Council on Gaming Reform. The draft report was provided to members of the Working Group on a COAG-In-Confidence basis.
48. I note that the cover of the document is dated May 2011. As the applicant's original application was lodged on 12 April 2011, the document is outside the temporal scope of the application as it was produced after that date.
49. In its response to my notice of investigation, the department advised me that:

At the time, the Accredited FOI Officer thought that this report was within the scope of the FOI application but, on reflection, believes it too is out of scope.
50. The end result of the department's misapplication of the scope of the FOI request is that the applicant has waited for over a year, only to be informed, through my investigation, that the department does not hold any documents that fall within the temporal scope of his application.
51. In my view, the department's misapplication of the scope of the FOI request, in conjunction with its failure to advise the applicant of his review and appeal rights and its significant delay, may suggest a deficiency in understanding its obligations under the FOI Act. In my view, this could be remedied through training or refresher training for the FOI unit staff within the department.

Opinion

52. In light of the above, my view is that the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Other comments

53. In my notice of investigation to the department, I wrote:

7. in his memorandum dated 1 June 2011, the Deputy Under Treasurer included a proposed response to address the complainant's request for information. The [Deputy] Under Treasurer's response included facts and figures about gaming machines in South Australia; however it appears that this information was not relayed to the complainant. Why was this information not relayed?

54. By way of response, the department advised that:

It has not been departmental practice to provide additional information to applicants, outside that which the Department is required to provide under the FOI Act. The FOI application requested information about the expected growth in the number of poker machines and anticipated revenue arising from any such increases. The information provided by the Deputy Under Treasurer relates to the decrease in the number of gaming machines, and is publically available.

55. In my view, the department should be supporting a culture of openness and accountability in the spirit of the objects of the FOI Act. I note in particular that section 3(3) of the FOI Act states:

- (3) Nothing in this Act is intended to prevent or discourage the publication of information, the giving of access to documents or the amendment of records otherwise than under this Act if it is proper and reasonable to do so or if it is permitted or required by or under any other Act or law.

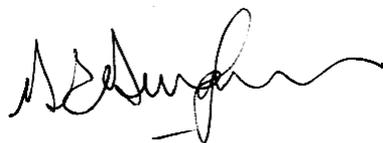
56. In my view, the practice expressed in the department's submissions above is unnecessarily restrictive in providing information to the public about the workings of government and contrary to the objects of the FOI Act.

Recommendations

57. To remedy the errors outlined above, I considered a recommendation that the department extend the time for accepting the complainant's internal review application. However, in light of the fact that no documents appear to fall within the temporal scope of the application, this recommendation would serve no useful purpose.
58. Therefore under section 25(2) of the Ombudsman Act, I recommend that the department should consider:
- assisting the complainant to resubmit his application in accordance with the FOI Act with a suitably broad temporal scope
 - waiving the application fees in accordance with section 53(2)(a) of the FOI Act
 - having the Principal Officer of the department determine the new application, in order to expedite the process
 - providing the complainant with a copy of the Deputy Under Treasurer's minute dated 1 June 2011, in light of the objects 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 12 April 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.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long, sweeping horizontal flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

28 February 2013