

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Dr Daven Kurl
Agency	Northern Adelaide Local Health Network
Ombudsman reference	2018/03422
Agency reference	16FOI-0877
Date complaint received	22 March 2018
Issues	<ol style="list-style-type: none">1. Whether the delay in the agency dealing with the complainant's Freedom of Information application was unreasonable2. Whether the agency's handling of the complainant's Freedom of Information application was wrong3. Whether the agency's searches for documents were insufficient and therefore unreasonable

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
- seeking several responses from the agency and considering the documents provided
- considering the *Freedom of Information Act 1991*
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report and revised provisional report

Both the complainant and the agency made submissions in response to my provisional report.

In responding to my provisional report the complainant made additional submissions relating to what he considers to be insufficiencies in the agency's searches for documents within the scope of his application made under the Freedom of Information Act. Included in the complainant's additional submissions was that:

- the agency should have undertaken searches of the agency's server
- the agency should have undertaken a search of the mailboxes of particular employees of the agency and, if those individuals are no longer direct employees of the agency, the agency should have restored the relevant mailboxes.

The complainant made further additional submissions in response to my revised provisional report. He raised further matters which he considers indicate insufficiencies in the agency's search for documents within the scope of his application. Included in the complainant's more recent submissions was that:

- there is indication that there are documents that exist on servers not identified by the agency
- the agency should have undertaken further searches to locate former members of the Mental Health Clinical Credentialing Committee (**the MHCCC**).

I have considered the submissions made by the complainant throughout this full report where I have considered it relevant to do so.

However, I note that some matters submitted by the complainant proposed that the agency should have undertaken searches for documents that I consider do not fall within the scope of the complainant's original FOI application. This includes:

- a schedule of documents relating to all documents provided to him during the processing of his FOI application
- details of a file provided to the complainant titled the 'Credentialing Zip' file, the file's contents, the full name of the file, the creation date and location of the file
- information establishing Ms Leonie Nowland's membership of MHCCC
- in relation to employment documents relating to the complainant's employment in the year 2004:
 - documents dated between 1 April 2004 and 14 July 2004 using the search terms 'Kurl', 'resign', '10 May', 'Ward round'
 - a resignation letter sent to Dr Russel Draper between 1 April 2004 and 10 June 2004 (the complainant has noted this could involve the restoration of Dr Draper's mailbox)
 - documents dated between 1 April 2004 to 14 July 2004 using the search terms 'Daven Kurl', 'Dave Kurl', 'Russel Draper', 'Barbara Weiland', 'Lyn Fraser' and 'Dianne Pitcher'.

I note that the complainant may wish to initiate discussions with the agency about any potential access to these documents, which may include the complainant making a fresh application to the agency under the Freedom of Information Act.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Given that the complainant has this right available to him, I do not consider it necessary or justifiable to consider these issues as part of this investigation.³

Throughout the body of this report, where I have considered it relevant to do so, I have considered the agency's submissions made in response to both my provisional report and to the subsequent matters that were raised by the complainant.

In response to the complainant's and the agency's submissions, I have revised my report where I have considered it appropriate to do so.

Background

1. The complainant currently resides in Adelaide but travels interstate for work.
2. In 2004 the complainant was employed by the agency as a Consultant Psychiatrist.
3. In early September 2013 the complainant was offered a 6 month position as Consultant Psychiatrist with the Modbury Hospital. As part of the pre-employment process, the complainant submitted a credentialing application form on 16 September 2013 to the MHCCC. The MHCCC was authorised by the Chief Executive of the former Central Northern Adelaide Health Service to make credentialing determinations.
4. The process of credentialing aims to ensure that clinical staff are appropriately qualified and skilled to undertake the roles and responsibilities for which they are employed.⁴ Credentials are verified by recognised university degrees, registration by professional boards, membership of professional boards, membership of professional associations, certificates of training, referee reports and professional indemnity history and status.⁵
5. On 19 September 2013 the MHCCC wrote to the complainant advising him of provisional credentialing, subject to further information being provided to the MHCCC.
6. From that date, there was ongoing communication between the complainant and the MHCCC in relation to additional information that was required by the MHCCC. Consequently the complainant's provisional credentialing was extended.
7. By letter dated 12 December 2013 the MHCCC advised the complainant that a particular matter remained unresolved and the complainant's credentialing could not be extended. By letter the next day, the complainant's employer advised the complainant that until credentialing was achieved, he could not return to the role.
8. By email dated 13 December 2013 the complainant sought to appeal the decision of the MHCCC.
9. In 2014 an audit was undertaken focussing on compliance with the SA Health 'Credentialling and Defining the Scope of Clinical Practice for Medical and Dental Practitioners Policy'. I have been advised that the audit revealed significant issues in the record keeping practices of the MHCCC. Consequently, it was determined that credentialing would be undertaken by the Northern Adelaide Local Health Network Credentialing Committee (**NALHNCC**). I understand that all documents of the MHCCC were then transferred to the Northern Adelaide Local Health Network (**the agency**).

³ *Ombudsman Act 1972*, section 17(2)(d).

⁴ Northern Adelaide Local Health Network, 'Credentialing and Defining Scope of Clinical Practice - Information Sheet', p 2.

⁵ Australian Council for Safety and Quality in Health Care, 'Standard for Credentialing and Defining the Scope of Clinical Practice' (2004).

10. The NALHNCC met in April 2014 to consider the complainant's application for appeal and the decision was finalised in June 2014. The complainant was successful in the appeal.
11. On 31 October 2016 an application for access to documents was made to the agency under the *Freedom of Information Act 1991* (**the FOI application**) by Cowell Clarke Commercial Lawyers (**the complainant's lawyer**) on behalf of the complainant.
12. The FOI application requested access to documents relating to the complainant's credentialing application, decision of the MHCCC and the complainant's appeal to the NALHNCC. The request was made in the following terms:
 1. All correspondence between members of the Mental Health Clinical Credentialing Committee (MHCCC) regarding the Credentialing Application including emails, letters, file notes, and other records of conversation between members of the MHCCC;
 2. File notes, minutes and other records of any meetings, deliberations and discussions of the members of the MHCCC leading to or relating in any way to the MHCCC Determination;
 3. All correspondence between members of the Northern Adelaide Local Health Network Credentialing Committee (NALHNCC) regarding the Credentialing Application and/or the MHCCC Determination including emails, letters, file note sand other records of conversations between members of the NALHNCC;
 4. A correspondence, records/minutes of meetings between members of the MHCCC and members of the NALHNCC regarding the MHCCC Determination and the Credentialing Application;
 5. File notes, minutes and any other records of any meetings, deliberations and discussions of the members of the NALHNCC regarding the MHCCC Determination, the Credentialing Application and leading to or relating in any way to the NALHNCC Determination;
 6. All correspondence between any member of the MHCCC and any other parties concerning or relating to the applicant;
 7. All correspondence between any member of the NALHNCC and any other parties concerning or relating to the applicant;
 8. All correspondence regarding the applicant from or between any person involved in the employment or credentialing process.
13. Having not received a determination in relation to the FOI application, six months later the complainant emailed the Personal Assistant to the former Chief Executive Officer of SA Health (a separate agency) on 30 April 2017, noting:

You will see from the attachments, that the relevant departments have not complied with FOI requests thus far, despite being given a substantial amount of time to do so, nor have they provided any sort of explanation for the behaviour.

This is in breach of the organisations obligations.

By bringing this matter to her attention directly, I hope that we might be able to progress the matter, rather than pursuing the higher profile action, suggested by my legal representative.
14. The complainant was informed that the matter was being followed up with the agency's Freedom of Information (**FOI**) team.
15. On 1 June 2017 the complainant re-emailed the office of the Chief Executive of SA Health noting that he still had not received an outcome and that his application had been made eight months ago.
16. On 2 June 2017 the agency's Principal Officer, FOI Privacy, Policy and Legislative Compliance, Ms Rebecca Horgan, emailed the complainant stating:

Please accept my sincere apologies for the delay in processing your request for information ...

Your application was mislaid and is now being processed as a matter of priority.

I apologise for any inconvenience the delay may have caused.

17. On 23 June 2017 a determination was made by the agency (**part one of the determination**). It was determined that 118 documents, some of which had several attachments, were within the scope of the complainant's request. It was determined the documents were to be provided to the complainant with:
 - names of unrelated third parties redacted on the basis that such information concerned the personal affairs of those parties and was therefore exempt pursuant to clause 6 of Schedule 1 to the *Freedom of Information Act 1991* (**FOI Act**)
 - matters not relating to the complainant redacted on the basis that such information was out of scope.
18. Part one of the determination stated:

Please note the attached documents relate to parts 3 to 8 of your application. I am still sourcing documents from the MHCCC in response to parts 1 and 2 of your request and will forward them as soon as they are to hand.

...

If you are not satisfied with this determination you are entitled to apply for an internal review in accordance with section 29 of the FOI Act ...
19. I note that parts 1 and 2 of the FOI application related to documents of the MHCCC concerning the complainant's credentialing application and the determination.
20. It appears that part one of the determination was not provided to the complainant until several days later; Ms Horgan emailed the complainant on 28 June 2017 stating that a determination would be couriered to the complainant's lawyer the next morning and 'I apologise for not getting these out earlier'.
21. The complainant emailed the agency on the evening of 1 February 2018 noting that six months had passed since the agency had explained that it was continuing to search for documents of the MHCCC and that he had not been advised of an outcome. The complainant also queried why his personnel file relating to his employment in 2004 has not been included in the documents released by part one of the determination.
22. Having not received a response, the complainant sent a follow-up email on 15 February 2018.
23. The agency responded by email on 27 February 2018 informing the complainant that a letter was sent to his lawyer on 22 February 2018, including his personnel file relating to 2013 but that his 2004 personnel file was still being retrieved from storage.
24. The letter from the agency to the complainant's lawyer dated 22 February 2018 concluded that, other than the documents that were provided with part one of the determination, no other documents existed (**part two of the determination**). Part two stated the following:
 - in undertaking further searches for documents relating to the MHCCC, the Secretariat of the MHCCC was asked to undertake searches on the basis that the Chair of the MHCCC no longer works for the agency. Other than the documents already provided and listed in the schedule of documents as 'Credentialing Zip', no further documents were located. It was noted that the documents contained in

the Credentialing Zip file were documents provided by the MHCCC Secretariat in response to a request made by the NALHNCC for a copy of the complainant's complete file

- the agency's Director of Mental Health Strategy and Operations was asked to search electronic files for documents relating to the MHCCC and the complainant but was unable to locate any such documents
- the Central Adelaide Local Health Network's Manager of Medical Administration was contacted to determine if that agency held any relevant documents, which it did not
- in response to the complainant's request, a complete copy of the complainant's personnel file relating to his employment in 2013 was attached and that the agency was waiting for further information to be retrieved from off-site storage relating to the complainant's employment in 2004
- if the complainant was not satisfied with part two of the determination, he could make an application for an internal review of the determination.

25. By email dated 6 March 2018 the complainant wrote:

Today, I went to the offices of Cowell Clarke, who after searching, advised me that the letter, with the file has not yet been received.

Later this evening I am flying to London, can you therefore send me a scanned copy of the 2004 file and check on what may have happened to the original hardcopy.

26. The complainant's 2004 personnel file was provided to the complainant's lawyer by letter dated 8 March 2018.

27. On 19 March 2018 the complainant emailed Ms Horgan raising concerns about the searches that were undertaken by the agency in relation to the FOI application. Ms Horgan responded by email dated 22 March 2018, referring the complainant to part two of the determination which set out the searches undertaken and the rights of review available to the complainant under the FOI Act.

28. In making a complaint to my Office about the agency, the complainant expressed the following concerns:

- the delay in the agency dealing with the complainant's FOI application
- the agency's handling of the complainant's FOI application, including a concern that the agency may have withheld the provision of information
- the sufficiency of the searches undertaken by the agency for documents within the scope of the complainant's FOI application.

Relevant law

29. The Freedom of Information Act provides:

3A—Principles of administration

...

(2) Agencies are to give effect to this Act in a way that—

- (a) assists members of the public and Members of Parliament to exercise rights given by this Act; and
- (b) ensures that applications under this Act are dealt with promptly and efficiently.

...

12—Right of access to agencies' documents

A person has a legally enforceable right to be given access to an agency's documents in accordance with this Act.

...

14—Applications to be dealt with by certain persons and within certain time

- (1) An application will be dealt with on behalf of an agency by an accredited FOI officer of the agency.
- (2) An application must be dealt with as soon as practicable (and, in any case, within 30 days) after it is received.

...

19—Determination of applications

- (1) After considering an application for access to a document, an agency must determine—
 - (a) whether access to the document is to be given (either immediately or subject to deferral) or refused; and
 - (b) if access to the document is to be given—any charge payable in respect of the giving of access; and
 - (c) any charge payable for dealing with the application.
- (2) If—
 - (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).

...

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.
- (2) An application for review of a determination—
 - (a) must be in writing; and
 - (b) must be accompanied by such application fee as may be prescribed; and
 - (c) must be addressed to the principal officer of the agency; and
 - (d) must specify an address in Australia to which notices under this Act should be sent; and

- (e) must be lodged at an office of the agency within 30 days after the day on which notice of the determination was given to the applicant or within such further time as the principal officer of the agency may allow.
- (3) On an application for review under this section the agency may confirm, vary or reverse the determination under review.

...

- (6) A determination is not subject to review under this section if it is made by or at the direction of the principal officer of the agency or at the direction of a person or body to which the principal officer is responsible.

...

49—Agency taken to have made determinations

For the purposes of any proceedings, a determination under this Act that has been made by an officer of an agency is to be taken to have been made by the agency concerned.

Whether the delay in the agency dealing with the complainant's Freedom of Information application was unreasonable

30. Section 14(2) of the FOI Act provides:

- ...
 (2) An application must be dealt with as soon as practicable (and, in any case, within 30 days) after it is received.

31. Pursuant to section 19(2)(b) of the FOI Act, if an agency fails to determine an application within 30 days after receiving the application, the agency is taken to have determined the application by refusing access to the documents. This is known as a 'deemed refusal'.
32. However, section 19(2a) provides that nothing prevents an agency from making a determination to give access to a document after the period within which the agency was required to deal with the application.
33. For completeness, I note that the FOI Act provides mechanisms by which an agency may:
- extend the time period within which an application would otherwise have to be dealt with. However, this may only be done in circumstances where the principal officer of the agency is satisfied that:⁶
 - the application is for access to a large number of documents or necessitates a search through a large quantity of information and dealing with the application within the usual 30 days would unreasonably divert the agency's resources from their use by the agency in the exercise of its functions;⁷ or
 - the application is for access to a document in relation to which consultation is required under the FOI Act and it will not be reasonably practicable to comply with the requirement to consult within the usual 30 days⁸.
 - 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 30 day period or any reasonable extension of that period under section 14A, would substantially and unreasonably divert the agency's resources from their use by

⁶ *Freedom of Information Act 1991*, s 14A.

⁷ *Freedom of Information Act 1991*, s 14A(1)(a).

⁸ *Freedom of Information Act 1991*, s 14A(1)(b).

the agency in the exercise of its functions.⁹ However, the agency must not refuse to deal with such an application without first endeavouring to assist the applicant to amend the application.¹⁰

34. The complainant's FOI application was made on 31 October 2016. Part one of the determination was made by the agency approximately eight months later on 23 June 2017. Part one of the determination only dealt with parts 3 to 8 of the complainant's application.
35. Part two of the determination, dealing with parts 1 and 2 of the complainant's application, was made by the agency on 22 February 2018. This was approximately 16 months after the complainant's FOI application was made.
36. Effectively, the determination was completed, in full, 16 months after the application was made.
37. The wording of the FOI Act is such that an application relating to documents held by an agency, must be 'dealt with' within 30 days after it is received,¹¹ unless the circumstances allow for the agency to do otherwise.
38. The FOI Act does not provide for an agency dealing with an application in parts by splitting a determination over time. I address this issue separately in my report.
39. In order to establish whether the delays associated with the agency's handling of the FOI application were unreasonable, I have considered what action was taken by the agency during the 16 month period.
40. The agency has informed me that, following receipt of the complainant's application:¹²

Unfortunately, it would appear that the application was misplaced and not dealt with at the time.

...

When NALHN was advised that Dr Kurl had contacted SA Health in May 2017 regarding his application, urgent enquiries were made in an attempt to source documents falling within the scope of the application.

...

On 23 June 2017 the applicant (Cowell Clarke Commercial Lawyers) was advised of the FOI determination ... In the notice of determination the applicant was advised that attempts were being made to source further documents from/regarding the MHCC (falling within part 1 and 2 of the request) ... Further enquiries were made in relating [sic] to the existence of further documents relating to the MHCC. No further documents were located and unfortunately, Dr Kurl's lawyer was not advised of this at that time.

When Dr Kurl contacted NALHN in February 2018, urgent enquiries were made in attempt to determine if any further documents existed relating to the MHCC ... The applicant was advised of this via a notice of determination (relating to parts 1 and 2 of the original request) on 22 February 2018.

...

NALHN apologises for the delays in responding to Cowell Clarke Commercial Lawyers' FOI application.

41. I have asked the agency whether, at any stage, the agency sought to extend the time within which to deal with the application. The agency has explained that:¹³

⁹ *Freedom of Information Act 1991*, s18(1).

¹⁰ *Freedom of Information Act 1991*, s 18(2).

¹¹ *Freedom of Information Act 1991*, s 14.

¹² Letter from agency dated 3 May 2018.

¹³ Letter from the agency dated 18 July 2018.

Given the significant period of time which had lapsed from the time the original application was received until the FOI Office located it, the 20 day time limit within which to grant an extension had passed. As a result, an extension under S.14A of the FOI Act was not sought.

42. In addition to the agency's submissions, I have considered documents provided to me by the agency.

43. The agency has informed me:¹⁴

As no known members of the MHCC were still employed at NALHN, the previous Executive Officers to the MHCC were contacted to determine if they held any records relating to the then MHCC and, if not, they were asked to provide advice as to whom the discovery request should be directed ...

44. An email chain indicates that on 24 November 2016, almost one month after the date of the complainant's application, Ms Horgan emailed two officers asking whether they held documents relating to the MHCCC and 'if you don't, can you please let me know who would'. One officer responded that day stating 'I don't think I have access anymore but I can try and look'. Ms Horgan asked that the officer search for 'any documents (applications, agendas, minutes, correspondence, emails, letter etc) in relation to an application by, and decision relating to [the complainant]'.

45. The documents provided to me indicate that no further action was taken by the agency.

46. Approximately six months after the application was made, by email dated 30 April 2017 the complainant informed the Personal Assistant (**the PA**) to the then Chief Executive Officer of SA Health that the agency had not yet provided a determination. The PA responded the following day stating that the Chief Executive of SA Health had been informed, the matter was being followed up with the agency's FOI team and the complainant would be re-contacted when further information was available.

47. It is unclear to me whether SA Health contacted the agency's FOI unit. However, the documents provided to me indicate that still no action was taken by the agency.

48. On 2 June 2017 Ms Horgan emailed the complainant stating:

Please accept my sincere apologies for the delay in processing your request for information ... your application was mislaid and is now being processed as a matter of priority.
I apologise for any inconvenience the delay may have caused.

49. However, this only occurred after the complainant re-contacted SA Health on 1 June 2017 and after SA Health's Senior Liaison Officer, Freedom of Information emailed Ms Horgan of the agency and asked that she contact the complainant 'as a matter of urgency and inform him of the progress to prevent any possible media involvement'.

50. The complainant responded to Ms Horgan's email asking when he could expect to receive a determination and, in addition, requesting copies of 'all my emails from and to my work email address [suffix@sa.gov.au] I seem to remember from 2000 to 2003 or 4 when I left'. On 8 June 2017 the complainant re-emailed asking for a response. Still having received no response, the complainant emailed again on 26 June 2017 noting that a month had passed since the matter was said to be being dealt with as a priority and that his emails had not been responded to.

¹⁴ Letter from the agency received on 3 May 2018.

51. Part one of the determination is dated 23 June 2017 and was therefore made several days prior to the complainant's email on 26 June 2017. However, the determination evidently was not posted on the date it was finalised and signed. Ms Horgan emailed the complainant on 28 June 2017 stating that a determination would be couriered to the complainant's lawyer the next morning and 'I apologise for not getting these out earlier'.
52. I am satisfied that the documents show that following part one of the determination, steps were initially taken to search for documents that were previously held by the MHCCC. On 13 July 2017, Ms Horgan re-emailed the previous executive officers of the MHCCC stating:¹⁵

Hi all,
 You may recall late last year I contacted you about a Freedom of Information application ...
 ...
 At that time, you indicated you no longer had access to the documents and were making further enquiries.

We still need to progress this application and it would be appreciated if you could provide me with any relevant documents ASAP. If you do not have access to records, it would be appreciated if you could please advise on the most appropriate person for me to contact.

53. There is no documentary evidence of further action being taken by the agency until 31 January 2018 whereby Ms Horgan emailed several officers, including the former executive officers of the MHCCC stating:

I have not received a response to the below FOI discovery request. The applicant has contacted me by phone today and is chasing up any documentation relating to the Mental Health Credentialing Committee.

Please note that we are under a legal obligation to provide members of the public with access to documents in the possession of the Government, subject only to restrictions as are necessary for the protection of the personal privacy and effective conduct of public affairs.

As a result, it is essential that documents relating to the then Mental Health Credentialing Committee's consideration of [the complainant's] credentialing application are provided ASAP. If you believe that the documents are more likely to be held/accessible by someone else, can you please let me know ASAP.

54. One officer replied by email dated 1 February 2018 stating 'I've had a search through Q-drive and there is nothing for this Dr Sorry'.
55. Following this email there is again no documentary evidence to indicate that any further action was taken by the agency to continue searches for documents relating to the MHCCC. I am mindful that the agency has submitted that it failed to inform the complainant at the time that no such documents had been discovered.
56. An email from the complainant to the agency on the evening of 1 February 2018 noted that six months had passed since the agency had explained that it was continuing to search for documents of the MHCCC and he had not been advised of an outcome. The complainant also queried why his personnel file relating to his employment in 2004 had not been included in the documents released by part one of the determination.
57. Having not received a response, the complainant sent a follow-up email on 15 February 2018 at 11.50am. At 12.20pm that same day, Ms Horgan received an email from a credentialing officer of the agency with the 'Credentialing Zip file' attached. It is unclear to me whether Ms Horgan contacted the credentialing officer in response to the

¹⁵ Email from Ms Horgan to officers dated 13 July 2017.

complainant's follow up email. Although I have requested copies of notations of all telephone calls, the agency has not provided such records. It is concerning that the agency may not have made or retained records of this kind.

58. That same day, Ms Horgan emailed a Human Resources Officer (**HR Officer**) for the agency requesting a copy of the complainant's personnel file from 2004. The HR Officer responded the next day stating the file had been accessed but authorisation was needed from the Manager. Ms Horgan sent a formal email request to the HR Manager that same day, who approved the release of the file to Ms Horgan. It was arranged that the file would be sent from Modbury Hospital to Ms Horgan on 19 February 2018.
59. An internal email chain between Ms Horgan and the former Principal Officer of the agency records that Ms Horgan submitted a draft of part two of the determination on 19 February 2018. On 22 February 2018 the Principal Officer noted 'I'm ok with it' but that another officer would consider the draft document the following day.
60. On 27 February 2018 the agency informed the complainant that part two of the determination had been sent to his lawyer on 22 February 2018. The email noted the complainant's 2013 personnel file was included with part two of the determination but that his 2004 personnel file was still being retrieved from storage.
61. The complainant emailed on 6 March 2018 stating:

Today, I went to the offices of Cowell Clarke, who after searching, advised me that the letter, with the file has not yet been received.
Later this evening I am flying to London, can you therefore send me a scanned copy of the 2004 file and check on what may have happened to the original hardcopy.
62. An internal email from an agency FOI Liaison Officer to Ms Horgan queries '... did his determination get sent to the lawyers'. There is no further email correspondence relating to this issue. Accordingly, it is unclear to me how the complainant eventually received a copy of part two of the determination.
63. By letter dated 8 March 2018 and addressed to the complainant's lawyer, the agency provided a copy of the complainant's 2004 personnel file.
64. The complainant then emailed Ms Horgan on 19 March 2018 explaining that he now resided overseas. The complainant then raised concerns about the searches for documents undertaken by the agency in handling his application. Ms Horgan responded on 20 March 2018, referring to part two of the determination as it set out the searches undertaken and the review rights available to the complainant.
65. On the information before me, it appears that:
 - approximately one month after the application was made the agency commenced enquiries with officers in order to undertake searches for documents
 - as submitted by the agency, the application was then 'misplaced'
 - the agency did not take further action until some eight months later when, following contact by SA Health, the agency emailed the complainant to apologise for the delay and advise that the matter would now be prioritised
 - part one of the determination was then made on 23 June 2017
 - several weeks after part one of the determination was made, in July 2017, the agency re-contacted officers in relation to searches for documents concerning the MHCC
 - no further action was taken by the agency until late January 2018 when the agency re-contacted those same officers

- as submitted by the agency, the agency failed to inform the complainant that, at that time, the agency was aware that no documents related to the MHCC could be discovered
 - following further contact from the complainant in February 2018 the agency commenced searches for the complainant's personnel files
 - on 19 February 2018 a draft of part two of the determination was submitted internally and on 22 February 2018 part two of the determination was finalised.
66. Accordingly there were several separate delays in the agency's handling of the application; the agency 'misplaced' the application, on numerous occasions failed to undertake searches for documents and failed to inform the complainant that documents within the scope of his application could not be found.
67. As no extension of time was sought by the agency, the time within which the application should have been dealt with was within 30 days of receipt of the application. Instead, the agency's determination was not complete until 16 months from the date the application was made.
68. I accept that section 19(2a) provides that nothing prevents an agency from making a determination to give access to a document after the period within which the agency was required to deal with the application. However, the objects of the FOI Act are to:¹⁶
- promote openness and accountability in government
 - to facilitate effective participation by members of the public in the making and administration of laws and policies.
69. In order to achieve these objects the FOI Act provides that, among other things, information concerning the operations of government is readily available to members of the public.¹⁷
70. Section 3A(1)(a) provides that the FOI Act should be interpreted and applied so as to further the objects of the Act.
71. In itself, it is concerning that the agency 'misplaced' the complainant's application and this only came to light eight months after the application was made when the complainant made enquiries.
72. The agency has submitted that once it became aware the application had been misplaced, steps were taken to obtain documents expeditiously. It is encouraging that the agency then worked to ensure that the complainant received documents within the scope of his application. However, it is equally concerning that, following part one of the determination, further delays and periods of inactivity by the agency ensued.
73. Given that the objects of the FOI Act provide that information should be readily available to the public so as to promote openness and accountability and facilitate a means by which the public may participate in the processes of government, it is my view that providing a part determination eight months after the application was made and finalising the application 16 months after the application was made, is not envisaged by the FOI Act.
74. In light of the above, my view is that the delay in the agency dealing with the complainant's FOI application was unreasonable within the meaning of section 25(1) of the Ombudsman Act.

¹⁶ *Freedom of Information Act 1991*, s 3(1).

¹⁷ *Freedom of Information Act 1991*, s 3(2).

Opinion

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) of the Ombudsman Act. I have formed this view for the following reasons:

- pursuant to section 14(2) of the FOI Act, the agency was required to deal with the application within 30 days of its receipt however, the agency did not make a full determination until 16 months after the application was made
- the agency initially 'misplaced' the application, on numerous occasions failed to undertake searches for documents and, when it later became evident that particular documents could not be discovered, the agency failed to inform the applicant
- although section 19(2a) of the FOI Act provides that nothing prevents an agency from making a determination to give access to a document after the period within which the agency was required to deal with the application, I do not consider that the circumstances relating to the handling of complainant's application are contemplated by section 19(2a).

In response to my investigation, the agency has informed me that:¹⁸

- the agency generally has a good reputation in relation to dealing with a large volume of FOI applications in a timely manner. The agency advised that 99% of applications received during 2016/17 were determined on time
- the agency has since reviewed its processes to ensure that an 'oversight like this' does not occur in the future
- in response to the handling of the complainant's application, the agency has introduced systems and processes aimed at ensuring all FOI applications are dealt with within the specified timeframe. The agency has advised that this includes regular reviews of outstanding applications and, where applications may require a search through a large amount of documents, FOI Officers seek extension.

In my revised provisional report I asked the agency to provide me with an explanation of the review undertaken. I received no further submissions.

In order to address my findings about the agency's dealing with the complainant's Freedom of Information application, I recommend that:

1. The agency provide a summary of the review undertaken of its processes and the outcome of that review.
2. The agency provide me with a more detailed explanation of the systems and process that have been implemented in response to the handling of the complainant's application, including copies of all updated policies and procedures reflecting the implementations.

Whether the agency's handling of the complainant's Freedom of Information application was wrong

75. Besides the delays, the complaint raised several concerns about the agency's handling of the FOI application.
76. Having considered the information before me, I have identified particular areas of concern and therefore will address each of these separately.

¹⁸ Letter from agency dated 18 July 2018.

Partial determination

77. The agency determined the application in two parts. Part one of the determination was made on 23 June 2017 and part two of the determination was made eight months later on 22 February 2018.
78. Section 19 of the FOI concerns the determination of applications and provides that an agency must determine:
- whether access to the document is to be given or refused
 - any charge payable in respect of the giving of access and for dealing with the application.
79. The FOI Act does not provide that a determination can be dealt with in parts. Rather, the FOI Act provides mechanisms by which an agency can:
- extend the time period within which to deal with the application if it is evident that the application concerns a large number of documents or a search through a large quantity of information and that dealing with the application would result in an unreasonable diversion of the agency's resources¹⁹
 - refuse to deal with an application if, among other things, it appears that the work involved in dealing with it within the required time period would substantially and unreasonably divert the agency's resources.²⁰
80. I have noted that the agency did not seek any extensions of time to deal with the complainant's applications. Similarly, no steps were taken by the agency to refuse to deal with the application.
81. The agency has advised me:

Over six (6) months had lapsed since Dr Kurl's lawyers had submitted its application and NALHN had been alerted to the oversight in misplacing the application. As a result, rather than advising Dr Kurl to submit a fresh application (on the basis that his application was a deemed refusal, and the time within which to seek review and appeal had expired), the FOI Officer undertook to deal with the application in a timely fashion.

The FOI Officer contacted Dr Kurl by email on 2 June 2017 advising his application had been misplaced and advising his application would be dealt with as matter of priority. Dr Kurl's response indicated he was satisfied with this approach.

The FOI Officer experienced difficulties discovering documents reacting to correspondence between members of the MHCC and MHCC meeting papers (part 1-2 of the request). As a result, and given the passage of time since the application was submitted, it was considered within the spirit of the Act to provide the applicant with as many documents as possible in a timely manner and for subsequent searches to be made for further documents. The applicant was advised, at that time, of the rights of review and appeal if it [sic] were dissatisfied with this approach.

Despite further discovery attempts, no further documents were discovered and it is unfortunate that the applicant was not advised at the time.

NALHN has since reviewed its processes to ensure that an oversight like this does not occur in the future.

82. Accordingly, it appears that once the agency had been alerted to the fact that a determination had not been made eight months after the application, it sought to expeditiously make a determination that provided the complainant with as many documents as possible. However, as the agency was not able to readily locate

¹⁹ *Freedom of Information Act 1991*, s 14A.

²⁰ *Freedom of Information Act 1991*, s 18(1).

documents relating to the MHCCC, part one of the determination was made releasing documents relating to parts 3 to 8 of the request.

83. The agency then re-contacted relevant officers in order for them to undertake searches for documents relating to the MHCCC. It appears at some stage in those enquiries it became known to the agency that no documents relating to the MHCCC could be accessed however, the agency failed to inform the applicant of this. Accordingly, part two of the determination was not made until eight months after part one of the determination, once the complainant had again followed the matter up himself.
84. I have jurisdiction under the FOI Act to undertake external reviews of agency determinations. In doing so, I have become aware of the manner in which agencies generally deal with applications and I note that it is not common practice for an agency to determine an application in separate parts. I remain concerned that doing so may not only result in delays in an application being fully determined but confusion as to what the full determination of the agency is.
85. I appreciate that the agency made a partial determination in consideration of the errors that had already occurred and in an effort to provide documents to the complainant as quickly as possible. However, in my view, the FOI Act does not envisage a determination being made in such a manner. In fact, I consider the agency's handling of the complainant's application an illustrative example of the risk involved in an agency making partial determinations over time.

Right to internal review

86. Part one of the determination informed the complainant of his right to an internal review of that decision. However, the complainant had a right to an internal review much earlier. Section 29 of the FOI Act provides that a person aggrieved by a determination is entitled to a review of the decision. Section 29 of the FOI Act provides that an application for internal review must be lodged with the agency within 30 days after the day on which notice of the determination is given to the applicant. However the Principal Officer of the agency has a discretion to extend that time.
87. When the complainant's application was not determined within the 30 days provided for by section 14 of the FOI Act, the agency was taken to have made a determination refusing access to the information requested. This meant that very early on the complainant had a right to make an internal review application to the agency. I am mindful that the agency appears to have 'misaid' the complainant's application. However, when the agency became aware of this and had direct contact with the complainant, it appears the agency failed to discuss the right to internal review with the complainant.
88. The agency has submitted that it instead proceeded to deal with the application on the basis that the time for internal review had expired and the complainant would have had to make a fresh application given the time that had passed. Given that the Principal Officer has a discretion to extend the time, in my view, neither submission is accurate.
89. The complainant was not informed of his right to an internal review until it was referred to by the agency in part one of the determination. It is not surprising that the complainant did not exercise that right, given that part one of the determination only dealt with part of the complainant's FOI request and advised that further searches were being undertaken. It appears that, in good faith, the complainant allowed those further searches to be undertaken expecting that it would not take another eight months for the agency to finalise the determination.

-
90. It is evident from email communications provided to me that when the complainant made numerous enquiries with the agency following part one of the determination, again the agency did not remind the complainant of his right to an internal review.
91. Had the complainant been fully informed of his right to make an application for internal review, particularly when Ms Horgan communicated with the complainant on 2 June 2017, the delays in the handling of the complainant's application may well have been minimised.
92. An agency has 14 days within which to make an internal review determination and subsequent to that, an applicant has a right to an external review with my Office or the South Australian Civil and Administrative Tribunal. This would have escalated the complainant's application and although it may potentially have resulted in the same outcome as part two of the determination, the complainant would not have waited 16 months for the agency alone to reach such a conclusion.
93. Given the extent of the communications directly between the complainant and the agency and the issues that had already occurred in the handling of the complainant's application, in my view, the agency should have taken further steps to ensure the complainant was fully informed of his rights.

Failure to communicate

94. In relation to the email communications between the complainant and the agency, I have observed that:
- following the issue of part one of the determination, the complainant emailed Ms Horgan on 13 July 2017 to enquire as to the progress of the searches for documents relating to the MHCCC
 - the complainant's email was not responded to. There is no evidence of any action being taken by the agency in relation to the application until 31 January 2018 when the agency emailed the officers requesting searches be undertaken
 - having received no response, the complainant emailed Ms Horgan on 1 February 2018 noting the time that had passed
 - the complainant's email was not responded to however, Ms Horgan communicated with Ms Sheedy about searches undertaken for documents
 - having received no response, the complainant emailed Ms Horgan on 15 February
 - the complainant's email was not responded to however, there was internal agency communication in relation to accessing the complainant's personnel file and part two of the determination was finalised and posted to the complainant's lawyer on 22 February 2018
 - on 27 February 2018 the agency emailed the complainant to inform him that part two of the determination had been sent to his lawyer.
95. Accordingly, there were significant periods of time in which the agency failed to communicate with the complainant following part one of the determination. This, in my view, is poor practice and particularly concerning given the errors that had already occurred in relation to the handling of the application.

Complainant's concerns about deliberate mishandling

96. In making the complaint to my Office, the complainant expressed concern that the agency may have deliberately delayed dealing with the application or withheld the provision of information. The complainant based his concern on the fact that Dr Russel Draper, Chair of the MHCCC at the time the complainant's credentialing application was considered, was recently found by the Independent Commissioner Against

Corruption to have committed maladministration in public administration in relation to the performance of his official functions as Clinical Director of the Oakden Older Persons Mental Health Service (**Oakden Facility**).²¹

97. I put the complainant's concerns to the agency and in response, the agency explained:²²

It is understood that Dr Russel Draper chaired the Committee and Ms Leonie Nowland, Director, Mental Health Strategy and Operations was a member - both of whom are no longer employed in the SA Public Sector. Even if they were contactable, it would be inappropriate for them to have retained copies of documents relating to their official duties and hence, they were not contacted.

98. Further, the agency submitted:

The MHCC was disbanded in 2015 and Dr Russel Draper was no longer employed by the Northern Adelaide Local Health Network at the time the FOI request was received. The ICAC inquiry did not relate to the MHCC in any way, nor did it influence or hinder the FOI process.

... I am not aware of any concerns being raised in relation to Dr Draper's role as Chair of the MHCC.

99. I have considered the Commissioner's report concerning the Oakden Facility. I note that:

- the Commissioner announced that he would conduct an investigation into the management and delivery of services at the Oakden Facility on 25 May 2017. This was approximately seven months after the complainant made the FOI application and one month before part one of the determination was made providing documents to the complainant.
- the Commissioner's report was released on 28 February 2018. This was six days after the second determination was made by the agency
- the Commissioner's investigation did not relate to the MHCCC or Dr Draper's role with the MHCCC but rather Dr Draper's management of the Oakden Facility
- there are strict confidentiality obligations associated with investigations undertaken by the Commissioner and therefore I query the likelihood of FOI officers of the agency having knowledge of the Commissioner's investigation concerning the Oakden Facility, including the findings relating to Dr Draper, prior to the public release of the Commissioner's report.

100. For completeness, the documents provided to me do not reveal any internal discussions of the agency that indicate a deliberate delay or withholding of information. Rather, the documents indicate significant failures by the agency to process the complainant's applications.

101. On this basis, it appears to me that rather than deliberately delaying the handling of the application and provision of information, there were a series of errors in the agency's handling of the application.

Conclusion

102. In light of the consequences of the agency dealing with the application in separate parts over time, the agency failing to properly assist the complainant in understanding his rights to internal review and failing to communicate with the complainant, my view is

²¹ A report by the Hon. Bruce Lander QC, Independent Commissioner Against Corruption 'Oakden, A Shameful Chapter in South Australia's History' (28 February 2018).

²² Letter from the Agency received 3 May 2018.

that the agency's handling of the FOI application was wrong within the meaning of section 25(1) of the Ombudsman Act.

Opinion

In light of the above, my view is that the agency's handling of the complainant's FOI application was wrong within the meaning of section 25(1) of the Ombudsman Act. I have formed this view for the following reasons:

- the agency dealt with the application in two parts, with a period of eight months between each part of the determination
- the agency failed to assist the complainant in understanding his right to internal review
- the agency failed to properly communicate with the complainant.

In order to address my findings about the agency's handling of the FOI application, I recommend that:

3. The agency does not deal with FOI applications in separate parts.
4. All officers of the agency working in FOI undertake further FOI training.
5. All officers of the agency working in FOI be reminded of the importance of responding to all email communications in a timely manner.

Whether the agency's searches for documents were insufficient and therefore unreasonable

103. The complainant has expressed concern that there is an 'absence' of information relating to his credentialing by the MHCCC. Although the agency provided documents that were discovered as being within parts 3 to 8 of the application, the agency was not able to locate documents within the scope of parts 1 and 2 of the application, being:

1. All correspondence between members of the Mental Health Clinical Credentialing Committee (MHCCC) regarding the Credentialing Application including emails, letters, file notes, and other records of conversation between members of the MHCCC;
2. File notes, minutes and other records of any meetings, deliberations and discussions of the members of the MHCCC leading to or relating in any way to the MHCCC Determination;

104. In approaching my Office, the complainant submitted:²³

Despite the significant passage of time, the officer responsible has produced little of the requested data. The method of her search appears to have been to ask a handful of people for the relevant documents. I have asked whether the information was not stored on a database, likely located on a server or why she has not contacted members of the committee who made the decision I seek further information about.

105. The complainant similarly raised these concerns with the agency. By email to Ms Horgan dated 1 February 2018, the complainant wrote:

My concerns is that little of substance concerning the discussion or decision making by the MHCC [sic], including, who was on the committee, when they met, the results of the discussions has been divulged. There are no agendas, meeting notes or discussion record between members of the MHCC [sic]. The organisation is obligated to keep these records as set out in the mandatory directive 'The Policy for Credentialling and Defining the Scope of Clinical Practice for Medical and Dental Practitioners'.

²³ Email from the complainant dated 22 March 2018.

... In our telephone conversation, you stated that you did not approach those who would have received and therefore could be in possession of the requested documents, nor has any electronic search for the information been undertaken, but instead talked of approaching the administrative support to the MHCC.

What precludes an electronic search via the servers for the requested information?

106. By email to Ms Horgan dated 19 March 2018 the complainant:
- asked whether the agency's electronic records at the time were held on a central server and, if so, what steps were taken to obtain such records
 - asked whether members of the MHCCC had been contacted to ask for copies of Minutes, Agendas and corrections which the complainant submitted are, in the normal course of events, circulated by email
 - noted that an email from the Chair of the MHCCC to the RANZCP relating to CPD requirements was provided but no response to that email had been provided. The complainant queried whether the response would be held on a server that was used by the MHCCC. Further the complainant noted it may have been circulated to members of the MHCCC and queried whether the members had been approached in relation to this email
 - noted that no communication between Dr Conrad Wareham, Executive Director Medical Services NALHN and any other parties had been provided and queried what action had been taken to search for such information
 - queried what steps had been taken to obtain any other communications to or from members of the MHCCC and any other parties.
107. In order to grasp the extent of the searches that were undertaken by the agency in relation to the complainant's application, I have considered the documentary evidence before me and submissions made by the agency.
108. Part one of the determination provided documents to the complainant within the scope of parts 3 to the 8 of his application and noted that the agency was attempting to source documents of the MHCCC relating to parts one and two of the application.
109. Part two of the determination informed the applicant that Dr Draper, the former Chair of the MHCCC, no longer worked for the agency. Therefore, the former Secretariat of the MHCCC had been contacted in order to ascertain the existence of documents relating to the complainant's credentialing application and the decision of the MHCCC. The agency determined that, other than the documents already provided to the complainant, no further documents could be located.
110. Part two of the determination also noted that the Personal Assistant to the NALHN Director Mental Health Strategy and Operations had been asked to undertake searches of the electronic file but no documents under the name of the MHCCC or the complainant could be located. Similarly the Manager, Medical Administration of the Central Adelaide Local Health Network had been contacted in order to determine whether that agency held documents of the MHCCC. However, again no documents relating to the complainant were discovered. The agency determined:
- Based on the searches and enquiries made, I have come to the conclusion that, other than those documents already provided, no further documents exist.
111. I asked the agency to provide a detailed description of the searches undertaken by the FOI unit to locate documents, including:
- the time taken to search for relevant documents
 - the databases that were searched
 - the search terms that were used
 - emails, hard drives, memory sticks or USBs that were searched
 - hard copy records searched

- enquiries that were made with relevant officers.

112. The agency provided the following response:

No records were kept of the time taken to search for relevant documents.

... the Mental Health Q drive was searched for documents relating to Dr Kurl's MHCC application. No USBs were identified as containing relevant information. The NALHN Q drive containing the NALHNCC files yielded all of the documents provided to the applicant. Hard copy files were retrieved from off-site storage and Dr Kurl's 2014 personnel file was located from the previously flooded Modbury Hospital basement. Enquiries were made with the Executive Assistant to a then MHCC member, the previous executive officers of the MHCC and the NALHNCC executive officer.

113. The agency also noted:²⁴

- the 2014 audit identified significant deficiencies in the record keeping practices of the MHCCC
- credentialing was then undertaken by the NALHNCC
- it was difficult for the agency to establish the former membership of the MHCCC. However, the agency was able to establish that Dr Draper had been the Chair of the MHCCC and Ms Leonie Nowland, Director Mental Health Strategy and Operations had been a member. Dr Draper and Ms Nowland are no longer employed in the public sector and even if Dr Draper and Ms Nowland were contactable, it would be inappropriate for them to have retained copies of documents relating to their former official duties
- the agency was able to identify and contact two former executive officers of the MHCCC. Neither officer was able to locate MHCCC documents or provide insight into where relevant documents may be held
- no other members of the former MHCCC are known to be currently employed by the agency and, in any case, it would be inappropriate for former members to have retained records relating to the MHCCC
- the NALHNCC Secretariat was contacted and provided a large number of documents within the scope of the application. These documents were provided to the NALHNCC by the MHCCC when the shift in credentialing took place and relate to the complainant's appeal process with the NALHNCC.
- following part one of the determination, the agency undertook searches for documents within the scope of parts one and two of the application but was unable to locate documents. However, the agency failed to inform the complainant of this
- following contact from the complainant in February 2018, the agency made further enquiries for documents relating to parts one and two of the application. Searches were undertaken by the Executive Assistant to the Director of Mental Health Strategy using the search terms "Dr Kurl" and "Mental Health Credentialing Committee" in the shared drive used by NALHN mental health units. However, no further documents were located
- the documents that have been provided to the complainant are 'believed to be a complete copy of the records relating to Dr Kurl's credentialing application and the decision of the then MHCC [sic]'.

114. In my provisional report, I accepted the agency's explanation that, due to the shift in credentialing from the MHCCC to the NALHNCC and the time that had passed, officers who once had access to documents of the MHCCC may no longer be employed by the agency or in the public service and it would be inappropriate for such officers to have retained MHCCC documents.

²⁴ Letter from the agency received 3 May 2018; Letter from the agency dated 18 July 2018.

115. I also accepted that due to the record-keeping issues of the MHCCC, there was the potential that documents within the scope of the complainant's application may once have existed but were not retained by the MHCCC at the time.
116. However I expressed concern that the agency had not been able to provide me with a documented record of the searches that were undertaken. Further, the only evidence of searches provided to me were email communications indicating:
- Ms Horgan emailed officers on 29 November 2016, one month after the application was first made, requesting that searches be undertaken. There is no evidence of further action being taken
 - part one of the determination released documents to the complainant six months later. There is no evidence of how those documents were discovered
 - following part one of the determination, Ms Horgan emailed officers on 13 July 2017 asking that searches be undertaken. No further action appears to have been taken until Ms Horgan sent a further email on 31 January 2018 which one officer responded to advising that the Q drive had been searched and no documents could be located.
117. I expressed the provisional view that these email communications alone suggest that minimal searches may have been undertaken by the agency. Particularly in light of the fact that significant periods of inactivity occurred in the agency's handling of the applications and submissions by the agency that it sought to provide documents as quickly as possible once those delays were brought to its attention.
118. I noted that, given that the documents of the MHCCC appear to have been provided to the agency when credentialing transitioned to the NALHNCC and given the age of the documents relating to the complainant's MHCCC credentialing application, it is likely that such documents would have been retained by the agency in storage in accordance with the *State Records Act 1997*.
119. Although the agency submitted that off-site storage was searched for relevant documents, my provisional report noted that I have no records of such searches being undertaken in relation to documents within the scope of the complainant's FOI application. Instead, email communications between Ms Horgan and other officers indicate that off-site storage was searched for the complainant's personnel files. I also noted that the complainant's personnel files did not form part of the FOI application as it was worded and, as I understand it, were instead provided to the complainant in a show of good faith.
120. My provisional report also noted that I had nothing before me demonstrating:
- whether other drives were searched in addition to the Q drive and if not, the agency's reasoning for not undertaking such searches
 - if only the Q drive was searched and other drives were not searched, the agency's reasoning for undertaking its searches in such a way
 - whether the server was searched and if not, the agency's reasoning for not doing so
 - whether off-site storage was searched for documents within the scope of the application
 - exactly which officers undertook searches, the time taken to undertake searches and the exact search terms used by each officer for each of the searches.
121. The Freedom of Information and Sufficiency of Search Guideline (**the Guideline**) created by State Records of South Australia²⁵ provides that electronic data information might reside on servers, disks, smartphones, portable storage devices and cloud based storage. The Guideline states:

²⁵ State Records of South Australia, Freedom of Information and Sufficiency of Search Guideline (July 2017).

It is advisable that agencies retain a detailed account of all the places, both physical and electronic, they have searched. This will ensure that if the applicant questions the agency's search or raises a complaint with the Ombudsman SA under the Ombudsman Act 1972, the agency can explain what attempts were made to locate all relevant documents. The time spent searching for and locating documents should also be recorded since an agency can charge the applicant for this time unless the applicant is entitled to a fee waiver or the agency chooses not to charge the applicant.

Individual FOI officers or other staff involved in searching may also have to swear affidavits or make statutory declarations confirming they have conducted a thorough search if the matter becomes the subject of a complaint to the Ombudsman.

A template of a basic form for staff to use to record their searches can be found on the State Records website.

122. Module 4 of the Freedom of Information training provided by State Records of South Australia to FOI officers has, since at least 2009, included a copy of the basic form to be used by staff when recording their searches.
123. I made the provisional observation that, it is concerning that the agency has not kept a record of the searches that were undertaken. I consider it prudent for all agencies to do so.
124. In my provisional report I explained that the FOI Act does not prescribe the manner in which questions concerning the sufficiency of the agency's searches to locate documents within the scope of an access application are to be resolved. Accordingly, I consider such matters in the context of whether the searches appear to have been unreasonable for the purposes of the Ombudsman Act.
125. In doing so, it is my usual practice to take guidance from the Queensland Information Commissioner who considers that a two-stage test is useful in sufficiency of search matters (**the two-stage test**). The two-stage test requires the following considerations:
 - a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency...; and if so,
 - b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstance of a particular case.²⁶
126. I then addressed the following:
 - the complainant considers that documents such as Minutes and Agendas of the MHCCC as well as email communications and records relating to the decision making process of the MHCCC relating to his credentialing application should exist
 - while I was mindful that issues have been identified with the record-keeping practices of the MHCCC, such documents are of a kind that should have been made and retained by the MHCCC. Given that the agency has undertaken what appears to be minimal searches, I was of the provisional view that there were reasonable grounds to believe that such documents may still potentially exist and, without wider searches, it cannot be concluded that such documents do not exist.
 - it is prudent for all agencies to keep records of the searches they have undertaken when dealing with FOI applications. Due to a lack of such records in relation to the agency's handling of the complainant's application, coupled with what appears to be limited searches undertaken swiftly and in response to issues

²⁶Shepherd v Department of Housing, Local Government & Planning (1994) 1 QAR 464 [19].

with the agency's handling of the application, I was unable to form the view that the search efforts of the agency were reasonable in the circumstances.

127. Accordingly, I formed the provisional view that the searches of the agency were unreasonable for the purposes of the Ombudsman Act.
128. In response to my provisional report the complainant made additional submissions relating to what he considers to be insufficiencies in the agency's searches for documents, including that:
- the agency should have undertaken searches of the agency's server
 - the agency should have undertaken a search of the mailboxes of particular employees of the agency and, if those individuals are no longer direct employees of the agency, the agency should have restored the relevant mailboxes.
129. In particular, the complainant submitted that the agency's server should be searched for:
- emails relating to the complainant's application for an appeal of the MHCCC decision; emails sent between 13 December 2013 and 6 March 2014 involving Dr Conrad Wareham (ED Medical Services), Professor Paddy Phillips (Chief Medical Officer), Ms Margot Mains (then CEO NALHN) and Ms Tanya Malins (Executive Assistant to the CEO)
 - all original emails in sent and received form of those contained in the Credentialing Zip file
 - NAHLNCC records relating to the appeal process not already contained in the Credentialing Zip file
 - records of a meeting that occurred between 15 and 26 November 2013 relating to the final decision of the MHCCC
 - emails to and from the following individuals relating to the complainant's original application and appeal (spanning the credentialing process from 1 September 2013 to 30 July 2014):
 - Russell.draper2@health.sa.gov.au
 - Darryl.Watson@health.sa.gov.au
 - Kirsteen.Knevitt@health.sa.gov.au
 - Conrad Wareham
 - Shane Gill
 - Douglas Wilson
 - Janine or Janina Gipslis
 - Megan.Glowik@health.sa.gov.au
 - Naz.Barbato@health.sa.gov.au
 - Hendrika.Meyer@health.sa.gov.au
 - Atanas.nikolof@sa.gov.au
 - Margot.mains@health.sa.gov.au
 - Leonie.nowland@health.sa.gov.au
 - Tanya.Malins@health.sa.gov.au
 - Brett.Thompson@health.sa.gov.au.
130. The complainant submitted that mailboxes should be searched and/or restored for:
- emails and attachments relating to the credentialing process from 1 September 2013 to 30 December 2014 and emails and attachments relating to a meeting that occurred between 15 and 26 November 2013 concerning the final decision of the MHCCC. The complainant submits the following mailboxes are relevant:
 - Russell.draper2@health.sa.gov.au
 - Darryl.Watson@health.sa.gov.au
 - Kirsteen.Knevitt@health.sa.gov.au
 - Conrad Wareham
 - Shane Gill

-
- Douglas Wilson
 - Janine or Janina Gipslis
 - Megan.Glowik@health.sa.gov.au
 - Naz.Barbato@health.sa.gov.au
 - Hendrika.Meyer@health.sa.gov.au
 - Atanas.nikolof@sa.gov.au
 - Margot.mains@health.sa.gov.au
 - Leonie.nowland@health.sa.gov.au
 - Tanya.Malins@health.sa.gov.au
 - Brett.Thompson@health.sa.gov.au.
 - emails and attachments that would have been received by an officer in lieu of a Secretary when there was no MHCCC Secretary in place from 24 October 2013 to 26 November 2013 and 13 December 2013 to 7 March 2014. In particular, emails and attachments sent/received between 13 November 2013 and 7 March 2014 that concern the matter eventually being passed to the NALHNCC for appeal. The complainant submits that all of the above mailboxes should be searched and/or restored.
 - an email with an attached letter sent by Dr Russell Draper to the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) on 29 October 2013 in relation to the complainant's credentialing and the RANZCP response to Dr Draper (the complainant submits that the RANZCP usually responded to matters approximately one month after a request was made)
 - sent and received emails relating to an email sent by Dr Russell Draper to Dr Conrad Wareham on 18 September 2013 including:
 - Dr Russell Draper's sent copy, with full header (full metadata), of the email sent on 18 September 2013 to Dr Conrad Wareham and Cc'd to Ms Kirsteen Knevitt
 - Dr Conrad Wareham's received copy, with full header (full metadata), of the email sent on 18 September 2013 by Dr Russell Draper at 15:58
 - Ms Kirsteen Knevitt's received copy, with full header (full metadata), of the email sent on 18 September 2013 by Dr Russell Draper at 15:58
 - Ms Kirsteen Knevitt's sent copy, with full header (full metadata), of her reply email sent on 18 September 2013 at 16:45 to Dr Russell Draper
 - Dr Russell Draper's received copy, with full header (full metadata), of Ms Kirsteen Knevitt's email sent on 18 September 2013 at 16:45
 - Ms Kirsteen Knevitt's received copy, with full header (full metadata), of Dr Russell Draper's reply email sent on 18 September 2013 at 17:54
 - Mr Daryl Watson's received copy, with full header (full metadata), of Dr Russell Draper's email sent on 18 September 2013 at 17:54
 - Mr Shane Gill's received copy, with full header (full metadata), of Dr Russell Draper's email sent on 18 September 2013 at 17:54
 - Mr Douglas Wilson's received copy, with full header (full metadata), of Dr Russell Draper's email sent on 18 September 2013 at 17:54
 - Ms Janina Gipslis' received copy, with full header (full metadata), of Dr Russell Draper's email sent on 18 September 2013 at 17:54.
 - an email received by Dr Russell Draper in December 2013, sent by the complainant, relating to the complainant's application for appeal, and any related emails sent and received by Dr Draper.
131. Accordingly, I sought a response from the agency in response to the complainant's additional submissions.
132. In relation to the complainant's submissions concerning searches of the agency's server, the agency responded with the following:

- in handling the original application the server was searched by the Executive Assistant to the Director of Mental Health Strategy using the terms 'Dr Kurl', 'Mental Health Credentialing Committee' and 'MHCC'
- the agency's Credentialing Officer searched the part of the Q drive used by the NALHNCC using the terms 'Dr Kurl', 'Kurl' and 'MHCC'. This search yielded the majority of documents provided to the applicant, including the Credentialing Zip File provided by the Executive Officer of the MHCCC to the NALHNCC representing the complainant's 'complete credentialing file'
- a search was undertaken of Objective (the agency's electronic record management system) using the terms 'Kurl', 'MHCC', 'credentialing' and 'credentialling'
- the agency considers it unlikely that any other part of the Q drive would contain information relating to the complainant's credentialing application or the subsequent appeal.

133. In relation to searches and/or restoration of mailboxes the agency responded:

- the complainant has been provided with a significant number of emails to and from the officers named in the complainant's submissions, including:
 - Dr Russell Draper, the then Chair of the Mental Health Credentialing Committee
 - Dr Naz Barbato, then Member of the MHCCC
 - Leonie Nowland, then member of the MHCCC
 - Atanas Nikolof, the then Executive Officer to the MHCCC
 - Kirsteen Knevitt, previous Executive Officer to the MHCCC
 - Conrad Wareham, then Executive Director of Medical Services
 - Hendrika Meyers, then A/Executive Director of Medical Services
 - Megan Glowik, Executive Officer to the NALHNCC
 - Prof Paddy Phillips, Chief Medical Officer
 - Tanya Malins, then Executive Assistant to Ms Margot Mains who was the then CEO of the agency
- the agency also submitted:

The SA Health intranet quotes "mailbox restores are charged at \$795 (excl. GST) per user mailbox per month" and "data is subject to availability on a case-by-case basis. Usual turnaround time is 3-6 months".

On this basis, the cost of restoring the 15 mailboxes of interest to Dr Kurl for a period of 11 months each would cost \$131, 175.

If the mailboxes were restored, in addition to the cost of restoring them, considerable resources would be required to search through the emails in an attempt to find any which have not already been provided to Dr Kurl.

The expected cost of restoring and searching the mailboxes would appear excessive and may yield little, if any, additional emails.

Searches of the server

134. In my provisional report I formed the view that the searches undertaken by the agency were unreasonable on the basis that:

- the agency appears to have only searched the Q drive
- the agency appears to have searched hard copy files in off-site storage for the complainant's personnel file and not documents within the scope of the FOI application
- there were extended periods of time in which it appears the agency did not undertake searches for documents. Further, it appears the searches that were undertaken were done too quickly as issues in the agency's handling of the application came to light

- the agency failed to keep records of the searches undertaken.
135. Accordingly, I foreshadowed recommending that, among other things, the agency undertake further searches for documents within the scope of the complainant's application.
136. In response to the complainant's submissions made following my provisional report, the agency has advised that searches of the server were undertaken when handling the original application and that the agency's Q drive as well as Objective was searched. The agency has explained that this is where relevant documents would be stored rather than on other drives.
137. I accept that it now appears that the agency undertook wider searches than those that were first explained to me. However, for the other reasons set out in my provisional report, I remain concerned with the manner in which the agency searched for documents within the scope of the complainant's application.
138. I also draw attention to a further submission from the complainant that he considers there is evidence in the documents which shows there are documents on other drives, such as C drive and Z drive. I however note that C drive typically refers to the local storage on a single computer which are not part of a shared server and as such it may not be indicative of further drives that need to be searched.
139. I am mindful that a search of the agency's server as a whole may not result in documents within the scope of the complainant's application being discovered and may be considered too onerous.
140. What is more, I am mindful that my provisional report foreshadowed recommending that the agency undertake further searches for documents within the scope of the complainant's application, that the agency clearly record the searches and provides this record to the complainant along with any outcome of the searches.
141. My view remains unchanged in this respect. However, I note that in undertaking further searches, the agency should turn its mind to whether further drives may potentially yield a result in relation to documents within the scope of the complainant's application. These considerations should be documented as part of the agency's further searches and provided to the complainant.

Searches and restoration of mailboxes

142. The complainant has submitted that the mailboxes of particular officers who were involved with his credentialing application at the time, should be searched. I understand that in order to undertake those searches, the mailboxes would need to be restored due to the time that has passed and due to mailboxes no longer being accessible based on a change in officer employment circumstances.
143. The FOI Act is silent as to whether an agency is required to restore mailboxes when processing FOI applications.
144. The Queensland Information Commissioner considers that an agency is only required to take reasonable steps to locate a document. The Australian Information Commissioner echoes this view.
145. The meaning of 'reasonable' has been construed by the Australian Information Commissioner as not going beyond the limit assigned by reason, not extravagant or

excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.²⁷

146. What constitutes a reasonable search depends on the circumstances of each request and will be influenced by the normal business practices in the agency' operating environment.²⁸ At a minimum, the agency should take steps to locate a document, having regard to, among other things, the current and past file management systems, the age of the documents and the individuals within the agency who may be able to assist in locating the documents.²⁹
147. Whether it is necessary for an agency to conduct a search of backup systems for documents will depend on the circumstances. If an agency retains data for a maximum period and the applicant is seeking documents that are older than that period, it may not be necessary to undertake a search of backup systems.³⁰
148. I am of the view that my consideration of what is fair and reasonable must be based on the circumstances at hand and the information that is before me. In addition, I must reach a determination which is fair and reasonable both for the applicant and the agency.
149. I appreciate that the complainant is able to identify specific emails from specific officers which he considers should exist, should be held by the agency and therefore should have been discovered by the agency and consequently provided to him.
150. However, I also appreciate that, given the change in the committee that handled credentialing applications and that relevant officers are now no longer taken to be officers of the agency, there have been limitations to the searches the agency has been able to undertake.
151. I am of the view that that agency is required to take reasonable steps rather than exhaustive steps to locate documents.
152. I am mindful of the time that has passed since the documents sought by the applicant were created and that mailboxes would need to be restored in order for the agency to attempt to search and locate relevant documents. I am mindful that the cost of restoring the 15 mailboxes identified by the complainant and for the period of time indicated by the complainant, would amount to approximately \$131,175.00. Lastly, I am mindful that it is my continued view that the agency should undertake further searches given the other issues I have identified with the agency's original searches.
153. Accordingly, it is my view that the search efforts of the agency were not unreasonable on the basis that the mailboxes identified by the complainant have not been restored or searched. To the contrary, it would arguably be unreasonable for me to recommend that such action be taken by the agency given the cost and the resources that would be involved for the agency to do so.

²⁷ *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

²⁸ *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

²⁹ *'KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

³⁰ *'HL' and Department of Defence* [2015] AICmr 73.

Opinion

In light of the above, my view remains the same as my provisional view in that, the searches undertaken by the agency were unreasonable within the meaning of section 25(1) of the Ombudsman Act. I have formed this view for the following reasons:

- the agency appears to have searched hard copy files in off-site storage for the complainant's personnel file and not documents within the scope of the FOI application
- there were extended periods of time in which it appears the agency did not undertake searches for documents. Further, it appears the searches that were undertaken were done so quickly as issues in the agency's handling of the application came to light
- the agency failed to keep records of the searches undertaken.

In order to address my views about the agency's handling of the FOI application, I recommend that:

6. the agency undertake further searches for documents within the scope of the complainant's application. The agency clearly records the searches and provide this to the complainant along with any outcome of the searches.
7. the agency, as a matter of practice, keeps a detailed record of all searches undertaken for documents when handling FOI applications.

Summary and recommendations

My views are as follows:

- In relation to the agency's delay in dealing with the complainant's Freedom of Information Application, my view is that the agency acted in a manner that was unreasonable within the meaning of section 25(1) of the Ombudsman Act.

In order to address my findings about the agency's dealing with the complainant's Freedom of Information application, I recommend that:

1. The agency provide a summary of the review undertaken of its processes and the outcome of that review.
 2. The agency provide me with a more detailed explanation of the systems and process that have been implemented in response to the handling of the complainant's applicant, including copies of all updated policies and procedures reflecting the implementations.
- In relation to the agency's handling of the complainant's Freedom of Information application, my view is that the agency acted in a manner that was wrong within the meaning of section 25(1) of the Ombudsman Act.

In order to address my views about the agency's handling of the FOI application, I recommend that:

3. The agency does not deal with FOI applications in separate parts.
4. All officers of the agency working in FOI undertake further FOI training.
5. All officers of the agency working in FOI be reminded of the importance of responding to all email communications in a timely manner.

- My view is that the searches undertaken by the agency were insufficient and therefore the agency acted in a manner that was unreasonable within the meaning of section 25(1) of the Ombudsman Act.

In response to my revised provisional report, the complainant raised concerns that he has suffered personal consequences as a result of the agency's insufficient search.³¹ He asked that as a result of the consequences he has had to bear, that I offer stronger encouragement that the agency conduct a more onerous search. I wish to draw the applicant's attention to section 25(2) of the Ombudsman Act which sets out the powers available to me in the case of investigations. Whilst I am mindful of the consequences that the applicant has had to face due to the agency's dealing of his application and the insufficiency of search, the recommendations that I make are those that I consider appropriate and within the scope of my powers.

In order to address my views about the agency's handling of the FOI application, I recommend that:

6. The agency undertake further searches for documents within the scope of the complainant's application. The agency clearly records the searches and provide this to the complainant along with any outcome of the searches.
7. The agency, as a matter of practice, keeps a detailed record of all searches undertaken for documents when handling FOI applications.

Final comment

In accordance with section 25(4) of the Ombudsman Act the department (or council) should report to the Ombudsman by **18 May 2020** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Health and Wellbeing as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

8 April 2020

³¹ Letter from complainant dated 14 January 2020.