



## Final Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Department	Department for Correctional Services
Ombudsman reference	2019/09754
Department reference	CEN/20/0570
Date investigation commenced	31 March 2020
Issues	<ol style="list-style-type: none"><li>1. Whether, between January 2018 and January 2020, the department failed to consistently acknowledge receipt of applications made under the <i>Freedom of Information Act 1991</i> in a timely manner, and whether this failure was wrong</li><li>2. Whether, between January 2018 and January 2020, the department failed to seek clarification from applicants:<ul style="list-style-type: none"><li>• in timely manner</li><li>• in a manner required by the Freedom of Information Act</li></ul>and whether these failures were:<ul style="list-style-type: none"><li>• contrary to law</li><li>• and/or wrong</li></ul></li><li>3. Whether, between January 2018 and January 2020, the department failed to assist applicants to reduce the scope of their applications:<ul style="list-style-type: none"><li>• in a timely manner</li><li>• in a manner required by the Freedom of Information Act</li></ul>whether this failure was:<ul style="list-style-type: none"><li>• contrary to law</li><li>• based on a mistake of law</li><li>• and/or wrong</li></ul></li><li>4. Whether, between January and December 2020, the department failed to consistently receive and record Freedom of Information related mail from prisoners in a timely manner, and whether this failure was wrong</li></ol>

## Jurisdiction

Between 2018 and 2020, I became concerned about how the Department for Correctional Services (**the department**) communicates with and assists prisoners who make applications for access to documents or amendment of records under the *Freedom of Information Act 1991* (**the FOI Act**). In light of these concerns, I commenced an investigation of my own initiative pursuant to section 13(2) of the *Ombudsman Act 1972*.

I consider it is proper to exercise my discretion to do so for the following reasons.

Access to Government-held information via the FOI Act is an important right for all South Australians. It is essential to transparent and accountable decision-making, and informed participation in the development and administration of laws and policies that guide government decisions. This right should not be curtailed by inefficiencies or errors in the administration of the FOI Act.

As individuals who are regularly, and often significantly, affected by government decision-making, prisoners' right to information is particularly important. I understand that most FOI applications by prisoners request access to documents concerning their custody and management,<sup>1</sup> and that departmental policy occasionally prohibits access except by application under the FOI Act.<sup>2</sup> However, unlike the general public, prisoners have limited options to seek advice about the FOI Act, and must often rely on written communication by post in order to make an application and respond to the department in the course of an application's progress.

With this in mind, I considered it proper to act on my concerns and commence an own initiative investigation of the department's early management of FOI applications and communication with FOI applicants who are prisoners.

Since commencing this investigation, I have received complaints from prisoners, raising issues that are the same or substantially similar to those listed above. Rather than conduct individual investigations of each complaint, I advised the complainants of this investigation and my intention to consider the issues identified in their complaints more broadly.

In my view, these ongoing complaints indicate that the issues continue to arise, appear to be systemic, and warrant attention and response by my Office and by the department. I understand that the department is currently reviewing its FOI policies and procedures, and I anticipate that this report may be of use in that process.

## Investigation

My investigation has involved:

- reviewing complaints made by prisoners to my Office between 2018 and 2020 about the department's management of their applications
- seeking a response from the department, including:
  - records of FOI applications between 2018 and 2020
  - relevant policies and an explanation of current practices
- seeking further information from the department about specific applications identified in its records

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<sup>1</sup> In response to my investigation, the department explained that, generally speaking, the information most commonly sought by prisoners are case notes, case reviews, and documents relating to the Serious Offender Committee and Rehabilitation Program Branch of the department.

<sup>2</sup> The department advised my Office that seven of its 109 Standard Operating Procedures require that requests by prisoners for certain information be made under the FOI Act.

- seeking an explanation from the department about its processes for receiving and recording prisoner mail
- reviewing prisoner correspondence provided to my Office in the course of external reviews since January 2020
- considering:
  - the FOI Act
  - guidelines issued by State Records of South Australia
  - the department’s Freedom of Information Procedure Manual
- providing the department with my provisional report for comment, and considering its response
- preparing this report.

Some of the records provided by the department appear to be incorrect.<sup>3</sup> Where necessary, I have considered further information provided by the department in order to gain an accurate understanding of certain FOI applications. Where it has not been possible to reconcile the department’s information, I have not relied on the relevant data.

After reviewing the department’s records for 510 FOI applications received between January 2018 and January 2020, my Office requested relevant documents for 136 specific applications, particularly where delays and limited communication appeared to have occurred. This included records of communication between the applicant and the department, and any determinations, where one had been issued. Of the files obtained:

- 106 concerned the application of section 13 and 15 of the FOI Act, and were relevant to my consideration of issue two
- 30 concerned the application of section 18 of the FOI Act, and were relevant to my consideration of issue three

although a number of the files concerned all three sections, or appear to have been miscategorised in the department’s records.

11 of the files are presented as case studies in this report.

Where I have considered the efficiency of the department’s prisoner mail system, I have had regard to records of my Office’s interactions with the department in the course of external review applications in 2020, although I have not considered the content or outcome of the external reviews.

## Terms

In assessing the records provided by the department and timeliness of its communication with applicants, I have adopted the following metric. Each category is represented with a particular colour in the graphs 1, 3 and 4 of this report.

Colour	Definition
Blue	Correspondence, communication or action within 3 days of the previous relevant contact (i.e. an application, an applicant’s response to the department’s request for clarification or reduction of scope)
Green	Correspondence, communication or action between 4 and 7 days after the previous relevant contact

<sup>3</sup> For example, at times, the records provide that the department took action in response to an FOI application *before* it had been received.

Yellow	Correspondence, communication or action between 8 and 14 days after the previous relevant contact.
Orange	Correspondence, communication or action between 15 and 30 days after the previous relevant contact.
Grey	Correspondence, communication or action between 31 and 60 days of the previous relevant contact.
Dark grey	Correspondence, communication or action more than 60 days after the previous relevant contact.

I have not considered applications made by members of the public. A reference to an applicant means an applicant who is a prisoner.<sup>4</sup>

Occasionally, where referring to the general application of the FOI Act, I have used the term ‘agency’ as this is the language of the Act. Otherwise, I refer to the department.

### 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.<sup>5</sup> It is best summed up in the decision as follows:

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 ...<sup>6</sup>

### Procedural fairness

The department did not raise any significant objections to the reasoning or conclusions detailed in my provisional report, or the recommendations I foreshadowed. It is therefore unnecessary for me to alter my conclusions, and there are no notable changes in the data or reasoning between my provisional report and this report. Nevertheless, I have referred to the department’s response, where relevant, in the body of this report.

### Background

1. For a number of years, individual complaints and external reviews by my Office have given rise to concern about the department’s communication with FOI applicants who are prisoners, and the early management of their FOI applications.<sup>7</sup>
2. In late 2019, my Office conducted a review of complaints lodged by prisoners about their FOI applications over a two year period. The review identified a number of issues in the early stages of FOI applications:

<sup>4</sup> On occasion, this includes applications made on a prisoner’s behalf.

<sup>5</sup> 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.

<sup>6</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

<sup>7</sup> That is, before the department turns to determine an original or internal review application.

- delays between an FOI application being received by the department's FOI unit and an applicant receiving an acknowledgement of that receipt
  - how the department seeks clarification from applicants, pursuant to section 15 of the FOI Act
  - the apparent conflation of sections 15 and 18 of the FOI Act, where it did not appear that the department had met the obligations under section 15 before proceeding to apply section 18
  - an applicant's inability to contact the department's FOI unit directly for advice
  - the department's general preference to contact applicants by letter, rather than by officer assisted phone call or other, more efficient methods.
3. More recently, it has come to light that the department's processes for prisoners' FOI-related mail may be relevant to the issues above as it appears that there may be a delay between the receipt of hardcopy prisoner mail and the electronic recording of that mail by the FOI unit. This issue warrants specific attention, and I have dealt with it as a discrete part of this investigation.

### Relevant law and policies

4. The FOI Act relevantly provides:

#### 3–Objects

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament–
- (a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good governance of the State; and
  - (b) to facilitate more effective participation by members of the public in the processes involved in making and administration of laws and policies.
- (2) The means by which it is intended to achieve these objects are as follows:
- (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
  - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; and
  - (c) enabling each member of the public to apply for the amendment of such government records concerning his or her personal affairs as are incomplete, incorrect, out-of-date or misleading.
- (3) Nothing in this Act is intended to prevent or discourage the publication of information, the giving of access to documents or the amendment of records otherwise than under this Act if it is proper and reasonable to do so or it is permitted or required by or under any other Act or law.

#### 3A–Principles of administration

- It is the intention of the Parliament–

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

#### 4—Interpretation

- (1) In this Act, unless the contrary intention appears—

...  
*document* includes anything in which information is stored or from which information may be reproduced;

...

- (5) Where—

- (a) an agency holds information in computer storage; and
- (b) a particular document is capable of being produced by the computer on the basis of information so stored,

the agency is to be taken to hold that document.

...

#### 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.

#### 13—Applications for access to agencies' documents

An application for access to an agency's document—

- (a) must be in writing; and
- (b) must specify that it is made under this Act; and
- (c) must be accompanied by such application fee as may be prescribed; and
- (d) must contain such information as is reasonably necessary to enable the document to be identified; and
- (e) must specify an address in Australia to which notices under this Act should be sent; and
- (f) must be lodged at an office of the agency, and may request that access to the document be given in a particular way.

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

- (1) An application will be dealt with on behalf of the 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.

### 15–Incomplete or wrongly directed applications

An agency must not refuse to accept an application merely because it does not contain sufficient information to enable the document to which it relates to be identified without first taking such steps as are reasonably practicable to assist the applicant to provide such information.

...

### 18–Agencies may refuse to deal with certain applications

- (1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.
- (2) An agency may not refuse to deal with such an application without first endeavouring to assist the applicant to amend the applications so that the work involved in dealing with it would, if carried out, no longer substantially or unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.
- ...
- (5) An agency that refuses to deal with an application under this section must forthwith cause written notice of that fact to be given to the applicant.
- (6) Such a notice must specify–
- (a) the reasons for the refusal; and
  - (b) the findings on any material fact underlying those reasons, together with a reference to the sources of information on which those findings are based.
- ...
- (8) A refusal to deal with, or continue to deal with, an application under this section is a determination for the purposes of this Act.

### 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
- ...
- (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 an application,

the agency is 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.

### 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.
- ...
- (5) An agency that fails to determine an application made under this section within 14 days after it is received by the agency is, for the purposes of this Act, to be taken to have confirmed the determination in respect of which a review is sought.
5. Under Part 4 of the FOI Act, an applicant may:
- apply for an amendment of an agency's records
  - seek internal review of an agency refusal to do so.
6. The agency is required to make a determination, or an internal review determination, within the same time frames as those required for applications for access to documents – 30 days and 14 days, respectively.
7. Finally, Part 5 of the FOI Act affords an applicant the opportunity for external review of an agency's determination, either by my Office or the South Australian Civil and Administrative Tribunal. In each instance, applications for external review must be made within 30 days of:
- the applicant receiving a determination by the agency's principal officer, whether in response to the initial application or for internal review
  - the date on which the agency was required to issue an internal review determination, but failed to do so.

#### *State Records of South Australia guidelines*

8. State Records issues guidelines to assist agencies in processing and determining FOI applications. The 'Processing FOI Applications Guideline' provides the following of relevance:

#### ***Processing FOI Applications***

The following information is provided to assist agencies process FOI applications in a logical sequence that is consistent with the requirements of the FOI Act...

#### **Step 1 FOI Application Received**

Ensure that the application has a clear 'date received' notation (ie the application is date stamped). The time limits commence the day after receipt of an application provided it is a valid application.

...

#### **Step 2 Is the application valid?**

Check the application to ensure that it is valid. ...

If the application is valid, a letter acknowledging receipt of the application should be sent to the applicant.

If the application is not valid the Accredited FOI Office is obligated to assist the applicant to make it a valid application. **The 30 day time limit does not commence until the application is considered valid.**

[My emphasis]

...

#### **Step 4 Identify all documents covered by the application**

...

Section 4(1) of the FOI Act provides the following definition of a document:



*document* includes anything in which information is stored or from which information may be reproduced

This a very broad definition and can involve consideration of many types of documents including:

- paper documents, including drafts
- temporary and permanent files
- notes (including messages on post-it notes)
- electronic documents including databases and emails
- DVDs, video tapes or film recordings
- photos, maps and plans
- mobile phone SMS & MMS messages.

In addition, section 4(5) of the FOI Act provides that where an agency holds information in computer storage, and a particular document can be produced on a basis of the information so stored, the agency is taken to hold that document. **This does not mean that agencies are obliged to research information. The obligation is only to provide access to existing documents or documents that can readily be produced from information held in computer databases.**

[My emphasis]

#### **Step 6 Is the application excessive?**

Sometimes the scope of the application results in a large number of documents being captured by the FOI application.

If the application is very broad or you are having difficulty identifying exactly what information the applicant wants to access, you should contact the applicant and discuss narrowing the scope of the application in accordance with section 18(2) of the FOI Act. If the applicant agrees to narrow the scope of the application, you will then need to confirm the agreed terms in writing with the applicant. ...

If the agency believes the work involved in processing the application will exceed the application fee, an advance deposit from the applicant can be sought. ...

If the applicant does not agree to narrow the scope of the application, section 18(1) of the FOI Act could be applied to refuse the application. ...

#### **Step 7 Will the application unreasonably divert the agency's resources?**

If the applicant is unwilling to reduce the scope of the application, you should establish whether dealing with the application will substantially and unreasonably divert the agency's resources. If a decision that the agency's resources would be substantially and unreasonably diverted is made, and a reasonable time extension would not resolve this, you can refuse the application under section 18(1). ...

#### **Step 8 Is an extension of time needed?**

For applications that are seeking access to large numbers of documents or require considerable consultation or both, an extension of time for dealing with the application may be necessary. The applicant must be advised of the extension to the time limit in writing by the Principal Officer. ...

#### *The department's guidelines*

9. Finally, the department's FOI unit is currently guided by its Freedom of Information Procedure Manual (**the manual**). I understand that two versions of the manual were in use during the period relevant to this investigation, and I have had regard to both versions.
10. The manual provides a detailed procedural guide for the department's management of FOI applications. Little guidance is given on how to interpret and apply the provisions of

the FOI Act, although the manual does refer to State Records guidelines. Much of what remains is not relevant to this investigation, except that:

- applications are only acknowledged after they are considered valid under section 13 of the FOI Act
- once considered valid, all applications must be acknowledged by letter or email, or verbally.

**Whether, between January 2018 and January 2020, the department failed to consistently acknowledge receipt of applications under the Freedom of Information Act in a timely manner, and whether this failure was wrong**

11. My investigation of this issue has involved consideration of:
  - records of the 510 applications received by the department between January 2018 and January 2020
  - eight files in which the department issued an acknowledgement letter 30 days or more after the application had been received
  - 53 files in which an acknowledgment was not issued, and the department determined the application 30 days or more after it had been received
  - six files in which an acknowledgement letter was not issued, the department did not issue a determination, and the applicant did not seek internal review
  - one complaint received by my Office in 2019.
12. When the department receives an application, certain time frames are triggered under the FOI Act. Chief among them, the department must issue a determination within 30 days of receiving the application. After this point, the applicant is afforded certain rights of review.
13. Although it is not specifically required by the FOI Act, acknowledging receipt of an application is recognised as good administrative practice. In response to my provisional report, the department accepted this view. In his 2014 audit of the State Government departments' implementation of the FOI Act, my predecessor recommended that, absent a formal requirement under the FOI Act, agencies should acknowledge receipt of an application. Such acknowledgement allows the department to:
  - confirm receipt of the application and its terms
  - advise the applicant of the time in which they may expect to receive a determination
  - advise the applicant of their future review rights.
14. As the timeframes under the FOI Act pass quickly, it is also important that acknowledgement in this form is provided promptly. This is consistent with the principles of administration outlined in section 3A of the FOI Act.
15. In response to my investigation, the department provided my Office with a copy of its template letter for acknowledging receipt of an application (**the acknowledgement letter**). It provides the following, with fields between angled brackets to be adapted to the relevant application:

I acknowledge receipt of your Freedom of Information application dated <>, received by the Department for Correctional Services (the Department) on <>, seeking access to:

<[Field for the terms of an application]>

In accordance with section 14(2) of the *Freedom of Information Act 1991* (FOI Act), your application for access to documents held by the Department will be processed within 30 days; therefore, you can expect a response by <check spreadsheet>.

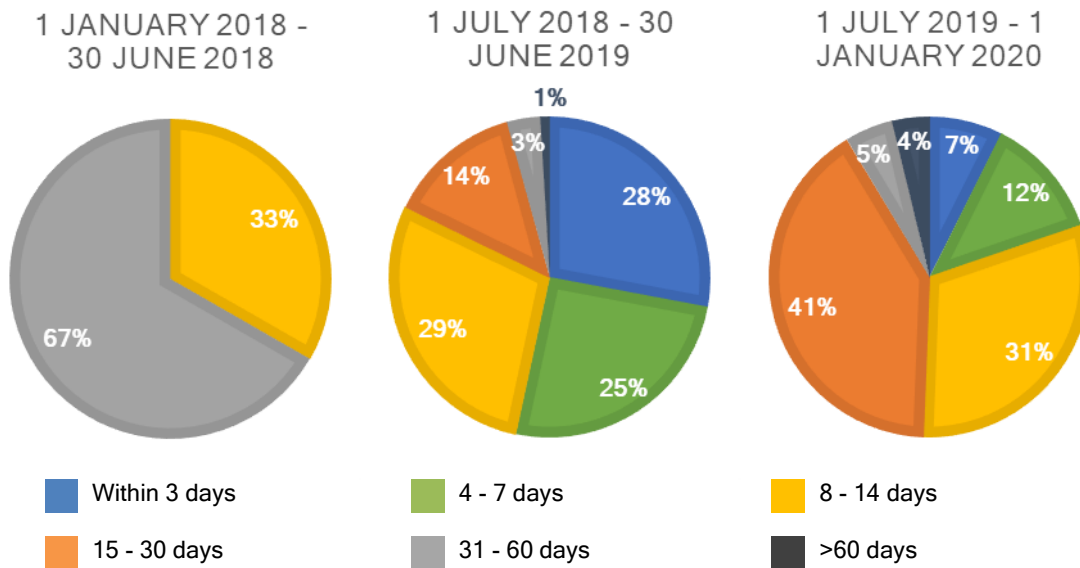
...

Should you not receive a response by the due date, in accordance with section 29(1) of the FOI Act, you are entitled to exercise your right of internal review within 30 days of the due date. A fact sheet outlining your rights of review and appeal is <prisoners> attached...

<only prisoners> If you have any questions regarding the FOI process please speak with your Case Management Coordinator, who can contact the FOI Unit for advice. Enclosed is a fact sheet about FOI that may assist you.

16. Despite the availability of this template, delays in the department’s acknowledgement of applications appear to have been common between 2018 and 2020.

*Graph 1: Delays in acknowledgement of valid applications*



17. The percentages shown above are rounded for the sake of legibility and clarity. Further detail is provided below.<sup>8</sup>

*1 January 2018 - 30 June 2018*

18. Of the 66 applications received between 1 January and 30 June 2018<sup>9</sup>, the department was able to immediately acknowledge receipt of 43 – the applications were valid, did not require a reduction of scope and were not transferred to another agency.

19. However, only three appear to have been formally acknowledged by the department.<sup>10</sup> Of these three, one was acknowledged 16 days after the application had been received by the department. The other two were acknowledged 38 and 56 days after the applications had been received. By this point, the department’s deadlines for determining the applications had passed.

*1 July 2018 - 30 June 2019*

20. Of the 274 applications received between 1 July 2018 and 30 June 2019,<sup>11</sup> the department was able to immediately acknowledge receipt of 194. The department

<sup>8</sup> A similar approach appears later in this report when considering delays in application clarification and reduction of scope.

<sup>9</sup> One file was excluded from consideration due to an apparent error in the records provided by the department.

<sup>10</sup> One file was excluded as the acknowledgment letter served to advise the applicant that their application had been transferred to another agency.

<sup>11</sup> Five files were excluded due to apparent errors in the records provided by the department.

formally acknowledged receipt of 118 but failed to acknowledge 76. 63 (approximately 53%) of the acknowledgements occurred within a week of receipt.

*1 July 2019 - 1 January 2020*

21. Of the 159 applications received between 1 July 2019 and 1 January 2020,<sup>12</sup> the department was able to immediately acknowledge receipt of 106. The department acknowledged receipt of 81 but failed to acknowledge 25. 16 (approximately 19%) of the acknowledgements occurred within a week of receipt.
22. These statistics are concerning, particularly when the process for receiving, assessing and acknowledging applications is relatively simple. There are six criteria for an application to meet in order to be valid. Five of the criteria – sections 13(a), (b), (c), (e) and (f) – do not require complex assessment and may be determined on the face of the application. Where an application fails to satisfy section 13(d), the department defers acknowledgement until clarification is sought and obtained.
23. Once an application is assessed as valid, little work is required to prepare an acknowledgement letter, as the template provided at paragraph 15 indicates. With this in mind, I do not consider it is appropriate or reasonable for acknowledgement to take more than a week. In response to my provisional report, the department explained that, subject to complexity, it is 'now endeavouring to provide acknowledgement of all FOI applications... within a week of receipt'.<sup>13</sup>
24. Beyond the practical considerations outlined above, I consider this time frame to be appropriate for two reasons. Firstly, the department's primary method of communicating with applicants is slow, and an applicant has limited options for confirming that the department has received their application. Secondly, acknowledgement letters serve to advise applicants of when to expect a determination, and what they may do if one is not received. Without this information, an applicant may miss their opportunities for review.
25. I have considered the efficiency of departmental mail processes later in this report, and it appears that the current average time in mail transmission is a week. The lag in communication by post is relevant to delay in acknowledgement as applicants may not be able to reasonably predict when their application has been received and when a determination is due, unless the department advises them of this in an acknowledgement letter. Prompt and accurate advice is therefore crucial:

#### **Case study 1<sup>14</sup>**

Three applications, dated 22 November 2019, were received by the department on 29 November 2019. On 18 February 2020, the department wrote to the applicant, advising that it had received the applications.

The department explained that, pursuant to section 14(2) of the FOI Act, its determinations were overdue and the applicant was entitled to seek internal review. Nevertheless, the department advised, it would continue to process the applications. The department did not, however, offer a due date for its belated determinations.

Records provided by the department indicate that determinations were never issued and the applicant did not seek internal review.

<sup>12</sup> Four files were excluded due to apparent errors in the records provided by the department.

<sup>13</sup> Letter from Mr David Brown to my Office, 9 June 2021.

<sup>14</sup> DCS refs: CEN/19/1427; CEN/19/1457; CEN/19/1458.

26. Where an applicant does not receive acknowledgement, their ability to contact the department's FOI unit is limited as they are unable to call the FOI unit directly. Instead, I understand that they may write to the FOI unit or speak with a correctional officer who may then contact the unit on their behalf. In response to this investigation, the department explained that:

The FOI Unit rarely receives direct requests from prisoners seeking advice. Prisoners are encouraged to convey any FOI process enquiries to their Case Management Coordinator (CMC). However, responses received from the prisons indicate very few prisoners seek FOI Advice. Whilst the FOI Unit does communicate with prisoners primarily by letter, the Unit ensures that when necessary, telephone contact is facilitated by prison staff through an assisted phone linkup.

...

The FOI Unit does not record or keep statistics on prisoner requests for advice and to identify these requests would involve a comprehensive examination of all hard and electronic records received for FOI applications over any given time. The FOI Unit does receive general queries relating to FOI applications, particularly questions on the status of a prisoner's FOI applications. These queries are facilitated by custodial staff that contact the FOI Unit, through emails or phone calls on behalf of prisoners.<sup>15</sup>

27. In some instances, applicants contact my Office for advice:

#### Case study 2<sup>16</sup>

An applicant contacted my Office and complained that they had made an application two weeks prior but received no response or acknowledgement. In response to my Office's enquiry, the department advised that it had received the application a week after it was dated, and that the department intended to send an acknowledgement letter that day, a week after receipt.

#### *Comment*

It was unclear whether the acknowledgement letter had already been prepared or had been prompted by my Office's enquiry. In any event, given the specific timeframes of the FOI Act, a two week delay between application receipt and receipt of an acknowledgement letter may result in confusion for applicants.

28. This is clearly inefficient, and it is concerning that simple enquiries about application receipt sometimes require assistance by my Office.
29. I also consider that acknowledgement within seven days is appropriate because of the impact that delay or failure may have on an applicant's understanding of their review rights. Acknowledgement letters serve a greater purpose than administrative courtesy given that they advise an applicant when to expect a determination, and what they may do if a determination is not issued by the deadline.
30. Records provided to my Office reveal a number of applications where no acknowledgement was issued and the department failed to determine the application within time. Once that deadline had passed, applicants were entitled to seek internal review, but may not have known that the right had arisen because they had not been provided with an acknowledgement letter. In some instances, the department issued its determination after the applicant's internal review had expired.
31. On occasion, the applications were 'revived' by an application for internal review. I recognise that some applicants may have been aware of their right of review when they made an application, and may have had to guess when their applications were received

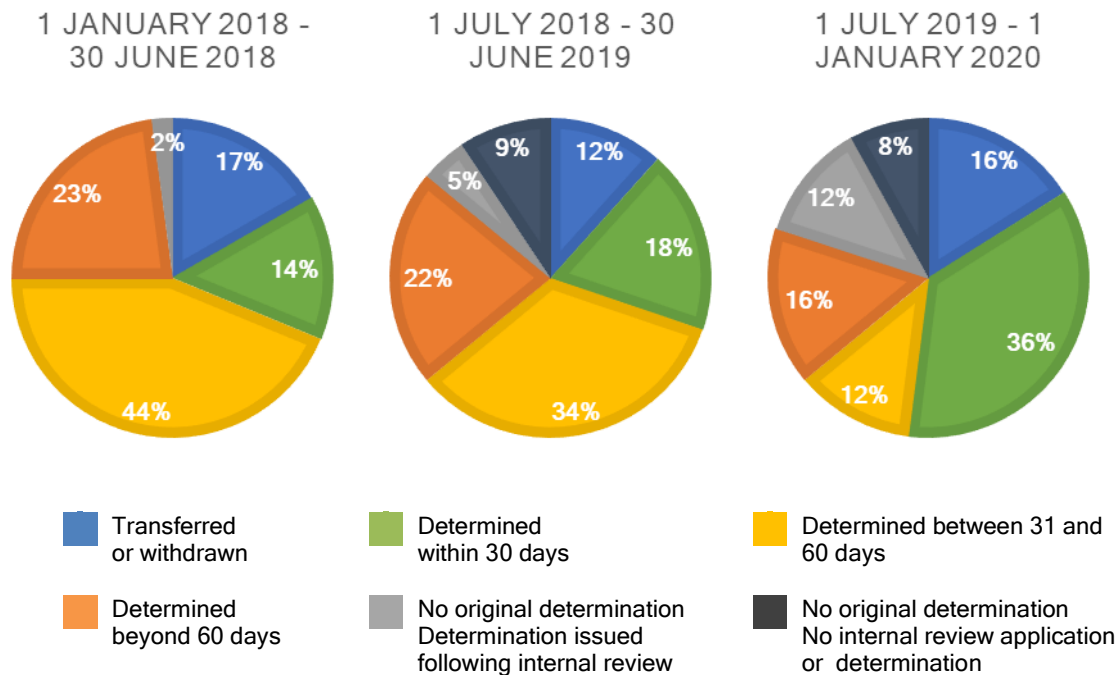
<sup>15</sup> Letter from Mr David Brown to my Office, 26 June 2020.

<sup>16</sup> DCS ref unknown. Prisoner ID: 147332.

and when the deadline for the department’s determination had passed. Alternatively, they may have asked a correctional officer to query the status of their applications. As the department does not keep statistics in this regard, it is not possible to confidently conclude how often this occurred during the relevant period.

32. In other cases, represented by the dark grey segments in the graphs below, the applications progressed no further than the department’s receipt – the department does not appear to have acknowledged receipt of an application, no determination was made and no application for internal review was received. The department’s records that this occurred for 10 applications between 1 July 2018 and 1 January 2020.<sup>17</sup>

*Graph 2: Application progression where no acknowledgement was issued*



33. Although the number of applications determined within 30 days increased across the relevant period, it is particularly concerning that:
- the rate of applications ‘revived’ by internal review increased
  - the rate of applications where no determination is made, no internal review application is received, and no internal review determination may be made, remained steady from July 2018 to January 2020.
34. Where applications progressed no further than receipt, it is not possible to know whether the applicants were not aware of their review rights, or whether they chose not to pursue their application further, and if so, their reason for this decision. That said, I am reluctant to assume that applications are a trivial exercise for most prisoners.<sup>18</sup> I also note the possibility that, in some cases, an internal review application may have been lodged but not received by the department. This is addressed further in my discussion of the department’s prisoner mail processes below.
35. Although the FOI Act does not require the department to acknowledge receipt of an application, I query whether there is a reasonable explanation for the frequency of

<sup>17</sup> This does not appear to have occurred between 1 January 2018 and 30 June 2018.  
<sup>18</sup> I understand that there are a small number of prisoners who are very familiar with the FOI process and make frequent applications for access or amendment during their incarceration. I also understand that these applicants add considerable pressure of the workload of the FOI unit. That said, in my view, these applicants are an exception.

delay or lack of acknowledgement that the department's records indicate. Such explanation was not offered by the department when it responded to my provisional report. It is worth noting that I am not aware of the circumstances surrounding the relevant applications, and I appreciate that there will be times when prompt acknowledgment is not possible.<sup>19</sup>

36. Nevertheless, I am concerned with what appears to be an inconsistent approach to application acknowledgement. Having regard to:
- the sluggishness of the prisoner mail system
  - an applicant's inability to contact the FOI unit directly for advice
  - the availability of the template acknowledgment letter
  - the purpose of an acknowledgement letter
  - the FOI Act's principles of administration
- it is vital, in my view, that the department promptly acknowledge receipt of all applications. For the reasons outlined in paragraphs 22 to 29, this should occur within a week of the department receiving an application. On the information available, I cannot conclude that this was consistently the case for the period relevant to this investigation.

### Opinion

In light of the above, my final view is that the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act when it failed to acknowledge receipt of applications within a week, or at all.

The department's records indicate that:

- of the 43 valid applications received between 1 January 2018 to 30 June 2018, the department:
  - failed to acknowledge 40 applications
  - acknowledged receipt of three applications more than a week after those applications were received
- of the 194 valid applications received between 1 July 2018 and 30 June 2019, the department:
  - failed to acknowledge 76 applications
  - acknowledged receipt of 63 applications more than a week after those applications were received
- of the 106 valid applications received between 1 July 2019 and 1 January 2020, the department:
  - failed to acknowledge 25 applications
  - acknowledged receipt of 16 applications more than a week after those applications were received.

**Whether, between January 2018 and January 2020, the department failed to seek clarification from applicants:**

- in a timely manner
- in a manner required by the Freedom of Information Act

**and whether these failures were:**

- contrary to law
- and/or wrong.

37. For this issue, I have considered 57 applications in which the department sought clarification from applicants.<sup>20</sup> Having regard to the objects of the FOI Act and the

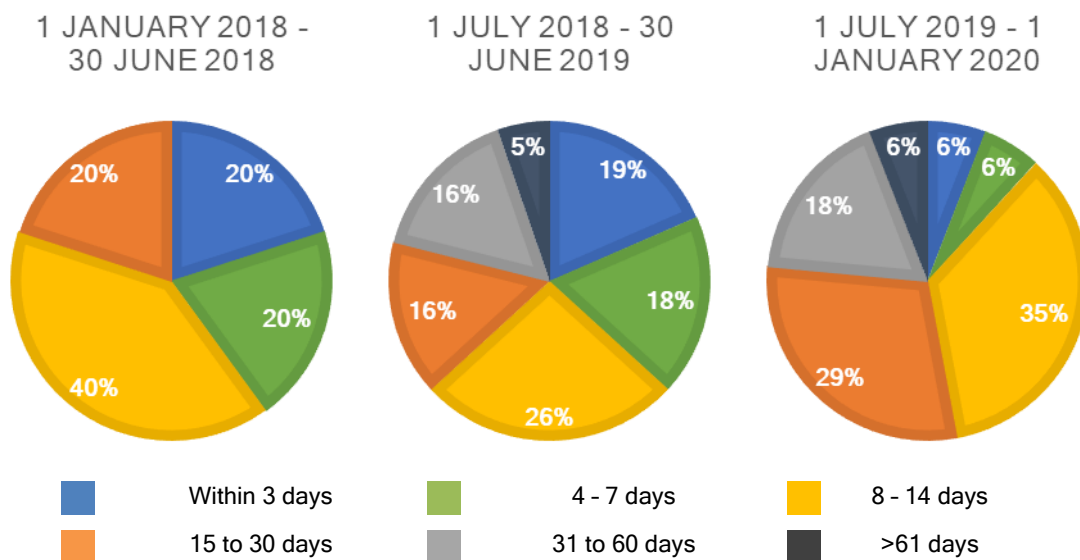
<sup>19</sup> For example, due to staff absence in the FOI unit or competing demands in the workload of that unit.

<sup>20</sup> I have excluded applications where the department advised an applicant that their application was invalid due to a fee or identify issue.

obligations imposed on the department, I have considered the timeliness and quality of the department’s communication with applicants pursuant to section 15 of the FOI Act.

- 38. Section 13(d) of the FOI Act requires an applicant to provide information reasonably necessary for an agency to identify documents within the scope of the application. However, if such information is not provided, section 15 of the FOI Act requires the agency to take reasonably practicable steps to assist the applicant to provide it. Only after doing so may an agency refuse to accept an application as invalid.
- 39. Guidelines provided by State Records provide that the time for an agency to deal with an application does not commence until a valid application is received. With this, and the FOI Act’s principles of administration, in mind, it is important for the department to seek clarification, where necessary, in a timely manner.

*Graph 3: Delays in clarification requests*



- 40. Between 1 January and 30 June 2018, the department requested clarification from applicants on five occasions. Four requests were made within a fortnight of the department’s receipt of the application. The remaining request was made 24 days after the application had been received.
- 41. Between 1 July 2018 and 30 June 2019, the department requested clarification from applicants on 38 occasions. 24 requests were made within a fortnight. The remaining 14 (approximately 37%) requests were made between 15 and 134 days after the applications had been received.
- 42. Between 1 July 2019 and 1 January 2020, the department requested clarification from applicants on 17 occasions. Eight requests were made within a fortnight. The remaining nine requests (approximately 53%) were made between 16 and 109 days after the applications had been received.
- 43. I recognise that some applications may be particularly confusing. That said, having regard to the examples provided by the department, these applications appear to be rare. In any event, if an application is confusing and unclear, the need for clarification should be simple to identify and act on. With this and section 3A(2)(b) of the FOI Act in mind, I consider it reasonable to expect that clarification is sought within a fortnight of



the department's receipt of an application. In response to my provisional report, the department accepted this view and advised that this is its current position.<sup>21</sup>

44. Regardless of its timing, in order to satisfy this requirement, the department uses a template letter (**the clarification letter**). The letter includes a field to re-state the terms of an application, and provides:

The Department is not able to process your request because it is not a valid application pursuant to section 13<> of the FOI Act.

...

<part(d)> Before your request can proceed as a Freedom of Information application, you must provide specific details of the document/s that you request access to. It would assist to locate a document if you can provide specific dates, reference numbers or incidents to assist to identify a document within the Department's records. For example you may be seeking access to <case notes, case review, incident report>.

...

Pursuant to section 13 of the FOI Act, the Department is not required to continue processing your request until you submit a valid application. If you do not respond to this correspondence by <4 weeks> your request may be closed.

45. At first glance, this template appears reasonable. However, the department's standard reference to dates, reference numbers or incidents may not always be appropriate, and on occasions where the information sought does not readily fit within these parameters, it may confuse applicants instead. Two examples of this are provided below:

#### Case study 3<sup>22</sup>

An applicant contacted my Office, having received a clarification letter from the department. They had sought access to a broad range of documents, including their telephone records, and explained to my Officer that they were seeking the records for the purpose of court proceedings.

The applicant complained that they were confused by the department's request for specific dates, reference number and incidences. Although the clarification letter referred to section 13(d), the department had only explained that 'a large quantity of information' would be captured by the terms of the application.

After making an enquiry to the department, my Officer provided advice to the applicant about how they might clarify the terms of their application. The applicant accepted this advice, noting the difficulty they had encountered in finding information about FOI.

Later, the applicant contacted my Office again, explaining that their application had been rejected due to a fee issue. The applicant complained that he was unable to call the FOI unit to seek advice, and it was taking months to lodge a valid application.<sup>23</sup>

In response to my Officer's enquiries, the department explained that it did not make telephone calls to prisoners due to its preference for written records. Furthermore, prisoners were not able to call the FOI unit directly, as it was considered likely that this would result in the FOI unit being inundated with prisoner phone calls.

Upon further enquiry, the department acknowledged that officer assisted phone calls may have been useful for clarifying applications more efficiently and the FOI unit would be encouraged to do so, at their discretion.

<sup>21</sup> Above n 13.

<sup>22</sup> DCS ref: CEN/18/0192; OSA ref:2018/03429.

<sup>23</sup> Records indicate that the application was made on 2 February 2018 and received on 12 February 2018. The department first sought clarification on 15 February 2018. The applicant contacted Ombudsman SA on 21 February 2018. The applicant provided clarification on 15 March 2018. The department issued its determination on 19 July 2018.

**Case study 4<sup>24</sup>**

An applicant contacted my Office and explained that they had sought access to a report and records from the department's electronic records management system. The department sought clarification from the applicant, who found the request confusing and was unsure how to respond.

After enquiring with the department, my Office relayed the department advice to the applicant; that no such document within the scope of the second point was held by the department as it was not possible to generate a report from its records system. It is unclear why this advice had not been included in the clarification letter to the applicant.

The applicant accepted this advice but noted their dissatisfaction with a slow process that had cost them a considerable amount of money.

46. On 15 occasions between January 2018 and January 2020,<sup>25</sup> the clarification letter's reference to dates, reference numbers and incidents appears partially or completely irrelevant to the terms of the applications. In these instances, I cannot conclude that the department took reasonable steps to assist the applicants, given that they are unable to contact the FOI unit directly to ask for advice on how the original terms of the application might be amended to meet the department's requirements.
47. Documents provided by the department in response to my investigation also reveal a number of instances where it appears that clarification was sought when it may not have been necessary, or that it was unlikely that the applicant would be able to provide the requested clarification. In 20 applications across the relevant period,<sup>26</sup> clarification appears to have been sought by the department:
- on minor points
  - where the information provided by the applicant appears to be sufficient, or very close to sufficient
  - where the applicant was unlikely to provide the precise detail requested.
48. The following case studies provide examples in this regard:

**Case study 5<sup>27</sup>**

The applicant sought access to:

- all records regarding movement of the applicant between various sections of the Pt Augusta Prison
- disclosure of all case notes regarding the applicant while in custody
- records held by the Sentence Management Unit in respect of the applicant.

More than a month later,<sup>28</sup> the department explained that it could not identify documents within parts one and two of the application, and that it was not reasonable for the applicant to have requested all records.

The department also advised that part two of the application had identified a considerable amount of information, and as it was only required to complete two hours of work, the applicant needed to provide a date range to reduce the scope to avoid further fees.

<sup>24</sup> DCS ref: CEN/19/1072.

<sup>25</sup> DCS refs: CEN/18/0255; CEN/18/0260; CEN/18/0305; CEN/18/0382; CEN/18/0192; CEN/18/0495; CEN/18/0991; CEN/18/1174; CEN/18/1544; CEN/19/0618; CEN/19/0587; CEN/19/0679; CEN/19/1815; CEN 19/0835; CEN/19/1090.

<sup>26</sup> DCS refs: CEN/18/0407; CEN/18/0468; CEN/18/0842; CEN/18/0991; CEN/18/1069; CEN/18/1312; CEN/18/1313; CEN/18/1403; CEN/19/0048; CEN/19/0101; CEN/19/0201; CEN/19/0536; CEN/19/0562; CEN/19/0563; CEN/19/0564; CEN/19/0574; CEN/19/0815; CEN/19/1221; CEN/19/1241; CEN/19/1372.

<sup>27</sup> DCS ref: CEN 18/0842

<sup>28</sup> The department did not offer an explanation for the delay.

The department's records indicate that the applicant did not provide a response, the department made no further contact with the applicant, and the application was closed.

*Comment*

Having regard to the definition of document under the FOI Act, I do not consider that a request for 'records' was unreasonable, or that the department would not have been able to identify relevant documents. It is unclear what information the applicant, as a prisoner, may have been able to offer to provide clarification.

**Case study 6<sup>29</sup>**

The applicant sought access to 'all notes, case notes, information. All photos and video... Everything please' for a specific 15 day period.

The department issued a clarification letter, stating that:

It would assist to locate a document if you can provide specific dates, and reference numbers or incidents would better assist to identify a document within the Department's records. For example, you may be seeking access to case notes for the dates 1 January 2018 to 20 July 2018.

The department did not seek any other clarification.

The department's records indicate that the applicant did not provide a response, The department made no further contact with the applicant, and the application was closed.

*Comment*

It is unclear why the applicant's reference to a specific date range, which was shorter than the one suggested by the department, had not been sufficient.

**Case study 7<sup>30</sup>**

The applicant sought access to a summary report from a program they had completed within a specified date range, and 'information (intel)' about their removal from Mobilong Prison on a particular date 'which suggests my involvement in the planning and introduction of contraband'.

The department issued a clarification letter, stating that:

It would assist to locate a document if you can provide specific dates, and reference numbers or incidents would better assist to identify a document within the Department's records.

For example, you should provide the date that you completed the Making Changes program so the FOI Unit can identify whether the report you want access to exists. You also need to explain what you mean by the word 'intel'. You must describe the exact document you want access to? I confirm that it is not the Department's responsibility to work out which document you want.

The applicant responded, explaining:

I feel as though my request had enough information in order for the document I asked for to be identified easily, and I will go into detail about. My first dot point request was 'Making Changes Termination Summary (Report)', I have only done Making Changes once and therefore is only going to be 1 (one) report or Termination Summary. And my second dot point request was 'Intel about removal from Mobilong - 17<sup>th</sup> August '18', obviously the word 'Intel' is short for 'Intelligence' and means information and the description about removal from Mobilong - 17<sup>th</sup> August '19. Clearly self-explanatory...

<sup>29</sup> DCS ref: CEN 18/0991  
<sup>30</sup> DCS ref: CEN/18/1403.

The applicant continued, provided specific details about when, where and with whom they had completed the program, and what they meant by 'intel';

Intel Informant(s), source of Intel, description of contraband, explanation of how the planning took place, and how said contraband was introduced to the institution'.

Two documents were identified within the scope of the application, and although the department did not issue a determination within the required time, an internal review determination was issued following further contact by the applicant.

*Comment*

Section 13(d) does not require an applicant to identify a specific document. They are merely required to provide information needed for the department to do so. I agree with the applicant's assertion that they had done so in their original application.

49. I do not intend to offer a view as to whether the department consistently took a strict view of section 13(d) in the relevant period. However, where the terms of an application from a prisoner is very close to sufficient, or they are unlikely to be able to provide further specific detail about documents held by the department, I query whether a technical letter is likely to assist the applicant or the department to progress the application. Instead, it would appear that alternative communication methods, such as an officer assisted telephone call, would be more appropriate. Although the department has explained that its FOI Unit may contact applicants by telephone, it is unclear in what circumstances this is considered necessary and it appears from the records provided to my Office that this course of action is rarely taken.<sup>31</sup>
50. With this in mind, I consider that reliance on a technical letter, sent by slow internal mail, did not constitute the reasonable steps required by section 15 of the FOI Act on occasions where:
- the department's standard template was not relevant to the terms of the application
  - limited clarification was required
  - or the applicant might not reasonably have been able to assist the department.
51. In response to my provisional report the department advised that:
- the FOI Unit is currently taking reasonable steps to assess FOI applications and seek clarification, where necessary, in a timely manner
  - senior FOI officers assist in determining whether the terms of an application are very close to sufficient
  - when clarification is needed, the application is prioritized. Clarification is then sought either by standard letter or an officer assisted phone call.<sup>32</sup>

## Opinion

In light of the above, my final view is that:

- 1) The department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act when it sought clarification from applicants, pursuant to section 15 of the FOI Act, more than 14 days after it had received the application.

This appears to have occurred on:

- one occasion between 1 January and 30 June 2018
- 14 occasions between 1 July 2018 and 30 June 2019

<sup>31</sup> Of the 510 records considered, 4 note telephone contact with an applicant.

<sup>32</sup> Above n 13.

- nine occasions between 1 July 2019 and 1 January 2020.
- 2) The department acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act when it failed to take reasonable steps to assist applicants to clarify the terms of their applications, as required by section 15 of the FOI Act.

In my view, this occurred on:

- four occasions between 1 January and 30 June 2018
- 20 occasions between 1 July 2018 and 30 June 2019
- 10 occasions between 1 July 2019 and 1 January 2020.

**Whether, between January 2018 and January 2020, the department failed to assist applicants to reduce the scope of their applications:**

- in a timely manner
- in a manner required by the Freedom of Information Act

**whether this failure was:**

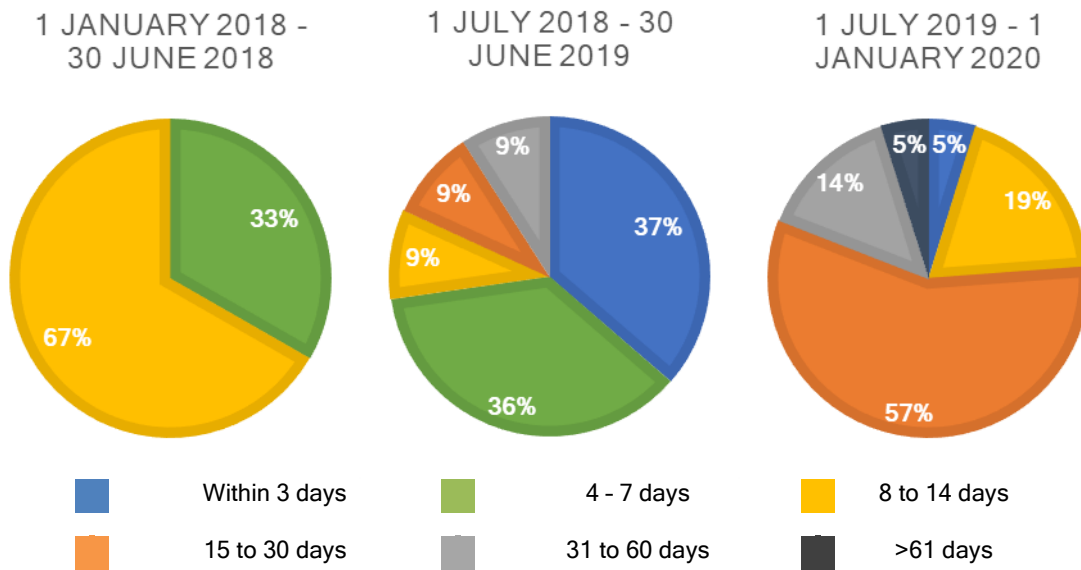
- contrary to law
- based on a mistake of law
- and/or wrong.

52. In considering this issue, I have had regard to:
- 38 applications between January 2018 and January 2020 for which the department sought a reduction of scope<sup>33</sup>
  - 22 applications between January 2018 and January 2020 where the department appears to have combined the processes of sections 15 and 18 of the FOI Act.
53. Section 18(1) provides that an agency may refuse to deal with an FOI application if it appears that the nature of the application is such that the work involved in dealing with it within 30 days would, if carried out, substantially and unreasonably divert resources from use in the exercise of the agency's functions. However, before exercising this power, section 18(2) requires an agency to endeavour to assist the applicant to amend their application so that the work would not lead to a substantial and unreasonable diversion. I have referred to this action as a request for reduction of scope.
54. As with all processes under the FOI Act, it is important that the action required under section 18(2) is promptly taken. Records provided by the department indicate that this was not always the case in the relevant period:

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<sup>33</sup> I have included seven applications where reduction of scope letters were incorrectly categorised as clarification letters.

Graph 4: Delays in scope reduction requests



55. Between 1 January and 30 June 2018, the department requested that applicants reduce the scope of their applications on three occasions.<sup>34</sup> One request was issued seven days after the department received the application. The other two requests were issued 10 and 14 days after the applications had been received.
56. Between 1 July 2018 and 30 June 2019, the department requested that applicants reduce the scope of their applications on 12 occasions. One request was issued 21 days after the department had received the application. Another request was issued 41 days after the application had been received. By this point, the deadline for the department’s determination had already passed.
57. Between 1 July 2019 and 1 January 2020, the department requested that applicants reduce the scope of their applications on 22 occasions. 16 requests (approximately 73%) were issued more than 14 days after the department had received the applications. Of these, two requests were issued 32 and 43 days after the applications had been received. By this point, the department’s deadline for determination had passed. Another was issued 61 days after the application had been received. By this point, the applicant’s right of internal review of the department’s deemed refusal had lapsed.
58. I recognise that, on occasion, it may be difficult for the department to understand the terms of an application and determine that a refusal under section 18(1) is necessary. Nevertheless, if this is the case, the application should be prioritised as the department’s opportunity for refusal is, in my view, limited by the time required to make a determination. The FOI Act deems that a refusal to deal with an application is a determination. In my view, an agency loses this power after 30 days, when it would be otherwise deemed to have refused access to the documents in issue.
59. With this, and the department’s slow mail system in mind, I consider that requests for reduction in scope should be issued within a fortnight of the department’s receipt of an application. In response to my provisional report, the department acknowledged this view and advised that it would be taken into consideration. In any event, applications that require a reduction of scope are prioritised.<sup>35</sup>

<sup>34</sup> One file was excluded as the department has advised that it is unsure when the request was sent.  
<sup>35</sup> Above n 13.

60. The proper application of section 18(1) is not a trivial exercise as the anticipated diversion of resources must be substantial and unreasonable. In my view, this presupposes that the department has a clear idea what an applicant is seeking. If it is not clear what an applicant is seeking, clarification is required under section 15. These processes are necessarily separate and further explanation of my view in this regard is provided below from paragraph 62.
61. However, on 22 occasions within the relevant period,<sup>36</sup> it appears that the department simultaneously considered sections 15 and 18(1). The following case studies are examples of this:

#### Case study 8<sup>37</sup>

The applicant sought access to:

All evidence on record in regard to alleged investigation against me, eg case notes, reports, intel.

More than a month after receiving the application,<sup>38</sup> the department issued a clarification letter, stating that clarification was required as the application had not provided sufficient information to identify any documents. In doing so, the department queried what the applicant meant by 'all evidence', and asked that they provide a date and the name of the person who had conducted the investigation.

The department also noted that, according to section 18(2), it could not refuse to deal with the application without endeavouring to assist the applicant to amend their application, so that the work involved in dealing with it would not substantially or unreasonably divert the department's resources from use in its functions.

#### *Comment*

It is not clear to me:

- why the department sought clarification on what the applicant meant by 'all evidence' when examples had already been provided
- whether the applicant would have known the name of the investigating officer/s, or whether it was reasonable to expect that they did
- how the department had concluded that dealing with an application would trigger section 18, when it could not identify the kind of the document the applicant was seeking.

#### Case study 9<sup>39</sup>

Between 10 and 29 April 2019, the applicant made three applications for access to documents. The applications requested a significant amount of information, but the applicant provided considerable detail, including relevant dates, document types, authors and administrative units within the department.

On 5 June 2019,<sup>40</sup> the department wrote to the applicant, advising that the applications were not valid, as they had not provided sufficient information to identify documents in accordance with section 13(d). The department explained that it appeared the applicant was seeking documents relating to two particular administrative units, but that 'in their current form the applications do not identify documents that can be identified and these applications would

<sup>36</sup> DCS refs: CEN/18/0305; CEN/18/0382; CEN/18/0744; CEN/18/0842; CEN/18/1016; CEN/18/1054; CEN/18/1225; CEN/18/1266; CEN/18/1334; CEN/18/1414; CEN/18/1449; CEN/19/0087; CEN/19/0101; CEN/19/0201; CEN/19/0536; CEN/19/0562; CEN/19/0563; CEN/19/0877; CEN/19/0932; CEN/19/1074; CEN/19/1248; CEN/19/1249.

<sup>37</sup> DCS ref: CEN/19/0201.

<sup>38</sup> The department did not offer an explanation for the delay, as requested by my Officer.

<sup>39</sup> DCS refs: CEN/19/0536; CEN/19/0562; CEN/19/0563.

<sup>40</sup> The department did not offer an explanation for the delay, as requested by my Officer.

require an excessive use of agency resources, and may be refused pursuant to section 18 of the FOI Act.’ The letter did not mention section 15.

The letter went on to outline sections 18(1) and 18(2), before recommending that the applicant withdraw their application and lodge another, seeking access in terms the department suggested.

The department’s records indicate that the applicant did not provide a response, that the department made no further contact with the applicant, and the matter was closed. It does not appear that the department issued a notice refusing to deal with the applications, as required by section 18(5).

62. I do not consider it is open for the department to conclude that an application will involve work that will substantially and unreasonably divert its resources if it truly cannot identify the documents an applicant is seeking. Where it is not possible to identify the documents to which an applicant is seeking access, the FOI Act requires the department to seek clarification. This work is therefore reasonable, and, in my view, is unlikely to attract the proper application of section 18. Certainly, communicating with an applicant to seek clarification is not unreasonable work.
63. After clarifying the department’s understanding of the application, it may be open to consider refusing to deal with the application, but, in my view, this cannot occur simultaneously
64. This is based on the distinct responsibilities and powers under section 15 and section 18. Section 15 provides that a department may refuse to *accept* an application after taking reasonable steps to assist an applicant to provide the kind of information required by section 13(d). If an applicant is unable to do so, the application does not meet the requirements of section 13 and may be considered invalid. According to State Records, if clarification is required, the time for an agency to issue a determination commences after an application is accepted as valid.
65. In contrast, section 18 allows the department to refuse to *deal* with an application, only after it has endeavoured to assist the applicant to amend their application so that the work involved in dealing with the application no longer presents a substantial and unreasonable diversion of its resources. This suggests to me that the department has already accepted an application as being valid under section 13, and has commenced dealing with it, such as by searching for documents within scope, or turning to consider those documents.
66. With this in mind, I do not consider it was permissible for the department to seek clarification from applicants pursuant to section 15 of the FOI Act, and simultaneously seek a reduction of scope under section 18(2). In response to my provisional report, the department acknowledged this view, and advised that it would be taken into consideration.<sup>41</sup>
67. Although section 15 and 18(2) should, in my view, be dealt with separately, the requirements under each are, admittedly, similar – before refusing to deal with an application, an agency must *endeavour to assist* an applicant to reduce the scope of their application.
68. In order to do so, the department uses a template letter (**the scope reduction letter**), which provides:

<sup>41</sup> Above n 13.



I refer to your Freedom of Information application dated <>, received by the Department for Correctional Services (the Department) on <>, seeking access to:

<[Field for the terms of an application]>

A preliminary search for the documents in your application has identified a considerable amount of information. The Department requests that you consider reducing the scope of the documents you want access to. For example you might consider changing your request to, case notes for ----->, which could be completed within two hours.

Section 18(1) of the *Freedom of Information Act 1991* (the FOI Act), states that an agency may refuse to deal with an application if by completing the application, the work involved would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

Section 18(2) of the FOI Act, states that an agency must not refuse to deal with such an application without first endeavouring to assist the applicant to amend the application, so the work involved in dealing with it would, if carried out, no longer substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

Pursuant to the FOI Act, your application will not proceed until further information is received from you. If no response to this correspondence is received on or before <4 weeks from today's date>, a determination to refuse access may be considered. <only prisoners> if you have any questions regarding the FOI process please speak with your Case Management Coordinator, who can contact the FOI Unit for advice. Enclosed is a fact sheet about FOI that may assist you.

69. I have considered 37 applications in which the department used the scope reduction letter,<sup>42</sup> and it appears that the department consistently adopted a two hour threshold. That is, if an application requires more than two hours of work, the applicant was asked to reduce its scope.
70. I understand that this may be based on a repealed clause of the *Freedom of Information (Fees and Charges) Regulations 2018 (the Regulations)*. Prior to 1 July 2019, clause 2(1) of schedule 1 to the Regulations provided that there was no charge for the first two hours spent by an agency in dealing with an application where the relevant information concerns the applicant's personal affairs. Clause 2(1) has since been replaced in the *Freedom of Information (Fees) Notice 2020*.
71. However, neither the FOI Act nor the Regulations contain, in their current or previous forms, provisions that permit an agency to limit its dealings with an application to two hours. It is therefore unclear why the department consistently adopted this threshold in determining whether an application will substantially and unreasonably divert its resources. If this is based on clause 2(1), it appears to be incorrect. In response to my provisional report, the department acknowledged this view, and explained that it has endeavoured to comply with the requirements of the FOI Act. I understand that the reference to a two hour threshold has now been removed from the scope reduction letter.<sup>43</sup>
72. I do not consider that reference to this threshold provides sufficient explanation for why applications may be refused and, more importantly, what an applicant may do to address this and reduce the scope of their application, other than by agreeing to the amended terms proposed by the department. The case study below provides an example in this regard:

<sup>42</sup> The department was not able to provide any records for application CEN/18/0115.

<sup>43</sup> Above n 13.

**Case study 10<sup>44</sup>**

An applicant sought access to case notes between 28 November 2016 and 28 November 2017.

The department wrote to the applicant, explaining that it was considering exercising its power under section 18(1). The department noted that because the applicant had sought a fee waiver and the estimated time to process the application would likely exceed two hours, the applicant would need to narrow the scope of their application. The department then suggested that the applicant confine their application to case notes between 1 April 2017 and 28 November 2017.

The applicant replied, confining their application to a similar period of time between 1 September 2016 and 1 March 2017.

The department replied that 'this was not as recommended by the Department, and constitutes an unreasonable use of agency resources', and issued a formal notice refusing to deal with the application.

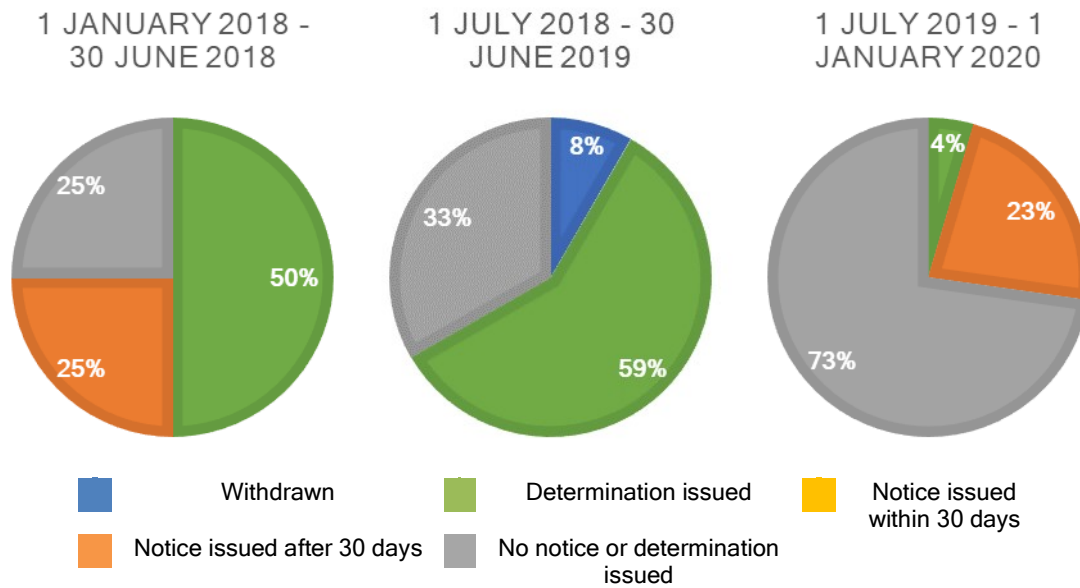
*Comment*

I do not consider that insisting that an applicant amend their application 'as recommended', and refusing an alternative but similar amendment, without clear reasons or further opportunity for response, is the assistance envisaged by section 18(2). This appears to have had the effect of allowing the department to limit the release of information, without clear explanation and regardless of the proper application of exemption clauses under the FOI Act.

73. I accept that an applicant's response to a request for scope reduction may not always be sufficient. Nevertheless, section 18(2) places the burden on the department to endeavour to assist the applicant to do so, and on the information available, I am not satisfied that this assistance was provided in the relevant period where the department relied on its two hour threshold, given that:
- it appears to be based on a mistake of law
  - applicants are not well placed to amend the scope of their applications to meet this threshold, unless they agree to the proposed amendment.
74. Where the department has taken reasonable steps to assist an applicant, but those attempts are unsuccessful, the department may refuse to deal with the application. In doing so, section 18(5) requires the department to issue a notice to the applicant and explain its decision, reasoning and evidence. This notice is a determination within the meaning of the FOI Act, and may therefore be subject to review.
75. Records provided to my Office suggest that the department did not consistently meet this requirement when it refused to deal with applications between 2018 and 2020.

<sup>44</sup> DCS ref: CEN/18/0154.

Graph 5: Progress of applications where reduction of scope has been requested



76. Between 1 January and 30 June 2018, the department requested a reduction of scope for four applications. Responses were provided for two applications and the matters progressed. A formal notice of refusal was only issued for one of the two remaining applications.
77. Between 1 July 2018 and 30 June 2019, the department requested a reduction of scope for 12 applications. One was withdrawn and seven progressed after a response was provided. All of the four remaining applications were closed without a formal notice by the department.
78. Between 1 July 2019 and 1 January 2020, the department requested a reduction of scope for 22 applications. A response was received for one application and the matter progressed. Formal notices were only issued for five of the remaining 21 applications.
79. None of the formal notices between 1 January 2018 and 1 January 2020 were issued within 30 days of the applications being received. All of the notices for applications between 1 July 2019 and 1 January 2020 were issued between six and nine months after the applications had been received.
80. This data suggests that the department is exercising its power to refuse to deal with applications more often, but is failing to issue formal notices at an increasing rate, contrary to the requirements of the FOI Act.
81. In its initial response to my investigation, the department explained that, until recently, 'no template was commonly available for a section 18(5) notice, as these were done on an ad hoc basis. However in response to your investigation, a template has been drafted'.<sup>45</sup>
82. The template provides the following:

I refer to a Freedom of Information application dated <>, received by the Department for Correctional Services (the Department) on <>, seeking access to:

<[Field for the terms of an application]>

<sup>45</sup> Above n 15.

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I also refer to correspondence dated <>, requesting you to <>. To date, no response has been received from you in relation to the above request; therefore pursuant to section 18(5) of the FOI Act, I have determined to refuse to deal with your application.

If you are dissatisfied with this determination, you may seek an internal review by writing to the Chief Executive, Department for Correctional Services. Your request should be sent within 30 days of receipt of this letter and accompanied by the prescribed fee (\$36.75). A fact sheet outlining your rights to review and appeal is attached.

83. This is an improvement. It may enable the department to more consistently meet its obligations under section 18(5). In response to my provisional report, which highlighted the need for a clear explanation of reasons, the department explained that:
- 'all reasonable steps have been undertaken to ensure that where an application has been refused, a formal notice is now sent to the applicant in a timely manner'
  - the template has since been updated to include reasons for its refusal, as required by section 18(6) of the FOI Act.<sup>46</sup>

## Opinion

In light of the above, my final view is that:

1. The department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act when, in accordance with section 18(2) of the FOI Act, it requested that applicants reduce the scope of their applications more than 14 days after the department had received the applications. This appears to have occurred on:
  - two occasions between 1 July 2018 and 30 June 2019
  - 16 occasions between 1 July 2019 and 1 January 2020.
2. The department acted in a manner that was based on a mistake of law within the meaning of section 25(1)(f) of the Ombudsman Act when it simultaneously considered sections 13(d) and 18(1), and applied sections 15 and 18(2), of the FOI Act. This appears to have occurred on:
  - two occasions between 1 January and 30 June 2018
  - 16 occasions between 1 July 2018 and 30 June 2019
  - four occasions between 1 July 2019 and 1 January 2020.
3. The department acted in a manner that was based on a mistake of law within the meaning of section 25(1)(f) of the Ombudsman Act when it relied on a two hour threshold to assist applicants to reduce the scope of their applications in accordance with section 18(2) of the FOI Act. This appears have occurred on:
  - three occasions between 1 January and 30 June 2018
  - 12 occasions between 1 July 2018 and 30 June 2019
  - 22 occasions between 1 July 2019 and 1 January 2020.
4. The department acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act when it was required by section 18(5) of the FOI Act to issue formal notices of refusal but failed to do so. This appears to have occurred on:
  - one occasion between 1 January and 30 June 2018
  - four occasions between 1 July 2018 and 30 June 2019
  - 16 occasions between 1 July 2019 and 1 January 2020.

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<sup>46</sup> Above n 13.

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**Whether, between January and December 2020, the department failed to consistently receive and record FOI related mail from prisoners in a timely manner, and whether this failure was wrong**

84. In the course of this investigation, it became apparent that some of the issues I have considered may be affected by department's process for receiving, recording and responding to prisoner mail. Specifically, it appears that prisoner mail may not be consistently recorded in a timely manner, or at all.
85. Although my investigation thus far has focused on the department's management of applications between January 2018 and January 2020, it appears that issues with the department's prisoner mail processes continue. In light of this, and noting that the department's mail system was updated in May 2020, I consider it appropriate to refer to more recent examples that have been identified by my Office.
86. I understand that the department's process for receiving and recording prisoner mail is as follows:
- 1) a prisoner will hand any outgoing mail to the correctional officer on duty in the unit. A correctional officer will then deliver the mail to the prison's Business Centre pigeonhole. The mail is sorted on a daily basis by the Business Centre and sent to the relevant area which, in the case of FOI applications and correspondence, is the department's central office.
  - 2) upon receipt at the department's central office mailroom, the mail is sorted by the Records Management unit. The department has advised that this occurs on the same day the mail is received. The Records Management unit date stamps the mail and places it in the FOI pigeonhole.
  - 3) the mail is then collected and further processed by the department's FOI unit. This includes recording mail electronically. The department has advised that although it has always been the FOI unit's policy to make an electronic record of all prisoner mail, a process change in May 2020 resulted in a reduction of the average time taken to create an electronic record. This time was reduced from approximately three days to approximately one day.
87. The prisoner mail process described by the department appears, at first glance, to be appropriate. However, I am concerned that the department has described an 'ideal' process and that there are significant discrepancies between the ideal process and what appears to be occurring.
88. In the course of conducting external reviews, my Office regularly requests that the department provide copies of the relevant application and internal review application for each FOI matter being reviewed. I understand that the department's Records Management unit date stamps prisoner mail on the day it is received. In many cases, applications are also dated by the applicant. The delay between an application being given to the correctional officer on duty and the application being received by the department's head office is, therefore, often easy to determine.
89. It appears that, on average, prisoner applications are not being processed by the department's Record Management unit until around 6.6 calendar days after the date of the application. This figure was obtained by viewing all applications and internal review applications received by this Office in the course of conducting 37 external reviews in 2020,<sup>47</sup> recording the number of days between the date of the application and the date

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<sup>47</sup> 54 external review applications were made to my Office by prisoners in 2020. Applications that were not within my jurisdiction as an external authority have been excluded from consideration as my Office does not always obtain the documents necessary for my calculations in this instance.

on the 'received' stamp, then using those numbers to create an average. In its response to my provisional report, the department did not challenge the accuracy of this assessment.

90. I am aware that in some cases, particularly where prisoners are located in close proximity to the department's head office, mail is often received in a shorter timeframe. On the other hand, prisoner mail being sent from other prisons, in particular Mount Gambier Prison and Port Lincoln Prison, can take up to 14 days to reach head office. This difference in delivery times causes me to rely on an average.
91. An average delay of 6.6 calendar days is particularly significant as this is nearly a quarter of the total time afforded to the department to deal with an application. Noting that each prison's Business Centre sorts its outgoing mail daily, and the Records Management unit sorts its incoming mail daily, it is unclear why the delay in mail transmission occurs.
92. My second concern is that further delay appears to arise between prisoner correspondence being processed by the department's Records Management unit and the FOI unit creating an electronic record of same.
93. By email dated 4 January 2021 my Officer requested that the department provide an indication as to the average delay in creating an electronic record of correspondence after it is received. In response, the department explained that the FOI unit aims to register an application with 24 hours of receipt of the application.<sup>48</sup> Again, I am concerned that this is the 'ideal' process, and may not fully reflect current practices. Alternatively, if I were to accept that the average electronic registration period is 24 hours, I note that there are a number of outliers.
94. In the course of assessing whether an application for external review falls within my jurisdiction, my Officers may need to contact the department to confirm the date of the application's receipt. In some instances, the department's response has indicated that prisoner correspondence had not been recorded electronically in a timely manner.

#### Case study 11<sup>49</sup>

My Office received an application for external review on 13 August 2020. In the process of assessing whether the application fell within my jurisdiction, my Officer contacted the department via phone call, querying the date on which the internal review application had been received.

The department initially advised that a search of its electronic database indicated that the applicant did not lodge an application for internal review.

Later the same day, the department contacted my Office again to advise that the applicant's internal review application had been located in hard copy. It is unclear why no action had been taken upon receipt of the application.

#### Case study 12<sup>50</sup>

My Office received an application for external review on 31 August 2020. My Officer contacted the department and was initially told that no internal review application had been lodged as same could not be located on the department's electronic database.

<sup>48</sup> Email from the FOI Unit Manager to my Officer, 5 January 2021.

<sup>49</sup> DCS ref: CEN/20/0408, OSA ref: 2020/03873.

<sup>50</sup> DCS ref: CEN/20/0404, OSA ref: 2020/04168.

The department later located the internal review application in hard copy. It is unclear why no action had been taken upon receipt of the application.

95. These case studies suggest that, on occasion, prisoner mail is not being recorded electronically in a timely manner. There also appear to be instances of prisoner mail being missed entirely, lost or disregarded:

#### Case study 13<sup>51</sup>

An applicant contacted my Office and requested 11 separate external reviews of applications that the department failed to determine and was deemed to have refused. In assessing whether the applications fell within my jurisdiction, my Officer emailed the department requesting copies of the initial applications and internal review applications for each of the FOI matters.

In response, the department provided copies of the nine applications it could locate, but advised that no internal review application could be located for one of the matters, and no original application could be located for a further two matters.

In reviewing the documents provided by the department, my Officer located the copy of the internal review application that the department had advised could not be located. In light of this, my Officer requested that the department conduct a further search for relevant applications. The department subsequently located the relevant applications.

#### Case study 15<sup>52</sup>

An applicant lodged an application for external review with my Office. In assessing whether the application fell within my jurisdiction, my Officer contacted the department, querying the date on which the internal review application had been received. The department advised that no internal review application had been received.

On this basis, my Officer advised the applicant that he must apply for an internal review before I could conduct an external review. The applicant responded, remaining adamant that he had already done so, but agreed to lodge a further internal review application with the department. My Office received a copy of the further application.

Upon receipt of the further application, my Officer again contacted the department to confirm that the internal review application had been received. The department advised that it had not. The department maintained 20 days later that it did not receive either copy of the internal review application.

96. Of the 55 external review applications by prisoners received by my Office in 2020, 8 appear to have been affected by misplaced mail.<sup>53</sup> Although I cannot confidently identify the cause, this may be due to the current system requiring multiple handlings of all correspondence before it is received by the FOI unit and recorded electronically.
97. In light of this, I query the accuracy of the data provided by the department regarding instances where:

<sup>51</sup> DEC ref: CEN/20/1493, OSA ref: 2020/06351; DCS ref: CEN/20/1490, OSA ref: 2020/06340; DCS ref: CEN/20/1504, OSA ref: 2020/06352.

<sup>52</sup> DCS ref: CEN/20/0969, OSA ref: 2020/04292.

<sup>53</sup> DCS ref: CEN/20/0404, OSA ref: 2020/04168; DCS ref: CEN/20/0408, OSA ref: 2020/03873; DCS ref: CEN/20/0969, OSA ref: 2020/04292; DCS ref: CEN/20/1490, OSA ref: 2020/06340; DEC ref: CEN/20/1493, OSA ref: 2020/06351; DCS ref: CEN/20/1504, OSA ref: 2020/06352; OSA ref: 2020/03199; OSA ref: 2020/04513.

- an application was acknowledged, but no determination was issued, and no internal review application was lodged
- the department sought clarification or a reduction of scope, but no response was received
- the department issued a determination, but no internal review application was lodged.<sup>54</sup>

98. The following case study provides an example in this regard:

#### Case study 14<sup>55</sup>

On 11 December 2019, an applicant sought access to:

- case notes for a five month period
- case review materials for a 5 year period
- the minutes of the Serious Offender Committee for the relevant case reviews

On 31 December 2019, the department responded and split the application. It explained that it would commence its determination of the first part, and provided a due date for its determination.

The department also advised that it was considering exercising its power under s18(1) in relation to the second and third points of the application. The department noted that because the estimated time to process the application would likely exceed two hours, the applicant would need to narrow the scope of their application. The department then suggested that the applicant confine their application to a two year period. The department asked that the applicant provide a response by 31 January 2020, or a determination to refuse access would be considered.

In a letter dated 12 January 2020, the applicant responded, apologising for the inconvenience and explaining that they were 'happy to amend my application regarding points 2 and 3 as suggested'.

On 15 January 2020, the department issued its determination for part one of the application, and noted that it had requested that parts two and three be narrowed. It appears unlikely that the department had received the applicant's response at that time, and the copy provided to my Office by the department is not marked with a date of receipt.

Records provided by the department state that it did not receive a response from the applicant to narrow the scope of the application, and that the application was closed. It does not appear that a formal notice to refuse to deal with the remaining parts of the application was issued, as required by section 18(5).

It is unclear why the department did not appear to have regard to the applicant's agreement to amend their application.

99. However, on the information available, I cannot conclude, to a sufficient standard of proof, that the apparent delays and failures in the receipt and electronic recording of incoming prisoner mail amounted to administrative error in 2020. My consideration is confined to a concerning snapshot of the department's processes, but I am wary of drawing conclusions under the Ombudsman Act based on the information currently available.
100. Nevertheless, given that the outgoing prisoner mail is already processed by each prisons' Business Centre daily, I query why electronic recording and transmission does not occur at that stage. This would not only allow for prisoner mail to be received more

<sup>54</sup> Excepting those applications where the applicant was satisfied with the agency's determination.  
<sup>55</sup> DCS ref: CEN/19/1488.



promptly, but may also lessen the possibility of mail being misplaced or lost as the amount of handling of the mail prior to an electronic copy being recorded would be significantly reduced.

## Opinion

On the information available, I am unable to form a conclusion, to a sufficient standard of proof, as to whether the department failed to consistently receive and record FOI related prisoner mail in a timely manner, and whether this amounted to error within the meaning of the Ombudsman Act.

If I were to attempt to form a conclusion, it would require significant expenditure of effort and resources by my Office and the department.<sup>56</sup> Even if these efforts were undertaken, I consider I would still lack sufficient evidence to confidently conclude whether administrative error occurred. Furthermore, I understand that the department is currently reviewing its FOI policies and procedures, and the possible meaningful outcomes that may result from an investigation of this issue may already be in train.

I therefore discontinue my investigation of this issue, pursuant to section 17(2)(d) of the Ombudsman Act. Nevertheless, I record my observations and concerns above for the department's attention.

## An observation on the availability of FOI advice

101. An applicant's limited ability to seek FOI advice from the department's FOI unit is an issue that has arisen throughout this investigation, and I consider it is worthy of attention. That said, it is not possible for me to form a view, to a sufficient standard of proof, of whether administrative error occurred in regard to a specific administrative act by the department. Rather, my observations below are for the department's attention and consideration.
102. My observations are based on:
  - complaints to my Office between January 2018 and January 2020, some of which are described in the case studies above
  - files obtained by my Office in the course of this investigation
  - the department's explanation of its FOI advice processes, part of which is provided above at paragraph 25.
103. I understand that applicants may seek advice from correctional officers, and I have had regard to the information provided to officers so that they may assist applicants. That said, it appears that the kind of advice available at that level would be similar to the general FOI advice my Office is able to provide. Neither are well placed to answer specific questions about an existing application without first seeking information from the department's FOI unit.
104. On the information available, it is not possible to determine:
  - how often the FOI unit receives requests for advice from correctional officers
  - what kind of advice is most often sought
  - how often advice is effectively communicated back to an applicant. That is, whether the advice is received and understood.

<sup>56</sup> Such as the identification and proper recording of lost or misplaced mail in a two year period.

105. This is not possible because the department does not keep an overall record of requests for advice, and obtaining this information would require a search through each FOI file for the relevant period.
106. Nevertheless, the reliance on correctional officers and my Office is concerning for two reasons:
  - 1) seeking, obtaining and relaying this information is a time consuming process, and in the context of an application, may contribute significantly to delays. An applicant's deadline for response to a clarification or scope reduction letter may pass before advice is relayed
  - 2) relaying information may result in miscommunication that could otherwise be avoided if the FOI unit provided it directly to an applicant. For example, a correctional officer or an Officer at Ombudsman SA would not be able to confidently advise the applicant of the kind of reduction they might make to the scope of the application to avoid the department's foreshadowed refusal under section 18(1).
107. Alternatively, an applicant may write to the FOI unit, but this method is also affected by delay and does not provide accessible solutions for applicants who have difficulty with English and with written communication.
108. In response to my investigation, the department explained that it is reluctant to allow prisoners to call the FOI unit directly, as, in its view, the unit is likely to be swamped by phone calls. I query how realistic this concern is, given that prisoners are currently able to contact the department's Prisoner Complaints and Advice Line, as well as my Office. Moreover, I do not consider that this is compelling reason to limit this form of contact. Rather, it suggests to me that there is an unmet need for FOI advice.
109. In light of the short time frames provided by the FOI Act, and its overarching principles of administration, this appears to be an imperfect system operating against the interests of the department and applicants. However, on the information available, I am unable to confidently conclude whether an administrative error occurred in relation to a specific administrative act by the department. Instead, my observations are for the department's attention, and it may wish to consider developing and adopting additional avenues for applicants to seek advice from the FOI unit, such as:
  - allowing prisoners to request an officer assisted phone call with the FOI unit, via the KEX system, and/or
  - adding a number on the prisoner telephone list for the FOI unit, to be available for a specific period of time each day.

## Summary and recommendations

My final view is that the department:

- 1) Acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act when it failed to acknowledge receipt of applications within a week, or at all.

The department's records indicate that:

- of the 43 valid applications received between 1 January 2018 to 30 June 2018, the department:
  - failed to acknowledge 40 applications
  - acknowledged receipt of three applications more than a week after those applications were received

- 
- of the 194 valid applications received between 1 July 2018 and 30 June 2019, the department:
    - failed to acknowledge 76 applications
    - acknowledged receipt of 63 applications more than a week after those applications were received
  - of the 106 valid applications received between 1 July 2019 and 1 January 2020, the department:
    - failed to acknowledge 25 applications
    - acknowledged receipt of 16 applications more than a week after those applications were received.
- 2) Acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act when it sought clarification from applicants, pursuant to section 15 of the FOI Act, more than 14 days after it had received the application. This appears to have occurred on:
    - one occasion between 1 January and 30 June 2018
    - 14 occasions between 1 July 2018 and 30 June 2019
    - nine occasions between 1 July 2019 and 1 January 2020.
  - 3) Acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act when it failed to take reasonable steps to assist applicants to clarify the terms of their applications, as required by section 15 of the FOI Act. In my view, this occurred on:
    - four occasions between 1 January and 30 June 2018
    - 20 occasions between 1 July 2018 and 30 June 2019
    - 10 occasions between 1 July 2019 and 1 January 2020.
  - 4) Acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act when, in accordance with section 18(2) of the FOI Act, it requested that applicants reduce the scope of their applications more than 14 days after the department had received the applications. This appears to have occurred on:
    - two occasions between 1 July 2018 and 30 June 2019
    - 16 occasions between 1 July 2019 and 1 January 2020.
  - 5) Acted in a manner that was based on a mistake of law within the meaning of section 25(1)(f) of the Ombudsman Act when it simultaneously considered sections 13(d) and 18(1), and applied sections 15 and 18(2), of the FOI Act. This appears to have occurred on:
    - two occasions between 1 January and 30 June 2018
    - 16 occasions between 1 July 2018 and 30 June 2019
    - four occasions between 1 July 2019 and 1 January 2020.
  - 6) Acted in a manner that was based on a mistake of law within the meaning of section 25(1)(f) of the Ombudsman Act when it relied on a two hour threshold to assist applicants to reduce the scope of their applications in accordance with section 18(2) of the FOI Act. This appears have occurred on:
    - three occasions between 1 January and 30 June 2018
    - 12 occasions between 1 July 2018 and 30 June 2019
    - 22 occasions between 1 July 2019 and 1 January 2020.
  - 7) Acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act when it was required by section 18(5) of the FOI Act to issue formal notices of refusal but failed to do so. This appears to have occurred on:
    - one occasion between 1 January and 30 June 2018
    - four occasions between 1 July 2018 and 30 June 2019

- 16 occasions between 1 July 2019 and 1 January 2020.

Finally, on the information available, I am unable to form a final conclusion as to whether the department failed to consistently receive and record FOI related prisoner mail in a timely manner, and whether this amounted to error within the meaning of the Ombudsman Act. For the reasons outlined on pages 31 and 32, I discontinued my investigation of this issue pursuant to section 17(2)(d) of the Ombudsman Act, but note my observations and concerns for the department's attention.

To remedy the errors identified above, I make the following recommendations under section 25(2) of the Ombudsman Act.

That the department:

1. review and amend its policies, guidelines and other internal documents for processing applications, to require:
  - application acknowledgement within seven days of receiving a valid application
  - requests for clarification or reduction of scope within 14 days of receiving an application, where necessary
  - a notice refusing to deal with an application under section 18 of the FOI Act to be issued, where necessary.

and to provide guidance on:

- the circumstances in which the department may:
  - refuse to accept an application
  - refuse to deal with an application
 and what the department is required to do in each instance
- the reasonable steps and endeavours respectively required of the department under section 15 and section 18(2), particularly where it appears that an applicant:
  - may not understand the department's system for document creation and storage
  - may have difficulty clearly describing the information they are seeking
  - may have difficulty with written communication in English
- alternative methods for contacting applicants to discuss their applications, including officer assisted telephone calls with an applicant.

and provide further training, or, where relevant, arrange training from State Records, for officers in the FOI unit on the above.

2. develop and adopt a standard notification for acknowledging receipt of an FOI application via the Kiosk Express System (**KEX**)
3. review and amend the template clarification letter to note that the standard paragraph about dates, reference numbers and incidents should be removed or amended where it does not appear to be relevant to the terms of the application.
4. review and amend the template scope reduction letter to remove reference to work that can be completed within two hours.
5. develop and implement a regular audit of FOI processes and compliance, including
  - the average times between application receipt and
    - acknowledgement
    - clarification requests pursuant to section 15 of the FOI Act

- requests for reduction of scope, pursuant to section 18(2) of the FOI Act
  - formal notices refusing to deal with an application, pursuant to section 18(5)
  - how often no further action is taken on an application after acknowledgement
  - how often applicants provide a response to clarification requests and requests for reduction of scope
- in order to monitor and address the issues identified in this report on an ongoing basis.

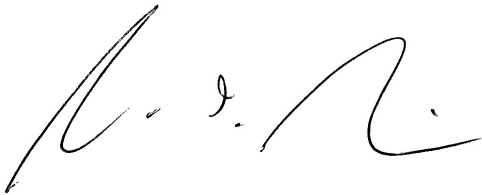
### Final comment

In accordance with section 25(4) of the Ombudsman Act the department should report on what steps have been taken to give effect to the recommendations above by 21 September 2021; including:

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

In the event that no action has been taken, reasons for the inaction should be provided.

I have also sent a copy of my report to the Minister for Police, Emergency Services and Correctional Services, as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines  
SA OMBUDSMAN

22 June 2021