

Determination

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

Applicant	[The applicant]
Agency	City of Adelaide
Ombudsman reference	2017/11142
Agency reference	ADEL156163
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to:

Any evidence howsoever determined that any actual certificate that contains the particulars legally or otherwise determined by the Fines Enforcement Recovery Officer "FERO" (with evidence of precisely what particulars were determined by the FERO; when any such determination was sent by the ACC to the FERO for purposes of complying with s. 13(1) of Expiation of Offences Act 1996 (SA) relating to (i) the alleged offender; (ii) the offence or offences that remain unexpiated; (iii) the amount due under the notice; (iv) compliance by the authority with the requirements of this Act and any other Act); was in fact issued by ACC as issuing authority for purposes of seeking and obtaining an enforcement determination that was sent to the FERO for purposes of enforcement as permitted within s. 13 of Expiation of Offences Act 1996 (SA).

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 30 November 2017. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
5. The applicant provided submissions in response. I have considered these submissions in this determination

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹ (My emphasis.)
7. Section 18(2a) of the FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse to deal with the application if, in the opinion of the agency, the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Issues in this review

10. Section 18 of the FOI Act relevantly provides:
 - (2a) An agency may refuse to deal with an application if, in the opinion of the agency, the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information.
 - ...
 - (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 questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.
11. On 31 October 2017, the agency's chief executive officer Mr Goldstone wrote to the applicant advising him that he had decided to refuse to deal with the application on the basis that it was part of a pattern of conduct that amounted to an abuse of the right of access conferred by the FOI Act.
12. The issue for me to consider is whether the agency has demonstrated that Mr Goldstone's opinion - that the application was part of a pattern of conduct that amounted to an abuse of the right of access - was arrived at on reasonable grounds.²

Consideration

13. In conducting this external review, I bear in mind the objects of the FOI Act as set out in section 3, which relevantly provides:
 - (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament -

¹ *Freedom of Information Act 1991*, section 12.

² *Gabrielsen v Nurses Board of SA* [2008] SADC 41 at [24].

(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 government of the State; and

(b) to facilitate more effective participation by members of the public in the processes involved in the 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 the 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; ...

14. Given the contents of section 3, a decision to refuse to deal with an application under section 18(2a) is not one that should be made lightly.

15. In *Gabrielsen v Nurses Board of SA* Judge Simpson considered the respondent's refusal to deal with an FOI application on the basis of section 18(2a) of the FOI Act. Her Honour said:

Section 18(2a) of the *Freedom of Information Act 1991* only requires that the agency is of the (subjective) opinion that the application of 10 August 2006 was part of a pattern of conduct that amounted to an abuse of the right of access, or was made for a purpose other than to obtain access to information. The terms of the section contain no qualifying requirement; for example, there is no specific reference to 'reasonable' opinion, or that the opinion be held 'on reasonable grounds' ...

Notwithstanding that no qualifying term is used in section 18(2a) of the Act, it is usual to imply an objective element into the proper exercise of a discretionary power, no matter how widely it is conferred by the legislation.

...

In order to justify the determination to refuse to deal with the appellant's application of 10 August 2006, in my opinion the respondent is required to demonstrate that the opinion of the Registrar of the Nurses Board was arrived at on reasonable grounds ...

...

In my view it is sufficient if the respondent establishes, not that the opinion held was necessarily right, but that the opinion held was reasonably open on the material facts underlying the reasons given for the opinion - that it is not open to criticism on the basis of overlooking relevant material, or taking into account irrelevant or inaccurate factual material or because it was subject to illogicality in reasoning or was capricious or irrational

...

16. In his letter to the applicant dated 31 October 2017, Mr Goldstone stated:

Since 15 September 2016, Council has received 15 different (and sometimes related), applications under the FOI Act from you pertaining to the Council's administration and enforcement of the *Expiation of Offences Act 1996* (the **EO Act**) and its parking expiation process. Two of these applications have been referred for internal review by you.

³ *Gabrielsen v Nurses Board of SA* at [21]-[25].

There has been a similarity and, on occasion, duplication of requests within the applications. A number of applications have focused on the certificate process prescribed by Section 13 of the EO Act.

17. Mr Goldstone then set out each of the applications received from the applicant. The applications were all received between 15 September 2016 and 6 October 2017. On both 15 September 2016 and 10 October 2016 the agency received two applications from the applicant.
18. 11 of the applications related to requests for information about any certificates sent by the agency to the Fines Enforcement and Recovery Officer under section 13(1)(a) of the *Expiation of Offences Act 1996*:

Date application received by the agency	Nature of application (in whole or in part)
15 September 2016	Any and all information that relates to the number of certificates issued by the Adelaide City Council as issuing authority sent to the FERO for purposes of making an enforcement determination from 3 February 2014 to date pursuant to s.13 of the Act ...
15 September 2016	<p>Any and all information that relates to the number of certificates issued by ACC as issuing authority and sent to the FERO for purposes of making an enforcement determination once the payment arrangement has terminated as referenced at 1 above and an enforcement determination is subsequently made as referenced at 2 above from 3 February 2014 to date pursuant to s.13(2)(b) of the Act; ...</p> <p>Any information/statistics that identify the number of enforcement determinations made pursuant to s.13(2)(b) of the Act that:</p> <p>...</p> <p>(b) Any and all information that relates to the number of certificates issued by ACC as issuing authority and sent to the FERO for purposes of making an enforcement determination as referenced at (a) above and an enforcement determination subsequently made outside of the period from 3 February 2014 to date.</p>
5 October 2016	<p>Access to and provision of the following that relates to ACC expiation and infringement notice: 11036131 ("notice") issued:</p> <p>...</p> <p>2. Any and all information that relates to the certificate issued by ACC as issuing authority and sent to the FERO for the purposes of making an enforcement determination in relation to the notice pursuant to s.13(2)(b) of the Expiation of Offences Act.</p>
10 October 2016	<p>Access to and provision of the following that relates to ACC expiation and infringement notice: 11036131 ("notice") issued:</p> <p>...</p> <p>2. Any and all information and documents involving any policy, protocol or</p>

	<p>guideline that relates to obtaining, receiving and providing any certificate to the FERO as issuing authority for purposes of s.13 of the [<i>Expiation of Offences Act 1996</i>]. (“the information”)</p> <p>3. Any and all information that relates to the current administrative practices involving the issuance of any certificate to the FERO from 3 February 2014 to date.</p>
10 October 2016	<p>1. Any and all information, documents, communications, emails between the FERO and ACC as issuing authority that identifies the number of certificates issued regarding any alleged offences for purposes of making an enforcement determination from 3 February 2014 to date for purposes of s.13(2)(b) of Expiation of Offences Act 1996 (SA) (“the Act”)</p> <p>2. Any and all information and documents involving any policy, protocol or guideline that relates to obtaining, receiving and providing any certificate by ACC as issuing authority to the FERO from 3 February 2014 to date for purposes of s.13(2)(b) of the Act.</p>
17 October 2016	<p>Any and all information, documents, templates (what information is included) and procedures used by ACC as issuing authority for purposes of issuing a certificate from 3 February 2014 to date pursuant to s.13 of Expiation of Offences Act (“the Act”).</p>
1 November 2016	<p>1. Any and all information, documents, communications, emails between any parties howsoever determined for purposes of seeking, obtaining and making any enforcement determination and issuance of a certificate as required pursuant to s.13 Expiation of Offences Act 1996 (SA) (“the Act”) that relate to my alleged offences; (I note that more than 1 enforcement determination has been made)</p> <p>2. A copy of any and all certificates received within the relevant period as required pursuant to s.13 of the Act, that relate to my alleged offences for purposes of making any enforcement determination. (I note that more than 1 certificate was required to be issued.)</p>
10 August 2017	<p>1. Any and all information and documents involving any policy, protocol or guideline that relates to obtaining, receiving and providing any certificate by ACC as issuing authority pursuant to s 13(2)(ii) of Expiation of Offences Act 1996 from 3 February 2014 to date for purposes of any enforcement determination;</p> <p>2. Any and all information that relates to the current administrative practices involving the issuance of any certificates to the FERO by the ACC as issuing authority pursuant to s 13(2)(ii) of Expiation of Offences Act 1996 from 3 February 2014 to date for purposes of any enforcement determination;</p> <p>3. The total number of certificates issued by the ACC as issuing authority referred to FERO following any expiation enforcement warning notice issued from 3 February 2014 to date pursuant to s 13(2)(a)(ii) of Expiation of Offences Act 1996 (“the information”).</p>
30 August 2017	<p>1. The number of any and all certificates issued by ACC as issuing authority that is compliant with s.13(1) of the Expiation of Offences Act 1996 (SA) that relates to any enforcement determination made by the FERO from February 2014 to date.</p> <p>2. The number of any and all certificates issued by ACC as issuing authority that is not compliant with s.13(1) of the Expiation of Offences Act 1996 (SA) that relates to any enforcement determination made by the FERO from 3 February 2014.</p>

6 October 2017	Any evidence howsoever determined that <u>any actual certificate</u> that contains the particulars legally or otherwise determined by the Fines Enforcement Recovery Officer "FERO" (with evidence of precisely what particulars were determined by the FERO; when any such determination was sent by the ACC to the FERO for purposes of complying with s.13(1) of Expiation of Offences Act 1996 (SA) relating to (i) the alleged offender; (ii) the offence or offences that remain unexpiated; (iii) the amount due under the notice; (iv) compliance by the authority with the requirements of this Act and any other Act); was in fact issued by the ACC as issuing authority for purposes of seeking and obtaining an enforcement determination that was <u>sent to the FERO</u> for purposes of enforcement as permitted within s.13 of Expiation of Offences Act 1996 (SA).
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19. For the sake of clarity I set out section 13(1) of the *Expiation of Offences Act 1996 (the EO Act)*.

An expiation notice may be enforced against an alleged offender by the issuing authority sending to the Fines Enforcement and Recovery Officer -

(a) a certificate that contains the particulars determined by the Fines Enforcement and Recovery Officer relating to -

(i) the alleged offender; and

(ii) the offence or offences that remain unexpiated; and

(iii) the amount due under the notice; and

(iv) compliance by the authority with the requirements of this Act and any other Act; and

(b) the prescribed fee.

20. In 2016 the applicant issued an application for judicial review in the Supreme Court of South Australia. By his application the applicant sought a declaration that the Fines Enforcement and Recovery Officer (**the FERO**) had acted in excess of his statutory authority in determining to enforce expiation notices issued to the applicant by the agency and SA Police. Judgement was handed down by His Honour Kourakis CJ on 11 December 2017.

21. Although the Chief Justice decided against granting the declaration, he upheld the applicant's arguments that (a) the FERO had failed to determine the particulars he required under section 13(1)(a) of the EO Act and (b) spread sheets sent to the FERO by fines issuing agencies for the purposes of recovery and enforcement did not amount to certificates within the meaning of section 13(1)(a).

22. In response to my provisional determination the applicant stated that I had misconceived the nature of his most recent application to the agency. He wrote:

The determination that I seek is the determination (if any and should more than one (1) determination be made, then the provision of the subsequent determination) for the purposes of statutory compliance of (sic) s.13(1)(a) of EOA, being the *particulars determined by the FERO* for certification.

This is not a repeated request for documents. In fact, no such request for provision of "the particulars determined" by the FERRO has in fact been sought previously. I am not seeking as you assert, evidence relating to certification of my own parking expiation notice.⁴

23. It appears from the applicant's submissions that, as at 30 November 2017, it was his position that what he sought from the agency is access to any document it holds that amounts to a determination by the FERRO for the purposes of section 13(1)(a) of the EO Act. However, this is not clear from the wording of his application to the agency.

24. If one removes the words appearing in parentheses from the applicant's application, it appears that what he was seeking was access to:

Any evidence howsoever determined that any actual certificate that contains the particulars legally or otherwise determined by the Fines Enforcement Recovery Officer "FERRO" was in fact issued by ACC as issuing authority for purposes of seeking and obtaining an enforcement determination that was sent to the FERRO for purposes of enforcement as permitted within s.13 of Expiation of Offences Act 1996 (SA).

25. The underlining included in the application gives rise to a reasonable inference that what the applicant was primarily seeking access to was any certificate sent by the agency to the FERRO.

26. If, as the applicant states, he was in fact seeking access to any document the agency held which amounted to a determination by the FERRO for the purposes of section 13(1)(a) of the EO Act, it is difficult to understand why he did not frame his application accordingly, why he included his request for such particulars in parentheses and why he chose to underline phrases that did not relate to such a document.

27. I conclude that it was reasonable for the agency to have interpreted the most recent application as focussing on the certificate process prescribed by section 13(1) of the EO Act.

28. [xx.]

29. [xx.]

30. There is evidence before me from which I conclude that, in making his most recent application to the agency, the applicant was seeking to establish that the FERRO had failed on a continuing basis to comply with section 13(1)(a) of the EO Act in that he had not determined the particulars to be provided to him by fine issuing authorities such as the agency and had not required such authorities to provide him with certificates before proceeding to take enforcement and recovery action against expiation notice recipients.

31. This evidence includes:

- the fact that the applicant has made 15 applications to the agency for access to documents relating to action taken by the agency under section 13(1) of the EO Act
- the fact that, since about mid-2016, the applicant has made at least six FOI applications to the Attorney-General's Department for access to documents relating to the validity of enforcement determinations made by the FERRO⁵

⁴ Emails sent at 3.44PM and 4.21PM on 30 November 2017.

⁵ Since 1 August 2016 I have received six applications from the applicant for external review of determinations made by the Attorney-General's Department: 2016/06108, 2016/06285, 2016/08387, 2016/09226, 2016/09579, 2017/00068.

- the fact that in 2017 the applicant has made at least one FOI application to SA Police for access to documents relating to the validity of enforcement determinations made by the FERO⁶
- the fact that the applicant took the judicial review action in the Supreme Court against the State of South Australia and the agency, [xxxxxxxxxxxxxxxxxxxxxxxx]
- the agency provided the applicant with access to a copy of what it considered to be the section 13(1)(a) certificate it provided to the FERO for enforcement of the single expiation notice it issued to him in response to his first FOI application of 5 October 2016. Despite this the applicant has continued to make further FOI applications to the agency for access to documents relating to the issuing of the certificate.

32. In *Gabrielsen* Her Honour Simpson DCJ stated:

Taking into account the terms of section 18(2a) of the *Freedom of Information Act 1991*, in considering the applicant made by the appellant on the 10 August 2006, in order to determine whether if it were part of a pattern of conduct that amounted to an abuse of the right of access under the Act, or was made for a purpose other than to obtain access to information, the respondent was entitled to have regard to matters which included the following:

- whether it was the last of a number of requests which could be regarded as excessive according to reasonable standards;
- whether the nature and scope of any of the total number of requests were identical or similar;
- whether the timing of the requests appeared to be connected to other proceedings;
- whether the requests appeared to be intended to accomplish an objective other than to gain access to documents;
- whether an inference could be drawn from the behaviour generally of the appellant that he had a purpose other than to gain access to documents, bearing in mind that the purpose of the pattern of conduct is more likely to be ascertained by inference, rather than by a statement from the applicant.⁷

33. In my view it was reasonable for the agency to have formed the view that the applicant's most recent application was part of a pattern of conduct that amounted to an abuse of the right of access conferred by the FOI Act, or was made for a purpose other than to obtain access to information. In particular it was reasonable for the agency to form this view on the basis that:

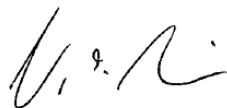
- the most recent application was the 15th application made by the applicant to the agency in a period of 13 months
- each of the 15 applications constituted requests for access to documents relating to the enforcement of a single parking fine issued by the agency to the applicant
- each of the 10 applications set out [xxxxxxxxxxxxxxxxxxxx] above constitute requests for access to documents relating to the certificate provided by the agency to the FERO
- the requests appear to have been intended to assist the applicant to establish that the FERO had been taking enforcement action against expiation notice recipients without requiring issuing authorities to comply with section 13(1)(a) of the EO Act.

⁶ On 20 November 2017 I received an application from the applicant for external review of a determination made by SA Police: 2017/11799.

⁷ *Gabrielsen v Nurses Board of SA* at [41].

Determination

34. In light of my views above, I confirm the agency's determination.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

8 January 2018

APPENDIX

Procedural steps

Date	Event
6 October 2017	The agency received the FOI application.
31 October 2017	The agency's principal officer determined the application.
3 November 2017	The Ombudsman received the applicant's request for external review dated 2 November 2017.
30 November 2017	The Ombudsman issued his provisional determination and invited submissions from the parties.
30 November 2017	The applicant provided the Ombudsman with his submissions.