

Redacted Report
Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	Department of Planning, Transport and Infrastructure
Ombudsman reference	2018/04050
Agency reference	2018/12521/T01
Issue	Whether the Department of Planning, Transport and Infrastructure acted contrary to section 39(7) of the <i>Freedom of Information Act 1991</i> in the course of an external review under that Act

Jurisdiction

The circumstances giving rise to this investigation came to my attention in the course of an external review conducted under the *Freedom of Information Act 1991* (**FOI Act**). On 24 April 2018 I determined to commence an 'own initiative' investigation of the matter, using my powers under section 13(2) of the *Ombudsman Act 1972*.

Broadly speaking, my investigation concerns the question of the Department of Planning, Transport and Infrastructure's (**DPTI's**) compliance with section 39(7) of the FOI Act in respect of a request for information from the (now former) Shadow Treasurer.

Investigation

My investigation has involved:

- assessing the information before my Office
- seeking a response from DPTI
- seeking information from the former Chief Executive Officer of DPTI, Mr Michael Deegan
- seeking information from the Manager of the Office of the Chief Executive, [REDACTED] [the CEO Office Manager]
- considering:
 - the FOI Act
 - the Ombudsman Act
 - the DPTI policy: *DP019 - Freedom of Information*
- preparing a provisional report and providing it to the parties for comment
- preparing this report.

Responses to my provisional Report

Mr Deegan

Mr Deegan responded to my provisional report by way of correspondence from his solicitor, Mr Graham Harbord, dated 20 February 2019.

Mr Deegan disagreed with my provisional views and submitted:

We are instructed that the relevant staff in the FOI Unit were continually placed under substantial pressure as a result of the number of FOI Applications and indeed as a result of continual pressure from your office. We are instructed that the turnover of staff in the FOI Unit was extremely high. We are also instructed that the general[sic] the relationship with a number of staff in your office was poor (with Helen Lines being a notable exception). Indeed, [the CEO Office Manager] suggested that Mr Deegan meet regularly as Chief Executive Officer with the FOI Unit to offer encouragement and to help retain the better practitioners, which he did.

Mr Deegan disagrees that DPTI contravened section 39(7) of the FOI Act in the course of the external review, and that it otherwise acted in apparent contravention of the law.

You state that "it is responsibility of each agency to ensure that adequate resources are allocated for the purpose of complying with the requirements of the FOI Act". Again, clearly this is a matter of priorities of Government. However, it is noted that your punitive approach to effectively "performance managing" the Department in this respect, rather than seeking to improve the relationship between your office and DPTI, is likely to have a counterproductive effect in the Department seeking to maintain experienced and skilful staff in this area.

While I accept that the relevant staff in the department's FOI Unit were under pressure due to high workload, I do not otherwise accept Mr Deegan's submission outlined above, and consider that the general relationship with the staff in my office was not poor as Mr Deegan described. My report details all calls, emails and even meetings between the Ombudsman's staff and DPTI related to this external review process.

I do not accept that my approach was unduly 'punitive'. I consider my approach reasonable especially considering the period taken by DTPI (more than one year from December 2016 to January 2018) to release all the required documents. Further, it is a matter for senior management to ensure that it supports my recommendations for administrative improvement and emphasises to staff the importance of complying with those recommendations and legislative requirements more generally.

Ms TePohe

Ms Tepohe did not provide submissions to my investigation regarding this matter.

██████████ *[the FOI Manager]*

In response to my provisional report, the FOI Manager raised issue with some of my interpretation of internal communications and provided some further information.

I have carefully considered the FOI Manager's submissions and address them as necessary in the body of this report.

The CEO Office Manager

The CEO Office Manager did not provide submissions to my investigation regarding my provisional report.

Having considered Mr Deegan, Ms TePohe and the FOI Manager's responses, my views remain as set out in my provisional report.

Background

The FOI Act

1. The FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents.¹
2. DPTI is an agency for the purposes of the FOI Act.²
3. Section 13 of the FOI Act provides for the process by which persons can apply for documents held by an agency. Section 14 of the Act provides that an application is to be dealt with on behalf of an agency by an accredited FOI officer as soon as practicable and no more than 30 days after it is received. This notwithstanding, section 18(1) of the Act provides that an agency may refuse to deal with an application if it appears that the nature of the application is such that the work involved in dealing with it within a reasonable period of time would, if carried out, 'substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.'
4. Section 19 of the FOI Act provides that after considering an application for access to a document an agency must determine whether to give or refuse access to the document. If an agency fails to determine an application within 30 days of receiving the application, the agency is to be taken to have determined the application by refusing access to the document to which it relates.
5. Under section 20 of the FOI Act, an agency may only refuse access to a document if:
 - it is an exempt document (exemptions are identified in Schedule 1 of the Act)
 - it is a document that is available for inspection at that or some other agency in accordance with Part 2 of the FOI Act, or in accordance with a legislative instrument other than the FOI Act
 - it is a document that is usually and currently available for purchase
 - it is a document that was not created or collated by the agency itself and genuinely forms part of library material held by the agency
 - it is a document that came into existence before 1 January 1987.
6. Section 23 of the FOI Act provides that an agency must notify the applicant of its determination of an application, including the reasons for refusing access to a document.
7. Section 29 of the FOI Act provides that a person who is aggrieved by a determination made by an agency is entitled to a review of the determination (internal review).
8. Section 29(3) of the FOI Act provides that on receiving an application for internal review, 'the agency may confirm, vary or reverse the determination under review.'
9. Section 39 of the FOI Act provides that a person who is aggrieved by a determination of an agency following an internal review is entitled to an external review of the determination by the Ombudsman (external review).

¹ FOI Act, section 12.

² FOI Act, section 4(1).

10. Section 39(5) of the FOI Act provides that in conducting an external review, if it appears that the agency has failed to properly sort or compile documents relevant to the review, the Ombudsman may, inter alia, 'require the agency to sort or compile the documents'.
11. Section 39(7) of the FOI Act provides that the agency 'must cooperate in the process proposed by the [Ombudsman] for the purposes of the conduct of [an external review]' and 'must do all such things as are reasonably required to expedite the process.'
12. Section 48 of the FOI Act provides that in any proceedings concerning a determination made under the FOI Act by an agency (including, relevantly, an external review by the Ombudsman),³ 'the burden of establishing that the determination is justified lies on the agency.'

The FOI application and request for external review

13. On 22 December 2016 the then-Shadow Treasurer, the Hon Rob Lucas MLC, made an application to DPTI under the FOI Act.

14. The application requested access to:

[c]opies of all documents that relate to a) the payment of any entertainment and meal expenses for the Chief Executive or Chief Executives from 1 January 2016 to 31 December 2016 and b) details of all transactions on the Chief Executive or Chief Executives [sic] credit card(s) from 1 January 2015 to 31 December 2016 excluding those documents already released under the Government's Proactive Disclosure Policy.

15. On 8 March 2017 [REDACTED], an accredited FOI officer, wrote to Mr Lucas on behalf of DPTI:

The period for processing your application has now passed. A determination was due on 27 January 2017. This means that the Department of Planning, Transport and Infrastructure is deemed by section 19(2)(b) of the [FOI] Act to have refused access to the documents. However, nothing prevents an agency from making a determination to release documents to you under section 19(2a).

As you may be aware, Chief Executives are required to proactively disclose a range of information on their departmental website. This includes credit card expenditure and any entertainment expenses since 2013. The relevant web link is provided below for easy reference:

[hyperlink omitted]

16. On 23 March 2017 Mr Lucas wrote to DPTI to request an internal review of the FOI determination.
17. On 13 April 2017 the then-Chief Executive Officer of DPTI, Mr Michael Deegan, wrote to Mr Lucas to communicate his decision on internal review:

I have reviewed the determination on your original application and I have determined to uphold this determination. As advised in the original determination dated 8 March 2017, Chief Executives are required to proactively disclose a range of information on their departmental website [sic]. This includes credit card expenditure and any entertainment expenses since 2013. The relevant web link is provided below for easy reference:
[hyperlink omitted]

The agency interpreted the application to request the details of payments as provided in the above link. I note your internal review highlighted that no invoices were provided, the link provides a great deal of detail to any transactions [sic], the majority being for accommodation or travel. If all invoices were to be requested, then consultation with all

³ *Department of The Premier & Cabinet v Redford* [2005] SADC 58 at [28].

related parties would need to be undertaken and this would be an unreasonable use of agency's resources.

18. On 24 May 2017 Mr Lucas wrote to my Office to request an external review of the Chief Executive Officer's determination.

The external review

19. On 26 May 2017 my delegate wrote to the Team Leader of DPTI's FOI Unit, [REDACTED] [the FOI Team Leader], to inform the department of the external review and to clarify whether it was DPTI's position that its Chief Executive had invoked section 18(1) of the FOI Act in the decision on internal review.⁴

20. On 31 May 2017, no response having been provided, my delegate telephoned DPTI's FOI Unit to reiterate her query. By telephone, the FOI Team Leader clarified that it was DPTI's position that the Chief Executive had not invoked section 18(1) of the FOI Act. This was followed by an email from the FOI Team Leader later that same day:

I wish to advise that DPTI did not incite [sic] section 18 in regards to this application. The scope of the application was read in the sense that the applicant was requesting the summary of the expenses.

[...]

On internal review when the applicant stated he required invoices, this was taken as a change of scope and therefore, the original determination was upheld, however, we tried to give the applicant an insight into the work that would be involved is [sic] they were to add this factor to the application.

21. On 6 June 2017, having confirmed the request for external review with Mr Lucas' representative, my delegate wrote to the Chief Executive of DPTI to formally notify him of the external review. In doing so, my delegate requested that DPTI supply to my Office by 27 June 2017, inter alia:
- copies of all of the documents within the scope of the Mr Lucas' application; and
 - any submissions in support of the agency's determination, in view of the agency's obligations under section 48 of the FOI Act.

22. On 21 July 2017, having received no response from the Chief Executive, my delegate telephoned DPTI's FOI Unit to request that the FOI Team Leader contact her in respect of the apparent delay. This was followed by a further telephone call by my delegate on 28 July 2017.

23. On 1 August 2017 the FOI Team Leader telephoned my delegate to state that DPTI's FOI Unit had not received the 6 June 2017 letter. The FOI Team Leader requested that a copy of the letter be emailed directly to the FOI Unit.

24. That same day, my delegate emailed the FOI Team Leader:

Please find attached a copy of my letter to [the Chief Executive] dated 6 June.

Can you please let me know when the agency will be able to respond to the letter?

25. On 3 August 2017 the FOI Team Leader emailed my delegate to request that, '[d]ue to a high workload at present', DPTI be permitted until 31 August 2017 to supply the requested documents to my Office.

⁴ Section 39(3)(a) of the FOI Act requires that an application for external review be made to the Ombudsman within 30 days after notice of the decision on internal review. This notwithstanding, section 39(4) of the Act provides that the Ombudsman may in his or her discretion extend the time for making an application for external review. In the present case, I determined to exercise my discretion under section 39(4) because it appeared that an earlier attempt to communicate the request to my Office (made within the statutory timeframe) had been misdirected by Australia Post.

26. On 4 August 2017 my delegate wrote to the FOI Team Leader:

I have discussed this matter with the Deputy Ombudsman. [...]

In relation to your request for an extension, the Deputy points out that the applicant has now been waiting for the Ombudsman's determination since early June and we have not yet received the documents. In these circumstances, the matter ought to be given priority. I therefore request that the agency provide the documents and its submissions by 18 August.

27. That same day, the FOI Team Leader emailed the Manager of DPTI's Office of the Chief Executive, the CEO Office Manager:

Good Morning [...]

Can we work with 18 August?

28. The CEO Office Manager subsequently responded:

No, we need end of month sorry [sic], it's not our fault that their letter got lost.

Can you please politely try again (no reason) and advise we'll get to them earlier if we can.

29. On 7 August 2017 the FOI Team Leader emailed my delegate:

I have been advised that, under the circumstances, the department will not be able to provide an adequate response by 18 August 2017 which is why the date of 31 August has been requested. We will continue to work on this as a matter of priority and endeavour to get the response to you earlier if possible.

30. On 8 August 2017 my delegate telephoned DPTI's FOI Unit to request that the FOI Team Leader contact her to discuss the matter.

31. On 9 August 2017 the Manager of DPTI's FOI Unit, the FOI Team Leader, telephoned my delegate to submit that DPTI's FOI Unit was processing a considerable volume of FOI requests and that she did not realistically believe that DPTI could provide the requested information before 31 August 2017.

32. Later that same day, the FOI Manager emailed the FOI Team Leader and the CEO Office Manager:

I've just spoken with Helen Lines from the OMB. I reiterated that this is a priority for us but we are being as transparent as possible about a realistic timeframe due to workloads and resourcing. Helen advised that the OMB is still of the view that this has dragged on too long and will make a note of that in the determination letter.

At this stage I don't think the OMB will follow up with us again, Helen understands our view (even if not happy about it) and she's been asked to follow up which she has. Can you please keep me in the loop with this one and how it progresses?

33. That same day, the CEO Office Manager replied to the FOI Manager:

Given their letter got lost in the mail and they've only just chased it up (from June), I think it's a bit rich that they are saying it has dragged on too long!

I've just spoken with the CE, which is where that deadline came from, appreciate we don't want to tell OMB that but FYI – we'll get to it when we get to it.

34. On 29 August 2017 the CEO Office Manager emailed the FOI Manager:

This is the OMB letter that was lost in the mail and not received in June as indicated below (we have asked them before to email as well as post given the post is so unreliable).

This will not be ready by the new date of 31 August, can you please seek a further extension?

A couple of weeks should do it.

35. On 30 August 2017 the FOI Manager replied:

[T]hey were pretty unhappy with us about the 31st so I can only imagine what the response will be this time! What date am I putting forward – Friday 15th September?

36. Later that same day, the CEO Office Manager responded in turn:

Yeah that would be great thanks. Not for their info but between us – CE wanted October!!!

37. That same day, the FOI Manager emailed my delegate:

I'm emailing with an update on this file. I've been advised that we will not have our response prepared by 31st August and believe we can provide the documents by Friday 15th September. I appreciate that the applicant has been waiting for the determination and we are endeavouring to get the information to you as soon as we can.

38. The next day, my delegate responded:

Thank you for keeping me up to date. Is there any particular reason for the further delay?

39. DPTI did not provide a response to my delegate and, on 15 September 2017, no documents having been provided, my delegate again emailed the FOI Manager:

I note that the agency previously requested an extension until 31 August to provide its documents and submissions in this matter. To date the Ombudsman does not appear to have received them.

Can you please advise when the Ombudsman can expect to receive the requested material?

40. That same day, the FOI Manager emailed the CEO Office Manager:

I previously emailed the OMB asking for an extension until today – 15/9, and Helen Lines is now following up asking me when they can expect to receive the material. Are you able to provide me with any updates?

41. Later that same day, the CEO Office Manager responded:

Ugh sorry, will speak to CE Monday when he's back in the office. Will update you on Monday 😊

42. That same day, the FOI Manager responded:

No worries, thanks [...]. I will let Helen know that I will respond to her by COB Monday. I'll set myself a reminder to touch base with you in the afternoon in case I haven't heard anything earlier, I don't want to lose too much credibility with the OMB so at least want to make sure I email her on Monday with an update.

43. The CEO Office Manager subsequently responded in turn:

Yes absolutely, totally agree. I've been getting a lot of resistance up here so will do my best to manage that Monday 😊

44. That same day, the FOI Manager emailed my delegate:

My apologies for the delay with this one. Unfortunately the person I need to follow this up with is not available today and so I will chase this up on Monday and get back to you with an update.

45. On 18 September 2017 the CEO Office Manager emailed the FOI Manager:

The CE would like to reiterate our IR [internal review] determination for this ER [external review] response. Chiefs Executives [sic] and Ministers are required to proactively disclose a range of information, which [the Chief Executive] regularly does. We interpreted the scope of this FOI [application] to be that information, therefore directed Mr Lucas to those links.

**please insert wording from IR letter about not invoices, onerous, etc[.]

46. Later that same day, the FOI Manager emailed my delegate:

I have had a chance to follow this up and have been advised that we would like to reiterate in our submission for the external review that the agency interpreted the application to request the details of payments made as provided in the following link (which was provided to the applicant).

[hyperlink omitted]

Whilst the internal review highlighted that no invoices were provided, the link provides a great deal of detail to any transactions, the majority being for accommodation or travel. If all invoices were to be requested for the two year period specified in the application, then collation of the records and consultation with all related parties would need to be undertaken and this would be too onerous and an unreasonable use of the agency's resources.

I apologise for the delay in providing this information.

47. On 20 September 2017 my delegate responded:

I am afraid that this information is insufficient to enable the Ombudsman to conduct an external review. An external review cannot be conducted without access to the documents falling within the scope of the application.

I must insist that the agency comply with my letter of 6 June 2017.

Please note that unless the agency provides the Ombudsman with all documents falling within the scope of this application by 5PM on 27 September 2017, I will have to bring this to the Ombudsman's attention.

48. On 28 September 2017 my delegate met with representatives of DPTI's FOI Unit to discuss several outstanding matters. During this meeting, DPTI's representatives accepted that DPTI could not seek to invoke section 18(1) of the FOI Act in the course of an external review. The FOI Manager undertook to communicate this to the relevant business unit of DPTI, with a view to coming to a realistic estimate as to when the documents could be supplied to my Office. The FOI Manager undertook to notify my Office of this estimate by no later than 5 October 2017.

49. This was followed by an email from the FOI Manager to the CEO Office Manager:

██████ and I met with Helen Lines from the OMB this morning on another ER matter and Helen raised that the OMB is not accepting our position relating to [the present matter].

The OMB is insisting that we provide all documents so that the ER can be completed. Helen has provided me with the opportunity to liaise internally so we can go back to her with an appropriate, realistic timeframe to provide the information. If we don't provide a timeframe then one will be imposed on us by the OMB.

The OMB would consult with third parties as a result of the ER process so the main workload for us would be to provide the copies of the documents (i.e. invoices). I'm happy to help brainstorm what resources we could use to collate this information.

Can you please let me know your thoughts and what timeline we might go for?

50. Later that same day, the CEO Office Manager responded:

Don't think this will be acceptable to the CE, will chat to him tomorrow. His position was we read it as the disclosure we put on net, not receipts/invoices. Even if the OMB interprets the scope differently i'm [sic] not sure they can make us go and do all that work? We answered it (as we interpreted it) and they are supposed to be reviewing that answer not asking us to completely redo it??

51. That same day, the FOI Manager responded in turn:

I know it wasn't what we wanted to hear.

We spoke with Helen about the fact that we provided what we thought was in scope as per our interpretation for [sic] the determination. When we received the IR we upheld our initial determination and felt like they were trying to widen the scope by asking for invoices in the IR. The OMB's interpretation is that they were not trying to widen the scope because the OMB interprets the "Copies of all documents" terminology to include copies of invoices, even though we didn't. Helen advised we had an opportunity to invoke [section] 18(1) in our IR determination but I assume we didn't go down that path because we considered we had provided what was required.

I'll see if I can find anything else that supports our case, including previous cases of different interpretations between agencies and OMB to see if there is a way that we can stop them trying to impose this on us.

Let me know what the CE's view is.

52. That same day, the CEO Office Manager responded:

Thanks [...], you are spot on below.

Ultimately he'll just put in a new one asking specifically for invoices even if we win this battle (but I guess then we can 18(1) it).

Will let you know what the boss says!

53. On 6 October 2017, no further contact from DPTI having been made, my delegate emailed the FOI Manager to request that the agreed-upon estimate be provided by close of business that day.

54. Later that same day, the FOI Manager responded to my delegate:

We are currently seeking advice on how to manage a difference between our interpretation of the application and the Ombudsman's interpretation. I hope to have further information by next week and will advise by Friday 13th – or earlier if I hear back sooner.

55. This was followed by an email from the FOI Manager to my delegate on 11 October 2017:

I now have further information on this one. We have reviewed the credit card statements and have 151 transactions to review to determine what's in scope for entertainment and meal expenses. Given the large number of transactions to sift through and then the need to locate and review information contained on the receipts, I am requesting an extension until Monday 30th October.

56. On 18 October 2017 the FOI Manager emailed the Executive Assistant to the Chief Executive:

Do you manage the CE's credit card receipts? We have an FOI that is at external review and the Ombudsman has asked us to provide copies of credit card receipts. I can have someone review them all but at this stage I'm trying to find out where they are filed or located?

57. Later that same day, the Executive Assistant responded to refer the FOI Manager to another officer within the department. On contacting that officer, the FOI Manager was advised:

I do not have any for 2015 – I didn't start and look after [the Chief Executive's] receipts until Jan 2016. I do not know where the 2015 ones are. Sorry.
I have a departmental file here with the [2016] receipts in it[.]

58. The FOI Manager subsequently arranged to take a copy of the receipts pertaining to the 2016 period on the following day.

59. On 20 October 2017 the FOI Manager emailed a member of DPTI's Contracting and Procurement Unit:

We have an FOI request to provide copies of the CE's credit card invoices/receipts for 2015 and 2016. I have been liaising with [...] who has provided me with receipts from 2016 but she advised that she doesn't know who was managing the CE's receipts in 2015. Are you able to find out any information about who was managing these or where they might be saved/filed?

60. This query was subsequently referred to DPTI's Information Management Unit:

Please see below email trail – are you able to help me locate where the CE's credit card receipts for 2015 might be filed?

61. This was followed by a further email to the Information Management Unit on 30 October 2017:

I haven't received a response to the below but I have done some searching and can find file part 2011/00903/01 which seems to be the most recent folder which relates to OCE Credit Card/Procurement Information. I realise the file number is quite old but it was closed on 15/03/16 so I was wondering if it might have information up to 2015 within it.
[...]
This information is due to the Ombudsman soon and so your earliest review of this request is much appreciated.

62. On 31 October 2017 a DPTI Information Officer responded:

We can retrieve file 2011/00903/01 for you however I doubt it will have the information you are after [...].

I did find another 2 files that possibly may have some information:
[...]

Another contact is [...] who worked in the CE Office – he may be able to shed some light on their practises. Is it possible to retrieve the information you are after from another source i.e. Basware?

63. That same day, the FOI Manager responded in turn:

I have emailed both [...] and [...] and will see what they come back with. I agree that the other files [...] probably won't have what we need. I have also asked [...] if she can run a

promaster [sic] expense report for the CE's credit card for 2015, it won't give us the hard copy receipts but will give us half the information that we need to provide to the OMB.

64. The FOI Manager continued to unsuccessfully liaise with various departmental officers over the course of the day. During this time, the FOI Manager requested and was subsequently supplied with a copy of DPTI's expense reports relating to the 2015 transactions.
65. Later that same day, the FOI Manager telephoned my delegate to provide a verbal update as to DPTI's progress in meeting the outstanding request. This was followed by an email later that same day

Please find attached documents and copies of receipts relating to the CE's entertainment and meal expenses for 2016. We are currently working through the 2015 information and hope to have something to you by the end of this week.

[...]

I have attached a schedule for these documents. Not all information is currently filled out but there is enough on there to help you identify which documents are which.

Please note there is information on these documents, particularly the Expense report (run out of our credit card management system called Promaster) which is out of scope and includes transactions unrelated to entertainment and meal expenses. We would submit that this information should be redacted prior to any information being released but we haven't had time to work through physically outlining the redactions as yet. I know you have been waiting a long time for these documents so I wanted to get something to you as soon as possible.

We will get the 2015 details to you as soon as possible and then we can take it from there as to what more is required to help finalise this ER.

66. On 15 November 2017 my delegate telephoned the FOI Manager to seek provision of the remaining documents. The FOI Manager informed my delegate that there had been a reduction in the Chief Executive's support staff and that DPTI was accordingly struggling to collate the outstanding materials. My delegate reminded DPTI of the obligation to comply with the request made on 6 June 2017, including the requirement to provide all materials requested for the purposes of the review.
67. On 22 November 2017 I wrote to DPTI's Chief Corporate Officer, Ms Julienne TePohe, to raise the matter of the outstanding documents. In doing so, I adverted to DPTI's obligation under section 39(7) of the FOI Act to do 'all such things as are reasonably required to expedite the [external review] process.' I requested that DPTI supply the remaining materials to my Office by no later than 8 December 2017.
68. On 4 December 2017 Ms TePohe responded:

I understand that the original External Review letter from your office to DPTI was not received however came to light in subsequent follow up emails. I understand that you do not agree with the department's interpretation of the scope of the FOI and have requested copies of all the relevant receipts related to Mr Lucas' request.

An internal audit is currently being done of the Chief Executive's expenses over his time in the department to ensure his previous executive support followed correct protocols with coding and filing.

I will now personally oversee this process and ensure it is completed in an expedient timeframe. Once complete, I will be able to come back to you with the necessary paperwork.

I will write to you again once this has been finalised.

69. On 21 December 2017 I wrote to Ms TePohe a further time to note that her letter did not identify when DPTI would be in a position to comply with the outstanding request. I observed that the undertaking of an internal audit appeared irrelevant to the external

review and that it was not otherwise apparent to me how the departmental audit was likely to affect DPTI's ability to supply the remainder of the materials. I reminded the agency that I was conferred with the powers of a commission as defined in the Royal Commissions Act 1917; concluding (emphasis in original):

I again ask that the agency comply with the requests contained in the letter of 6 June 2017 by **12 January 2018**. Should the agency fail to provide the requested material by this date I will consider utilising these powers.

70. On 9 January 2018 an assistant to Ms TePohe telephoned my delegate to state that my letter had only recently come to the attention of the Office of the Chief Executive. The assistant requested and was granted a two-week extension in which to provide the requested materials.
71. On 25 January 2018 Ms TePohe wrote to my Office to supply the outstanding documents, commenting:
- The agency has undertaken the work to provide these receipts in accordance with your request however still maintains that they are out of the scope of this application.
72. The external review was subsequently deemed withdrawn by the applicant on 4 April 2018, following the results of the March 2018 South Australian state election.

Enquiries of Ms TePohe, Mr Deegan and the CEO Office Manager

Ms TePohe

73. Ms TePohe was notified of my investigation by way of letter dated 30 April 2018. At this time, Ms TePohe occupied the position of Acting Chief Executive of DPTI.
74. Ms TePohe responded to my investigation by way of undated letter, received by my Office on 29 May 2018.
75. In response to my request for an explanation for the delays in supplying the requested documents to my Office, Ms TePohe submitted:
- Reasons for the delays included:
- High FOI workloads (up to 140 applications at any one time)
 - Staff turnover in key roles (including senior FOI roles)
 - Major office relocations (from Roma Mitchell House to 50 Flinders Street) contributed to records management issues
 - Difficulty in locating the requested documents.
76. Ms TePohe submitted that she had 'subsequently directed that all purchase card documentation be stored in an electronic format as well as hard copy to ensure it is readily available in the future.'
77. In response to my query as to whether she considered that DPTI had complied with section 39(7) of the FOI Act in this instance, Ms TePohe submitted:

DPTI acknowledges the delays, though DPTI considers that it complied as best as reasonably practicable given the circumstances outlined above.

Mr Deegan

78. My investigation sought further information from Mr Michael Deegan by way of letter dated 6 June 2018. Mr Deegan was the Chief Executive Officer of DPTI during the period relevant to my investigation.
79. Mr Deegan responded to my investigation by way of letter from his solicitor, Mr Graham Harbord, dated 19 September 2018.
80. When asked to identify the reason for the delays in supplying the requested documents to my Office (to the extent that such was known to him), Mr Deegan's solicitor submitted:

Mr Deegan was diligent in seeking to ensure that your office was provided with up to date and accurate material and documents, as far as reasonably practicable. In this respect Mr Deegan directed that Ms TePohe [...] organise a thorough review and ensured that all proper processes were followed. [Mr Deegan] acknowledges that this did take some time but there was certainly no intention by our client to unreasonably delay providing a response.

The CEO Office Manager

81. My investigation sought some further information from the CEO Office Manager by way of letter dated 22 October 2018. The CEO Office Manager was the Manager of the Office of the Chief Executive during the period relevant to my investigation. She was also the Manager of DPTI's FOI Unit prior to the FOI Manager's appointment to the role.
82. The CEO Office Manager responded to my investigation by way of correspondence dated 16 November 2018.
83. The CEO Office Manager submitted that she had 'no specific recollections' about the matter. In response to my query as to the reason for the delays in supplying the requested documents, the CEO Office Manager observed that 'the DPTI FOI Unit was always under a high workload.'
84. When asked to comment on the resources allocated to the FOI Unit during the relevant period, the CEO Office Manager submitted:

From the best of my recollection, the DPTI FOI Unit was under a period of improvement from when I started as manager and I understand it is continuing to improve and has been as best resourced as possible at any given time.

85. When asked to clarify the circumstances of an apparent annotation to one of the documents supplied to my Office, ⁵the CEO Office Manager submitted:

From the best of my recollection, an additional annotation was made to explain how the transaction was split, this wasn't reflected from the system print out.

Relevant law / policies***The FOI Act***

86. The objects of the FOI Act are expressed in section 3 of the Act:

⁵ As described in an email from the CEO Office Manager to the FOI Manager dated 24 January 2018.

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 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 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 if it is permitted or required by or under any other Act or law.

87. Section 3A of the FOI Act identifies certain principles of administration:

3A—Principles of administration

- (1) 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 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.
- (2) Agencies are to give effect to this Act in a way that—
 - (a) assists members of the public and Members of Parliament to exercise rights given by this Act; and
 - (b) ensures that applications under this Act are dealt with promptly and efficiently.

88. Section 39 of the FOI Act concerns the external review process and relevantly provides:

39—External review

- (1) In this section—

[...]

relevant review authority, in relation to a determination, means the Ombudsman.

[...]
- (5) In conducting a review under this section, the relevant review authority—

[...]

(b) may, if it appears to the relevant review authority that the agency has failed to properly sort or compile documents relevant to the review or to undertake consultations relevant to the review that should have been undertaken by the agency—

(i) require the agency to sort or compile the documents or undertake the consultations[.]

[...]

(7) The agency and the applicant must cooperate in the process proposed by the relevant review authority for the purposes of the conduct of a review under this section (including any attempt of the relevant review authority to effect a settlement between the participants), and must do all such things as are reasonably required to expedite the process.

[...]

(11) On an application under this section, the relevant review authority may (based on the circumstances existing at the time of the review) confirm, vary or reverse the determination the subject of the review.

89. Section 48 of the FOI Act further provides:

48—Burden of proof

In any proceedings concerning a determination made under this Act by an agency, the burden of establishing that the determination is justified lies on the agency.

The FOI Policy

90. During the period relevant to my investigation, DPTI maintained a policy relating to the determination of applications under the FOI Act: DP019 – Freedom of Information (**the FOI Policy**).

91. The FOI Policy was a very brief document. It provided (in full):

PURPOSE

The purpose of the policy is to ensure the department's obligations are met in accordance with the Freedom of Information Act 1991 (the FOI Act).

DEFINITIONS

"The FOI Act" The Freedom of Information Act 1991 provides a legal right of public access (subject to certain restrictions) to documents in the possession of Ministers, government departments and authorities, South Australian Universities, as well as Councils constituted under the *Local Government Act 1999*.

"Agency" under the FOI Act the department's Minister's Offices, the Rail Commissioner and the department are agencies.

"Principal Officer" is the Chief Executive Officer of the agency, or person designated by the regulations as Principal Officer of the agency. For DPTI this is the Chief Executive.

"Accredited Freedom of Information Officer" is the Principal Officer, or a senior officer of the Agency that has undertaken State Records FOI Accredited Officer training and been designated by the Principal Officer of the Agency.

SCOPE

This policy applies to all divisions of the Department and the Rail Commissioner.

POLICY STATEMENT

The department will manage FOI applications in accordance with the FOI Act and other relevant legislation and across government policy.

Process, workflow and roles and responsibilities in line with this policy are published on the department intranet.

REFERENCES

The department Freedom of Information intranet site:

[hyperlinks omitted]

Whether the Department of Planning, Transport and Infrastructure acted contrary to section 39(7) of the *Freedom of Information Act 1991* in the course of an external review under that Act

92. The FOI Act exists both to 'promote openness in government and accountability of [...] government agencies' and to 'facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.'⁶
93. Members of the public and Members of Parliament are accordingly conferred a legally enforceable right to be given access to documents held by an agency 'subject only to such restrictions as are consistent with the public interest [...] and the preservation of personal privacy.'⁷
94. Agencies are expected to interpret and apply the FOI Act in a manner which furthers the objects of openness, accountability and effective participation in government processes, and, wherever possible and without infringing the right to privacy of individuals, exercise any discretion arising under the Act in a manner which favours the disclosure of information.⁸
95. The FOI Act prescribes strict timeframes for the processing of requests. Applications for information must be dealt with 'as soon as practicable' and, in any case, within 30 days after receipt by the agency (there are limited exceptions to this requirement).⁹ Internal reviews must be determined within 14 days.¹⁰ Agencies are at all times required to give effect to the FOI Act in a way that ensures that applications under the Act are 'dealt with promptly and efficiently.'¹¹
96. The right to external review of determinations made by agencies under the FOI Act has been described as 'fundamental [...] to the effective operation of the legislation and public confidence in it.'¹² An effective system of merits review is considered to be 'consistent with the role of FOI in the framework of administrative law and the overarching objective of improving the quality of government decisions by ensuring that administrative decisions of government are correct and preferable.'¹³ It is also said that external merits review bodies 'achieve a measure of independence that internal reviewers cannot.'¹⁴
97. Section 39(7) of the FOI Act, which requires that agencies 'cooperate in the process proposed' by the Ombudsman for the purposes of the external review and 'do all such things as are reasonably required to expedite the process', was inserted following passage of the Freedom of Information (Miscellaneous) Amendment Act 2004. It was observed at that time that the existing external review process 'was slow and

⁶ FOI Act, section 3(1).

⁷ FOI Act, section 3(2)(b).

⁸ FOI Act, section 3A(1).

⁹ FOI Act, section 14(2).

¹⁰ FOI Act, section 29(5).

¹¹ FOI Act, section 3A(2).

¹² Paterson, M. (2015) *Freedom of Information and Privacy in Australia*, 2nd ed., at 12.10.

¹³ Hawke, A. (2013) *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, p. 27.

¹⁴ Bannister, J. et al. (2018) *Government Accountability: Australian Administrative Law*, 2nd ed., p. 236.

cumbersome[,] creating a perception that existing mechanisms were being used to deliberately obstruct access to documents.’¹⁵

98. It is not difficult to appreciate why the FOI Act emphasises the timely resolution of applications made under the legislation. A freedom of information application may be time-sensitive, or may serve as a necessary precursor to the applicant taking some other action under the law. The ability to impose unnecessary delays on the processing of an application or the conduct of an external review could allow a government to frustrate the objects of the legislation. A lack of timely resolution may also give rise to a perception that a government is seeking to avoid the proper scrutiny of its affairs. In this way, the failure of an agency to facilitate timely access to information may undermine ‘confidence in the efficacy of the law itself.’¹⁶
99. The emphasis on prompt and efficient action is also reflective of the overriding statutory regime – an individual has a right to be given access to information held by an agency, and an agency may only refuse access to information in certain circumstances; in most cases, the agency must be satisfied that disclosure of the information in question would, on balance, be contrary to the public interest. The legislative intention, if not the reality, is that agencies will default towards disclosure in their consideration of requests for information.
100. Mr Lucas made his application to DPTI in December 2016. DPTI failed to deal with the application in a timely manner and was accordingly deemed to have refused access to the requested information. On internal review, DPTI confirmed that refusal on what could charitably be described as a counterintuitive interpretation of the terms of the request (how does a request for ‘all documents that relate to’ the payment of certain expenses not extend to the relevant invoices and transaction statements?). It did so in a manner that did not invoke a relevant exemption clause and which did not otherwise satisfy the criteria for refusing to deal with the application.¹⁷
101. It was not until January 2018 that DPTI compiled the materials relevant to the applicant’s request and supplied them to my Office. The delay of approximately one year from the making of the application for access to the proper commencement of the external review was, in my view, wholly unconscionable. The application had by that time lost all currency. It was in any case rendered largely irrelevant by the change of government which shortly followed.
102. As near as I can tell, DPTI first commenced compiling the relevant documents in approximately October 2017. By that time, DPTI had failed to adhere to five successive deadlines imposed by my Office. It would go on to miss three more.
103. It is of obvious concern that DPTI appears to have contended, both to the applicant and subsequently to my Office, that its compilation of the relevant documents was likely to involve the substantial and unreasonable diversion of its resources prior to undertaking any substantive efforts to identify where and how the documents were held. That action would appear entirely inconsistent with DPTI’s obligations under section 3A of the FOI Act.
104. DPTI’s internal communications during the relevant period also suggest a concerning attitude to the department’s responsibilities under sections 39(5) and (7) of the FOI Act

¹⁵ SA, Parliamentary Debates, House of Assembly, 28 August 2002, 1375 at 1402

¹⁶ Banisar, D. (2006) *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws*, Privacy International, p. 28

¹⁷ Section 18(2) of the FOI Act provides that an agency must not refuse to deal with an application under section 18(1) ‘without first endeavouring to assist the applicant to amend the application so that 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.’ It is in any case doubtful that the terms of the applicant’s request satisfied the criteria for refusing to deal with the application under section 18(1).

(‘...we’ll get to it when we get to it...’; ‘...I’m not sure they can make us go and do all that work...’; ‘... I’ll [...] see if there is a way that we can stop them trying to impose this on us...’). Again, it is difficult to reconcile this attitude with the principles underpinning the FOI Act.

105. It was not until I intimated that I would issue a summons for the requested documents under the Royal Commissions Act that DPTI supplied the materials to my Office. It is highly unusual for me to be required to take such action in the conduct of an external review.
106. It was also not appropriate for DPTI to have made an annotation to one of the documents prior to its provision to my Office. Although no doubt intended to clarify the circumstances surrounding the relevant transaction, the covert alteration of records requested under the FOI Act is enormously troublesome. There were other ways in which DPTI could have clarified the matter.
107. Both Ms TePohe and the CEO Office Manager adverted to the high workload within DPTI’s FOI Unit during the period relevant to my investigation. This would appear corroborated by my own (somewhat limited) observation of the breadth and nature of the requests for external review concerning the department. I accept that the other matters identified by Ms TePohe, including staff turnover within DPTI and difficulties in accessing records, may also have contributed to the delays experienced in this case.
108. In response to my provisional report, the FOI Manager provided the following information:

(...) in April 2018 we started an FOI improvement project which included reviewing internal processes and improving employee understanding of FOI. The team and I have done what we can to raise the profile of FOI in the agency, including creating a short FOI video and implemented an e-learning module for employees to help them understand the importance of FOI in their roles. I have worked hard on implementing a team culture strategy to reduce staff turnover in the team and the team is always looking at ways to improve our FOI determinations and timelines. I believe this is reflected in improved dealings with your office over the last six months and hope that we continue to see improvements in the future.
109. DPTI nevertheless had a statutory duty to cooperate in the external review and ‘do all such things as are reasonably required to expedite the process.’ Its actions in this case clearly fell short of this requirement.
110. It follows that I am of the opinion that DPTI’s omission to supply the materials requested by my Office for a period of approximately seven months was contrary to section 39(7) of the FOI Act and, accordingly, was in apparent contravention of law for the purposes of section 25(1)(a) of the Ombudsman Act.

Opinion

I consider that the Department of Planning, Transport and Infrastructure contravened section 39(7) of the *Freedom of Information Act 1991* in the course of an external review under that Act and, accordingly, acted in apparent contravention of law for the purposes of section 25(1)(a) of the Ombudsman Act.

I have made recommendations to the department at the conclusion of this report.

Summary and recommendations

It is my final view that the Department of Planning, Transport and Infrastructure contravened section 39(7) of the *Freedom of Information Act 1991* in the course of an external review

under that Act and, accordingly, acted in apparent contravention of law for the purposes of section 25(1)(a) of the Ombudsman Act.

It is the responsibility of each agency to ensure that adequate resources are allocated for the purposes of complying with the requirements of the FOI Act.

In the circumstances, I make the following recommendations under section 25(2) of the Ombudsman Act:

1. That the Department of Planning, Transport and Infrastructure take such action as is necessary to ensure that applications received by the department under the FOI Act, including associated review processes, are dealt with in a prompt and efficient manner.
2. That the Department of Planning, Transport and Infrastructure report to the Ombudsman by **28 February 2020**, in respect of the following matters (as relating to the intervening period):
 - the number and total percentage of applications for access under the FOI Act dealt with by the department within 30 days
 - the number and total percentage of applications for access under the FOI Act received by the department in respect of which the principal officer of the department extended the period within which the application was to be dealt with, identifying in each case the period of the extension and whether the department proceeded to deal with the application during that period
 - the number and total percentage of requests for internal review under the FOI Act dealt with by the department within 14 days.

Final Comment

In accordance with section 25(4) of the Ombudsman Act the department should report to the Ombudsman by **27 September 2019** on what steps have been taken to give effect to recommendation 1 above; including:

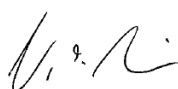
- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In respect to recommendation 2, the department should confirm by **19 July 2019** whether it accepts and intends to comply with recommendation with a view to providing the report required by recommendation 2 by **28 February 2020**.

In the event that no action has been taken in relation to either recommendation by the specified date, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Transport, Infrastructure and Local Government as required by section 25(3) of the *Ombudsman Act 1972*.

I also intend to monitor the department's compliance with requests from my Office in respect of external reviews under the FOI Act during this same period.



Wayne Lines
SA OMBUDSMAN

11 June 2019