

Determination

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

Applicant	Mr Justin Freytag
Agency	District Council of Coober Pedy
Ombudsman reference	2020/02346; 2020/00992
Agency reference	FOI 09-19
Determination	The determination of the agency is varied.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (**the FOI Act**) an applicant (**the first applicant**) requested access from the agency to a list of 24 specific documents. Approximately one month later, another applicant (**the second applicant**) requested access from the agency to a list of 23 specific documents.
2. The 23 documents sought by the second applicant were 23 of the 24 documents sought by the first applicant.

Background

3. For ease of reference, the procedural steps relating to the application for external review are set out in the appendix. However, due to the complicated circumstances giving rise to this application, I have briefly detailed the timeline of the preceding events below.

Events prior to the FOI applications

4. As a result of a technological glitch on the agency's server, between 1 and 4 February 2019, information/documents held by the agency became accessible to any Councillor (noting that all Councillors at that time were suspended as a result of the *Local Government (Defaulting Council) Proclamation 2019*) who logged in to its system. During this period, the first applicant reviewed and made copies of a number of documents which should not have been accessible to him.
5. On 15 February 2020, the agency filed proceedings in the Supreme Court of South Australia seeking orders inter alia that the first applicant return the 23 documents obtained and refrain from making use of those documents or the information contained therein.
6. In the course of the proceedings, the first applicant stated that the disclosure of the 23 documents led to the commencement of two defamation cases in the Magistrates Court; the first applicant is plaintiff in one and defendant in the other. The first applicant

alleged that the 23 documents are relevant to the factual matters raised in the defamation matters.

7. On 3 July 2019, His Honour Judge Dart found in favour of the agency, ordering that the first applicant return the documents to the agency and that he refrain from using the documents. Relevantly, His Honour also stated that

The reality is that the defendant wishes to use the documents in private litigation in the Magistrate's Court. He is not entitled to do so.¹

8. His Honour Judge Dart also stated that the first applicant (or any other person) was permitted to apply for access to the documents by legal means, specifically by way of an application under the FOI Act.
9. To date, the defamation proceedings have not yet concluded.

The FOI applications

10. On 8 November 2019 the first applicant lodged an FOI application seeking access to 24 specific documents (**the first FOI application**). Of the 24 documents sought, 23 were the documents obtained and copied by the first applicant during the period of the technological glitch.
11. On 27 November 2019 the principal officer of the agency responded to the first applicant extending the time to deal with the first FOI application until 31 January 2020 in accordance with section 14A of the FOI Act.
12. On 3 December 2019 the second applicant lodged an FOI application seeking access to 23 specific documents (**the second FOI application**). The documents sought were the 23 documents obtained and copied by the first applicant during the period of the technological glitch.
13. The second FOI application was made on behalf of 59 community members of the agency, and lodged by one of those community members.
14. On 20 December 2019 the principal officer of the agency responded to the second applicant extending the time to deal with the second FOI application until 31 January 2020 in accordance with section 14A of the FOI Act.
15. From this point onwards, it appears that the agency has, to some extent, dealt with the two FOI applications as one. For example, the agency was required to consult with several interested parties in relation to each FOI application. The interested parties were only informed of 'an application' and were only consulted once.
16. On 20 January 2020 the agency contacted Mr Justin Freytag (**the applicant**) as part of its consultation requirements. The agency sought the applicant's views as to whether nine of the documents in issue in the first and second FOI applications are exempt pursuant to clause 6 of Schedule 1 of the FOI Act.
17. On 30 January 2020 the applicant responded to the agency indicating his position that eight of the nine documents were exempt pursuant to clauses 6(1), 6(2), 10 and 13(1)(a).
18. On 31 January 2020 the agency wrote to the applicant advising that, despite the applicant's objection, it proposed to partially release two of the documents about which

¹ *District Council of Coober Pedy v Naumovic* [2019] SASC 189, at [21].

the applicant was consulted (in this particular correspondence those two documents are referred to as documents 1 and 9). The agency then issued its determinations to the first and second applicants on the same day.

19. In its determinations, the agency stated that it intended to defer granting access to the above two documents (in the determination referred to as documents 2 and 17) until the expiration of the period within which an application for review under the FOI Act could be made.
20. On 28 February 2020 the applicant sought an external review of the agency's determination of the first FOI application. The application for external review was made via the applicant's solicitor. It is noted that neither of the agency's determinations are subject to internal review as they were made by the agency's principal officer.
21. Noting that the agency determined to partially release two of the documents in issue despite the applicant's objection, but that the application for external review referred only to one document, the Ombudsman's Legal Officer sought clarification from the applicant's solicitor as to the scope of the external review. On 18 May 2020 the applicant's solicitor confirmed via email that only one document is in issue in this external review (document 1 in the correspondence to the applicant dated 31 January 2020; document 2 in the agency's determination). The document in issue shall hereafter be referred to only as 'the document in issue'.
22. Having reviewed all of the documents and submissions provided by the agency, it was noted that although there were two separate FOI applications and two subsequent determinations, the applicant had lodged only one application for external review with this Office and in that application had referred to only the first FOI application.
23. Noting that, insofar as they relate to the document in issue, the first and second FOI applications and subsequent determinations are identical, I consider that it would be senseless for an external review to be conducted in relation to the first FOI application but not the second FOI application. However, in the absence of an application, the Ombudsman cannot conduct an external review.
24. Accordingly, on 27 May 2020 the Ombudsman's Legal Officer contacted the applicant's solicitor via telephone to explain the issue before the Ombudsman and query whether it was intended that the application for external review should relate to both the first and second FOI applications.
25. The applicant's solicitor advised that neither he, nor the applicant, were aware of the second FOI application. Having been made aware of the second FOI application, the applicant's solicitor requested that this external review relate to both the first and second FOI applications, and advised that a second application for external review would be lodged in writing with this Office accordingly.
26. On 29 May 2020 the applicant, via his solicitor, lodged an application for external review in relation to the second FOI application. Noting that the second FOI application was determined on 31 January 2020, the second application for external review was made beyond the statutory timeframe. However, due to the complex nature of this matter, and for the reasons I will discuss below, I consider it appropriate to exercise my discretion to extend the time for making an application for external review.²
27. Accordingly, this external review relates to both the first and second FOI applications.

² *Freedom of Information Act 1991*, section 39(4).

Jurisdiction

28. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
29. As stated above, the second application for external review was lodged beyond the 30 day statutory period. Subject to receiving submissions from the parties, I propose to exercise my delegated discretion under section 39(4) to extend the time for making the application.
30. In reaching this conclusion I have had specific regard to the complex circumstances leading to this external review.
31. I note that in its submissions to this Office, the agency stated that:

Mr Freytag's application for external review relates to two determinations made by the Council under the *Freedom of Information Act 1991*: one in respect of an application made by Mr George Naumovic and one in respect of an application made by Mr Iordanis Angelidis.
32. In light of this, I believe that the agency is already of the view that this external review relates to both the first and second FOI applications. Accordingly, I do not consider that extending the time to accept the second application for external review would cause any prejudice to the agency.
33. Additionally, the applicant's solicitor indicated that neither he nor the applicant were aware that a second FOI application had been made. The agency only consulted with the applicant once, and in doing so, repeatedly referred to having received an application [emphasis added], rather than two applications. I consider that, in the circumstances, the applicant could not have reasonably been expected to be aware of the second FOI application.
34. For these reasons, as well as noting that it would be senseless to conduct an external review in relation to only the first FOI application but not the second, I am satisfied that if I were not to extend the time to accept the second application for external review, this would cause unfair hardship to the applicant.

Provisional determination

35. The Deputy Ombudsman provided her tentative view about the agency's determination to the parties, by her provisional determination dated 25 June 2020. The Deputy Ombudsman informed the parties that subject to her receipt and consideration of submissions from the parties she proposed to vary the agency's determination.
36. The agency provided submissions in response. I have considered these submissions in this determination.

Relevant law

37. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.³
38. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists

³ *Freedom of Information Act 1991*, section 12.

various exemption clauses which may be claimed by an agency as a basis for refusing access.

39. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
40. 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.
41. The agency determined to partially release the document in issue, redacting the email address of the applicant on the basis that the information is exempt pursuant to clause 6(1). The applicant contends that the document is fully exempt on the basis of clauses 6(1) and 6(2). I set those clauses out in full:

6 – Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve an unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
- (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable

Documents in issue

42. As already outlined, there is one document in issue in this determination. The document in issue is numbered 'document 2' in the agency's determinations and 'document 1' in the consultation correspondence with the applicant. The document is referred to simply as 'the document in issue' in this determination.

Issues in this review

43. It is for me determine whether the agency has justified its determination to grant partial access to the document in issue to the first and second applicants.
44. I note that the agency intends that the document be released with the applicant's email address redacted. The applicant has not objected to this redaction. Accordingly, the redaction of the email address will not be considered in my external review.

Agency's submissions

45. The agency advised in its submissions that it had no substantive submissions in response to the provisional determination, but requested that two amendments be made to the provisional determination for clarification purposes. The agency has requested minor additions to paragraphs 4 and 5 of the provisional determination.
46. Both requested amendments relate to the events preceding this external review rather than the external review consideration itself. The amendments have been requested to ensure that the background information which I have set out above is accurate and complete.
47. I am satisfied that it is appropriate to make the requested amendments in this determination to ensure accuracy of the background information.
48. The remainder of this determination is in the same terms as the provisional determination.

Consideration

49. The document in issue is an email comprising a copy and pasted comment on an online article and a forwarding remark in response to that comment.
50. In his submissions to the agency and to this Office, the applicant objected to the release of the document in issue on the basis of clauses 6(1) and 6(2). The applicant has specifically raised concerns about the document in issue being used in the course of the ongoing defamation proceedings.
51. The agency has stated that, to the extent that the document in issue contains the applicant's personal affairs (which are not already proposed to be redacted), disclosure would not be unreasonable given that the information contained therein was posted to a public forum.

Clauses 6(1) and 6(2)

52. The term 'personal affairs' is defined inclusively in section 4(1) of the FOI Act, and includes a person's:
 - financial affairs
 - criminal records
 - marital or other personal relationships
 - employment records
 - personal qualities or attributes.
53. The term has also been held to involve 'matters of private concern to an individual'⁴ and the 'composite collection of activities personal to the individual concerned'.⁵
54. In *Bradshaw v South Australia Police; South Australia Police v Bradshaw* Judge Muscat considered clause 6(2):⁶

An '*allegation*' is simply an assertion. A '*suggestion*' involves a lower threshold and includes to inform or insinuate. A suggestion, in this context, simply requires that a document, by its content, be capable of conveying an idea of information to the reader.

...

Whether or not a document falls within clause 6(2) is a question of fact and degree to be determined upon a consideration of the document and any other document(s) the release of which is sought. Allegations or suggestions may be made directly or indirectly.

Whether or not an allegation or suggestion is contained within a document may also depend on the context to be drawn from the document itself, or when read in combination with another document, or from information which is otherwise known to the applicant.

At times, whether something amounts to an allegation or a suggestion is only apparent when documents are read together.

55. Having reviewed the document in issue, I am satisfied that the copied comment relates to the perceived personal qualities/attributes of the applicant, and would certainly be a matter of private concern. I am also satisfied that the copied comment contains allegations of criminal and improper conduct. To my knowledge, the truth of the allegations has not been established by judicial process.

⁴ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88-89.

⁵ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

⁶ *Bradshaw v South Australia Police; South Australia Police v Bradshaw* [2012] SADC 184 (unreported, Judge Muscat, 20 December 2012), [41], [46] to [48].

56. In regards to the forwarding remark, the applicant has expressed his views in relation to the allegations of criminal and improper conduct contained in the copied comment. These views are clearly a matter of private concern to the applicant, and also speaks to the applicant's personal qualities and attributes.
57. I am therefore satisfied that the entirety of the document in issue relates to the applicant's personal affairs. I now turn to consider whether disclosure of the document in issue would be unreasonable.
58. In *Treglown v SA Police (Treglown)* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision maker needs:
- ... to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.⁷
59. In addition, unreasonableness has 'as its core, public interest considerations'.⁸
60. On 24 March 2017 an article was published on RenewEconomy.com.au regarding the switch to a renewable energy grid in Coober Pedy.⁹ Being an online article, any member of the public was able to post a comment in response to the article. The copied comment in the document in issue is one of the publicly posted comments in response to the online article. Both the article and all subsequently posted comments are currently publicly available online.
61. I note that the agency has stated that disclosure of the document in issue would not be unreasonable given that the information contained therein was posted to a public forum. Although ordinarily I would agree that it would not be unreasonable to disclose information which is publicly available, in this case I am of the view that there are other persuasive considerations.
62. The South Australian District Court in the matter of *Treglown* found that, although not usually relevant, in some circumstances it is appropriate to consider an applicant's motive in seeking access to documents, particularly when that motive appears to be an abuse of the intended purpose of the FOI Act.¹⁰ I consider this to be relevant and applicable.
63. As I have outlined in my summary of the events preceding this external review, His Honour Judge Dart speculated that the first applicant wished to use the document in issue (as well as the other documents sought by the first applicant) in the defamation proceedings currently pending in the Magistrates Court. Having considered the circumstances of this matter, I agree that this is most likely true.
64. The source of the copied comment is not clear from the contents of the document in issue. There is no mention of the original article, and the copied comment has been posted by someone who goes by 'ragnor lothbrook neroden'. Noting that 'Ragnor Lothbrok' is a character in the popular television series *Vikings*, it appears that the screen name is a pseudonym, adding anonymity to the comment. I consider that disclosure of the copied comment absent any contextual information could be

⁷ *Treglown v SA Police* (2011) 278 LSJS 231, [133], considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223, [18] and [106]-[103].

⁸ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 438.

⁹ Giles Parkinson, 'Fear and loathing about renewable grid in Coober Pedy', *Renewable Economy*, 24 March 2017, accessed 3 June 2020.

¹⁰ *Treglown v SA Police* (2011) 278 LSJS 231, at [147].

misleading and could potentially result in false assumptions as to the accuracy of the copied comment. Should the first applicant wish to refer to the copied comment in the defamation proceedings, I am of the view that it would be more appropriate to do so by referring to the original source; the article and subsequent comments.

65. In light of this, I consider that disclosure of the copied comment would be unreasonable and that the copied comment is therefore exempt pursuant to clauses 6(1) and 6(2).
66. Having determined the copied comment to be exempt, I am of the view that it would also be unreasonable to disclose the forwarding remark. The two are intrinsically linked and I consider that the former provides crucial context as to the latter.
67. It is therefore my view that the entirety of the document in issue is properly exempt.

Determination

68. In light of my views above, I vary the agency's determination such that the document in issue is not to be released to the first and second applicants.



Wayne Lines
SA OMBUDSMAN

24 July 2020

APPENDIX 1

Procedural steps

Date	Event
8 November 2019	The agency received the first FOI application dated 8 November 2019.
27 November 2019	The agency extended the time to deal with the first FOI application until 31 January 2020. ¹
3 December 2019	The agency received the second FOI application dated 3 December 2019.
20 December 2019	The agency extended the time to deal with the second FOI application until 31 January 2020. ²
20 January 2020	The agency consulted with the applicant regarding nine of the documents in issue.
30 January 2020	The applicant advised the agency that he believed eight of the nine documents on which he had been consulted were exempt documents.
31 January 2020	The agency determined the application, proposing to partially release two of the documents which the applicant had claimed were exempt. The determination was made by the principal officer and was therefore not subject to internal review. ³
28 February 2020	The Ombudsman received the applicant's request for external review of the first FOI application, dated 28 February 2020.
3 March 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
27 March 2020	The agency provided the Ombudsman with its submissions and documentation.
29 March 2020	The Ombudsman received the applicant's request for external review of the second FOI application, dated 29 March 2020.
25 June 2020	The Deputy Ombudsman issued her provisional determination and invited submissions from the parties.
7 July 2020	The agency provided submissions in response to the provisional determination.

¹ *Freedom of Information Act 1991*, section 14A.

² *Freedom of Information Act 1991*, section 14A.

³ *Freedom of Information Act 1991*, section 29(6).