

PART 11 FREEDOM OF INFORMATION

Refer: *Freedom of Information Act 1991 (FOI Act)*
Freedom of Information (Fees and Charges) Regulations 2003
Freedom of Information (Exempt Agency) Regulations 2008
Royal Commissions Act 1917 (Royal Commissions Act)
Ombudsman Act 1972 (Ombudsman Act)

TIMELY RESOLUTION OF EXTERNAL REVIEWS

Ombudsman SA aims to complete external reviews within four months.

SETTLEMENT BETWEEN THE PARTIES

Ombudsman SA encourages and prioritises settlement of the review between the parties. Getting the parties together provides an opportunity for both sides to be heard and often results in efficient and timely resolution of the review (see section 39(5)(c) FOI Act).

PART A:

FOI PROCEDURES/STEPS on receipt of an application for external review

1. JURISDICTION

1.1 Is the body an agency as defined in the FOI Act?

The Ombudsman only has jurisdiction to undertake an external review of a determination of an agency that falls within the definition of 'agency' in section 4(1) of the FOI Act.

Is the body an exempt agency?

- An exempt agency is not subject to the FOI Act. The term 'exempt agency' is defined in section 4 of the FOI Act to mean:
 - (b) a person or body referred to in Schedule 2 or a person or body referred to in that Schedule in respect of functions or classes of information specified in that Schedule; or
 - (c) an agency declared by regulation to be an exempt agency or declared by regulation to be an exempt agency in respect of functions or classes of information specified in the regulation.
- see Schedule 2 of the FOI Act for list of 'exempt agencies', and
- Freedom of Information (Exempt Agency) Regulations 2008 for list of 'exempt agencies'.

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When the FOI Act does not apply

- Section 5A of the FOI Act provides that the Act does not apply to the Parliament, an officer of the Parliament or a Parliamentary Committee.
- Section 6 provides that the Act does not apply to the judicial functions of courts and tribunals.

1.2 When can Ombudsman SA become involved?

- **Has an internal review been conducted?**
 - An applicant must seek an internal review by an agency before seeking an external review by the Ombudsman¹ UNLESS the determination was made by, or at the direction of, the principal officer of the agency or at the direction of a person or body to which the principal officer is responsible.²
 - An application for an internal review of an original determination must be made to the agency within 30 days after the day on which the determination was given or within such further time as the principal officer of the agency may allow.³
 - Where the agency is deemed to have refused the application, the application for internal review should be made within 30 days after the date of the deemed determination.⁴
 - The agency has 14 days after receiving the application for internal review to make a determination.⁵
 - If the agency does not respond to the request for internal review within 14 days of receiving it, the agency is taken to have confirmed the original determination.⁶
- **External review**

If the determination was made by a police officer or the Minister for Police then the applicant must apply to the Police Ombudsman for external review (section 39(1)). All other applications for external review should be made to the Ombudsman (section 39(1)).
- **Review under the FOI Act**
 - Under section 40(2), an applicant can apply to the South Australian Civil and Administrative Appeals Tribunal for a review if they are aggrieved by:
 - an internal review determination by the agency
 - a determination that is not subject to internal review
 - an external review by the Ombudsman.
 - Under section 40(4), if the applicant has sought an external review of the determination, he or she cannot commence a review until the external review has been decided, or their application has been withdrawn.
 - Under section 40(4), if the applicant has commenced a review, he or she cannot then apply for an external review.
 - If an agency is aggrieved by a determination made by the Ombudsman it can seek permission of the South Australian Civil and Administrative Appeals Tribunal for a review on a question of law (section 40(1)).

¹ Under section 29 for access to documents determinations, and under section 38 for amendment to records determinations.

² Section 29(6) or section 38(5).

³ Section 29(2)(e) or section 38(2)(d).

⁴ Section 19(2) or 34(2).

⁵ Section 29(5) or section 38(4).

⁶ Section 29(5) or section 38(4).

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- Review proceedings must be commenced within 30 days after notice of the determination is given, or if notice of the determination was not given, within 30 days after the determination (section 40(3)).

1.3 Time limit on seeking an external review

- An application to the Ombudsman for external review must be made within 30 days:
 - after notice of the agency's determination following internal review is given to the applicant; or
 - after the date of determination in any other case.
- Where the agency is deemed to have confirmed the original determination, the application for external review should be made within 30 days after the date of the deemed determination.
- The Ombudsman has the discretion to extend the 30 day time limit (section 39(4)). However, there must be a proper basis upon which to grant an extension.

Relevant factors to consider include:

- the length of the delay
- the applicant's explanation for the delay
- whether the agency advised of external review rights
- the agency's views
- any action taken by the applicant to make the agency aware that he or she intends to exercise their review rights or that he or she remain aggrieved
- the prejudice to the agency if the extension was granted
- any hardship to the applicant if the extension is refused
- the merits of the application
- the public interest.

2. ACKNOWLEDGE THE APPLICATION

- The application for external review is to be acknowledged to the applicant.
- A copy of the FOI information sheet ('External Review by the Ombudsman') is to be sent with the acknowledgment.

3. NOTIFY THE AGENCY OF THE REVIEW

- On commencement of the review, the principal officer of the agency is to be notified in writing.
- A copy of the FOI information sheet ('External Review by the Ombudsman') is to be sent with the notification letter.
- Ombudsman SA will usually ask the principal officer to provide:
 - background information
 - copies of the application and the determinations
 - copies of the documents under review
 - other communications relevant to the determination
 - a report in justification of the determinations.

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- Ombudsman SA should also notify the agency that a determination may be made after Ombudsman SA's receipt and consideration of the report from the agency justifying the determination. The agency should therefore ensure that the report is complete and accurate.⁷

4. DETERMINE IF THERE ARE ANY 'INTERESTED PERSONS' INVOLVED

As per section 39(10) and Division 2 of Part 3 of the FOI Act, 'interested persons' may need to be consulted before a determination can be made that the following documents are to be released:

- documents affecting inter-governmental or local governmental relations⁸
- documents affecting personal affairs⁹
- documents affecting business affairs¹⁰
- documents affecting the conduct of research.¹¹

Whether 'interested persons' need to be consulted will depend on whether the Ombudsman is contemplating a determination to the effect that access is to be given to the document (section 39(10)).

5. SUBMISSIONS FROM PARTIES

- Submissions may be requested from the parties.
- It might be that submissions are only sought from parties if the determination is likely to be adverse to their interests.

6. COMMUNICATION

Communication with the parties must be regularly maintained by Ombudsman SA during the review.

7. PROVISIONAL DETERMINATION

In most cases it will be appropriate at an early stage of the review to provide the parties (including 'interested persons') with a provisional determination seeking their comment prior to finalising the determination.

8. DETERMINATIONS WILL BE PUBLISHED IF IT IS IN THE PUBLIC INTEREST

Ombudsman determinations may be published by the Ombudsman, in whole or in part (that is, with material deleted from the original determination), if it is in the public interest to do so.¹² Publication can occur by way of the Ombudsman website and AustLII.

In deciding whether or not to publish, the Ombudsman will consider each determination on a case by case basis.

Factors the Ombudsman may take into account when deciding whether it is in the public interest (or otherwise) to publish his determination (in whole or in part) may include:

- the need for accountability of the FOI process

⁷ See section 48.

⁸ Section 25 and clause 5 of schedule 1.

⁹ Section 26 and clause 6 of schedule 1.

¹⁰ Section 27 and clause 7 of schedule 1.

¹¹ Section 28 and clause 8 of schedule 1.

¹² Section 39(14).

- facilitating understanding of the FOI Act
- the need for accountability of the agency's processes and decisions
- the community interest in the issues raised in the determination
- the value of the determination as a precedent
- the identity of the parties involved in a determination, for example, whether they are private citizens, MPs, media entities
- the need to protect the privacy and circumstances of particular parties, including vulnerable people, such as children and people suffering from a mental infirmity.

9. EXAMPLES OF EXTERNAL REVIEWS UNDER THE FOI ACT

9.1 Section 14A

- Under section 14A the principal officer of an agency can extend the time in which the agency has to deal with the application.
- The agency must give the applicant written notice of the extension within 20 days after receiving the application (section 14A(2)).
- As the decision to extend the time must be made by the principal officer, the applicant has no right to an internal review and can come directly to Ombudsman SA to have the extension of time reviewed.
- Section 14A external reviews must be prioritised.

9.2 Sufficiency of search

- It will often be the case that an applicant will believe that the agency holds additional documents falling within the scope of the application.
- In a 'sufficiency of search' review, Ombudsman SA may ask the applicant to provide the following:
 - the applicant's reasons for believing that the agency holds additional documents
 - any evidence which supports the applicant's claims, including copies (such as an agency document which refers to the existence of other relevant documents, details of any further searches or inquiries which the applicant believes the agency could reasonably be asked to make in an effort to locate additional documents.
- The Ombudsman may then:
 - require the agency to conduct further searches, or make further inquiries
 - make further inquiries of officers of the agency, or other people who may have relevant information
 - require the agency, or specified officers, to provide evidence about the alleged additional documents or the searches they have undertaken.
- A Statutory Declaration may be requested by the Ombudsman of the agency, attesting to the searches conducted to locate documents.

9.3 Fees and charges

- A person required to pay an agency a fee or charge can request the agency to review the amount under section 53(3). The agency must review the amount and can reduce it if it thinks fit (section 53(3)).

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- If the person is dissatisfied with the agency's review of the fee or charge, he or she may apply to the Ombudsman (or the Police Ombudsman) for a further review. The Ombudsman (or Police Ombudsman) can waive, confirm or vary the charge or give directions as to the time allowed for paying the fee or charge, depending on what is fair and reasonable in the circumstances (section 53(4)).
- Fees and charges payable under the FOI Act are set by regulations (section 53). See Freedom of Information (Fees and Charges) Regulations 2003 - Schedule 1.
- An agency can only charge a fee in respect of the costs of finding, sorting, compiling and copying documents necessary for the proper exercise of a function under the Act (section 53(2aa)) and undertakings required consultations.
- An agency must waive or remit the application fee if the applicant is a concession card holder or the payment of the fee would cause the applicant financial hardship. See section 53(2)(a) and Freedom of Information (Fees and Charges) Regulations 2003.

9.4 Refusal to amend records

- Section 30 provides that:

A person to whom access to an agency's documents has been given may apply for the amendment of the agency's records if –

 - a) the document contains information concerning the persons personal affairs; and
 - b) the information is available for use by the agency in connection with its administrative functions; and
 - c) the information is, in the person's opinion, incomplete, incorrect, out-of-date or misleading.
- An applicant can only apply to amend an agency's records if the document contains information concerning their personal affairs. The term 'personal affairs' is defined in section 4. An agency must deal with an application to amend records within 30 days after receiving it (provided the relevant criteria have been met) (section 32(2)).
- An agency has no power to extend the time for making a determination about an application to amend records.
- If the agency fails to make a determination within 30 days after receiving the application, it is deemed to have been refused (section 34(2)).
- Section 35 provides that an agency may refuse to amend its records in the following circumstances:
 - (a) if it is satisfied that its records are not incomplete, incorrect, out-of-date or misleading in a material respect; or
 - (b) if it is satisfied that the application contains matter that is incorrect or misleading in a material respect; or
 - (c) if the procedures for amending its records are prescribed by or under the provisions of a legislative instrument other than this Act, whether or not amendment of those records is subject to a fee or charge.
- If an agency refuses to amend its records, note section 37 which provides that the applicant may lodge a written notice at an office of the agency requiring it to add a notation to the records.

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9.5 Refusal to deal or continue to deal with applications (section 18)

- An agency may refuse to deal or continue to deal with an application under section 18.
- The agency must give the applicant written notice that it is refusing to deal with the application (section 18(5)).
- An agency's refusal to deal or continue to deal with the application under section 18 is a determination that is reviewable (section 18(8)).

9.5.1 Voluminous applications – section 18(1)

- Section 18(1) provides that:
 - An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.
- The agency can only refuse to deal with the application if it has first endeavoured to assist the applicant to amend the application so that the work involved in carrying it out would no longer substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions (section 18(2)).

9.5.2 Abuse of process – section 18(2a)

- Section 18(2a) provides that:
 - 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.
- See *Gabrielsen v Nurses Board of South Australia* [2008] SADC 51 (Unreported, Judge Simpson, 2 May 2008).

9.5.3 Advance deposit - section 18(3)

- An agency may require an applicant to pay an advance deposit under section 17.
- An agency's request of an advance deposit is not, in and of itself, a determination that is reviewable.
- Under section 18(3) an agency may refuse to continue dealing with an application if it has requested that the applicant pay an advance deposit and the applicant has not made the payment within the period specified in the request.
- If the agency refuses to continue to deal with the application under section 18(3), section 18(4) provides that:
 - (a) it must refund to the applicant such part of the advance deposits paid in respect of the application as exceeds the costs incurred by the agency in dealing with the application; and
 - (b) it may retain the remainder of those deposits.

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- If the applicant does not pay the advance deposit, the agency may continue to process the application and claim fees and charges in the normal manner. The assessment of any such fees and charges would then be reviewable first by the agency, and then externally by the Ombudsman under section 53.

PART B:

FOI – additional information

1. POWERS AND OBLIGATIONS OF THE OMBUDSMAN

- In conducting an external review of an FOI determination, the Ombudsman uses the powers under the Ombudsman Act including the powers of a commission as defined in the Royal Commissions Act (section 39(5)(a)).
- In addition, section 39(6) of the FOI Act provides that section 21 of the Ombudsman Act does not apply to an external review. Section 21 of the Ombudsman Act entitles an agency to refuse production of a Cabinet document to Ombudsman SA.
- The Ombudsman may confirm, vary or reverse the determination of the agency (section 39(11)).
- Under section 39(5)(c) the Ombudsman may:
 - (i) try to effect a settlement between the participants to a review at any time during the review; and
 - (ii) at the request of the agency, suspend proceedings under this section at any time to allow an opportunity for a settlement to be negotiated.
- Under section 39(5)(b) the Ombudsman may if it appears 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; or
 - (ii) require officers of the agency to attend at a time and place specified by the relevant review authority for the purpose of sorting and compiling the documents or undertaking the consultations; ...
- Section 39(7) provides that –

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.
- Under section 39(8), the Ombudsman may dismiss an application if he considers that the applicant has failed to comply with subsection (7).
- If the Ombudsman is satisfied that a document is an exempt document, he does not have the power to direct the agency to release the document. But if the Ombudsman thinks that the applicant should be given access to the document, despite its exempt status, he can offer the agency this opinion and the reasons.
- Under section 39(13), the Ombudsman must notify the agency and the applicant of the determination and the reasons for the determination. The Ombudsman must also

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notify any interested persons if he determines to release a document over their objections, or was unable to obtain their views after taking reasonable steps to do so.

- The Ombudsman relies on the agency to give effect to his determination and does not release documents that are the subject of a review directly to the applicant. The agency should defer releasing any documents until the expiration of the review period if there are any 'interested persons'; and if a review is commenced, until the review process has been finalised.

2. SECTION 39(15)

The Ombudsman should avoid disclosing any matter that the agency has claimed is exempt matter, even if the Ombudsman has determined that the matter is not exempt under the Act (section 39(15)).

3. FOI APPLICATIONS TO OMBUDSMAN SA – OMBUDSMAN AN EXEMPT AGENCY

Ombudsman SA is an exempt agency under the FOI Act. Therefore, no person has a right of access to documents held in the office.

However, the Ombudsman will consider any requests for documents made to Ombudsman SA.

4. ADVICE ROLE

- Ombudsman SA may only give general advice only about rights and obligations under the FOI Act.
- Whilst appreciating the benefit in providing advice to assist agencies and the public, Ombudsman SA must be mindful not to pre-judge a matter which may later come to the Ombudsman for external review.

5. TRAINING ROLE

- Section 54A of the Act requires training to be provided by agencies.
- Ombudsman SA assists in training agencies to comply with the Act.
- Staff of Ombudsman SA currently conduct Module 4 of accredited FOI Officer training with State Records and other training on an *ad hoc* basis.

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