OmbudsmanSA

Report

Full investigation - *Ombudsman Act 1972*

Complainant	**Mr Chris Picton MP**
Agency	**Women's and Children's Health Network**
Ombudsman reference	**2019/09718**
Department/agency reference	**2017-00323**
Date complaint received	**21 November 2019**
Issues	**Whether the agency acted unreasonably by delaying the issue of two FOI determinations while awaiting a Minister's noting process**

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the agency
- seeking a further response from the agency
- considering the *Freedom of Information Act 1991*, the *Health Care Act 2008*, the SA Health Freedom of Information Act (FOI) Policy Directive (approved 6 December 2017)
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.[1] It is best summed up in the decision as follows:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved … .[2]

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1 This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

2 *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Procedural Fairness

On 3 November 2020 I issued my Provisional Report into this matter, and provided the complainant and the agency with the opportunity to provide comments on that report. I did not receive comments from either party.

Background

1. On 21 November 2019 I received a complaint from Mr Chris Picton MP regarding the Women's and Children's Health Network (**WCHN**) (**the agency**), in relation to two applications made by Mr Picton under the *Freedom of Information Act 1991* (**FOI Act**).

2. Mr Picton complained that two internal review determinations made under the FOI Act by the WCHN's accredited FOI Officer, Ms Gillian Plant, were delayed due to a process which Ms Plant had described as 'noting'. The applications had not been determined within the statutory time frames set out in the FOI Act.[3]

3. Although the determinations were signed by Ms Plant on 17 July 2019, Mr Picton did not receive copies of those determinations until he received the internal review determinations for both applications on 13 September 2019. Mr Picton formally complained to the WCHN by letter dated 10 October 2019. In his complaint to the agency, Mr Picton stated:

> I note that I did not receive a copy of these signed determinations, as might be concluded from the internal review determination letters. The first time I saw these determinations was in the form of attachments to the internal review determinations.
>
> In fact my office had been negotiating formal extensions with Ms Plant well past the 17 July sign-off date – Ms Plant advised the determinations were awaiting "noting" on 12 August.
>
> I am very concerned that the initial determinations for both these applications were signed off by Ms Plant on 11 July , well within her statutory timeframes for responding – only to be held up in a "noting" process for almost two months before arriving at my office.
>
> I seek a full explanation as to the "noting" process and how this complies with statutory requirements under the *Freedom of Information Act 1991*. [emphasis in original letter]

4. The agency's response to Mr Picton's complaint dated 23 October 2019 failed to address whether Ms Plant's determinations were not issued due to awaiting noting by someone senior such as the Chief Executive Officer or the Minister. It stated:

> WCHN recognise and value the role of transparency in the delivery of services and acknowledge the importance to provide access to official documents and records….At all times we work to meet the timeframes stipulated for responses contained within the Freedom of Information Act 1991 as demonstrated by the dates of the initial determinations to your requests.

5. I wrote to Ms Lindsey Gough, Chief Executive Officer of WCHN on 8 January 2020, seeking information in relation to the complaint. In particular, I sought clarification as follows:
   - whether there was an instruction, policy or guideline within the agency that requires accredited FOI officers to have their determinations noted by another person prior to issuing them
   - if there was such an instruction, policy or guideline, to provide me with a copy
   - whether or not Ms Plant's determinations in the two applications referred to in Mr Picton's complaint were delayed or not issued due to her waiting for them to be noted, and if so, by whom and for what reason

[3] WCHN 176212; WCHN 176196

- whether Ms Gough had formally instructed accredited FOI officers to issue their determinations immediately upon completion without having them noted by a third person.

6. By letter dated 20 January 2020 Ms Gough replied to my letter, confirming that the two FOI applications referred to in Mr Picton's complaint were forwarded to the Minister for Health and Wellbeing's office. She said that this was in accordance with a Policy Directive, which states in item 2.1 that Chief Executive Officers of Local Health Networks are responsible for 'briefing portfolio Ministers prior to releasing sensitive or contentious documents under FOI applications'. A copy of the SA Health Freedom of Information (FOI) Policy Directive (**the Directive**) was enclosed.[4]

7. On 11 February 2020, I wrote to Ms Gough, advising that I intended to undertake a full investigation into the complaint. In my letter, I sought answers to the following questions:
   - what criteria were applied in these two FOI applications in order to determine whether 'sensitive or contentious' documents were within scope for the purposes of the Directive?
   - more generally, what criteria or considerations would usually apply when considering whether an application should be referred to a third party under this policy?
   - does the Chief Executive Officer of WCHN scrutinise all FOI applications for sensitive or contentious material, or is that a matter for the accredited FOI officer to consider at first instance?
   - was it contemplated that the noting process in respect of these two applications might result in statutory time limits being exceeded?
   - did the briefing process in these two determinations result in any changes to the accredited officer's draft determinations as a result of that referral?
   - is it the practice of the agency to await for the outcome of Ministerial briefings before issuing FOI determinations?
   - approximately how many/what proportion of FOI applications overall are referred to a Minister in the manner contemplated by clause 2.1 of the Directive?

   I also asked to be provided with any other relevant information.

8. Ms Gough wrote to me on 26 February 2020, responding as follows:
   - applications outside of the traditional requests for patients for health information related to care/services from within WCHN are deemed as being of a sensitive and/or contentious nature - examples include those made by opposition Members of Parliament, media outlets, and industrial bodies
   - the two applications that are the subject of the complaint coincide with the types of applications under the FOI Act which would require noting by the Minister's office prior to release
   - all applications under the FOI Act deemed as being sensitive and/or contentious are sent to the WCHN CEO for consideration as part of the approval process
   - The WCHN FOI team aims to provide a timely response to applications in accordance with the requirements of the FOI Act at all times.
   - the briefing process in relation to the two applications in this matter did not have any changes made from the determination made by the FOI officer
   - as a Health Network, WCHN is bound by the Directive to notify the Minister's office of any requests deemed as being of a sensitive and/or contentious nature. Applications outside of this category are sent directly to the applicant

[4] https://www.sahealth.sa.gov.au/wps/wcm/connect/60b8550041526f138c0d8ee8f09fe17d/Directive_Privacy_30052017.pdf?MOD=AJPERES#:~:text=This%20policy%20directive%2C%20and%20its%20accompanying%20frameworks%2C%20apply,specimens%2C%20entries%20on%20computer%20databases%20%28including%20patient%20administration

- in the 2019/2020 year to date (February) approximately ten per-cent of applications were referred to the Minister's office for noting
- WCHN Officers 'respond to meet the obligations of the FOI Act in a timely and accurate manner'.

The WCHN

9. The WCHN is an incorporated hospital established under the *Health Care Act 2008*.[5] The Chief Executive Officer (**CEO**) is appointed under section 33E of the Health Care Act, and is responsible for managing the operations and affairs of the hospital.[6] The WCHN falls within the definition of an agency under the FOI Act.[7] The CEO of the WCHN is the principal officer of the agency for the purposes of the FOI Act.[8]

Relevant Law and policies

10. Section 3 of the FOI Act sets out the objects of the Act

> (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;

11. Section 3A of the FOI Act relevantly provides that:

> **Principles of administration**
> …
> (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.

Applications and timeframes

12. The applications in this matter were lodged with the agency on 14 June 2019. On 10 July 2019, Ms Plant emailed Ms Paech, advisor to the applicant. Ms Plant stated that she was late in finalising the determinations, at which time she asked Ms Paech to 'please consider a time extension'. Ms Paech responded by email on 15 July 2019, asking Ms Plant if she had a date in mind. Ms Plant responded by email the same day, stating:

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[5] *Health Care (Local Health Networks) Proclamation 2011*, published in the Gazette 9.6.2011 p 2547.
[6] *Health Care Act 2008*, s.33E(3).
[7] *Freedom of Information Act 1991*, section 4(1).
[8] *Freedom of Information Act 1991*, section 4(1).

> My aim is to have my determination completed by the end Wednesday 17th July, which will then need to be sent for noting. This shouldn't be more than 2-3 weeks.

13. Ms Paech responded on 16 July 2019 as follows:

> Hi Gillian – so perhaps an extension to 31 July? We can grant this.

14. Section 14 of the FOI Act provides that an application will be dealt with on behalf of an agency by an accredited FOI officer of the agency. An application must be dealt with as soon as practicable (and, in any case, within 30 days) after it is received.

15. The legislature expressly recognises that in some circumstances, an extension of time may be appropriate. Under section 14A:

> **14A—Extension of time limit**
>
> (1) The principal officer of an agency that is dealing with an application may extend the period within which the application would otherwise have to be dealt with under section 14 if satisfied that—
> (a) the application is for access to a large number of documents or necessitates a search through a large quantity of information and dealing with the application within that period would unreasonably divert the agency's resources from their use by the agency in the exercise of its functions; or
> (b) the application is for access to a document in relation to which consultation is required under Division 2 and it will not be reasonably practicable to comply with Division 2 within that period.
> (2) An extension under subsection (1) must be for a reasonable period of time having regard to the circumstances.
> (3) The extension must be effected by giving written notice of the extension to the applicant within 20 days after the application is received.
> (4) Such a notice must specify—
> (a) the period of the extension; and
> (b) the reasons for the extension; and
> (c) the rights of review conferred by this Act.
> (5) An extension under subsection (1) is a determination for the purposes of this Act

16. The circumstances under which an agency may extend the period within which the application dealt with is confined to the circumstances set out in paragraphs (a) and (b), that is where the application involves large numbers of documents or quantities of information, or where a party is required to be consulted under Division 2 of Part 3 of the Act (documents affecting intergovernmental or local government relations, personal affairs, business affairs or the conduct of research). Even in those circumstances, the extension must be for a reasonable period and subject to written notice requirements.

17. Although the email exchange above indicates that the applicant and the agency engaged in a process of negotiating extensions, it does not appear to me that section14A (and in particular the criteria under which an extension can be made under that provision) applied to the circumstances of those applications.

18. On 17 July 2019 the agency purported to make determinations on the applications. I use the term 'purported' because by law, in the absence of section 14A having any application, the date by which the agency was required to determine the applications was 15 July 2019.

19. Under section 19(1)(a) of the FOI Act, after considering an application for access to a document, an agency must determine whether access to the document is to be given (either immediately or subject to deferral)[9] or refused. Section 19(2) provides:

[9] See section 21, FOI Act.

> (2) If–
>
> (a) –
>
> (i) the principal officer of an agency has, under section 14A, extended the period within which an application must be dealt with by the agency; and
>
> (ii) the agency fails to determine the application within the period as so extended; or
>
> (b) in any other case–an agency fails to determine an application within 30 days after receiving the application, [emphasis added]
>
> the agency is to be taken to have determined the application by refusing access to the document to which it relates for the purposes of the provisions of Division 3 and Part 5.

20. In the present case, section 19(2)(b) applies, and so the applications were deemed to have been refused by operation of law.

Whether the agency acted unreasonably by delaying the issue of two FOI determinations while awaiting a Minister's noting process

21. As noted above, the agency received Mr Picton's applications on 14 June 2019 and purported to make determinations dated 17 July 2019. Owing to the operation of section 19(2)(b) of the FOI Act, the agency is taken to have determined to refuse access on 15 July 2019.

22. Further, despite the agency's letter being dated 17 July 2019, Mr Picton was not provided with a copy of this until he received the agency's subsequent letter on 13 September 2019, attached to the internal review determinations.

23. The agency's Directive states that the Chief Executive Officer is responsible for briefing portfolio Ministers prior to releasing sensitive or contentious documents under FOI applications. The Directive's requirement for a briefing on documents does not necessarily require the Chief Executive Officer to provide FOI determinations to the Minister. Nor does it necessarily follow that issuing of determinations or the release of documents should be delayed or impeded by the process of briefing. In my view, an interpretation of the Directive in that manner is contrary to the principles of the FOI Act.

24. The Directive states that it 'assists SA Health Agencies and staff comply with the objects and intent of the Freedom of Information Act 1991 (the Act)'. Clause 2 sets out roles and responsibilities and is expressed to apply to a range of senior officers including the Chief Executive of the Department and to Principal Officers and Chief Executive Officers of Local Health Networks. Clause 2.1 states that those persons are responsible for:

- Ensuring that SA Health meets its obligations under the Act.
- Approving SA Health staff to be designated under the Act as Accredited FOI Officers.
- Ensuring that SA Health's agency Information Statement is published on the SA Health website.
- Approving formal extensions of time under the Act in which to determine FOI applications.
- Making final determinations regarding internal reviews of FOI application decisions.
- Briefing portfolio Ministers prior to releasing sensitive or contentious documents under FOI applications.

25. It is an integral aspect of public administration that agencies will brief Ministers on a range of matters of policy. However, section 12 of the FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents in accordance with the Act. The agency is thus bound by the terms of the Act to comply with its provisions, including compliance with time limits. The Directive appears to

envisage that Ministers will be given advance notice before sensitive and contentious documents are to be released, which in my view does not and should not require the determination process to be impeded or otherwise impacted by the Minister.

26. State Records has published a Guideline entitled 'Processing FOI Applications'.[10] The document provides a stepped guide and flow chart to assist in an agency's processing of FOI applications. The stepped guide lists Steps 1 through to 17. On page 14 under Step 3 there is a section entitled 'Advise Minister's Office – For State Government Agencies Only', which states:

> When an application is received it is important to decide whether the Principal Officer of your agency and your Minister should be notified. When advising the Principal Officer and Minister of these applications, improper direction should not be given to an Accredited FOI Officer (or accepted by the Accredited FOI Officer) in relation to the processing of the application.

27. I note that Step 3 occurs in the preliminary stages, prior to Step 4 dealing with the identification of documents covered by the application. Towards the very end of the process, at Step 16 it states:

> If your Minister has advised that they wish to be informed of the outcome of a particular application (see Step 3) a copy of the finalised determination should be forwarded to them two working days prior to the determination being forwarded to the applicant. This enables the Minister to be made aware of the outcome of the application should he or she need to respond to any queries as a result of access being provided to the information.
>
> Advising the Minister of the outcome of a particular application should not cause the applicant to receive their determination late.

28. If the agency's policy is for Ministers to be apprised of the fact that particular documents are to be released by the accredited FOI officer, then my view is that the briefing should be provided in a manner that does not affect the determination of documents under the FOI Act, either in respect to the content of the determinations or the timing of their release to applicants.

29. In my opinion, the accredited FOI officer in this case should not have postponed the provision of determinations to Mr Picton in order that the Minister's office could note their contents prior to their issue. Although Mr Picton's advisor clearly became aware that the determinations would be out of time, and was provided with some information about a noting process, that additional step at the end of the process led to a further delay in the applications being dealt with in accordance with the FOI Act.

30. It also seems to me that a blanket requirement for all 'sensitive or contentious' matters to be referred to the Minister before issuing determinations may lead to delays under the FOI Act. In her letter to me of 26 February 2020, the CEO stated:

> As a Health Network, WCHN is bound by the SA Health Policy Directive to notify the Minister's office of any requests deemed as being of a sensitive and/or contentious nature. Applications for information outside of this category are sent directly to the applicant (i.e. patient requests for health information related to care/services received from within WCHN).

31. It appears from the CEO's statement that in order to provide a briefing to the Minister, the agency practice has been to delay the release of applications that fall into the category of 'sensitive or contentious'. In my view, that is neither necessary nor appropriate, particularly when the State Records Guideline provides a suggested process for informing the Minister without this resulting in breaching the time limits

[10] State Records of South Australia, *Processing FOI Applications - Guideline*, Version 17.1, Date Finalised 18/02/2019

under the FOI Act. The method described by the CEO effectively results in a two tier system of dealing with applications which the FOI Act does not contemplate. In summary, it appears to me that the provision of a briefing to the Minister does not require applications to be delayed for that purpose.

32. In my opinion, should there be a decision that a sensitive or contentious document needs to be brought to the attention of the Minister, that can be achieved by providing an appropriate briefing to the Minister's office without delaying the statutory process, for example by providing the Minister with the documents at the same time as they are provided to the applicant. In the alternative, it may be possible for the agency to provide the Minister's office with sufficient notice of the content of documents that are to be released, without that causing a delay in the determination process. I have made recommendations accordingly below. The State Records Guideline may assist the agency in that process.

33. For completeness, I mention that my predecessor considered the issue of ministerial noting in some detail in 2014 as part of an audit of departmental FOI practices.[11] Relevantly, the report noted [at 317]:

> Whilst it is appropriate for agencies to keep their Minister informed of sensitive matters, the practice of 'ministerial "noting"' can result in political interference, or the perception of political interference, in the FOI process. The Act provides a mechanism for transparency and accountability of government; and any perception of political interference in the decision making may affect public confidence in the process

34. Although I am not aware of any instance of political interference in the present matter, the issue of perception is nevertheless important for the reasons set out above. In any event, my view is that the agency acted unreasonably in delaying the issue of the determinations of Mr Picton's applications while awaiting the Minister to note them.

Opinion and Recommendations

In light of the above, my view is that by delaying the issuing of two FOI determinations while awaiting the Minister's noting process, the agency acted unreasonably within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2)(b) of the Ombudsman Act that the agency:

Recommendation One:

Amend the Directive to clarify that:
- any briefing of the Minister by way of noting should happen in such a manner so as not to cause any delay in the issuing of determinations or provision of documents
- determinations are not issued subject to Ministerial approval.

Recommendation Two

Remind all relevant staff of:
- the amendments to the Directive made in accordance with Recommendation One
- their obligations to comply with the timeframes in the FOI Act

[11] Ombudsman SA, *An audit of state government departments' implementation of the Freedom of Information Act 1991 (SA)*, May 2014.

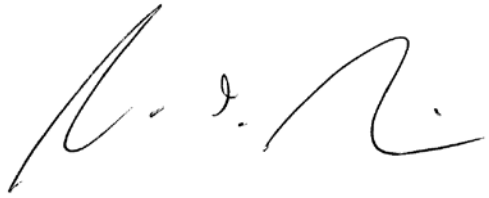
Final comment

In accordance with section 25(4) of the Ombudsman Act the agency should report to the Ombudsman by 29 January 2021 on what steps have been taken to give effect to the recommendations above; including:

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

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Health and Wellbeing as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

18 November 2020