

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant:	Peter Campbell for the Sunday Mail
Agency:	Department for Health and Ageing
Ombudsman reference:	2011/00552
Agency reference:	FOI2010-00010; FOI2009-00186
Applicant reference:	269962
Provisional determination:	The determination of the agency is varied

REASONS FOR DETERMINATION

Background

1. On 12 November 2009 Ms Elissa Doherty, of the Sunday Mail, applied to the then Department of Health (now the Department for Health and Ageing) (**the agency**) under the *Freedom of Information Act 1991* (**FOI Act**) for access to:

Details and the numbers of crimes reported on hospital grounds during the past five years. Details should include types of crimes and which hospitals they occurred at. If any of these documents include personal details precluded for release by privacy laws, I ask to receive copies of the documents with personal details omitted.
2. Initially, the agency located two reports within the scope of the application. Document 1 (a report from the Advanced Incident Management System (**AIMS database**)) and document 2 (a report from the HealthWatch database).
3. On 23 December 2009, the agency determined to refuse access to both documents in full, relying on clause 16(1)(a)(iv) with 16(1)(b) of Schedule 1 to the FOI Act. Specifically, the agency claimed that '[t]he release of these documents would have an adverse effect on the reporting and review of incidents in order to improve systems and procedures and the documents contain information that if placed into the public domain could compromise security for patients, staff and visitors in the hospitals'.
4. On 21 January 2010, Mr Nick Papps, Deputy Editor of the Sunday Mail, applied for an internal review of the agency's refusal to release the documents. In summary he submitted that the release of the documents would not have a 'substantial adverse effect' on the performance of the agency's functions and that the public interest favoured disclosure.
5. By letter dated 3 February 2010, Dr Tony Sherbon, the agency's then Chief Executive Officer and principal officer, advised that he was unable to complete the internal review within the required statutory timeframe and the applicant was entitled to exercise his right to external review. He further advised that he would continue to deal with the internal review application and provide 'it' to the applicant 'with all speed'.
6. By letter dated 25 February 2010, Dr Sherbon reiterated his intention to continue to deal with the internal review application. He advised a 'third document' had been 'discovered

that was also within the parameters of this FOI application'. In addition, Dr Sherbon sought payment of an advance deposit of \$1,700 towards \$4,986.10 for 'estimated costs associated with processing two hundred and thirty-eight pages'. He advised '[n]o further work will be undertaken on this matter until a cheque is received.'

7. By letter dated 11 March 2010 Mr Peter Campbell, a solicitor acting for the Sunday Mail, wrote to the agency about the advance deposit request, and sought clarification on various issues. Mr Campbell submitted that '[s]ection 17 of the FOI Act does not permit an internal review to be suspended or halted until payments are made'.
8. By letter dated 24 March 2010 Dr Sherbon indicated that the 'agency will continue to work on the application'. It appears the agency no longer sought payment of an advance deposit as no mention of this was made in subsequent letters between the parties.
9. By letter dated 1 June 2010 Mr Campbell wrote to the agency as he had not received notification of the outcome of the internal review.
10. By letter dated 7 June 2010, Dr Sherbon responded that the agency would 'continue to work on the application' and that:

...it will take some time before I am able to make an actual determination (to the extent permissible under subsection 19(2a) of the FOIA) to replace the 'deemed refusal determination' that presently exists. Thus, your client may wish to consider the exercise of its rights to external review.

11. By letter dated 5 July 2010, Mr Campbell advised the agency that his client did 'not wish to proceed on the basis of a deemed refusal' as it was awaiting completion of the internal review process. At law, a deemed determination at internal review had already been made, confirming the determination and refusing access to all documents.
12. I comment here that such 'extensions of time' agreed between the parties can only ever be informal and are made at the applicant's peril. Except under section 14A,¹ there are no provisions under the FOI Act for the agency to 'extend time' in fulfilling its statutory responsibilities, or for the applicant to 'consent' to delays in processing. Whilst I understand applicants may wish to make informal arrangements with an agency to extend the time in processing their FOI application, such arrangements have their inherent risks, as they are outside the FOI Act and not enforceable.
13. By letter dated 2 November 2010 Mr Campbell asked the agency to provide the internal review determination and reasons, or a date by which he could expect same.
14. By letter dated 11 November 2010, Dr Sherbon said the agency would make a determination 'no later than 30 November 2010'.
15. On 24 December 2010 the agency hand-delivered Dr Sherbon's 'internal review determination' (section 19(2a) decision), dated 10 December 2010, to the applicant. Dr Sherbon 'determined' to release:
 - all information considered to be within the scope of the application from documents 1 and 2, and
 - all information from document 3 not claimed exempt or out of scope.Regarding document 3, Dr Sherbon determined to release columns 4, 6, 10, 11, and 12. He claimed that column 1 was outside the scope of the application and that the

¹ The agency invoked an extension of time under section 14A of the FOI Act until 1 December 2009 but failed to make its determination by this date. It ultimately made its section 19(2a) 'determination' on 10 December 2010.

remaining columns were exempt under clauses 6(1); 6(3a); 12(1), in conjunction with the *Health Insurance Act 1973* (Cth) (**HI Act**); and 13(1)(b) of Schedule 1 to the FOI Act.²

16. On 21 January 2011 Mr Campbell applied to my office for external review of the agency's belated 'internal review determination'. In his view, the agency 'failed to include entries recording the location of the incidents', and other relevant information, when creating documents 1 and 2. In addition, he argued that the search terms used by the agency to produce the documents 'suggest[ed] that an overly narrow approach has been employed' which 'limit[ed] the information contained in them'.

External review process

17. By letter dated 28 January 2011 I asked the agency to provide relevant documents; a report in support of its claims of exemption; and a brief explanation for the lengthy delay in making the internal review determination.
18. On 1 April 2011, I received the agency's response. The agency advised that it had searched for documents relevant to the application 'across all Divisions of the Department of Health'. The agency did not consider it was 'appropriate... to interpret the meaning of a crime in terms of the *Criminal Law Consolidation Act 1935*, or the *Summary Offences Act 1953...*'. It further advised that for the purpose of the application it took 'crime' to mean:

'that if a community standard could be said to exist, the following type of incident[s] would be considered a "crime" if proven:

- a. an alleged theft
- b. alleged wilful damage to property
- c. an alleged assault

By comparison, the agency did not consider the following incidents to be 'crimes':

- a. an item reported 'missing' or reported as stolen when in fact it was actually missing
- b. a patient needing to be restrained
- c. a door left open, or an area otherwise 'unsecured'
- d. a patient using a false name to protect their privacy
- e. an unlocked cupboard
- f. verbal abuse

19. To create document 1 the agency used just five search terms:

- 'theft'; 'security'; 'police'; 'lost' and 'missing'.

I am told this was on advice from the Crown Solicitor's Office. The agency said that 'incidents that were not considered crimes and therefore considered out of scope were removed prior to the printing of [document 1]' (from the AIMS database).

20. To create document 2 (from the HealthWatch database), the agency searched selected pre-determined categories. In the agency's view only the following categories met the scope of the application:

- 'vandalism'; 'money theft'; 'robbery with violence'; 'property theft'; 'theft'; 'equipment theft'; 'money theft'; 'M/V / bike theft'; 'enter and steal'; 'break, enter and steal' and 'illegal drugs'.

² The agency no longer claimed exemptions under clause 16(1)(a)(iv) with clause 16(1)(b) of Schedule 1 to the FOI Act.

21. The agency manually removed information related to incidents that it considered not to be 'crimes' from the copy of document 1 and 2 released to the applicant, as well as removed 'information covered by "privacy laws" '.
22. Document 3 was created using three search terms: 'sex'; 'assault'; and 'sexual assault'. Ms Tricia Brooks, Principal Project Officer FOI, from the agency, confirmed that the agency's position regarding document 3 was the same as it was for document 2(5) in another external review (my reference 2010/00182). The agency submitted that it delayed progressing the internal review as it was awaiting my 21 April 2011 determination (**April determination**). Ultimately document 3 was released to the applicant in accordance with my April determination.
23. The applicant's concerns about document 3 were addressed by me in my April determination. I will not repeat my comments here. I understand the agency provided document 3 (document 2(5) in my previous review) to the applicant belatedly in late October 2011. As the applicant has received this document, it is not a subject of my external review. My review concerns documents 1 and 2 only.
24. Ms Tonia Nielsen, of my office, asked the agency on multiple occasions to provide additional information to assist me in my review, in particular details about the structure and contents of the AIMS and HealthWatch and how these databases could be searched. Following a meeting with the agency on 19 May 2011, Ms Nielsen sent an email to the agency on 10 June 2011 seeking:
 1. documents 1 and 2 containing a 'location' column
 2. the trees of categories able to be selected from the relevant databases (eg in addition to 'criminal concerns')
 3. a list of the terms able to be selected from the 'criminal concerns' and 'crime' drop-down menus
 4. details of the terms searched.
25. Despite multiple requests by phone and email, my staff were unable to obtain sufficient responses from the agency to explain the structure and contents of the AIMS and HealthWatch databases and how these databases could be searched, until November 2011.
26. Several versions of document 1 were supplied to my office between April and December 2011. All but the final version were insufficient in that, in my view, the agency had omitted to search relevant parts of the AIMS database, or had omitted relevant details from the document produced from the database.
27. The final version of document 1 consisted of 1466 pages, produced after sufficient search terms were entered into relevant sections of the AIMS database. However, in my view, much of the information produced from that database was out of scope. In December 2011, my office asked the agency to assess what material within Document 1 was within the scope of the application. However as at April 2012, while the agency had indicated that much of the material would be out of scope, it had not provided my office with any specific views about what matter was within scope.
28. The first part of document 2 (**Document 2(1)**) was supplied to my office with a 'location' column on 8 November 2011 (previous versions of this document did not include that column), and a final version of document 2(1) with 'out of scope' material removed was supplied on 12 December 2011. This document is 81 pages.
29. On 23 November 2011, I received a supplement report of 198 pages (**Document 2(2)**), which included notations by the agency showing those parts of the document the agency considered out of scope. Document 2(2) was produced using searches of incidents listed

under categories not originally searched by the agency. I will detail the searches conducted and the assessment of mater in scope below.

30. On 27 April 2012, Ms Megan Philpot, Deputy Ombudsman and Ms Justine Simpkins of my office met with Mr Campbell and his client, Ms Megan Lloyd of the Sunday Mail, to discuss the application with a view to receiving the applicant's views about the scope of the application, particularly in light of the volume and nature of the information contained in Document 1.

Relevant provisions of the FOI Act

31. The objects of the FOI Act are set out in section 3, 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 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.

32. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:

- (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; ...

33. Section 3A(1) states that the parliament has intended:

- (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.

34. The definition of a document under the FOI Act 'includes anything in which information is stored or from which information may be reproduced' (section 4).

35. Section 22 of the FOI Act provides:

- (1) Access to a document may be given to a person -
...
 - (f) in the case of a document in which words are recorded in a manner in which they are capable of being reproduced in the form of a written document - by giving the person a written document so reproduced.

36. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.

37. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the determination of the agency, based on the circumstances existing at the time of review.

Consideration of submissions regarding document 1

38. Document 1 is a five column schedule, comprising 1466 pages produced from the AIMS database relating to information stored in the database from 1 July 2005 to 31 October 2009. The columns produced are:
- Incident date
 - Incident recorded date
 - Incident location
 - What happened?
 - What was the outcome of the incident?

The AIMS database

39. As I understand it, the AIMS database is used to report any patient related incident, including near misses. Staff are encouraged to report incidents, and these incidents are allocated a Safety Assessment Code score (**SAC score**). It is mandatory for staff to report more serious incidents (those allocated a SAC score of 1).³ Incidents reported are reviewed by the relevant department or unit manager. Serious incidents undergo more detailed investigation.
40. Incidents are grouped in the AIMS database under the following Principal Incident Types: fall; medication/IV fluid; clinical management; aggression-aggressor; documentation; behaviour/human performance; accident/OH&S; medical device/equipment/property; organisation management/service; aggression-victim; nutrition; blood/blood product; building/fitting/fixture/surround; security; pressure ulcer; health care associated infection; pathology/laboratory; oxygen/gas/vapour.⁴
41. Details of incidents are written in free text form, under headings 'what happened' and 'what was the outcome of the incident'. From my reading of the reports produced from the AIMS database in relation to this FOI application, there is considerable variation in the way matters are recorded, including what details are relevant, and how incidents are described.
42. In November 2011 the agency advised my office that the principal incident classifications within the AIMS database can be searched by free text word search in the description fields ('what happened' and 'outcome' fields). The agency advised that incidents can have more than one Incident Type. Under Principal Incident Type there is a 'further classification' field - this includes a sub category of 'criminal concerns'. My understanding is that completing a further classification field is not mandatory.

Searches undertaken by the agency - AIMS database

43. In May 2011, the agency advised that 'criminal concerns' within the 'Security' Principal Incident Type was the only menu within AIMS relevant to 'crimes reported on hospital grounds', and as I understand it, was the only part of this database initially searched.
44. The meaning of 'crime' was addressed in correspondence between the parties, prior to the commencement of my review. On advice from the Crown Solicitor's Office, the agency selected five search terms to generate document 1. It became apparent to me that these terms were insufficient and were selected without a full understanding of the AIMS system.

³ *South Australian Patient Safety Report 2009-10*, page 32. the report is available at: <http://www.sahealth.sa.gov.au/wps/wcm/connect/7209378046aaedec99a4fb2e504170d4/PatientSafetyReport2009-10.pdf?MOD=AJPERES&CACHEID=7209378046aaedec99a4fb2e504170d4> (accessed 3 May 2012). I note the AIMS system was replaced with the Safety learning System in 2011.

⁴ *South Australian Patient Safety Report 2009-10*, page 34.

45. Additionally, the agency appeared to have initially taken the view that only matters 'proven' could be considered crimes, as set out in paragraph 18, above.
46. Ms Karyn Bloxham of my office, made enquiries with the agency as to why only five search terms were used to create document 1. The agency had advised my office that all possible search terms had been used. However in November, the agency responded that it was in fact 'possible' to enter any free text search terms into the AIMS system. The applicant had suspected such 'free text' searches could be performed as he had submitted in letters to both the agency and myself. In light of this, I formed the view that the searches conducted by the agency had been insufficient, and set about deciding what search terms would be sufficient.
47. By letter dated 21 November 2011 I gave the applicant the opportunity to nominate the search terms it thought met the scope of the application.
48. By letter dated 23 November 2011 the applicant replied with a list of around 114 terms. The applicant also placed a covenant that this list was not exhaustive. He submitted that the agency was more familiar with its own computer system and should therefore propose more terms than his client had suggested. I am not persuaded by this argument. Most FOI applicants would not know the intricacies of the agency's computer systems. There is an onus on the applicant to be clear about what information it is seeking. An applicant would be in a better position to explain what it understood to be crimes and what information it was specifically seeking.
49. That being said, the FOI Act provides at section 3A(2) that agencies are to give effect to the Act in a way that assists members of the public and Members of Parliament to exercise rights given under the Act. In my view, this places an onus on agencies to communicate with applicants where the scope of their application is unclear, and to assist applicants to understand the nature of its information holdings in order to clarify the scope of applications. This did not occur.
50. In my view, it is not reasonable for the agency to search hundreds of terms in the AIMS database. For this reason, and after the agency explained the limitations of generating reports from the AIMS system in more detail, I nominated that the following terms be searched by the agency to reproduce document 1:

Crim*	Polic*
Illegal	Agg*
Viol*	Fraud*
Assault*	Negl*
Stol*	Steal*
Theft*	Threat*
Murder*	Sex*

51. These searches were conducted under the 'principal incident type' categories of 'aggression - aggressor'; 'aggression - victim'; and 'security. These are the categories relevant to the scope of the application. The other AIMS categories are more clinically focussed, and in my view, not likely to hold any information relevant to the scope of the application.
52. The agency then produced 36 separate reports, which together make document 1. The 14 terms (13 of which were Boolean terms) were entered as individual free text searches by the agency into the three principal incident type categories, so a total of 42 searches were undertaken. Six yielded no results.
53. The following table lists the number of incidents produced as document 1 following these searches. The number of pages is represented in parentheses:

Aggression - Aggressor	Result	Aggression - Victim	Result	Security	Result
Crim	7 (3)	Crim	3 (1)	Crim	2 (1)
Polic	363 (80)	Polic	87 (26)	Polic	63 (15)
Illegal	4 (1)	Illegal	0	Illegal	4 (1)
Agg	3199 (587)	Agg	1098 (196)	Agg	27 (8)
Viol	347 (59)	Viol	130 (30)	Viol	10 (3)
Fraud	0	Fraud	0	Fraud	0
Assault	369 (70)	Assault	216 (38)	Assault	4 (2)
Negl	1 (1)	Negl	0	Negl	1 (1)
Stol	19 (4)	Stol	8 (2)	Stol	83 (14)
Steal	30 (7)	Steal	12 (3)	Steal	7 (1)
Theft	1 (1)	Theft	0	Theft	12 (2)
Threat	1358 (218)	Threat	307 (61)	Threat	18 (5)
Murder	7 (2)	Murder	2 (1)	Murder	1 (1)
Sex	57 (11)	Sex	34 (7)	Sex	3 (3)

54. Document 1 as produced from the database consisted of 1466 pages (1044 pages from the 'aggression-aggressor' Principal Incident Type, 365 pages from the 'aggression-victim' Principal Incident Type and 57 Pages from the 'security' Principal Incident Type). However, much of the material produced from the database was, in my view, out of scope.

Incident location in Document 1

55. The agency submits that the AIMS system is 'patient-focussed'. I understand that hundreds of staff across all hospital have access to AIMS and may input information in any number of ways. This may include lay terms, legal terms or clinical terms.
56. As such the 'location' of incidents within document 1 are described at the time of input. Some are hospital names, some are not. For example, a location could be 'ED', 'Ward 17', 'RAH' or 'gymnasium'.
57. On 8 December 2011, after approximately two months of enquiries between Ms Bloxham and the agency about the process and difficulty of altering the 'incident location' column so that it referenced the individual hospital, Ms Michele McKinnon (Director, Safety and Quality Unit) of the agency advised Ms Bloxham that it would take between 2 and 9 weeks for agency staff to run an estimated 1,296 searches in order to manually edit the location column (there are 318 hospitals within South Australia). Such work by the agency is not required by the FOI Act and goes above and beyond the requirements of section 22(1)(f) of the FOI Act. I consider that it was unreasonable to expect the agency to modify the report so as to list which hospital was involved.
58. I note the agency chose to perform such manual edits on document 3 which is only seven pages long.

Consideration of submissions regarding document 2

59. Document 2 comprises two reports produced from the HealthWatch database. Document 2(1) is a 81 page document produced from searching the parts of the database listed at paragraph 20. Document 2(2) is a 198 page report produced from searching the remaining parts of the database. It should be noted that the 198 pages which comprise

document 2(2) include considerable amounts of material that are considered out of scope; and the version of this document provided to my office contains notations by the agency as to which material is considered out of scope. The agency has not provided me with a final 'redacted' version of document 2(2) which excises all 'out of scope' material.

60. Both reports consist of four columns relating to information stored in the database from 1 July 2005 to 31 October 2009. The columns produced are:
- a. Date
 - b. Health unit
 - c. Incident description
 - d. Incident notes

The HealthWatch Database

61. This database is a police run database, used for community crime prevention. Operation is a partnership between SAPol and Health SA. The Incident Notes field in the database allows free text description of the incident.

62. The incident categories in the database are:

- Aggressive/Offensive behaviour
- Area not secured
- Armed Robbery
- Arson
- Assault - Physical
- Attempted Abduction
- Attempted Entry
- Bomb Threat
- Break and Enter
- Break, Enter and Steal
- Burglary
- Code Black
- Code Blue
- Code Brown
- Code Orange
- Code Purple
- Code Red
- Code Yellow
- Drunkenness
- Duress Alarm
- Enter and Steal
- Equipment Theft
- Harassment
- Illegal Drugs
- Laptop Theft
- Loiter
- M/V / Bike Theft
- M/V Accident
- Medication Theft
- Money Theft
- Other
- Other Emergency
- Other Security
- Patient Escort
- Patient Restraint
- Patient Stand by
- Property Theft
- Robbery with Violence

- Sexual Assault
- Standby
- Stores Theft
- Suspicious Activity
- Theft
- Threats against Minister
- Threats against staff
- Threats of Violence
- Trespass
- Vandalism
- Vehicle Theft
- Vehicle Vandalism
- Verbal Abuse
- Wandering Patient

Searches undertaken by the agency - HealthWatch database

63. The areas of the HealthWatch database search to produce the version of document 2 that was provided to the applicant at internal review are set out at paragraph 20.
64. On 10 October 2011, Ms Bloxham enquired with the agency as to whether the pre-determined search terms used to produce document 2 represented 'all possible' categories within the HealthWatch database. Ms Bloxham suggested to the agency that given this was a police database, and the 'drop-down categories' were pre-determined by the police, it would seem likely that all categories within HealthWatch would meet the scope of the application. The version of document 2 supplied to the applicant did not represent all of the pre-determined drop-down categories, but rather the ones the agency had determined met the scope of the application.
65. On 8 November 2011, the agency revealed there were additional categories to those represented in the first version of document 2. In light of concerns about the sufficiency of the search conducted by the agency into the HealthWatch database, Ms Bloxham requested that a report be generated using the remaining categories within the HealthWatch database.
66. In my view, the 'replacement' report effectively cured the deficiency of the earlier report and provided a remedy for the applicant. In November and December 2011, my staff then liaised with the agency about which material from within the 'replacement' document 2 was properly out of scope, noting also that the application did not seek any personal information.
67. Document 2 is now in the form of the earlier report (Document 2(1) - 81 pages after redaction of material determined to be out of scope) and a supplementary report. The supplementary report comprised 198 pages before material that was out of scope had been removed. Together, these reports represent all possible categories within HealthWatch.

Consideration of submissions regarding the scope of the application

68. Much of the efforts of my office in this external review has involved attempting to obtain full information from the agency about the way the databases were structured and the search terms used to generate the documents. Clearly, the proper identification of whether or not an agency holds documents the subject of an FOI application is 'front and centre' to adequately dealing with an FOI application.

-
69. Once I was satisfied that sufficient searches had been conducted, my office then spent time determining what portions of the documents produced from the databases were in scope.
70. During my review, the agency conveyed the view that much of the behaviour described in the database could not be regarded as reports of crimes for a variety of reasons, including:
- a. The patient's mental state may be such that even if their actions may, on their face, appear to be a criminal act (for example, an assault) their mental state may be such that they will not satisfy the mental element of committing a crime
 - b. The database may note allegations of a crime, but the outcome of that allegation is not required to be recorded (eg. items stolen or 'missing' and presumed stolen), and it is therefore unclear if the allegation amounted to a report of a crime
 - c. Much of the information in the database relates to medical care, not 'crimes'.
71. While I have had regard to these views, the agency has failed to provide me with its specific views as to what material within document 1 falls within the scope of the application.
72. During my review it has become apparent that if the scope is interpreted as broadly as the applicant would like, and all 114 search terms proposed by the applicant were used to generate a report, document 1 would become unworkably large. A test run conducted by the agency using just nine search terms resulted in more than 8,200 entries. As it stands, document 1 comprises 1466 pages, as a result of using 14 search terms.
73. I see two main issues with the wording of the scope of the application. Firstly, the period of five years means thousands of entries result from free text searches. Secondly, the scope wording 'details... of [types of] crimes reported... on hospital grounds' leaves room for much speculation. For example, in letters to the agency, the applicant has asked for details of vehicle accidents on hospital grounds. However, in my view these are not crimes. Car accidents are usually civil matters unless death or serious injury has resulted. A verbal threat in one fact situation may be a crime, but in another fact situation may not meet the elements of a crime. Accredited FOI officers do not have legal training to make assessments as to what fact elements of an incident meet the legal definition of a crime. This is why the cooperation of the applicant is important in explaining what it meant by 'crime', and by providing search terms to assist with searches.
74. In my view, the agency has fallen short of what is expected under the FOI Act in relation to engaging with the applicant to clarify the scope of the application. Where an application is ambiguous or uncertain, the agency should take such steps as are reasonably practicable to assist the applicant to modify the request. Had the agency, upon receipt of the application, attempted to clarify exactly what was meant by 'crimes reported on hospital grounds', and provided the applicant with sufficient information about the nature of its information holdings to allow the scope to be clarified, much of the work subsequently undertaken by my office may have been avoided. The spirit of the FOI Act accords with the view that agencies should assist applicants, and certain provisions of the FOI Act, such as sections 15 and 18, make it a requirement to provide such assistance.
75. At a meeting between the applicant and staff from my office held on 27 April 2012, my office provided the applicant with a description of the nature of the material produced from the databases, particularly that material produced from the AIMS database.
76. As canvassed during that meeting, it is clear that the primary purpose of the database is not for reporting crimes. Rather, it appears the database (or at least those parts of the database searched for the purpose of responding to this application) is used for noting risks to patients and staff (and visitors where relevant), particularly regarding occupational health and safety issues.

-
77. At this meeting, the applicant made it clear that the application did not seek a list of crimes prosecuted, or even of matters that had been reported to police. Rather, the applicant seeks 'allegations' rather than formal reports to police about acts which, on their face, may be a criminal act.
78. At the meeting, the applicant's client also said she would like to receive some of the context of the incident, including details about whether the patient was experiencing mental health issues and the gender of the patients.
79. I acknowledge that many of the incidents presented in documents 1 and 2 appear to describe patient behaviour, in circumstances where the patient may be experiencing deteriorated mental health, suffering from brain injury or may be confused or disoriented following arousal from anaesthetic. It is not possible to gauge from the databases whether any of the incidents, if reported and prosecuted, would be held to be a crime in any court. However, if the mental state of the perpetrator were to be considered, it is probable that many of the incidents would not be held to be crimes.
80. In light of the applicant's submissions, I have decided that allegations and descriptions of acts which, on their face, may include the objective element of a 'criminal act' are within the scope of the application, notwithstanding the facts that they may not have been reported to police; that the outcome of the incident may not detail whether an allegation was substantiated or that the mental state of the perpetrator may be such that they could not be held criminally responsible for their actions. In other words, in deciding if an incident amounted to an allegation or 'report' of a crime, I have considered only what may amount to a description of the objective element of a criminal act (the *actus reus*) without considering the mental element (*mens rea*). I have not had regard to whether the criminal liability could be proved in any of the incidents.
81. I viewed the following types of information as out of scope:
- a. incidents that clearly occurred in the community or in public places, where that is apparent from the location column or the content of the 'what happened' column - as these did not occur on hospital grounds. Where this was unclear, in the absence of submissions from the agency about which incidents clearly did not occur on hospital grounds, I have presumed the incident *has* occurred on hospital grounds and is within scope
 - b. incidents describing unspecified acts of aggression, or making general references to aggressive, violent or threatening behaviours, but without noting any specific criminal act
 - c. other descriptions of patients' behaviour that is not on its face a 'criminal act', for example, whether the patient is a 'wanderer', patient interactions with staff and other patients, patient compliance with management plans and hospital policy
 - d. descriptions of medical treatment and care provided to patients, including any medications and management plans
 - e. descriptions of the patients' medical needs, their past history, and other matters related to patients such as their visitors
 - f. descriptions of occupational health and safety issues that do not include details of any allegations that on their face could be considered criminal acts, for example, doors being left open, delays in responses to staff calls for assistance
 - g. information that could personally identify any patient or visitor - I note the applicant has specifically excluded this from the scope of the application.
82. Where the material in the both of the columns 'What happened' and 'What was the outcome' was out of scope, I have also redacted the date and location columns, as in my view, the entire incident is beyond the scope of the application.

83. I note the applicant's desire to receive additional contextual material relating to the patient's mental state and gender. In some instances, where such material, with the other material disclosed, would in my view amount to a disclosure of personal information, I have excluded this information as beyond the scope of the application lodged by the applicant in November 2009.

Source documents

84. I am satisfied that the agency does not have an immediate right of access to documents held by other bodies, such as hospitals, the Health and Community Services Complaints Commissioner, the South Australia Police, or the former Medical Board. I am therefore satisfied that documents held by such bodies were outside the scope of my review. My reasons are the same as the reasons in my April determination.

Determination

85. I am satisfied that, after quite some delay, the agency has now conducted all reasonable searches in an attempt to locate (create) documents falling within the scope of the application.

86. Following a meeting with the applicant in which we discussed, in general terms, the nature of the information that comprised document 1, my office has redacted information that falls outside the scope of the application. This task took my staff considerable time, and should have been undertaken by the agency, as detailed above in paragraph 27. Given the agency's failure to provide me with specific views about what material was within scope, and the considerable and unreasonable delays involved in its handling of the application and responses to my office throughout the external review, I decided that my office should undertake this task rather than risk further delays in delivering an outcome to the applicant.

87. Rather than describe the information redacted, and for ease of reference, I have provided the agency with a version of document 1 with all 'out of scope' material removed. That material has been marked either by black lines through the information or has been covered in white with a stamp 'out of scope'. In my view, no exemptions apply to the remainder of the material, particularly in view of the fact that the application does not seek any personal information.

88. With regard to document 2, I have considered the redactions suggested by the agency in relation to both parts 1 and 2 of this document.

89. I am of the view that the first part of document 2, which was provided to my office, in redacted form on 12 December 2011, is appropriate, and I confirm the agency's view about that part.

90. With regard to document 2(2), the version of this document provided to me on 23 November 2011 included notations by agency about which material from this document it regarded as 'out of scope'. The notations are in the form of lines striking through certain incidents deemed out of scope, and highlighted sections over the names of individuals and other personal information, which would be considered beyond the scope of the application. With the exception of 72 pages (discussed below), I agree with the agency's notations about which material falls beyond the scope of the application. It is now for the agency to redact the 'out of scope' material, in accordance with the notations marked on the version of document 2(2) provided to me on 23 November 2011. I note that version of the documents includes some hand written question marks next to some incidents in addition to a notation regarding whether the incident is within or out of scope. With the

exception of the 72 pages discussed below, those question marks should be ignored when finalising the redactions.

91. I also note that some incidents appear to be repeated, and the agency's notations make specific note of this. In my view, any repeated entry should be treated in the same manner as the incident when it first appeared.
92. With regard to document 2(2), there are 72 pages in which my views vary to those notated by the agency in the version it provided me on 23 November 2011. The agency should substitute my version of the page for its own in redacting information that is out of scope. I have marked in black material that is out of scope and highlighted material that is in scope for those 72 pages. I have provided the agency with a copy of document 2(2) which includes the 72 varied pages.
93. In light of my reasoning above, I vary the agency's determination, pursuant to section 39(11) of the FOI Act, to the effect that:
 - a. Document 1 - is replaced by the version I have provided to the agency with this determination, from which I have removed material I consider to be beyond the scope of the application. The agency should provide the applicant with a copy of document 1, as redacted by my office.
 - b. Document 2 - is replaced entirely by part 1 supplied to my office on 12 December 2012 and part 2(2), which I have provided to the agency with this determination. With regard to document 2(2), I confirm notations made by the agency in the version it provided me on 23 November 2011, with the exception of the 72 pages I have provided to the agency with this determination. The agency should now give effect to those notations, and provide a copy of the redacted document 2(2) to the applicant.
94. I reiterate that document 3 is not subject to my review as it has already been disclosed to the maximum extent permitted by the FOI Act. Additional searches of the Boolean term 'sex*' to produce the replacement document 1 should address any concerns the applicant has over any suspected 'missed' entries relating to any sexually based offences.

Richard Bingham
SA OMBUDSMAN

14 May 2012