

**Decision D0132021 – Published in note form only**

***Re Clark and Shire of Wyndham-East Kimberley [2021] WAICmr 13***

**Date of Decision: 28 September 2021**

***Freedom of Information Act 1992 (WA): sections 16(1) and 26***

***Freedom of Information Regulations 1993 (WA): regulations 3, 5 and 6***

On 13 September 2020, Jenette Clark (**the complainant**) applied to the Shire of Wyndham-East Kimberley (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents concerning her, as well as other documents which included certain position description documents, personnel records, file notes and correspondence.

The agency decided to give the complainant access in full to 45 documents and edited access to 102 documents. The agency also decided to impose charges for dealing with the complainant's access application in the amount of \$372.50. The complainant sought internal review, claiming that certain additional documents should exist; that the editing of one of the documents (**the disputed information**) was excessive; and that the charges imposed by the agency were unreasonable.

On internal review, the agency varied its decision and granted access to further documents which had been omitted in error in the initial decision. The agency varied the basis of its decision to refuse access to the disputed information but confirmed its decision in respect of the charges imposed for dealing with the complainant's access application.

On 17 December 2020, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency's decision on similar grounds to her application for internal review.

On 28 June 2021, after considering the material then before her, the Commissioner provided the parties with a letter setting out her preliminary view. It was the Commissioner's preliminary view that the disputed information was outside the scope of the complainant's access application and that the agency was entitled to delete that information on that basis; that there was insufficient information before the Commissioner to establish the agency's decision under section 26 was justified; and that the charges imposed by the agency were not reasonable.

Both parties accepted the Commissioner's preliminary view that the disputed information was outside the scope of the access application. Therefore, that issue was no longer in dispute.

In relation to the agency's decision under section 26, the complainant provided further submissions about the additional documents she considered existed. At the Commissioner's request, the agency provided further information in support of its decision which included a detailed breakdown of the searches conducted.

Section 26 of the FOI Act provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency's possession but cannot be found, or does not exist. After considering the extensive searches undertaken by the agency and the explanations provided by the

agency, in response to the Commissioner's preliminary view, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate documents within the scope of the complainant's access application and that additional documents either could not be found or did not exist. Accordingly, the Commissioner confirmed the agency's decision to refuse access to further documents under section 26.

In relation to the charges for dealing with the complainant's access application, the agency did not accept the Commissioner's preliminary view and maintained that the charges imposed were reasonable. After considering all of the information before her, the Commissioner was not dissuaded from her preliminary view in this regard.

The imposition of charges payable for dealing with an access application is governed by sections 16, 17, 18 and 19 of the FOI Act and regulations 3, 5, and 6 and Schedule 1 of the *Freedom of Information Regulations 1993*.

The Commissioner acknowledged the difficulties that small (and remotely based) agencies encounter in the training, development and experience of staff, in FOI matters, but did not consider it proportionate to pass that cost onto access applicants. To do so would have the potential effect of making an access application cost prohibitive to many people which undermines the intent of the FOI Act itself.

The Commissioner observed that it is not intended that agencies apply a strict 'user-pays' approach to calculating charges under the FOI Act and that this approach is in accordance with the duty imposed on agencies, by section 4, to assist the public to obtain access to documents promptly and at the lowest reasonable cost: see *Re Ravlich and the Crown Solicitor's Office* [2000] WAICmr 8 (*Re Ravlich*).

The Commissioner noted that the procedures for which charges may be imposed include examining documents, exercising judgment and making a decision about access; deleting exempt matter where appropriate; and preparing a notice of decision in the required form: see *Re Ravlich*. In this case, the Commissioner noted that many of the documents that the agency had given full or edited access to were personnel documents addressed to or received from the complainant directly. The Commissioner considered that 2 minutes per document was a reasonable amount of time to consider each of those documents, not 5 minutes per document as claimed by the agency. Similarly, the Commissioner considered that the time it should take to edit the documents in the circumstances was 2 minutes per document, not 5 minutes as claimed by the agency.

The Commissioner concluded that the amount of time it should take to undertake the activities for which a charge may be imposed was 7 hours. As the charges prescribed for those activities is \$30.00 per hour, the Commissioner found that the amount of charges that could be imposed to deal with the access application was \$210. Accordingly, the Commissioner set aside the agency's decision to impose charges in the amount of \$372.50 and, in substitution, decided that the agency could impose charges for dealing with the complainant's access application in the amount of \$210.00.