

**OFFICE OF THE INFORMATION  
COMMISSIONER (W.A.)**

**File Ref: F2014064  
Decision Ref: D0192014**

Participants:

**David Kelly**  
Complainant

- and -

**Department of Fisheries**  
Agency

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – estimate of charges – payment of an advance deposit – charges payable under the *Freedom of Information Regulations 1993* – calculation of charges

*Freedom of Information Act 1992*: sections 4(b), 13, 15, 16, 17, 18 and 19

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

*Re Biron and Department of Housing and Works* [2004] WAICmr 13

*Re Butcher and Agriculture Western Australia* [2000] WAICmr 62

*Re Hesse and Shire of Mundaring* [1994] WAICmr 7

*Re Ravlich and the Crown Solicitor's Office* [2000] WAICmr 8

## DECISION

The agency's decision is set aside.

In substitution, I find that a reasonable estimate of the charges to be imposed is \$340.00. Accordingly, I find that the maximum amount that the agency may require the complainant to pay as an advance deposit on account of the charges for dealing with the access application is \$85.00.

Sven Bluemmel  
INFORMATION COMMISSIONER

16 October 2014

## REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Fisheries (**the agency**) to require Mr David Kelly MLA (**the complainant**) to pay a deposit under the *Freedom of Information Act 1992* (**the FOI Act**).

### BACKGROUND

2. On 23 January 2014, the complainant applied to the agency under the FOI Act for access to:

*Copies of all documents produced between 23 November 2013 and 10 December 2013 relating to shark attacks in Western Australia and any proposed plans by the Government to mitigate shark attacks against humans.*

3. In an email dated 13 February 2014, the agency invited the complainant to reduce the scope of his access application by excluding correspondence to and from members of the public and to delete from the documents '*all third party information that is personal or commercial information.*'
4. The complainant, although invited to respond by 20 February 2014, did not do so. Therefore, in an email dated 20 February 2014 the agency wrote to the complainant requesting a response. By email dated 20 February 2014, the complainant confirmed that he reduced the scope of his access application in accordance with the agency's email of 13 February 2014.
5. In a letter dated 26 February 2014, the agency gave the complainant notice of its decision to require the payment of a deposit in the sum of \$405.50 on account of the estimated charges for dealing with the access application. The complainant was informed that the deposit was 25% of the estimated charges of \$1,622.00 for dealing with the access application. The agency gave a breakdown of those estimated charges as follows:

*Staff time dealing with the application: 46 hours at \$30 per hour = \$1380*

*Photocopying, staff time: 4 hours at \$30 per hour = \$120*

*Photocopies (Approximately): 500 Photocopies at \$0.20 per page = \$100*

*Actual charges for postage and handling (Approximately) \$22*

*The estimated charges are \$1622*

6. On 5 March 2014, the complainant applied for internal review of the agency's decision. By letter dated 17 March 2014, the agency confirmed its decision. It also invited the complainant to further reduce the scope of his access application in order to reduce the charges which may be imposed.
7. On 26 March 2014, the complainant applied to me for external review of the agency's decision.

## REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of this complaint, the agency produced to me its FOI file maintained in respect of the complainant's access application. Having examined the agency's FOI file, I considered I needed further information to support its estimate of charges. Accordingly, I requested the agency to provide me and the complainant with a further explanation of its estimate of charges and a schedule of the documents it had identified as coming within the scope of the complainant's access application.
9. In a letter dated 11 April 2014, the agency provided that additional information and the schedule of documents to me and the complainant. Accordingly, my office requested confirmation from the complainant whether or not he was satisfied with the agency's further explanation of its estimate of charges and the requirement to pay a deposit. In a letter dated 5 May 2014, the complainant confirmed that he was not satisfied and wished to pursue this matter.
10. On 18 July 2014, having considered the information then before me, I advised the parties in writing of my preliminary view of this complaint and my reasons. It was my preliminary view that the agency's decision to require the payment of a deposit of \$405.50 was not justified. It was also my preliminary view that a reasonable estimate of charges to be imposed was \$340 and, therefore, I considered that the deposit which the agency may require the complainant to pay on account of the charges for dealing with the access application was \$85. That amount is 25% of the substituted estimate of \$340.
11. The agency confirmed that it had reconsidered the decision and it accepted my preliminary view. The complainant was of the view that the new estimate of charges remained excessive. However, the complainant did not provide any further submissions and requested that I proceed to publication of my final decision.
12. Notwithstanding that the agency has now reconsidered its decision and amended its position by accepting my preliminary view, as the complainant remains dissatisfied with the estimate of charges now adopted by the agency, it is necessary that I deal with the entirety of the agency's decision. That is, even though the agency no longer requires payment of the amount of \$405.50 by way of an advance deposit, for completeness and to give context to these reasons, I will set out my review of the agency's decision that gave rise to this complaint.

## IMPOSITION OF CHARGES

13. 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 Regulations**).
14. Section 16(1) of the FOI Act provides as follows:
  - (1) *Any charge that is, in accordance with the regulations, required to be paid by an applicant before access to a document is given, must be calculated by an agency in accordance with the following principles or, where those principles require, must be waived –*

- (a) *a charge must only cover the time that would be spent by the agency in conducting a routine search for the document to which access is requested, and must not cover additional time, if any, spent by the agency in searching for a document that was lost or misplaced;*
- (b) *the charge in relation to time made under paragraph (a) must be fixed on an hourly rate basis;*
- (c) *a charge may be made for the identifiable cost incurred in supervising the inspection by the applicant of the matter to which access is granted;*
- (d) *no charge may be made for providing an applicant with access to personal information about the applicant;*
- (e) *a charge may be made for the reasonable costs incurred by an agency in supplying copies of documents, in making arrangement for viewing document or in providing a written transcript of the words recorded or contained in documents;*
- (f) *a charge must not be made for producing for inspection a document referred to in section 94 or 95;*
- (g) *a charge must be waived or be reduced if the applicant is impecunious; and*
- (h) *a charge must not exceed such amount as may be prescribed by regulation from time to time.*

15. Regulation 5 of the Regulations provides that the charges set out in column 2 of item 2 of Schedule 1 of the Regulations are prescribed as payable under section 16(1) of the Act for the purposes set out opposite those charges in column 1 of that item.

16. The agency's initial estimate of charges, as provided to me and the complainant on 11 April 2014, is as follows:

	<u>Hours:</u>	<u>Cost @ \$30 per hour:</u>
Collate documents for examination	1.00	\$ 30.00
Examination of documents	26.5	\$795.00
Editing of documents	17.5	\$525.00
Preparing notice of decision	1.00	\$ 30.00
Photocopying documents	4.00	\$120.00
Photocopy 500 pages @ 20c a page		\$100.00
Postage and handling		\$ 22.00
<b>TOTAL</b>		<b>\$1622.00</b>

### **The complainant's submissions**

17. In his letter to me of 5 May 2014, the complainant submitted as follows:

- other access applications made on the same subject have not incurred any charges;

- there are only 476 folios listed in the schedule of documents as provided by the agency, and not 530 as stated by the agency;
  - the agency is claiming charges for five separate steps, including ‘*collating, examination for exemptions, redacting for personal and commercial information, writing the Notice of Decision and photocopying*’ which are not accurately calculated; and
  - the estimated time for dealing with the complainant’s access application is excessive.
18. In his letter to me in response to my preliminary view of this complaint, the complainant submitted that the new charges outlined in my preliminary view remain excessive and against the spirit of the FOI Act which was to provide for public access to documents.

### Consideration

19. In accordance with its obligation under section 17(3) of the FOI Act, on 26 February 2014 the agency notified the complainant of its estimate of the charges for dealing with his access application together with the basis on which its estimate was made and the requirement to pay a deposit of \$405.50. The agency also sought confirmation from the complainant as to whether or not he wished to proceed with his access application and notified him of the requirement contained in section 19(1)(b), namely, that if he did not notify the agency of his intention to proceed within 30 days he was to be regarded as having withdrawn his access application. On the information before me I consider that the complainant notified the agency of his intention to proceed.
20. The charges payable under the FOI Act are separate payments which are prescribed by the Regulations and authorised under section 16 of the FOI Act. Only if a charge is – in accordance with the Regulations – required to be paid, must the principles in section 16 be applied to the calculation of that charge. Schedule 1 to the Regulations sets out the prescribed charges and the purpose for which they relate. The Regulations distinguish between the payment of a \$30.00 application fee for an application for non-personal information (regulation 4) and the payment of charges for certain specific purposes (regulation 5). Item 2(a) in Schedule 1 of the Regulations provides that an agency may charge \$30.00 per hour or *pro rata* for part of an hour, for the time taken by staff in “*dealing with*” an application for non-personal information.
21. In *Re Hesse and Shire of Mundaring* [1994] WAICmr 7 (***Re Hesse***) the former Information Commissioner held that it is only at the point where a decision-maker ‘*considers and decides*’ the issue of access that it can be said that he or she ‘*deals with*’ the application according to the obligation in section 13(1) of the FOI Act. In *Re Biron and Department of Housing and Works* [2004] WAICmr 13 (***Re Biron***) a former Acting Information Commissioner went on to hold that it is only for the procedures described in paragraphs (a) and (b) of section 13(1) of the FOI Act that a charge may be imposed. The Acting Information Commissioner agreed with the former Information Commissioner in *Re Ravlich and the Crown Solicitor’s Office* [2000] WAICmr 8 (***Re Ravlich***) who described the various administrative procedures for dealing with an access application and the processes for which charges may be imposed under the

Regulations (see also *Re Hesse* and *Re Butcher and Agriculture Western Australia* [2000] WAICmr 62 (*Re Butcher*)). Those procedures are:

- seeking the view of third parties (but only where required);
- examining the documents, exercising judgment and making a decision about access;
- deleting exempt matter where appropriate;
- preparing a notice of decision in the required form where access is denied;
- providing access in the manner required by the applicant (or in an alternative manner).

22. The intent of the legislature in including in the FOI Act a power for an agency to impose charges for dealing with an access application is evident from a reading of Hansard of the second Reading Speech as follows:

*Agencies are required to give effect to the legislation in a way that assists the public in obtaining access to documents, and which allows access to be obtained promptly and at a reasonable cost.*

[Mr D L Smith, Member for Mitchell – Minister for Justice, Hansard, 28 November 1991, 7170]

23. Further, in the parliamentary debate on this legislation, Hon C Edwardes stated that:

*The sentiment that the costs are kept as low as possible is important. There was never any intent to have full recovery of the costs of providing the information by the agency. That has been discussed over a number of months during briefings from the Minister's staff and other jurisdictions ...*

[Hon C Edwardes, Member for Kingsley, Hansard, 10 November 1992, 6505]

24. Parliament has entrusted the task of reviewing a decision on charges to the Information Commissioner; clearly Parliament intended the Commissioner's decisions on charges to be final, as the FOI Act does not provide a right of appeal to the Supreme Court on a decision made by the Commissioner concerning charges.
25. Former Information Commissioners have held (see *Re Ravlich*, *Re Butcher* and *Re Hesse*) that it was never intended that agencies apply a strict 'user-pays' approach to calculating charges under the FOI Act. This approach is in accordance with the general principles of administration of the FOI Act which impose a duty on agencies to assist people who make applications under the FOI Act to obtain access to documents promptly and at the lowest reasonable cost: section 4(b) of the FOI Act.

#### *Collating documents for examination*

26. In light of *Re Hesse*, *Re Biron*, *Re Ravlich* and *Re Butcher*, collating the documents is not an activity for which a charge can be imposed. Therefore, it is my view that the agency is not entitled to impose a charge for 'collating documents.'

*Examination and editing of documents and writing of the notice of decision*

27. According to the schedule of documents prepared by the agency and provided to me and the complainant under cover of a letter dated 11 April 2014, the agency has identified 108 documents as coming within the scope of the complainant's access application. Based on my examination of the description of those documents, 90 documents consist of 1-5 pages; two documents are substantial in that they consist of 40 and 94 pages; and 16 documents consist of 6-22 pages. The agency also estimates the 108 documents comprise approximately 500 folios.
28. Therefore, the majority of the disputed documents, in my view, do not require a decision-maker to spend a considerable amount of time in dealing with them to decide the question of access.
29. In my view, when the scope of an access application has been agreed between the parties and the requested documents identified and located by the agency, the first step in dealing with an application should be to consider the character of the requested documents and the general nature of their contents. It should often be apparent from the kind of documents requested whether or not they are of the kind for which exemption should be claimed.
30. The agency estimates that it will take 26.5 hours for an officer to examine the 108 documents (or approximately 500 folios) identified as coming within the scope of the complainant's access application. By my calculations, the agency estimates that it will take approximately three minutes to examine each folio, which would mean that it would take almost 5 hours to deal with a document of 94 folios and, therefore, an estimate of \$150.00 for dealing with it and deciding whether or not to give access. I agree with the former Commissioner in *Re Ravlich* at paragraph 37, where she stated:

*Except, perhaps, in the case of a document containing personal or business information about a large number of third parties (in which case the FOI Act provides, in any event, mechanisms for minimising the consultation required),... I find it difficult to conceive of circumstances in which an access application for one document of [50 pages] would require 5 hours of an officer's time. Nor do I consider that it could ever have been intended that access to one document should be that expensive.*
31. Accordingly, I consider that a reasonable estimate of time to examine the 90 shorter documents is two minutes per document or three hours. In addition, I consider an estimate to examine the balance of the documents to be three hours. Therefore, I consider a reasonable estimate of the time to examine all of the documents identified by the agency as coming within the scope of the access applications is six hours.
32. In relation to the writing of a notice of decision, it is my view that if the documents are generally of a kind for which the agency considers there is no need to claim exemption then a decision on access can be made relatively quickly. In addition, it is my view that if an agency does decide to claim and exemption, or exemptions for the any of the documents, it can do so by consolidating similar claims for exemption and reasons for those claims, even if they relate to different documents.



33. I consider an hour a reasonable estimate of time to prepare a notice of decision.

*Photocopying documents – staff time*

34. The agency claims that it will take four hours to photocopy the 108 documents at a cost of \$120.00. The agency has not provided any detail as to why it considers it would take four hours to photocopy 108 documents. I consider that given the photocopying technology available in agencies today, that a more reasonable estimate of time to physically photocopy the documents would be 1 hour.

*Photocopying*

35. The agency intends to charge \$100.00 for copying approximately 500 pages at \$0.20 per page. This amount is in accordance with the prescribed rate per page of photocopying as set out in item 2(c) of Schedule 1 to the Regulations I consider it reasonable.

**A reasonable estimate of charges**

36. Having considered the number and approximate sizes and nature of the documents identified by the agency as coming within the scope of the access application, I am of the view that a reasonable estimate of the time that it should take for an officer having the appropriate competence, skills and knowledge to deal with the complainant's access application for the 108 documents is 8 hours.

37. As the charges prescribed for those activities are \$30.00 per hour, I consider a reasonable estimate of charges to \$240.00. The agency is also entitled to charge 20 cents per copy of photocopies of the documents. Therefore, if the agency ultimately decides to give the complainant access to all approximately 500 folios, it will be entitled to charge \$100.00.

38. In addition, the agency is also entitled to charge the actual costs for postage and handling, so if the agency ultimately decides to give the complainant access to all of the documents, it will then be able to charge the amount of postage to the complainant. It will be open to the complainant to advise the agency whether or not he wishes to attend at the offices of the agency to collect the documents to reduce the charges in that manner.

39. Therefore, I consider that the advance deposit, which the agency may require the complainant to pay on account of the charges for dealing with the access application, is 25% of \$340.00 or \$85.00.

40. I remind the parties that the estimate of \$340.00 is only an estimate. If the actual time taken by the agency to deal with the access application exceeds that estimate, or is less than the estimate, then the final charge to be imposed may be adjusted accordingly.

**CONCLUSION**

41. I find that a reasonable estimate of the charges to be imposed is \$340.00. Accordingly, I consider that the deposit, which the agency may require the complainant to pay on

account of the charges for dealing with the access application, is 25% of \$340.00 or approximately \$85.00.

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