

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

**File Ref: F2012273
Decision Ref: D0222013**

Participants:

Lindsay Jamieson
Complainant

- and -

City of South Perth
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal to deal with application – documents relating to the complainant as a former Councillor – section 20 – agency’s obligations to help applicant to change application – diversion of a substantial and unreasonable portion of agency’s resources

Freedom of Information Act 1992: sections 3(1), 3(2)(a), 4, 16(1), 20, 20(1), 20(4), 30, 102(1) and 112(2)

Freedom of Information Regulations 1993: regulation 5; Schedule 1

Re Conservation Council of Western Australia and Department of Conservation and Land Management [2005] WAICmr 5

Re Ballam and Shire of Toodyay [2009] WAICmr 4

DECISION

The decision of the agency to refuse to deal with the complainant's access application under section 20 of the *Freedom of Information Act 1992* ('the FOI Act') is set aside. In substitution, I find that the agency has to deal with the complainant's access application in accordance with the provisions of the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

30 August 2013

REASONS FOR DECISION

1. This complaint arises from a decision made by the City of South Perth ('the agency') under section 20 of the *Freedom of Information Act 1992* ('the FOI Act') to refuse to deal with an access application made by Mr Lindsay Jamieson ('the complainant').

BACKGROUND

2. On 7 May 2012, the complainant applied under the FOI Act for access to the following documents:

"1. The Director General Jennifer Mathews of the Department of Local Government sent a letter to Mr A C Frewing CEO COSP dated 11 March 2011 with reference 124-10#03/D1100430/E1110673. Subsequent to that letter, there have been many interactions between myself, COSP, COSP staff, Council and Council members.

Date Range for Document Search for content prior to and subsequent to the Letter from DLG dated 11 March 2011:

I am after all documentation at COSP and Council that involves me from 01 January 2011 (in case there were any prior formal, semi-formal or informal discussions) until five working days prior to receiving the FOI response.

I may be identified or referenced in many ways including but not limited to:

*Mr Jamieson
Cr Jamieson
Former Cr Jamieson
A Former Councillor*

2. *In addition, I was named in the meeting agenda item 10.0.3 at the 25 May 2010 Council meeting without my knowledge nor my permission. I am after all documentation leading up to that meeting agenda item concerning me, which may also include other meetings such as Audit and Governance Committee Meetings.*

Date Range for Document Search for matters relating to agenda item 10.0.3 at the 25 May 2010 Council meeting:

It is difficult to provide a precise date range because it may date back as far as November 2007.

I wish to receive all documentation including but not limited to:

- *Reports*
- *Meeting minutes*

- *Draft meeting agendas*
- *Final meeting agendas*
- *Telephone conversation notes*
- *Emails*
- *Faxes*
- *Staff work books with notes.*

My preferred method of receiving the documents is digital, which for each piece of documentation could be as a source file (e.g. .doc), a published file (e.g. .pdf), as a scanned file of a paper copy (e.g. .jpg) or other digital files.

... As I am applying for personal information I understand there is no fee.”

3. By letter dated 29 May 2012, Mr Phil McQue, the agency’s Manager of Governance and Administration, wrote to the complainant advising him that although he stated in his access application he only sought access to personal information about him, the agency considered that the access application also included access to documents which contain non-personal information and therefore it required the complainant to pay an application fee of \$30.00 in accordance with Schedule 1 to the *Freedom of Information Regulations 1993* (‘the Regulations’).
4. In addition, Mr McQue stated that:

“... charges are payable for processing the application as set out in Schedule 1 of the Act. These apply regardless of whether the application is for personal information or non-personal information.”
5. As no response appears to have been received from the complainant, the agency wrote to the complainant on 12 June 2012, advising him that if no advice from him was received by a specified date, the agency would consider that the access application had been withdrawn.
6. In an email dated 14 June 2012 to the agency, the complainant confirmed that he wished to pursue his access application; that he did not agree with the agency’s assessment of personal and non-personal information; and that he agreed to pay any charges as set out in the FOI Act.
7. In a letter dated 16 July 2012, which purports to be the agency’s notice of decision, Mr McQue advised the complainant that the agency had refused to deal with his access application because *“... the work involved in dealing with the application would divert a substantial and unreasonable portion of the City’s resources away from core business and on these grounds has decided to not deal with your request.”*
8. By email dated 23 July 2012, the complainant sought internal review of the agency’s decision. In a letter dated 7 August 2012, Mr Cliff Frewing, the agency’s Chief Executive Officer, advised the complainant that:

“[a]n internal review has been conducted and I have concluded that the City’s decision to not deal with your FOI application is valid, on the basis that it would divert a substantial and unreasonable portion of the City’s resources away from core business.”

9. On 20 August 2012, the complainant applied to me for external review of the agency’s decision to refuse to deal with his access application.

REVIEW BY THE INFORMATION COMMISSIONER

10. After receiving this complaint, I required the agency to produce to me the original of the FOI file maintained in relation to the complainant’s access application.
11. As I considered that the agency’s notices of decision, as provided to me with the complainant’s application for external review, did not comply with the requirements of s.20(4) of the FOI Act, I also required the agency to provide me with specific additional information. In letters dated 28 August 2012 and 22 March 2013, the agency provided me with further information.
12. By letter dated 24 May 2013, I informed the parties in writing of my preliminary view of this matter. It was my preliminary view that the agency’s decision to refuse to deal with the complainant’s access application under s.20 of the FOI Act was not justified as the agency had taken no steps to help the complainant to change his application to reduce the amount of work needed to deal with it as required by s.20(1).
13. I invited the agency to accept my preliminary view or, alternatively, to provide me with further submissions relevant to my determination. The agency did not respond by the specified date. Accordingly, by letter dated 24 June 2013, I wrote again to the agency inviting it to accept my preliminary view or, in the alternative, to make submissions to me. In a letter dated 25 June 2013 the agency responded, confirming that it did not accept my preliminary view.
14. A number of issues concerning the manner in which the agency dealt with the complainant’s application was drawn to the agency’s attention in my preliminary view letter. Those issues are set out in paragraphs 15 to 24 below.

The agency’s notices of decision

15. Under s.102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified. Section 30 of the FOI Act sets out the details that must be included in an agency’s notice of decision given to an access applicant. In cases where an agency decides to refuse to deal with an access application, section 20(4) of the FOI Act provides that the agency must include the following details in its notice of decision:

- the reasons for the refusal;

- the findings on any material questions of fact underlying those reasons; and
 - reference or references to the material on which those findings were based.
16. In this case, neither the agency's initial decision nor the internal review decision complied with the requirements of s.20(4). The initial decision merely said that the *"work involved in dealing with the application would divert a substantial and unreasonable portion of the City's resources away from core business and on these grounds has decided to not deal with your request."*
17. The internal review notice of decision issued by the agency stated as follows:
- "An internal review has been conducted and I have concluded that the City's decision to not deal with your FOI Application is valid, on the basis that it would divert a substantial and unreasonable portion of the City's resources away from core business."*
18. In my view, the agency's notice of decision did not comply with the requirements of s.30 of the FOI Act. In particular, it did not demonstrate any consideration of the agency's obligations under s.20 of the FOI Act and it did not specifically refer to s.20 of the FOI Act.

Charges under the FOI Act

19. Section 112(2) of the FOI Act provides that the Governor may make regulations including, but not limited to, regulations prescribing fees for lodging access applications and charges for dealing with access applications or rates to be used in calculating such charges. Section 16(1) of the FOI Act provides that 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 in accordance with the principles in paragraphs (a)-(h) of that section. Those principles include a requirement that a charge must be waived or reduced if an applicant is impecunious (which does not apply in this case) and that a charge must not exceed such amount as may be prescribed by regulation from time to time.
20. Regulation 5 of the Regulations provides that the charges set out in column 2 of item 2 of Schedule 1 to the Regulations are prescribed as payable under s.16(1) of the FOI Act. Item 2 of Schedule 1 to the Regulations prescribes the charges payable under the FOI Act.
21. Section 16(1) of the FOI Act requires an agency to calculate any charge required to be paid in accordance with the following principle, among others:
- "(d) no charge may be made for providing an applicant with access to personal information about the applicant;"*
22. Consequently, the agency's statement in its letter dated 29 May 2012 to the complainant that *"... charges ... apply regardless of whether the application is for personal information or non-personal information..."* is not correct.

23. In that letter, the agency should have explained to the complainant the implications of not paying the \$30.00 application fee; that is, that any information other than personal information about the complainant will be considered outside the scope of the access application and deleted from those documents on that basis.
24. In this case, the complainant clearly marked on the form he included with his access application, that he sought access to personal information about himself only.

REFUSAL TO DEAL – SECTION 20

25. The agency has refused to deal with the complainant’s application pursuant to s.20 of the FOI Act, which provides as follows:

“20. Agency may refuse to deal with an application in certain cases

- (1) *If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.*
 - (2) *If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations, the agency may refuse to deal with the access application.”*
26. Section 20 is designed to ensure that the operations of government agencies are not unduly impeded by agencies having to deal with unreasonably voluminous access applications. It is one of a number of provisions aimed at striking a balance between, on the one hand, the public interest in open and accountable government and, on the other hand, the public interest in the ongoing effective operation of agencies.
27. When considering a complaint about an agency’s refusal to deal with an access application under s.20 of the FOI Act, my function on external review is to decide whether the agency:
 1. took reasonable steps to help an access applicant to change an application to reduce the amount of work needed to deal with it; and
 2. is justified in deciding that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations.

28. In *Re Conservation Council of Western Australia and Department of Conservation and Land Management* [2005] WAICmr 5, the former A/Commissioner said at [20]:

“A decision made by an agency under section 20 of the FOI Act cannot be justified where the agency has not satisfied its obligation under subsection 20(1). That is, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.”

29. In *Re Ballam and Shire of Toodyay* [2009] WAICmr 4, citing the above case, the former A/Commissioner said at [18]:

“In other words, an agency may be justified in claiming that the work involved in dealing with an access application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations but, if the agency has not taken reasonable steps to help the applicant change the application to reduce the amount of work needed to deal with it, the agency is not justified in refusing to deal with that application under s.20”.

I agree with those views.

THE AGENCY’S SUBMISSIONS

30. In its letter dated 28 August 2012 to me, the agency submits that the documents sought by the complainant fall into three categories: documents which are available publicly, such as Council Minutes and Agendas; correspondence between the complainant and the agency – the agency stated that “... *it is confidently predicted that in the order of 95% of correspondence documents that mention [the complainant] are emails and letters received from [the complainant]...*”; and correspondence between the agency and external organisations, “... *in order to release this information the [agency] would need to consult with third parties. It is anticipated that the majority of this information would be privileged.*”
31. In addition, the agency submitted that it estimated that it would take approximately ten days or 80 hours to deal with the complainant’s access application; and that on that basis it estimates that the applicable charges would be \$2,500.00.
32. The agency also listed and described the activities which it had estimated would be required to deal with the complainant’s access application as follows:
- searching and identifying documents;
 - printing and collating all “*council reports, agendas and minutes*”;
 - copying, printing and scanning of documents;
 - third party consultation;
 - editing of documents;
 - preparation of schedule of documents; and

- consultation between the FOI Coordinator and the FOI decision maker.
33. The agency also provided me with information regarding its current resources and, in particular, the resources it has available for dealing with FOI applications.

Has the agency taken reasonable steps to help the complainant change his access application?

34. The first question for my consideration is whether the agency took reasonable steps to help the complainant to change the application to reduce the amount of work needed to deal with it.
35. I have examined the agency's file maintained in respect of the complainant's access application. I can find nothing in that file to show that either the initial decision-maker or the internal reviewer made any attempt to discuss with the complainant practical alternatives for changing the application. There is nothing on the agency's FOI file to evidence that it explained to the complainant why it considered the scope of the application was too large, nor has the agency made any assertions to me claiming that it provided the complainant with any assistance.
36. The FOI Act states in its long title, that it is "[a]n Act to provide for public access to documents..." Its objects are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public (s.3(1)). Those objects are to be achieved by, among other things, creating a general right of access to State and local government documents (s.3(2)(a)). Section 4 of the FOI Act obliges agencies to give effect to the Act in a way that assists the public to obtain access to documents and allows access to documents to be obtained promptly and at the lowest reasonable cost.
37. As there is no evidence before me to demonstrate that the agency has taken any steps to help the complainant to change his access application to reduce the amount of work required to deal with it, I consider that the agency has not satisfied its obligation under s.20(1) of the FOI Act and therefore the agency is not justified in refusing to deal with the complainant's access application under s.20. Accordingly, it is not necessary for me to consider the next question of whether or not dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations.
38. However, by way of comment, it is not clear to me on the face of the information currently before me that dealing with the complainant's access application, in its current terms, would divert a substantial and unreasonable portion of the agency's resources away from its other operations in any event.

CONCLUSION

39. The decision of the agency to refuse to deal with the complainant's access application under section 20 of the FOI Act is set aside. In substitution, I find

that the agency has to deal with the complainant's access application in accordance with the provisions of the FOI Act.
