

## HESSE AND MUNDARING

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

**File Ref: 94035  
Decision Ref: D00794**

Participants:

**Peter Colin Hesse**  
Applicant  
  
- and -  
  
**Shire of Mundaring**  
Respondent

### DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - complaint against charges - meaning of "deal with"  
- charges that may be imposed for access to document containing non-personal  
information - no charge for personal information about the applicant.

*Freedom of Information Act 1992 (WA)* ss.4; 11; 12; 13(1); 16(1)(a); 17(3); 18(1);  
20(1); 32(2); 33(2); 76(1)(b); Schedule 1, clause 3; clause 4.

*Freedom of Information Regulations 1993 (WA)* Schedule, item 2(a).

## **DECISION**

The decision of the agency of 2 May 1994 that the applicant is required to pay the amount of \$91.50 for access to documents of the agency, is set aside.

In substitution therefore it is decided that the documents to which access is sought consist of personal information and no charge is payable.

**B.KEIGHLEY-GERARDY**  
**INFORMATION COMMISSIONER**

17 May 1994

## REASONS FOR DECISION

### BACKGROUND

1. This is an application to the Information Commissioner arising out of a decision of the Shire of Mundaring ('the agency') to provide access to documents of the agency, but at a cost of \$91.50. Mr Hesse ('the applicant') is a ratepayer and pensioner in the shire. He disputes the amount to be charged by the agency in this instance as he considers it to be an excessive charge for access to documents consisting of correspondence to the State Ombudsman and Mr Fred Chaney, the then Member for Pearce.
2. The background to this access application is as follows:

In 1991 a council building project commenced opposite the applicant's home in Mundaring. The project was not completed until late 1992 by which time the applicant's home had allegedly been polluted by dust and grime to the extent that it was necessary for him to incur costs to repair the damage. The applicant was subsequently offered a sum in settlement from the agency's insurers but this was insufficient to meet the cost of cleaning and repairing his home. He sought, but was not granted legal aid to pursue a claim for additional compensation. On 22 February 1994 the applicant submitted a request to the agency under the *Freedom of Information Act 1992* ('the FOI Act') seeking access to personal and non-personal information concerning the Yallambee Frail Aged Hostel.
3. On 30 March 1994 pursuant to s.17(3) of the FOI Act, the applicant was advised by the agency that the charges for dealing with his application were estimated to be \$718.85 and the agency asked for an advance deposit of \$179.71 in accordance with s.18(1) of that Act. On 6 April 1994 the applicant sought clarification of these charges which were subsequently reduced when he reduced the ambit of his request to cover only those documents consisting of correspondence between the Council, the State Ombudsman and Mr Chaney. The agency estimated the new charge to be \$121.50 being a revised total of \$162.00 less a 25% pensioner discount.

### ACTION BY THE INFORMATION COMMISSIONER

4. On 11 April 1994 the applicant formally complained to my office with respect to these revised charges. Initially my office attempted to conciliate the matter and discussions were held with various officers of the agency in an effort to reduce the amount payable in this instance, in accordance with the intent of the FOI Act. The agency was provided with copies of FOI Bulletins issued by my office containing an explanation of the structure of fees and charges, together with further advice on the practical application of these charges. During this process the matter was referred by officers of the agency to the General Manager of the agency ('the General Manager') who undertook to personally review the decision

on the charges and to provide a notice of decision to the applicant, sufficient to ground my jurisdiction in relation to this complaint.

5. On 2 May 1994 the applicant received a notice of decision made by Mr M. N. Williams, General Manager of the Shire, which affirmed the previous decision to grant access to the documents but at a cost. The applicant was also provided with a cost sheet detailing the amount of time spent by the agency on his request. However, the agency did not identify the number of documents falling within the scope of the applicant's request and, to some extent, the costings were meaningless without this information. Some concession was provided to the applicant in that Mr Williams had agreed to reduce the total cost by a further amount in recognition of the payment of the application fee of \$30. The balance, being an amount of \$91.50 is the amount now in dispute.

## THE VIEWS OF THE AGENCY

6. It appears that the agency proceeded to deal with the matter of charges in this instance on the basis that the documents sought contained non-personal information. From discussions with the General Manager and correspondence on file it is apparent the agency takes the position that the application fee of \$30 payable for non-personal information, is not intended to cover any costs associated with an FOI application and that the scale of fees and charges in the *Freedom of Information Regulations 1993* ('the regulations') is intended to cover all costs associated with processing an application. Such costs, according to the agency, are the costs of creating the file, writing letters of acknowledgement, searching for documents, assessing them, producing the documents and all associated correspondence in providing access.
7. As a result of this view the agency had computed its costs in the first instance as follows:

| <b>Initial Processing</b>       | <b>Total time</b> | <b>Charges</b> |
|---------------------------------|-------------------|----------------|
| - Making up file                | 0.10              | 5.00           |
| - Applicant consultation        | 0.05              | 2.50           |
| - Acknowledgement notice        | 0.10              | 5.00           |
| - Archives search               | 0.30              | 15.00          |
| - Identify and locate documents | 17.00             | 510.00         |
| <b>Consultation with:</b>       |                   |                |
| - Other Council Officers        | 0.30              | 15.00          |
| - Third parties                 | 0.30              | 15.00          |
| <b>Decision</b>                 |                   |                |
| - Examination of documents      | 1.45              | 52.50          |
| - Draft letter of advice        | 0.10              | 5.00           |
| <b>Access</b>                   |                   |                |
| - Document preparation          | 1.10              | 35.00          |
| - Photocopying                  | 0.45              | 22.50          |
| <b>Miscellaneous</b>            |                   |                |
| - Typing                        | 0.20              | 10.00          |

Total 22.25      \$718.85  
(Hrs)

8. After the applicant sought clarification of these charges and he agreed to reduce the ambit of his request, the agency revised the costs as follows:

| <b>Initial Processing</b>       | <b>Total time</b> | <b>Charges</b>  |
|---------------------------------|-------------------|-----------------|
| - Making up file                | 0.10              | 5.00            |
| - Applicant consultation        | 0.05              | 2.50            |
| - Acknowledgement Notice        | 0.10              | 5.00            |
| - Archives search               | 0.30              | 15.00           |
| - Identify and locate documents | 2.00              | 60.00           |
| <b>Consultation with:</b>       |                   |                 |
| - Other Council officers        | 0.30              | 15.00           |
| - Third parties                 | 0.30              | 15.00           |
| <b>Decision</b>                 |                   |                 |
| - Examination of documents      | 0.20              | 10.00           |
| - Draft letter of advice        | 0.10              | 5.00            |
| <b>Access</b>                   |                   |                 |
| - Document preparation          | 0.10              | 5.00            |
| - Photocopying                  | 0.25              | 12.50           |
| <b>Miscellaneous</b>            |                   |                 |
| - Typing                        | 0.20              | 10.00           |
|                                 | <b>Total 5.20</b> | <b>\$162.00</b> |
|                                 | (Hrs)             |                 |

## THE LEGISLATION

9. The FOI Act provides a general right of access to documents of State and local government agencies. This right is exercisable by lodging an application in accordance with the procedures contained in s.12 of the FOI Act. When an agency receives such an application, s.13(1) requires that agency to "deal with" the application as soon as practicable.
10. The administrative procedures that agencies may adopt include:
- (i) receiving the application and issuing a receipt for the fee (where applicable);
  - (ii) creating an FOI file or otherwise recording the application in the existing record system;
  - (iii) searching records for the relevant documents;
  - (iv) identifying and collating the documents in dispute;
  - (v) consulting with third parties if necessary;
  - (vi) examining the documents, exercising a judgement and making a decision about access;
  - (vii) deleting exempt matter where appropriate;

- (viii) preparing a notice of decision in the required form where access is denied;
- (ix) providing access in the manner required by the applicant (or in an alternative manner).

11. In the case of applications for access to personal information about the applicant the FOI Act and regulations make it clear that no charge is to be imposed. As to charges for access to documents containing non-personal information, item 2(a) in the Schedule to the regulations provides that an agency may charge \$30 per hour or *pro rata* for part of an hour, for the time taken by staff in "dealing with" the application. It is on the basis of this regulation that the agency has computed its charges for providing access to these documents.
12. The words "deal with" which appear in the regulations and in several other parts of the FOI Act are not defined. The Concise Oxford Dictionary gives a number of meanings to the word "deal" (followed by *with*) including:

*" a. take measures concerning (a problem, person, etc), esp in order to put something right, b. do business with; associate with, c. discuss or treat (a subject)."*
13. The process of "dealing with" an FOI application may cover all of the administrative steps (i) to (ix) outlined in paragraph 10 since these steps are the measures taken by the agency concerning the application. However, if these words are given such a wide interpretation, the right of access under the FOI Act would be effectively beyond the reach of the average citizen. Such a result, in my view, would be manifestly unjust and contrary to the stated intention of the Act.
14. Section 13(1) is in the part of the Act entitled "**Part 2 - Access to Documents**" and in the Division entitled "*Procedure for dealing with access applications*". That section, so far as it is relevant provides as follows:

*"13. (1) Subject to this Division, the agency has to **deal with** the access application as soon as is practicable (and, in any event, before the end of the permitted period) by -*

  - (a) *considering the application and deciding -*
    - (i) *whether to give or refuse access to the requested documents; and*
    - (ii) *any charge payable for dealing with the application;*
  - and*
  - (b) *giving the applicant written notice of the decision in the form required by section 30."* (My emphasis)
15. Section 13(1) indicates that the process of "dealing with" an application covers the stages of considering and deciding whether or not to give access, considering and deciding any charges payable and providing the notice of decision in the required form. This means that the administrative actions for which a charge may be payable under item 2(a) in the Schedule to the regulations are those steps (v) to (ix) outlined in paragraph 10. In my view, 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 s.13(1).

16. I am aware that a narrow construction will limit the amount of charges that may be payable for access. However, this construction is preferred since it accords with the intent contained in s.4 that the Act should be administered in a way that provides access promptly and at the lowest reasonable cost. Such an intent is also evident from the parliamentary debate on this legislation. For example, Mrs Edwardes, Member for Kingsley and now Attorney-General, said:

*"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..." [Hansard, 10 November 1992, p 6505]*

17. The impost on local government was recognised and accepted by Mr Wiese, Member for Wagin. He said:

*"Local government as a whole will be severely affected financially by the passing of this freedom of information legislation. I believe local government has accepted that fact. It has voiced its concerns to some degree about that aspect of this legislation. From my discussions with local government it has accepted that there is a down side to this legislation but it has also accepted that the concept of freedom of information is a worthwhile one so it accepts the need for it and agrees with Parliament's bringing local government under the requirements of the legislation." [Hansard, 10 November 1992, p 6509]*

18. The then Minister for Justice the Hon David Smith MLA, at the Second Reading of the Freedom of Information Bill on 28 November 1991, acknowledged that charges would be made for access but he stressed that these would be reasonable. During the debate on 10 November 1992, when responding to a question from Mr Omodei, Member for Warren, on the matter of compensation to local authorities for the additional costs of freedom of information, he said:

*It is inevitable that the provisions will impose additional costs on local government and on the State Government...Clearly, any use of the legislation by electors or ratepayers is likely to add to the administrative costs of individual local authorities. We must simply monitor the extra costs. We do not propose that local government should be treated any differently from the State Government in making sure the costs are kept to the least possible...Inevitably the local government providing the information will have some cost to bear which will not be recoverable from the applicant in those circumstances. In that sense there will be additional cost to local government, but it must be weighed against the benefits that freedom of information legislation brings in terms of accountability to the electors and ratepayers." [Hansard, p 6493]*



19. My view, that the words "deal with" should be read as limiting the charges payable for access, is supported by the inclusion in the FOI Act of various sections which operate to reduce the administrative burden on agencies. These sections, principally s.11(2), 11(3), 20(1), 32(2) and 33(2), are cast in the form of duties and they require agencies to adopt procedures which have the effect of keeping costs to a minimum. Such procedures include consulting with the applicant to identify the documents, assisting the applicant to reduce costs, considering the option of edited access and releasing documents which may be technically exempt.
20. For this reason, I am of the view that charging an applicant for procedures which the agency has both the capacity and a duty to control does not accord with the spirit and intent of this legislation. In this instance, even after the applicant reduced the ambit of his request, it appears to me that the agency calculated the charges payable on the basis of "user-pays" and without a proper regard for the principles in section 4 which it is bound to follow.

## THE DOCUMENTS

21. There are eleven documents involved in the applicant's amended request. I have had the opportunity of examining these documents in detail. They consist of letters from the General Manager to various parties about the applicant, letters to the agency or the General Manager from these parties and other acknowledgement letters. The agency has an opportunity to use discretion when imposing fees and charges. In this case the majority of the documents requested are properly described as containing personal information about the applicant. Therefore, in accordance with s.76(1)(b) I have decided that this agency should have determined that no charges are payable by the applicant for access to these documents. Although the applicant paid an application fee of \$30 in the first instance, that fee should now be refunded. Even if the disputed documents had contained non-personal information, I do not consider that the charges sought to be imposed by the agency are reasonable or authorised by the FOI Act and the regulations. This is the first formal decision required by me on charges imposed by an agency. I therefore propose to identify the type of charges which I consider to be reasonable so that the agency will understand its duties more clearly and will modify its approach in the future, and to assist other agencies in calculating charges.

## THE CHARGES IMPOSED BY THE AGENCY

22. Most of the procedures detailed by the agency in paragraph 9 under the heading **Initial Processing** are, in my view, adequately covered as administrative costs by the payment of an application fee where documents containing non-personal information are requested. In the case of requests for access to personal information, the FOI Act and the regulations make it clear that no charges are to be imposed. Although s.16(1)(a) provides that a charge may be made for routine searches only, no such charges have been prescribed by regulation. In instances

where the initial request is unclear, voluminous or where the relevant documents may be situated at diverse locations, the agency has a responsibility to assist the applicant to identify the documents requested. Early communication with an applicant after an access application is lodged can eliminate or reduce the workload on agencies which I recognise can be a burden. However, until such time as Parliament decides to prescribe a charge for searching for documents, however time consuming this process may be, I consider that an applicant should not be charged for this activity. In my view, none of the charges under this heading is payable because the activities described are not part of "dealing with" an application.

23. In some circumstances, I accept that consultation with third parties may be necessary to "deal with" an application. The duty to consult under s.32(2) and 33(2) arises when the agency has reached a preliminary conclusion that the document attracts exemption under clause 3 or clause 4 of Schedule 1 to the FOI Act, but that one or more of the limits on exemption applies, or the agency chooses not to claim exemption. If this preliminary position is reached and edited access without prior consultation is not an option, then it is reasonable, in my view, that some charge is made.
24. In this instance, the consultations undertaken by the agency included corresponding with parties involved in the construction of the hostel, with the State Ombudsman and with Mr Chaney. None of these parties objected to the release of the relevant information. From my examination of the documents I am not convinced that these consultations, other than those with the State Ombudsman, were necessary. Whilst my office encourages agencies to obtain inputs from all relevant parties, that does not mean that an applicant should bear the cost of doing so, particularly where the only costs involved appear to be typing letters and postage.
25. In a letter of explanation to me, the General Manager stated that the charges reflected the costs to the agency of the staff involved in processing this application. In particular he identified that the charges included "...*Consultation with Council officers and third parties, includ[ing] a briefing by Council's FOI Co-ordinator, given to the FOI Officer to enable that officer to examine relevant documents and assess their relevance to Mr Hesse's request, to assess any third party issue and to assess costs dealing with third parties.*" Whilst I am sympathetic to the demands that FOI places on agencies, such costs as those applied in this case, should not be passed on to an applicant. They are not within the spirit and intent of the legislation nor are they covered under the regulations.
26. Of the remaining activities identified in paragraph 10 above, the only matters for which it is reasonable to expect payment under the regulations for dealing with the application, are those for the examination of the documents, drafting the notice of decision and photocopying. During the Parliamentary Debates, the Hon David Smith said:

*"In order to facilitate an application, it is reasonable to charge for time spent deleting exempt matter from a document before providing the full document. In some cases that may be extensive. That is a flow-on from*

*the application and in order to consider the application one must look at the document and make a decision about whether it contains exempt matter. If one can delete the exempt matter, again with a view to providing the document to the applicant, as it is additional work required to satisfy the application, it is fair that a charge should be levied."*  
[Hansard, 10 November 1992, p 6503]

27. I agree with this statement. Deleting exempt matter is part of "dealing with" an application in my view, and charges may be imposed for this process in accordance with the regulations. I consider the remainder of the activities identified by the agency in its Time Sheet, fall within the normal range of clerical duties, and, whilst amounting to additional work, are not covered by the charge structure in the regulations.
  
28. The construction of the Act and the regulations allows for discretionary decisions to be made and the majority of agencies have shown that they are prepared to apply the fee structure in a way that accords with the principles outlined in s.4. I am aware that some agencies are waiving charges altogether even though a charge may be legitimately imposed. Others are altering their administrative practices and policies to provide access to documents outside of the rigours of the FOI Act. All of these approaches are to be encouraged and the agencies commended for adopting such an enlightened approach. It may be that this agency could also alter its policies and procedures to facilitate access by applicants, outside of the FOI Act.

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