

NAZAROFF AND SWDC

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

**File Ref: 95008
Decision Ref: D00795**

Participants:

Harry Nazaroff
Manya Mike Nazaroff
Diane Harry Nazaroff
Applicants

- and -

South West Development Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - a complaint against charges - definition of personal information - charges payable for access to documents containing non-personal information - meaning of "deal with" - reducing the ambit of the access application.

Freedom of Information Act 1992 (WA) ss. 11(2); 11(3); 13(1); 16(1); 18(1); 20(1); 24; 30; 39; 68(1); 102(1); Glossary in Schedule 2.

Freedom of Information Regulations 1993 (WA) Schedule Items 2(a) and 2(c).

Re A and Heathcote Hospital (Information Commissioner WA, 9 June 1994, unreported).

Re Kobelke and Minister for Planning and others (Information Commissioner WA, 27 April 1994, unreported).

Re Kiernan and Western Australia Police Force (Information Commissioner WA, 17 June 1994, unreported).

Re Hayes and The State Housing Commission of Western Australia (Homeswest) (Information Commissioner WA, 17 June 1994, unreported).

Re Burkala and City of Belmont (Information Commissioner WA, 25 August 1994, unreported).

Re Manly and Ministry of the Premier and Cabinet (Information Commissioner WA, 16 September 1994, unreported).

Re Morton and City of Stirling (Information Commissioner WA, 5 October 1994, unreported).

Re Jeanes and Kalgoorlie Regional Hospital (Information Commissioner WA, 7 February 1995, unreported).

Re Hesse and Shire of Mundaring (Information Commissioner WA, 17 May 1994, unreported).

DECISION

The decision of the agency of 23 December 1994, to impose a charge of \$163.70 for access to the requested documents is set aside.

In substitution it is decided that the charges payable for access to the requested documents are \$60 for dealing with the access application and \$3.80 for photocopying the requested documents.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

March 1995

REASONS FOR DECISION

BACKGROUND

1. This is an application for external review by the Information Commissioner arising out of a decision of the South West Development Commission (SWDC) ('the agency') to charge Mr, Mrs and Ms Nazaroff ('the applicants') for access to documents requested by the applicants under the *Freedom of Information Act 1992* ('the FOI Act'). The applicants claim that the requested documents contain personal information about themselves for which no charges are payable under the FOI Act.
2. On 21 September 1994, the applicants applied to the agency under the FOI Act for access to documents of the agency which were identified by 8 categories of subject headings. Those were:
 - * Department of Mines;
 - * Mines, fuel and Energy;
 - * Beenyup Project - Mineral Deposits Ltd;
 - * Mineral Deposits Limited;
 - * BHP;
 - * Mineral Sands;
 - * Conservation and Land Management; and
 - * Environment Protection Authority.

Although it is not clear from the access application, it seems that the applicants subsequently advised the agency that they were seeking access to personal information about themselves.

3. By letter dated 28 October 1994, the agency invited the applicants to review 12 files which had been identified as relevant to the access application. In that letter the agency informed the applicants that there would be no charge for reviewing the files. It appears that this was an attempt by the agency to reduce the ambit of the access application made by the applicants. However, in the same letter the agency informed the applicants that *"[f]or us to go through the files and identify information specific to yourselves or to allow you to view the files, we have estimated a fee of between \$600 and \$1200. This cost will cover the staff time (\$30 per hour) required to review approximately 2500 pages and prepare the information."*
4. On receiving this information the applicants sought a break-down of the charges and, on 2 November 1994, the agency advised them of the basis for its estimate of charges. The agency identified 2495 pages of documents which it estimated would take between 0.5 and 1.0 minute per page to review. This equated with 20-40 hours of staff time at \$30 per hour.

5. Subsequently, the applicants decided to accept the agency's offer to review the files with the Director of the agency and a meeting took place in Perth on 16 November 1994. It is my understanding that, at the meeting, Mr Chris Fitzhardinge, Director of the agency ('the Director'), read the titles of the files to the applicants and described certain correspondence in those files. Based on this information, the applicants then decided which files they wished to inspect and they were allowed to inspect those files selected. After this inspection, the applicants asked a number of questions about additional documents to which access was sought and the accessibility of certain types of documents under the FOI Act, and the agency undertook to answer those questions and to locate the documents. In all, 19 pages or folios were identified by the applicants as being the documents requested under the FOI Act.
6. On 1 December 1994, the agency wrote to the applicants and provided some answers to their questions and confirmed that some additional documents had been located. The agency also advised the applicants that the charges payable for access to the 19 documents had been calculated by the agency to be \$193.70 consisting of \$189.90 or 6.33 hours of staff time at \$30 per hour and photocopying charges of \$3.80.
7. On 6 December 1994, the applicants requested a review of these charges because they considered the documents to contain personal information about themselves for which no charge is payable under the *Freedom of Information Regulations 1993* ('the regulations'). Although it was not clear from that letter, this request appears to have been effectively an application for internal review under s.39 of the FOI Act and I understand it was treated as such by the agency.
8. On 23 December 1994, the Chairman of the Board of the agency, Sir Donald Eckersley, advised the applicants of the results of the internal review. It was the decision of the agency that the documents contained non-personal information for which charges now totalling \$163.70 were payable, the charges for locating files, letter writing and telephone calls having been deducted. The charges were said to be for 5.33 hours of staff time and for photocopying. Although that letter purports to be a notice of decision under s.13(1)(b) of the FOI Act, it did not comply with s.30 of the FOI Act, and, in particular, did not indicate the name of the person who had made the decision or the date on which the decision had been made. However, I take it that the decision was made by the Chairman of the Board on the date on which the letter was signed.
9. On 10 January 1995, the applicants applied to the Information Commissioner for external review of the decision of the agency to require the payment of charges for accessing the requested documents. The applicants claimed that the requested documents contained personal information for which no charges are payable under the FOI Act.

REVIEW BY THE INFORMATION COMMISSIONER

10. On 18 January 1995, pursuant to the requirements of s.68(1) of the FOI Act, the agency was notified that I had formally accepted this complaint for review. Although the agency had provided the applicants with some details relating to the charges payable for access, the exact basis for those charges was not clear. Therefore, I sought further information from the agency to justify its calculations. As the decision of the Chairman of the Board of the agency was not in the form required by s.30 of the FOI Act, I also required the agency to identify the material facts from which it had concluded that the requested documents contained non-personal information.
11. This additional information was provided to my office on 23 January 1995. However, the agency's explanation in relation to the calculations it used to determine the cost to the applicants did not provide me with enough detail. It appears from this advice that at some stage a search was conducted of all the files that related to the access application to determine whether any of those files contained personal information about the applicants.
12. On 31 January 1995, a member of my staff travelled to Bunbury where the offices of the agency are situated. She was provided with access to the fourteen files identified by the agency as being within the ambit of the access application, two additional files having been identified following the meeting on 16 November 1994 referred to in paragraph 5 above. It took my officer approximately three and a half hours to review those files to determine whether they contained any information that was personal information about the applicants.
13. By letter dated 10 February 1995, in response to a further request from my office, the agency provided my office with additional information in relation to its calculation of charges for access to the requested documents. The agency said:

"The calculation of charges is based on reasonable hours spent to identify information requested by the Nazaroff family. In order to properly deal with the complaint, the following files required examination; [a list of 17 files]....

The task of dealing with the files was undertaken by the then Freedom of Information Officer, Francine Hendon - Level 1, who used in excess of 28 hours to complete the function. This assessment was made by multiplying the approximate number of folios examined by an average of 0.5 minutes per folio.

*i.e. 3455 folios inspected x 0.5 minutes
= 1722.5 minutes or 28 hours.*

Additional time for access supervised by Director, Chris Fitzhardinge was not accounted for when calculating the assessment of charges. The total hours spent to facilitate access of documents to the complainant is anticipated to exceed 35 hours. However, an allowance of 5.33 hours only has been allocated to ensure charges were kept within reasonable bounds to enable the complainants the opportunity to exercise their rights."

14. By facsimile dated 22 February 1995, the agency indicated that "[t]he South West Development Commission has not charged the Nazaroff family for locating nineteen (19) documents requested by them after meeting with Director, Chris Fitzhardinge on November 16, 1994. The cost of photocopying was the only charge in this instance."
15. This advice further confused the issue in relation to the agency's calculation of charges, particularly when my office was later informed by the agency's FOI Coordinator that the cost of photocopying was not the only charge payable. He informed my officer that the agency had also charged the applicants for the time taken to check its files before the meeting took place on 16 November 1994, to determine whether the files to be viewed contained any exempt matter.
16. The first issue that I must determine concerns the proper characterisation of the information contained in the 19 folios to which access is sought. If that information is "personal information" about the applicants, as claimed by the applicants, no fees or charges are payable under the FOI Act for access to those documents. However, if the information is non-personal information, as claimed by the agency, then I must decide, secondly, whether the charges imposed by the agency are payable under the regulations.

Do the requested documents contain personal information about the applicants?

17. In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined to mean: "...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -
 - (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or
 - (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample."
18. In some instances, the mention of a person's name in the context of an agency's document may reveal "personal information" about that individual. Information which I have found in previous decisions to be "personal information" includes names of third parties involved in the incarceration of a patient in a psychiatric

hospital (*Re A and Heathcote Hospital*, 9 June 1994, unreported); name and signature revealing an employment relationship (*Re Kobelke and Minister for Planning and others*, 27 April 1994, unreported); information in police records containing the substance of an allegation against a police officer (*Re Kiernan and Western Australia Police Force*, 17 June 1994, unreported); names and addresses, gender, employment and family connections of tenants in a residential complex where that information would enable the applicant to identify those individuals (*Re Hayes and The State Housing Commission of Western Australia (Homeswest)*, 17 June 1994, unreported); name and address of a complainant ratepayer (*Re Burkala and City of Belmont*, 25 August 1994, unreported); names and addresses, personal relationships, financial details and business arrangements (*Re Manly and Ministry of the Premier and Cabinet*, 16 September 1994, unreported); name, address, employment status, relationships, signatures (*Re Morton and City of Stirling*, 5 October 1994, unreported); name and address of a medical practitioner subject to peer review (*Re Jeanes and Kalgoorlie Regional Hospital*, 7 February 1995, unreported).

19. The agency claimed it had searched the relevant files for documents which mentioned the complainants by name or which referred to their property at Scott River in order to satisfy the initial request for access to documents. That search had located one file to which the applicants had been granted access in response to a previous access application. However, the remaining documents identified by the applicants at the meeting with the Director in November 1994 did not mention the applicants by name and the agency had concluded that the information within those documents was not personal information about the applicants.
20. My officer also viewed those documents and the 14 files. I accept her advice that the 19 folios to which access is sought do not contain any references to the applicants, either specifically or in a general sense. The files contain memoranda, correspondence, notes, reports, minutes of meetings and other documents relating to the Beenup Mineral Sands Project and related issues. Although the subject matter of those folios may have a remote connection with the Scott River property of the applicants or a particular matter in which the applicants have an interest, that connection is not sufficient to make the contents of the documents personal information about the applicants.
21. In my view, the agency has correctly determined that the 19 folios to which the applicants require access, contain information that is not personal information about the applicants. I find, therefore, that the documents to which access is sought do not contain personal information about the applicants.

Are the charges imposed by the agency payable?

22. The FOI Act allows agencies to impose a charge on applicants seeking access to non-personal information. Section 16(1) of the FOI Act provides:

"Charges for access to documents

16. (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 arrangements for viewing documents 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 sections 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.*

(2)..."

23. 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 an access application. In my decision in *Re Hesse and Shire of Mundaring* (17 May

1994, unreported), I discussed the meaning of the words "deal with" in the context of the FOI Act. In my view, the decision in *Re Hesse* describes those procedures for dealing with access applications for which charges under the regulations may be payable.

24. 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)."

25. Section 13(1) is in the part of the FOI 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).

26. 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 a notice of decision in the required form. 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).

27. As I stated in *Re Hesse*, in my view, the words "deal with" should be read as limiting the charges payable for access. It appears that my view is in accord with the intent of Parliament as evidenced during the debates on the FOI Bill, to which I also referred in *Re Hesse*, at paragraphs 16-18 of that decision. It is also supported by the inclusion in the FOI Act of various sections, principally s.11(2), 11(3), 20(1) and 24, that 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.

28. As I stated in *Re Hesse* at paragraphs 10-15, the various administrative procedures which are necessary to process an FOI application 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).
29. It is my view that the administrative actions for which a charge under the regulations may be payable, are those steps (v) to (ix) outlined in paragraph 28 above. In my opinion, the practice of charging an applicant for any other procedures which an agency has both the capacity and a duty to control does not accord with the spirit and intent of the FOI Act.
30. The agency's notice of decision of 23 December 1994 indicates that charges were calculated on the basis of reviewing files, identifying appropriate documents, reviewing exemptions, drafting a memorandum and photocopying. However, by that stage, the agency had already identified and located the documents to which access was sought as it had met with the applicants on 16 November 1994 for that express purpose. Ordinarily I consider only those processes of reviewing exemptions, drafting the notice of decision, necessary consultation and photocopying the relevant documents would attract charges under the regulations.
31. The scope of the applicants' access application appears to have been very broad, and I consider that it may have been possible for the agency to rely on section 20 of the FOI Act in the first instance. It is open to an agency under section 20 to refuse to deal with an access application on the basis that to do so would involve an unreasonable diversion of its resources. However, before it may do so the agency must attempt to assist the access applicant to narrow the scope of the access application.
32. Whilst I acknowledge that the agency made considerable efforts to satisfy the applicants' access application in this instance and to assist the applicants to narrow the scope of their application and minimise the cost to the applicants, I am not

- satisfied that the agency has established that its decision to charge the applicants for 5.33 hours of staff time to deal with the application was justified.
33. Despite my repeated requests to the agency for a breakdown of the staff time charged for, it has not satisfactorily accounted for the 5.33 hours of staff time claimed to have been expended in dealing with the access application. The agency claims that 28 hours was spent examining 3455 folios, but that only 5.33 hours was charged to applicants *"...to ensure charges were kept to within reasonable bounds to enable the complainants the opportunity to exercise their rights."* However, no explanation of how the figure of 5.33 hours was arrived at was offered and I am of the view that the agency is not now entitled to charge for inspection of any more than the 19 documents identified as the subject of the access application.
34. It appears that those 3455 folios were inspected before the meeting of 16 November 1994 and that no estimate of charges was given to the applicants as required by section 18(1) prior to the agency proceeding to inspect all those documents. Rather, the applicants were invited to a meeting with the Director of the agency for the purpose of reviewing the 12 files identified, and narrowing the scope of their application by identifying more specifically the particular documents to which they sought access. They were told by the agency that there would be no charge for that review. In my opinion, although I appreciate that the unusual method chosen by the agency to assist the applicants to narrow the scope of the application involved a considerable amount of work on the part of the agency, it is not now open to the agency to charge the applicants for that process, its preparation for that meeting, albeit a discounted charge.
35. Having narrowed the scope of the access application to 19 documents, in my view, as I have said, the agency is only entitled to charge for dealing with the access application in respect of those 19 documents. The agency may only impose those charges provided for by the Act and the regulations and, upon a complaint to the Information Commissioner, must establish that its decision in respect of those charges was justified. In my opinion, it has not done so.
36. The agency indicated in its notice of decision on internal review that it had charged the applicants for dealing with their "follow up" requests made to the agency at their meeting with the Director. Those "follow up" requests involved the identification of certain documents not previously identified by the agency and requests for additional information. No charge may be made for searching for those documents. Although section 16(1)(a) of the Act contemplates that a charge may be made for a routine search for documents, no amount for that charge has been prescribed and therefore no charge is payable.
37. In my view, in this instance, the only charges that the agency is entitled to impose are for examining each of the 19 documents and making a decision, in respect of each, whether the document contains exempt matter; preparing a notice of decision; the time taken for a staff member to photocopy the 19 documents and \$0.20 for each

copy. I consider that the agency could also have charged for the Director's time spent effectively supervising access at the meeting on 16 November 1994. However, in keeping with the spirit and intent of the FOI Act the agency informed the applicants that it would impose no charge for that and it did not do so.

38. As the agency has not specifically identified the time taken for each of those steps, I can only make my own estimate, on the evidence before me, of what charges were justified. By the agency's own calculation, reviewing each page in order to determine whether it contains exempt matter would have taken between 0.5 and 1 minute. Therefore, the maximum time that ought to have been charged for in respect of examining the documents is 19 minutes. As the agency's decision was to grant access to all the documents, the notice of decision provided to the applicants need only have been brief and the time taken to prepare it minimal. I have examined the notice of decision provided to the applicants. Although some of the matters dealt with in the notice are not, strictly speaking, part of the decision on access, it deals with all the outstanding issues raised and documents sought by the applicants, at and following, their meeting with the Director, in an endeavour to finalise their application.
39. The maximum amount of time for which I consider it was justified to charge in respect of preparing the notice of decision is 1 hour. Item 2(c) in the Schedule to the regulations provides that a charge of \$30 per hour, or *pro rata* for part of an hour, of staff time may be charged for photocopying and \$0.20 per copy. In the absence of anything from the agency to establish that any more is justified, I consider that a maximum of half an hour for a member of staff to remove the 19 documents from the various files, photocopy them and replace them on the files may be justified together with \$0.20 per page.
40. Accordingly, in my view, the agency has not discharged its onus under section 102(1) and has not persuaded me that its decision to charge the applicants for 5.33 hours of staff time to deal with their application was justified. On the evidence before me I am satisfied that charges for only approximately 2 hours of staff time are justified in respect of dealing with the access application. Accordingly, I find that a charge of \$60 for dealing with the application and \$3.80 for photocopying is justified in this instance.
