OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: F1441999
Decision Ref: D0082000

Participants:

Ljiljanna Maria Ravlich
Complainant

- and -

Crown Solicitor's Office
First Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – complaint against decision to require payment of a deposit – estimate of charges – principles of administration of FOI Act in relation to charges – agencies to assist the public to obtain access to documents promptly and at lowest reasonable cost – charges for access – general approach to estimating charges.

Freedom of Information Act 1992 (WA) ss. 3(1), 3(2)(a), 4, 11(2), 11(3), 12, 15(2), 16(1), 17(3), 18(2), 19(1)(b), 20(1), 24, 35, 100, Schedule 1 Clauses 3(1), 7
State Supply Commission Act 1991 s.36

Re Hesse and Shire of Mundaring [1994] WAICmr 7
Re Ravlich and State Supply Commission [1999] WAICmr 37

DECISION

The decision of the agency is set aside. The deposit the agency may require the complainant to pay on account of the charges for dealing with the complainant's access application is $60.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

25 February 2000

REASONS FOR DECISION

BACKGROUND

1. This is a complaint to the Information Commissioner arising out of a decision made by the Crown Solicitor's Office ('the agency') to require the Hon Ms Ravlich MLC ('the complainant') to pay an advance deposit of $705 for it to deal with an access application made by the complainant under the *Freedom of Information Act 1992* ('the FOI Act').

2. In October 1997, the Minister for Works and Services ('the Minister') appointed the Crown Solicitor, Mr P Panegyres, to conduct a review of the *State Supply Commission Act 1991* ('the State Supply Act'), as required by s.36 of that Act. A Review Group composed of Mr Panegyres, Mr L E Smith and Ms J E Eckert, Senior Assistant Crown Solicitor, assisted by an officer from the Department of Contract and Management Services, conducted the review. The final report of the Review Group ('the Report') was prepared in May 1999 and, on 30 June 1999, the Minister tabled the Report in the Legislative Assembly of the Parliament of Western Australia.

3. On 18 May 1999, the complainant made an application to the State Supply Commission ('the Commission') for access to documents relating to the review of the State Supply Act and the operations of the Commission then being conducted by the agency. Pursuant to s.15(2) of the FOI Act, the Commission transferred the access application to the agency.

4. On 9 June 1999, the agency informed the complainant that it had received the transferred access application. The agency also informed the complainant that the documents sought by her were held by 130 different agencies and provided the complainant with an estimate of charges of $30,000 for dealing with her access application in its then existing form. That estimate was based on the agency's view that the application involved 20,000 folios and that it would take approximately 1,000 hours to deal with those folios in accordance with the FOI Act.

5. The complainant confirmed that she wished the agency to proceed with her access application, but did not accept the estimate of charges. However, the agency confirmed its estimate of costs and required the complainant to pay a deposit of $7,500. Subsequently, the complainant reduced the scope of her application and identified five categories of documents as being those to which she sought access. The agency further reduced its estimate of charges to $5,400 and required the complainant to pay a deposit of $1,350.

6. The complainant sought internal review of that decision of the agency. Following internal review, the estimate of charges was increased to $8,460 and, based on that figure, the internal reviewer informed the complainant that a deposit of $2,115 was required.

7. On 25 August 1999, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision to require the payment of a deposit based on its estimate of charges for dealing with her access application.

REVIEW BY THE INFORMATION COMMISSIONER

8. After receiving this complaint, I directed my Investigations Officer to discuss the scope of the access application with the complainant and the agency to determine whether this complaint could be resolved by conciliation between the parties. After discussions with the complainant, the scope of the access application was reduced even further. I am informed that the only documents of the agency to which the complainant seeks access are the following:

    - submissions to the review of the State Supply Act made by the Anti-Corruption Commission, the Chamber of Commerce and Industry, the Commissioner for Public Sector Standards, the Ministry of the Premier and Cabinet (Public Sector Management Office), the State Ombudsman and the Commission;
    - correspondence to and from the Commission between the Premier, the Minister for Services, any other Minister, the CEO of the Commission, CAMS and the Crown Solicitor's Office; and
    - general correspondence between those individuals listed above.

9. Having determined the scope of the complainant's access application to be as described above, my office conveyed that information to the agency. Subsequently, agreement was reached between my office, the agency and the complainant that 64 documents were within the ambit of the complainant's revised access application. However, the agency's revised estimate of charges for dealing with those 64 documents was $2,820, and the agency required the complainant to pay a deposit of $705.00. The complainant remained dissatisfied with the agency's latest estimate of charges and did not pay the deposit required.

10. On 26 November 1999, after considering the material before me, including the nature and contents of the 64 documents the subject of the access application, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the agency's estimate of charges for dealing with the application in its reduced form was unreasonable. It was also my preliminary view that the estimate of charges should be approximately $160 and, based on that estimate, it was reasonable to require the complainant to pay a deposit of $40.

11. The agency did not accept my view and refused to deal with the complainant's access application upon the payment of a deposit of $40.

ADVANCE DEPOSITS

12. Section 17(3) of the FOI Act requires that, if an agency estimates that the charges for dealing with an access application might exceed $25, then the agency has to notify the applicant of its estimate, and the basis on which its estimate is made, and inquire whether the applicant wishes to proceed and notify the applicant of the requirement of s.19(1)(b). That section provides that intention to proceed must be notified within 30 days (or such longer time as the agency allows) of the giving of the notice under s.17(3) or the access application is considered withdrawn.

13. Section 18(1) of the FOI Act allows an agency, in a notice given under s.17(3), to require the applicant to pay a deposit at the prescribed rate on account of the charges for dealing with the application. The rate prescribed by the *Freedom of Information Regulations* ('the Regulations') is 25% of the estimated charges in excess of the application fee (item 3 of the Schedule).

GENERAL PRINCIPLES OF ADMINISTRATION OF THE FOI ACT

14. The FOI Act is stated in its long title to be "[a]*n Act to provide for public access to documents…*", and 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 (s.3(1)). Those objects are to be achieved by, *inter alia*, 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 legislation in a way that, among other things, assists the public to obtain access to documents and allows access to documents to be obtained promptly and at the lowest reasonable cost.

15. Those principles and various other provisions of the FOI Act impose a duty on agencies to assist people making applications to obtain access to documents, promptly and at the lowest reasonable cost. For example, s.11(2) requires that, if circumstances of the applicant require it, an agency has to take reasonable steps to help a person to make an access application to the appropriate agency in a manner that complies with the FOI Act. If an application does not comply with the requirements of s.12, the agency has to take reasonable steps to help the applicant to change the application so that it does comply (s.11(3)).

16. Most relevantly to this matter, s.18(2) requires an agency that has required an applicant to pay a deposit, at the request of the applicant, to discuss with the applicant practicable alternatives for changing the application or reducing the anticipated charges. Section 20(1) requires that, if the agency considers 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, the agency must take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.

17. In this instance, rather than making any endeavour to assist the complainant to reframe her access application into a more manageable form, the agency's initial response was to estimate that the application covered approximately 20,000 folios and that the charge for dealing with it would be $30,000. I do not consider that an invitation to the complainant to advise the agency whether she wished to reduce the ambit of her access application, without giving her any information to assist her to do so, amounts to a reasonable effort to assist the complainant. When the complainant did not reduce the scope of her access application, having been given no assistance, the agency responded, again in writing, confirming that its estimate of charges was $30,000 and requiring the payment of an advance deposit of $7,500 before it would deal with the access application.

18. It was only when the complainant responded by reminding the agency of its obligation under s.20 to take reasonable steps to assist her to change the application to reduce the amount of work needed to deal with it, and requesting a summary of documents so that she could reduce the ambit of her application, that the agency provided the complainant with a list of the kinds of documents involved. Further, in my view, it was not until an officer of the agency subsequently contacted the complainant by telephone, some 7 weeks after the access application had been transferred to the agency, that any meaningful assistance was offered to the complainant. As a result of that conversation the complainant's access application was narrowed considerably.

19. Following discussions between the complainant and my office after the complaint was lodged, the complainant narrowed the scope of her application even further. If the agency had entered into discussions with the complainant at the outset, it is clear, in my opinion, that the scope of the request would have been significantly reduced and unnecessary expenditure of time and resources by both parties would have been avoided. In my experience in dealing with FOI complaints, early discussions with a complainant can clarify and reduce the scope of an application and thereby reduce the amount of work needed to deal with it in a way that can seldom be achieved by the lengthy process of an ongoing exchange of letters. On a number of occasions it has been apparent that, had that been done by the agency concerned on receipt of the application, the matter would have been satisfactorily resolved between the parties and not have resulted in a complaint to my office.

CHARGES UNDER THE FOI ACT

20. The actual charges for giving access to documents must be calculated by an agency in accordance with the principles in s.16(1) of the FOI Act. 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. The charges set out in column 2 of item 1 of the schedule to the Regulations are prescribed by regulation 4 as the charges for the purposes of s.16(1).

21. In my view, the Parliament of Western Australia clearly intended that, although charges may be payable for access, those charges would not, and should not, be calculated so as to frustrate the objects and intent of the legislation. Such an intent is clearly evident from a reading of Hansard containing the parliamentary debate on this legislation. For example, the Hon C Edwardes, Member for Kingsley, 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].

22. Clearly, in my opinion, it was never intended that agencies apply a strict "user-pays" approach to calculating charges under the FOI Act. The construction of the FOI Act and the Regulations allows for discretionary decisions to be made by agencies. A number of agencies and decision-makers in Western Australia have shown that they are prepared to apply the FOI Act and the Regulations in ways that accord with the principles outlined in s.4. I am aware, for example, that some agencies waive charges in circumstances where a charge could be legitimately imposed. Others have altered their administrative practices and policies to facilitate access outside of the processes of the FOI Act.

23. In my decision in *Re Hesse and Shire of Mundaring* [1994] WAICmr 7, I described the various administrative procedures for dealing with an access application and the processes for which charges may be imposed under the Regulations. I consider those procedures to be the administrative steps of :

- consulting with third parties (but only if consultation is required);
- examining the documents, exercising judgement 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).

24. In my view, a decision to impose a charge on an access applicant seeking to exercise his or her legitimate rights under the FOI Act for administrative procedures which an agency has both the capacity and a duty to control should be a decision that both accords with the legislation and reflects the spirit and intent of this legislation.

The agency's estimate of charges

25. In its initial estimate of charges, the agency informed the complainant that the estimate was based on approximately three minutes to read each folio, describe the folio in the schedule of documents, consider the applicability of exemption clauses to the folio, consult any third parties named in the folio and write the

notice of decision with respect to the folio. When the complainant subsequently reduced the scope of her access application, the agency gave a new estimate, doubling the estimated time required to deal with each folio. In a letter of 21 July 1999, the agency estimated that it would take approximately 6 minutes per folio to do all those things referred to earlier and also to obtain legal advice in relation to the applicability of exemption clauses to each folio, and to edit any exempt matter from the folio. Subsequent to that, the agency reduced its estimate to approximately 4 minutes per folio and, on each occasion that a new estimate was given, the number of estimated documents given was different.

26. The activities for which the agency proposes to charge the complainant $30 per hour to deal with her application include:

- reading each folio;
- describing each folio in a schedule;
- considering exemptions for each folio;
- obtaining legal advice in respect of each folio;
- consulting third parties;
- editing the documents; and
- writing the notice of decision with respect to each folio.

27. In my view, for the following reasons, the agency is not entitled to impose charges for one of the items in that list (obtaining legal advice) and, in respect of others, it is not entitled to charge to the extent indicated.

Charges for describing each folio in a schedule

28. In my opinion, there is no need to describe each folio of a multi-page document in a schedule of documents. The purpose of a schedule is to aid decision-making where an access application involves a number of documents, and to generally describe each document so that an applicant is aware of the documents that an agency has identified as being within the scope of a request. If exemption is claimed for matter on a particular folio of a document, then reference can be made in the schedule to that folio for the purpose of informing an applicant and identifying the location of the matter for which exemption is claimed.

29. Therefore, to the extent that the agency's estimate of charges includes time for describing each folio in a schedule, it is clearly not justified. There are 64 documents, consisting of 1,418 folios, and it is those 64 documents that would require description in any schedule. A reference needs only to be made to particular folios, or matter in particular folios, if exemption is claimed for that particular matter.

Charges for seeking legal advice

30. The agency contends that it is not unreasonable for it to seek legal advice on an access application given the obligations on it under the FOI Act and the

potential ramifications of breaching the Act. Accordingly, part of its estimate of charges for dealing with the complainant's application includes the time taken for it to obtain such advice.

31. Whether or not it is reasonable for the agency to seek legal advice before making a decision, I do not consider that it is entitled to charge the complainant for obtaining that advice, or for the time taken for internal consultations between officers of the agency who, after all, are being paid for their time as employees. An agency may consult as widely as it wishes and may obtain legal advice on any aspect of the FOI process if it chooses, but it is not required to do so and, in my view, an applicant should not have to pay for those procedures. If it were otherwise, the operation of the legislation could be, to a large degree, frustrated by an agency choosing to consult widely and seeking advice and input from a range of people, including legal advisers, and thereby delaying, and significantly adding to the costs of, the decision-making process at the expense of the applicant. I do not believe that Parliament intended that the FOI Act should be applied or administered in that fashion.

32. Section 100 of the FOI Act provides that decisions by an agency are to be made by the principal officer of that agency or by an officer directed by the principal officer for that purpose, either generally or in a particular case. Clearly, any officer who is directed for that purpose should have the skills, expertise and authority to make the decision for the agency and the access applicant should not be expected to pay for consultation undertaken because the decision-maker does not feel competent to make a decision for the agency.

Charges for consulting third parties

33. In respect of the estimate of charges for consulting with third parties, given the nature of the documents requested, I do not consider that charge to be justified without first consulting with the access applicant. Once again, I consider that proper communication with the complainant to obtain agreement on the scope of the application at the outset may well have resulted in the exclusion of personal or business information about third parties. Any such material could then be deleted from the documents before access is given and no consultation would be required. Whether or not the complainant would agree to that is speculative, but I do not consider charges for consulting with third parties to be justified without the inquiry having been made.

Charges for writing a notice of decision with respect to each folio

34. I do not consider that it is necessary for any agency to write a notice of decision for each folio or to write a notice of decision that separately deals with each page of information for which exemption might be claimed. An applicant can be given adequate reasons for a decision by simply consolidating similar claims for exemption and reasons for those claims. For example, personal information about one or more third parties might appear on several different pages of a document. In its notice of decision, an agency need only state that the matter deleted from pages x, y and z is personal information about third parties,

describe the information in general terms to show that it is within the definition of personal information in the FOI Act and that it is claimed to be exempt under clause 3(1). An agency does not have to, and should not need to, write a separate claim for exemption and to give separate reasons for each separate piece of personal information wherever it appears in the document.

35. It is my view that the estimate of charges proposed by the agency includes activities for which the agency is not entitled to charge the applicant. The estimate for each folio is also based on the maximum amount of activities that may be charged for, when some of those activities will not be necessary for every folio and may not be necessary at all for some documents. For example, if a decision is subsequently made to claim an exemption for a document as a whole, then no consultation and no editing is required.

The general approach

36. I do not generally consider it to be a reasonable approach to forming an estimate of charges to base the estimate on a "minutes per folio" approach as the agency has done in this instance. That approach may appear to be reasonable at first glance, but in practice it will often produce an estimate that bears little or no relation to the actual time required for any agency to deal with an application.

37. For example, an estimate of 6 minutes per folio would mean that it would take 5 hours to deal with a document of 50 folios and, therefore, an estimate of $150 for dealing with it and deciding whether to give access or not. 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 – see in particular ss. 24 and 35), I find it difficult to conceive of circumstances in which an access application for one document of that size 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.

A reasonable approach to estimating charges

38. When the scope of the access application has been determined and the requested documents have been identified and located by an agency, the first step in dealing with an application should be to consider the character of those documents and the nature of their contents. In my view, it is unnecessary for each folio of a multi-page document to be examined minutely in order to decide whether a document as a whole is exempt or whether access is to be given to it.

39. Initially, it should be apparent from the kind of documents requested whether or not they are of a kind for which exemption should be claimed. An authorised, competent decision-maker, reasonably familiar with the subject matter and content of the requested documents should be able to make a decision on access without the necessity of minutely examining and considering every line of every folio of each document. If the decision-maker lacks that experience and skill, I do not consider that it is reasonable to expect or require the complainant to pay the price of the agency's deficiency.

40. If the documents are generally of a kind for which the agency consider there is no need to claim exemption, then a decision on access can be quickly made, subject to a scan of each document to identify information about third parties and either deleting that information or consulting the third parties.

41. If the documents are of a kind likely to contain information which the agency consider exemption should be claimed, then a closer examination may or may not be required. For example, a letter to a client agency from a legal adviser containing confidential legal advice will clearly be exempt as a whole under clause 7 and the exemption may be claimed without detailed examination of every page, and with little or no difference in decision-making time whether it is a 2 page or 20 page letter. In circumstances where the closer examination of a document is required, once again, an appropriately experienced, skilled and knowledgeable officer should be able to quickly identify exempt matter and deal with it without minutely examining each folio.

A reasonable estimate in this instance

42. One substantial document within the scope of the application is the submission to the Review Group from the Commission. That particular document was the subject of my decision in *Re Ravlich and State Supply Commission* [1999] WAICmr 37. On the basis that the complainant no longer seeks access to that document because she has already been given access to it by the Commission, the agency is prepared now to reduce its estimate of charges by $472.00. Even if the complainant continues to seek access to that document, in my view the estimate of charges should be so reduced on the basis that there is no purpose to be served by claiming exemption for a document that has already been disclosed under the FOI Act. Therefore, there should be no need for the agency to examine it before making its decision. In any event, for the reasons given, I do not consider that the agency's estimate for dealing with that document was reasonable because it was calculated on a page by page basis.

43. Other documents that fall within the complainant's revised application consist of 1-2 pages only, some may vary in length up to 10-12 pages. None of those, in my view, requires a decision-maker to spend an inordinate amount of time in dealing with it to decide the question of access.

44. In the absence of any assistance from the agency as to what might be a realistic estimate of the time it will take to deal with the application for access to 64 documents, and having informed myself of the number, approximate sizes and nature of the documents concerned, 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 those 64 documents would be no more than 8 hours, the equivalent of 1 working day. On that basis, I am of the view that a reasonable estimate of charges for dealing with the application is $240, being 8 hours at the prescribed rate of $30 per hour, and that the advance deposit which may be required by the agency is $60.

45. It needs to be remembered by the parties that the estimate of $240 is just an estimate. If the actual time taken by the agency to deal with the application exceeds that estimate, or is less than it, then the final charge to be imposed may be adjusted accordingly. However, any charge payable by the complainant must be calculated according to the principles referred to and it must be reasonable.