OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: F2004073
Decision Ref: D0132004

Participants:

David Biron
Complainant

- and -

Department of Housing and Works
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – complaint against charges – distinction between application fee and a charge – charges payable under the *Freedom of Information Regulations 1993* – calculation of charges – preparation of a schedule of documents – reduction or waiver of charge if applicant is impecunious.

Freedom of Information Act 1992 (WA): sections 3(3), 4, 12(1), 13(1), 16, 17(3), 18, 19(1), 30 and 32; Schedule 1, Glossary
Freedom of Information Regulations 1993 (WA): regulations 4, 5 and10; Schedule 1

Re Ravlich and Crown Solicitor's Office [2000] WAICmr 8
Re Hesse and Shire of Mundaring [1994] WAICmr 7
Re Butcher and Agriculture Western Australia [2000] WAICmr 62
Re Y and The State Housing Commission of Western Australia (Homeswest) [1998] WAICmr 18
Re Larson and Office of Corrections (unreported, Administrative Appeals Tribunal of Victoria, Howie PM, 19 June 1990)

DECISION

The decision of the agency to impose a charge of $30.90 is varied.

In substitution, it is decided that the charge payable for access to the requested documents is $25.28, which includes $11.20 for photocopying the required documents and a 25% reduction for the total amount of the charge.

D A WOOKEY
A/INFORMATION COMMISSIONER

29 June 2004

REASONS FOR DECISION

1. Mr Biron ('the complainant') seeks external review by the Information Commissioner of a decision of the Department of Housing and Works ('the agency') to require him to pay a charge for dealing with an access application made by him for access to certain documents under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 22 February 2004, the complainant applied to the agency under the FOI Act for access to certain documents. On 4 March 2004, the agency advised him, in writing, that an estimated charge of $43.40 would be payable for dealing with this application, although the agency had waived the charges for dealing with a previous access application made by him.

3. The complainant's previous access application included a number of the same documents which were the subject of this application.

4. On 8 March 2004, the complainant wrote asking the agency to waive or reduce the proposed charge on the ground that he is a home worker and noting that the FOI legislation provides that a charge must be waived or reduced if the applicant is impecunious.

5. On 9 March 2004, the agency advised the complainant, in writing, that the onus was on him to prove that he was impecunious. However, the agency agreed to reduce the estimated charge by 25% ($10.85) to $32.55 (although this amount was afterwards referred to by the agency in its correspondence as $32.85).

6. On 19 March 2004, the agency decided to give the complainant access to the requested documents in full or in edited form and advised him that *"a description of the exempt folios and the reasons for deleting exempt matter is documented in the schedule of documents which will be sent to you along with the documents when you have paid the agreed charges."*

7. Following an internal review of that decision, the agency decided to, among other things, release 13 folios - comprising the complainant's own correspondence with the agency - outside the FOI Act and with no charge. By taking that action, the agency further reduced its estimated charge from $32.85 ($32.55) to $30.90. Thereafter, on 18 April 2004, the complainant applied to me for external review of the agency's decision to impose a charge.

REVIEW BY THE INFORMATION COMMISSIONER

8. I obtained the agency's FOI file relevant to this matter. I also asked the agency for an explanation as to how it had calculated the estimated charge.

9. On 14 May 2004, I informed the parties, in writing, of my preliminary view of this complaint and my reasons, on the basis of the material then before me. It was my preliminary view that the agency's estimate of charges was justified except for a charge of $7.50 for preparing the schedule of documents, thus reducing the total charge for the agency to deal with the access application by that amount. It was also my preliminary view that the complainant had not established that the charge should be waived on the ground that he was impecunious. The agency accepted my preliminary view. The complainant did not accept my preliminary view and he provided me with written submissions in support of his position.

THE AGENCY'S ESTIMATE OF CHARGES

10. The agency's estimate of charges, as amended in line with my preliminary view, is as follows:

		Cost @ $30 per hr
Examine relevant pages for decision-making	0.25	$7.50
Consult third parties (1)	0.25	$7.50
Preparation and notification of decision	0.25	$7.50
Photocopy 56 pages @ 20c a page		$11.20
		$33.70
Less 25% reduction:		$ 8.42
Total:		**$25.38**

The complainant's submission

11. By letter to my office, received on 27 April 2004, the complainant advised me that he had been asked to pay $60.90 to obtain a total of 16 new pages not covered by his previous FOI request. That amount consists of the $30 application fee for his present access application and the proposed charge of $30.90. The complainant said:

> "*… the Department of Housing and Works insisted on charging an additional $30 as reasonable in respect of only 16 pages, for all work associated with the preparation of these papers plus a further 20c a page supplied.*"

12. The complainant also submits that the agency should have waived the $30.90 charge in full under section 16(1)(g) "*because as a home worker I pay no tax, have no job, and I can't easily identify myself as impecunious."* My preliminary view of this aspect of the complainant's complaint was that the complainant would need to provide the agency with evidence of his financial position in order to establish that he was impecunious to the extent of qualifying for a waiver of all charges, rather than just the 25% reduction allowed by the agency. On 6 June 2004, in response to my preliminary view, the complainant wrote to me and repeated his statement that he is impecunious and advised me that he had asked the agency what evidence it required to establish that fact but had received no reply.

13. In that letter, the complainant made a number of other submissions, although it is not entirely clear to me what those submissions are. Aside from those which I consider to be merely unsubstantiated allegations and abuse relating to my office and other government agencies with which he has had dealings in relation to FOI matters, I understand the complainant's submissions to be, in brief, as follows:

- Charges should not be levied on documents that the complainant has previously paid for.

- Since the complainant was not consulted in respect of any third party consultations he should not have to pay for them.

- The charges *"are not within the spirit and intent of the legislation and nor are they covered under the regulations":* see *Re Ravlich and Crown Solicitor's Office* [2000] WAICmr 8*; Re Hesse and Shire of Mundaring* [1994] WAICmr 7*;* and *Re Butcher and Agriculture Western Australia* [2000] WAICmr 62. The complainant refers me to the following extracts from those decisions made by the former Information Commissioner ('the former Commissioner') which said that access should be provided "… *in the manner required by the access applicant*; *it was never intended that agencies apply a strict "user pays" approach to calculating charges";* and *"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"; "…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 complainant does not accept my view that an agency is not obliged to provide a complainant with a schedule of documents.

- The complainant is impecunious and the estimated charge should be waived because:

    - charges are discretionary;

- there were delays in dealing with his application; and
- such charges also go against the Labor Party Manifesto and Constitution and s4(b) of the FOI Act.

Consideration

14. Schedule 1 to the Regulations sets out the prescribed charges and what they relate to. The Regulations distinguish between the payment of a $30 application fee for an application for non-personal information (regulations 4 and 10) and the payment of charges for certain specified purposes (regulations 5 and 10). For an access application made under the FOI Act to be valid, it must be made in accordance with the provisions of section 12(1). Paragraph (e) of section 12(1) provides that the access application has to be lodged at an office of the agency with any application fee payable under the Regulations.

15. With regard to the complainant's submission that charges should not be levied on documents previously given to him, the agency wrote to the complainant on 4 March 2004 thanking him for clarifying the scope of his access application and confirming that he wanted *"copies of the same documents provided to you under your previous application … and any subsequent documents"*. Even if the complainant had omitted the documents he had previously obtained from the scope of his application, he would still have had to pay the $30 application fee for the other documents requested by him. The complainant's access application was for non-personal information and the application fee payable under clause 1 of Schedule 1 to the Regulations is $30. It is not open to an agency to waive or reduce that fee; neither is it open to the complainant to dispute the payment of that fee under the provisions of the FOI Act. Moreover, the agency advises me that it did not charge the complainant for examining the documents previously given to him.

16. The charges payable under the FOI Act are separate payments which are prescribed by the Regulations and authorised under section 16 of the FOI Act. Only if a charge is - in accordance with the Regulations - required to be paid, must the principles in section 16 be applied to the calculation of that charge.

17. Section 16(1) of the FOI Act requires an agency to calculate any charge required to be paid in accordance with the following principles, among others:

> "*(b) the charge in relation to time made under paragraph (a) must be fixed on an hourly rate basis;*
>
> …
>
> *(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;*
>
> …

(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."

18. Agencies are only entitled to impose a charge where the decision is to grant access to a document. Subject to section 18 - which relates to the payment of advance deposits - section 16(2) provides that payment of a charge will not be required before the time at which the agency has notified the applicant of the decision to grant access to a document.

19. If the agency estimates that the charges for dealing with the access application might exceed $25, it is required under section 17(3) to notify the applicant of its estimate and the basis on which its estimate is made and to inquire whether the applicant wishes to proceed with the application, referring the applicant to the requirements of section 19(1)(b). Having examined the agency's FOI file, I consider that the agency correctly notified the complainant of its estimate of charges pursuant to section 17(3) in its letter to him of 4 March 2004.

20. Section 13(1) provides that dealing with an application for the purposes of the FOI Act, means:

"*(a) considering the application and deciding -*

(i) whether to give or to 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."

21. In my opinion, "dealing with" the application means dealing with it in the manner set out in paragraphs (a) and (b) of section 13(1) and consequently it is for those procedures that a charge may be imposed. Regulation 5 and Schedule 1 to the Regulations prescribe $30 per hour as the charge for "dealing with" an access application.

22. Section 4 of the FOI Act sets out certain general principles of administration which agencies must apply in giving effect to the FOI Act, as follows:

"Agencies are to give effect to this Act in a way that –

(a) assists the public to obtain access to documents;

(b) allows access to documents to be obtained promptly and at the lowest reasonable cost; and

(c) assists the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading."

23. The former Commissioner in *Re Ravlich* discussed those principles in some detail and described the various administrative procedures for dealing with an access application and the processes for which charges may be imposed under the Regulations (see also *Re Hesse* and *Re Butcher*). Those procedures are:

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

I agree that those are the relevant procedures for which charges may be made.

Examination of documents

24. The agency examined the 28 documents (69 folios) – which were not a part of the complainant's previous FOI application – for the purpose of exercising a judgment, identifying exempt matter and making a decision on access and charged the complainant $7.50 calculated on the rule of thumb basis that 250 pages takes 4 hours to consider at $30 per hour. In *Re Ravlich* at paragraph 36, the former Commissioner said:

> *"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…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."*

I agree with that view. However, I consider that the charge estimated by the agency is reasonable in relation to the time needed to undertake that process with the documents as described by the agency in this case. The agency advises me that it did not charge for the first 41 folios dealt with previously but for the new 28 folios only. That represents a charge for only 15 minutes. From my experience, I would be surprised if the task of examining 69 folios and making a decision on each could be completed in only 15 minutes. In my view, the estimated charge is conservative and reasonable.

Consultation

25. From my inquiries with the agency, I understand that it consulted with the Minister for Housing and Works ('the Minister') in relation to one of the requested documents. Under section 32 of the FOI Act, the agency is required to obtain the views of a third party, where a document contains personal information about an individual ('the third party') other than the access

applicant and the agency intends to give access to that personal information. "Personal information" is defined in the Glossary in Schedule 2 to the FOI Act 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 finger print, retina print or body sample".

26. Whether or not the personal information about the Minister is also "prescribed details" under clause 3(3) of Schedule 1 to the FOI Act, does not alter the fact that it is still personal information and, consequently, the agency is required to consult with the Minister pursuant to section 32. I note from the agency's FOI file that the consultation took the form of a briefing note and letter to the Minister. The agency charged the complainant $7.50 for an estimated 15 minutes at a cost of $30 an hour. In my view, that is a conservative and reasonable charge for the drafting of the letter and the briefing note and the perusal of the Minister's response.

27. The complainant submits that he should not have to pay this charge because he was not consulted. He quotes from the decision of the former Commissioner in *Re Ravlich* at paragraph 33, as follows: *"I do not consider charges for consulting with third parties to be justified without first consulting with the access applicant"*. The full quotation from that decision is: *"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 the access applicant"*. In that case the agency's estimated charge was $8,460 and the former Commissioner considered that there had been no proper communication with the complainant to obtain agreement on the scope of the application, which, if it had occurred, might well have resulted in the exclusion of personal or business information about third parties. I consider that the facts of that case are different to those considered here, where the complainant was consulted as to the scope of his access application in the initial stages of the application process.

Preparation of notice of decision

28. The agency's estimate for preparing a notice of decision in the required form is $7.50 for an estimated 15 minutes work at a cost of $30 an hour. Having examined the notice of decision including the statement of reasons, and given my experience in preparing similar documents, it appears to me that it would have taken considerably more than 15 minutes. In my view, therefore, that is a reasonable charge for that task.

Photocopying

29. The agency's estimated charge of $11.20 for 56 pages at 20c a page is based on the release of 13 pages or folios to the complainant outside the FOI Act and the remaining 56 pages being charged at the rate of 20c a page as set out in Schedule 1 to the Regulations. In my view, this charge has been calculated correctly and the agency is entitled to make that charge.

30. As I understand it, the complainant contends that the agency's charges in this case do not reflect the spirit and intention of the FOI Act, particularly as reflected in the principles of administration set out in s.4(b) of the FOI Act. He refers me to the decisions of the former Commissioner in *Re Hesse, Re Ravlich* and *Re Butcher*, which concerned, respectively, estimated charges of $91.50, $8,460 and $1,380. The former Commissioner took the view that a number of the charges referred to in those cases were not within the spirit and intent of the legislation because they related to procedures which the former Commissioner considered to be unnecessary or activities for which an agency is not entitled to charge an applicant. In this case, with the exception of the charge for the schedule of documents, I consider that all of the charges levied by the agency are appropriate and validly made and were for processes which, in those decisions, the former Commissioner considered charges could be imposed. In my view, the agency has not adopted a "user pays" approach to the calculation of its charges, which are covered by the regulations. It is clear to me that in this case the agency has charged for considerably less than the actual time it took to "deal with" the access application. I consider that the agency's charges are moderate and within the spirit and intent of the legislation.

The schedule of documents

31. The agency's original estimate of costs included a charge of $7.50 for the preparation of a schedule which lists 40 documents. I understand from the agency that the charge of $7.50 was based upon its examination of the 28 documents (69 folios) - which were not a part of the complainant's previous FOI application - and recording them in the schedule of documents.

32. In *Re Butcher*, at paragraph 49, the former Commissioner took the view that a charge may be imposed for preparing a schedule if it is done as a necessary or desirable part of preparing a notice of decision, which activities should therefore be undertaken together. I agree with that view. In my opinion, when dealing with more than a handful of documents, a schedule is a useful aid in identifying the documents and assisting a complainant to understand an agency's decision. In some cases, the provision of a schedule as part of the notice of decision will be necessary in order to fully inform the applicant of the agency's reasons for decision and findings on material questions of fact, as required by s.30(f) in respect of refusals of access.

33. As I understand it, the complainant contends that the refusal of an agency to issue a schedule of documents causes extensive delays to the access application process, which is contrary to section 4(b) of the FOI Act. The

complainant says that such delays result in agencies taking longer than the prescribed period of 45 days in which to deal with an access application; incur unnecessary costs to the agency and unnecessary appeals to my office. The complainant submits that the way to prevent this and to ensure the proper application of s.4(b) is for agencies to provide schedules of documents to access applicants.

34. As noted above, I accept that a schedule of documents can be a useful tool which may also, in some cases, expedite the FOI process. However, the FOI Act is not prescriptive as to the issue of a schedule; it is not mandatory for agencies to create such documents. It is left to the discretion of agencies whether or not to issue a schedule.

35. In this case, the agency did create a schedule. However, on this occasion, it was my preliminary view that the schedule was not prepared as a necessary part of the notice of decision and its provision would be as a courtesy only, albeit that I considered that – if any charge for its preparation were permissible – the amount of the charge imposed in this case would be reasonable.

36. If the agency had provided the document schedule together with, and as part of, its notice of decision, and it was necessary for the notice to comply with s.30, I would have had no difficulty in agreeing with the charge being imposed.

37. In the present case, I considered both the agency's notices of decision and the statement of reasons given with each, against the requirements of s.30 of the FOI Act insofar as it is relevant to the provision or otherwise of a schedule. Section 30 requires that, where a decision is that a document is an exempt document (ie one that contains exempt matter) and that access is to be given to a copy of the document from which exempt matter has been deleted, the agency's notice must give the following details:

- the fact that access to an edited copy is to be given; and
- the reasons for classifying the matter as exempt and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based.

38. Having examined the agency's notices, I consider that the agency provided those details in both statements of reasons provided to the complainant and that the schedule is not necessary to understanding the nature of the information deleted from the requested documents, the reasons for its deletion or the material findings of fact underlying the reasons.

39. In respect of the decision to give full access to some documents, the agency is not required to give any reasons and therefore the provision of a schedule in relation to those documents is clearly not necessary.

40. In those circumstances, I agree that the agency was not required to prepare or provide the complainant with the schedule of documents and I consider, therefore, that the agency is not justified in charging the complainant for it. It

follows from that that I am also of the view that the agency is not obliged to provide the schedule of documents to the complainant at all. However, in this case, given that the agency agreed to provide the schedule together with the copy documents once the charges were paid, I would consider it unreasonable for the agency not to fulfil that undertaking.

Reduction on the ground of impecuniosity

41. The agency reduced its total charge of $41.20 by 25% to $30.90 on the basis of the complainant's statement that he is impecunious. Regulation 3 of the Regulations provides that if, in the opinion of the agency to which the application is made, the applicant is impecunious or the holder of a prescribed concession card, the charge payable under the Regulations is to be reduced by 25%. That is, the agency has the discretion to reduce the charge if the applicant either produces evidence to satisfy it that he or she is impecunious or produces a pension concession card.

42. In *Re Y and The State Housing Commission of Western Australia (Homeswest)* [1998] WAICmr 18, the former Commissioner considered the meaning of the word "impecunious" and took the view, at paragraph 14, that its plain and ordinary meaning of "*having little or no money*" - as defined in the *Concise Oxford Dictionary* - applied. Further, in *Re Larson and Office of Corrections* (unreported, Administrative Appeals Tribunal of Victoria, Howie PM, 19 June 1990) the Tribunal held that "impecunious", in the context of the Victorian *Freedom of Information Act 1982*, does not mean having no money at all or being utterly destitute. Rather, it means being poor, or in want of money, or having little money, or being unable reasonably to afford the access charges. I agree with those definitions.

43. In *Re Y* the access applicant was involved in legal action whereby it was alleged that he owed various creditors some $64,000, on top of a debt of $8,500 which he owed to the agency. In dealing with that matter the former Commissioner held that the applicant was impecunious for the purposes of the FOI Act and that the agency should waive all charges. In that case, there was a considerable amount of information available to the agency in relation to the access applicant's financial position.

44. In the present case, the agency decided, on the basis of the complainant's statement that he was impecunious, that the estimated charge should be reduced by 25%, pursuant to regulation 3 of the Regulations and section 16(1)(g) of the FOI Act. In my preliminary view, a copy of which was provided to the complainant, I took the view that the agency was more than reasonable in doing that since the complainant provided no evidence to the agency to support his claim that he has no income and that he is impecunious, and that the agency would have been justified in refusing to reduce the charge. I would generally consider it reasonable for an agency to require some evidence – other than an access applicant's unsupported claim – on which to form an opinion that the applicant is impecunious as is required by regulation 3(a) before reducing charges on that basis.

45. In response to my preliminary view, the complainant submits that he is impecunious and the agency has not advised him what evidence it needs to establish that fact in answer to his request for information on that point. However, I note that the agency wrote to the complainant on 9 March 2004 advising him that proof that he was impecunious could be established by the production of a pension concession card. In addition, I canvassed this matter in my letter to the parties of 14 May 2004, as referred to above, pointing out that the complainant can provide the agency with evidence of his financial situation, which need not be limited to a concession card. It is now up to the complainant to furnish the agency with the necessary documentation to establish that he is, in fact, impecunious. As he has not done so to date, I consider the agency's decision not to waive the charges to be reasonable.

46. Finally, the complainant submits that the estimated charge should be waived on the grounds that the levying of charges is discretionary and, since there were delays in dealing with his application, the agency should exercise its discretion in this case. The complainant also submits that the agency should exercise its discretion to waive the charge because such charges go against the Labor Party Manifesto and Constitution.

47. Section 16(1)(g) of the FOI Act provides that a charge must either be waived or reduced if the applicant is impecunious. The discretion to either waive or reduce a charge is that of the agency. In this case, the agency has decided to exercise its discretion to reduce rather than to waive the charge.

48. With regard to the question of delay, I note from the agency's FOI file that the agency received the complainant's access application on 25 February 2004, at which time he was advised, in writing, that it would be dealt with by or before 9 April 2004, that is, within 45 days from the date that a valid application was made. In the course of dealing with the application, the agency answered promptly a number of queries from the complainant concerning, among other things, the estimated charge. The agency issued its notice of decision on 19 March 2004 - well within the permitted period of 45 days (see sections 13(1) and 13(3) of the FOI Act). The complainant sought an internal review of that decision on 22 March 2004 and was advised by the agency that he would receive a notice of decision within the 15-day period prescribed by s.43(2) of the FOI Act - in this case, by or before 6 April 2004. The agency issued its notice of decision on 31 March 2004, again within the prescribed period. In view of this I do not accept the complainant's submission that there were unacceptable delays by the agency. Further, as noted, the discretion lies with the agency and not with me.

49. In conclusion, I consider that the complainant's submission concerning the contents of the Labor Party Manifesto and Constitution is not relevant to the question of the agency's exercise of its discretion to waive the estimated charge.

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