



Determination

External review - section 39 *Freedom of Information Act 1991*

Applicant:	Ms Isabel Dayman
Agency:	SA Police
Ombudsman reference:	2023/01953
Agency reference:	23-0407
Determination:	The fee charged by the agency is waived.
Date of Ombudsman's determination:	18 July 2023
Issues considered:	Whether a debt levied for processing a FOI application was fair and reasonable
Section considered:	53
Legislation considered:	Freedom of Information Act 1991

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

1. A list of proved and/or admitted breaches under the Police Complaints and Discipline Act 2016 for the years 2019, 2020 and 2021, including: i. Details of the misconduct, and the officer's age, gender, rank, and branch/section. ii. The penalty applied

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 29 June 2023. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to waive the fee charged by the agency.
5. Neither party provided a substantive submission in response to my provisional determination. Therefore, this determination is issued largely in the same terms.

Relevant law

6. Section 53 of the FOI Act provides:

53—Fees and charges

- (1) The fees and charges payable under this Act must be fixed by the regulations or in accordance with a scale fixed in the regulations.

- (2) The regulations—

- (a) must provide for such waiver, reduction or remission of fees as may be necessary to ensure that disadvantaged persons are not prevented from exercising rights under this Act by reason of financial hardship;

- (b) must provide for access to documents by Members of Parliament without charge unless the work generated by the application exceeds a threshold stated in the regulations,

and (except as provided by this section) the fees or charges must reflect the reasonable administrative costs incurred by agencies in exercising their functions under this Act.

- (2aa) A fee or charge can only be required by an agency under this Act in respect of the costs to the agency of finding, sorting, compiling and copying documents necessary for the proper exercise of a function under this Act and undertaking any consultations required by this Act in relation to the exercise of that function.

OFFICIAL

- (2a) An agency may, as it thinks fit, waive, reduce or remit a fee or charge in circumstances other than those in which such action is provided for under the regulations.
 - (3) Where an agency determines a fee or charge it must, at the request of the person required to pay, review the fee or charge and, if it thinks fit, reduce it.
 - (4) A person dissatisfied with the decision of an agency on an application for review of a fee or charge may apply to the Ombudsman or Police Ombudsman for a further review, and the Ombudsman or Police Ombudsman may, according to his or her determination of what is fair and reasonable in the circumstances of the particular case—
 - (a) waive, confirm or vary the fee or charge;
 - (b) give directions as to the time for payment of the fee or charge.
 - (5) A fee or charge may be recovered by an agency as a debt.
7. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.

Issues in this review

8. This is a review of the determination by the agency to require payment of the sum of \$720.30 which has been levied as a debt, for the purposes of processing the application.

Consideration

Is the fee/charge valid

9. Section 53(5) provides that a 'fee or charge may be recovered by an agency as a debt'. In the circumstances of this matter, the agency is seeking to recover the sum of \$720.30 as a debt, levied for the work involved in processing the application. In a letter to the applicant, the agency advises:

On 27 March 2023, as a result of an external review, the Ombudsman provided his final determination in which he requested documents be supplied to you on the basis of clause 12(1) in accordance with the Commissioner's authorisation.
As per previous correspondence, SAPOL require the following costs be paid in accordance with sections 17 and 53 of the FOI Act.

On application for access to an agency's documents (section 13(c)) of \$39.00	Paid
For dealing with an application for access to an agency's document and in respect of the giving of access to the document (section 19(1)(b) and (c)) – for each 15 minutes so spent by the agency @ \$14.70 for each 15 minutes spent Task – Estimated Time Finding – 15 minutes (1 Part) Compiling – 720 minutes (48 quarters)	\$720.30
CHARGE TOTAL	\$720.30

10. I note that in a previous determination, I had already determined that the agency did not have the power to request an advance deposit pursuant to section 17(1), because the

OFFICIAL

application was already a deemed refusal. Its continued reliance on that section in the above letter is misplaced.

11. The agency *can* recover the cost of the work required to process an application because of section 53(2aa), which provides:

(2aa) A fee or charge can only be required by an agency under this Act in respect of the costs to the agency of finding, sorting, compiling and copying documents necessary for the proper exercise of a function under this Act and undertaking any consultations required by this Act in relation to the exercise of that function.

12. Accordingly, the fee is being recovered as a result of the work required by the agency to find, sort and compile the documents necessary for the proper exercise of a function under the Act, which would include any work undertaken on external review, pursuant to section 39 of the FOI Act.
13. I am therefore satisfied that the request for a fee is valid, and can be recovered by the agency as a debt, pursuant to section 53(5).

Is the fee fair and reasonable?

14. The agency submits that:

All the issues that arose from this application stemmed from the fact that a document did not exist that met the scope of the applicants request and SAPOL in good faith sought to extract the data and create a document to assist the applicant, despite the difficulties and resources required to do so and under the assumption that the work involved would be substantiated by way of costs. It should be noted that the costs requested of the applicant were an estimate only and in the end, the actual time taken to deal with this application and create the documents required to meet the applicants request was significant and far outweighed the costs that were actually requested of the applicant.

15. I have not been provided with an explanation from the agency as to what exactly it was required to do in order to extract the information. I understand that it says 'compiling' the information took 720mins (12 hours). On the face of it, it does not seem fair and reasonable that the agency can charge \$720.30 for the compilation of the information. I have had regard to the source material from which the information that was provided to the applicant was drawn, and I cannot understand how it would have taken 12 hours to compile that information. The agency suggests that it only took 1 unit of time (15 mins) to find the information, ergo, it appears that the information is stored in one location. If this is the case, it is unclear how it then takes 12 hours to extract the information from the source. I am therefore not satisfied that the agency's time estimate is reasonable.
16. The applicant submits that the agency did not have jurisdiction to charge a fee, on the basis of its procedural flaws, namely because it did not have the power to charge for an advance deposit beyond the date that the application became a deemed refusal. For the reasons outlined above, I am not persuaded that this is the case; Parliament's intention was that a fee or charge could be recovered as a debt and the agency's procedural deficiencies are not a barrier to its recovery of a fee levied for undertaking the work required of it to comply with its obligations at external review.
17. The applicant also submits that the Commissioner released the requested documents pursuant to section 45 of the *Police Complaints and Discipline Act 2016* (PCD Act), under a power conferred by the PCD Act, rather than in compliance with a determination by the Ombudsman. While I appreciate the applicant's argument, I still consider the enlivening Act to be the FOI Act, and my powers pursuant to section

39(11) of the FOI Act were exercised to *vary* the agency's deemed refusal such that access was to be provided in line with the Commissioner's authorisation.

18. The applicant submitted:

Whilst the ABC understands the requested fee is calculated based on the work required to process the application, we argue the resulting charge is exorbitant compared with the small number of documents that are to be provided. Broadly speaking, the ABC functions under considerable budget constraints, including the ABC Adelaide newsroom.

We note previous FOI applications by the ABC to multiple other state government agencies have resulted in the delivery of a far greater number of documents, including complexities around redactions and significant third party consultation, but have not included a request for fees from the agency under the Act.

The requested fee does not operate to "enhance respect for the ... good government of the state", but rather creates a barrier to journalistic scrutiny on policing in South Australia. A primary function of the ABC is to report on matters of public interest, including the exercise of power by those in positions of authority in the community. The fee requested is prohibitive to the public broadcaster exercising this crucial function of ensuring accountability within government, including the police service, around matters of proven and admitted misconduct. The ABC should be allowed to, as freely as reasonably possible, report on areas of significant public interest, including the behaviour and standards of individuals conferred with law enforcement powers.

19. The Commonwealth *Freedom of Information Act 1982*, requires the decision maker, in relation to the levying of a fee or charge, to take into consideration whether 'the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public'.¹ While the FOI Act is absent that explicit consideration, I consider that any assessment of what is 'fair and reasonable' in the circumstances, naturally requires the decision maker to consider public interest arguments, because to do so is consistent with the objects of the FOI Act.²

20. The primary objects of the FOI Act relevant to this issue are:

(a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; ...

21. In 2020, Mr Gordon Barrett QC made a recommendation that would make the outcome of disciplinary processes better known to the public.³ This highlights that disclosure of the information requested would be in the public interest insofar as it would promote transparency and accountability, thereby enhancing respect for the law and demonstrate good government of the state.

22. It follows that I agree with the applicant. The fee creates a barrier to journalistic scrutiny, and ergo, public scrutiny, in relation to the unlawful exercise of power by a central and powerful part of the executive government. The applicant's reporting on the issue was enough to prompt a Member of Parliament to comment on the current regime that:

It doesn't require individuals to be named and shamed, but I think a level of detail that's made in a proactive way, without being dragged out of the police force, is something that South Australians would expect, and respect.⁴

¹ Freedom of Information Act 1982 (Cth) s29(5)(b)

² See section 3(1)(a), 3(2)(b) and 3A(1)(a) and (b) *Freedom of Information Act 1991*

³ Mr Gordon Barrett, 'Report on the operation of the Police Complaints and Discipline Act 2016 (SA)', 17 April 2020, p 89.

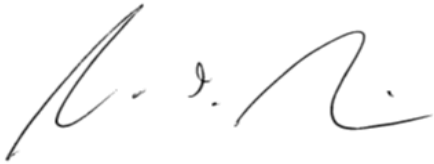
⁴ <https://www.abc.net.au/news/2023-05-03/sa-police-misconduct-secrecy-calls-for-legislative-change/102293508>

OFFICIAL

23. I consider that the absence of supporting information from the agency as to how and why the compilation of the data took 12 hours, and that the public interest weighs in favour of the publication of the information, as supporting the conclusion that it is fair and reasonable to waive the fee.

Determination

24. In light of my views above, I waive the fee charged by the agency.

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

18 July 2023

APPENDIX 1

Procedural steps

19 August 2022	The agency received the FOI application dated 19 August 2022.
18 September 2022	The agency failed to determine the application within the 30 day period required by the FOI Act, and is deemed to have refused access to the documents.
29 September 2022	The agency purported to request payment of an advance deposit.
20 October 2022	The agency purported to determine to refuse to deal with the FOI application on the basis of non-payment of the advance deposit.
11 November 2022	The agency received the internal review application dated 11 November 2022.
25 November 2022	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination.
28 November 2022	The Ombudsman received the applicant's request for external review dated 27 November 2022.
28 November 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
23 December 2022	The agency provided the Ombudsman with its submissions and documentation.
13 February 2023	The Ombudsman issued his provisional determination and invited submissions from the parties.
27 February 2023	The applicant provided submissions in response to the provisional determination.
24 March 2023	The agency provided submissions in response to the provisional determination.
27 March 2023	The Deputy Ombudsman issued the final determination
4 April 2023	The agency issued the applicant with a fees notice
6 April 2023	The applicant lodged an external review of the fees notice
6 April 2023	The Ombudsman advised the agency of the external review and requested submissions and documentation.
21 April 2023	The agency provided the Ombudsman with its submissions and documentation.
29 June 2023	The Ombudsman issued a provisional determination, inviting the parties to provide a submission in response.