

Determination

Review of fee or charge - section 53(4) *Freedom of Information Act 1991*

Applicant	[Applicant]
Agency	Registrar of the Veterinary Surgeons Board
Ombudsman reference	2013/01719
Determination	The determination of the agency is varied.

REASONS

Background

1. By application under the *Freedom of Information Act 1991 (the FOI Act)* received by the Board on 24 February 2011 the applicant requested access to:

All documents about the applicant or referring to him in the possession of the VSBSA, its officers, employees or agents. Specifically including but not limited to all documents and materials about: any complaints about the applicant's health, conduct and registration arising from same or including thereto.

The application requested access in the form of inspection of the documents.

2. Principal Officer of the Board, Ms Debra Lane, made a determination on 30 March 2011 to grant full access to 90 documents, part access to 2 documents and to refuse access to 14 documents and 31 extracts from Board minutes. The applicant was informed he could arrange a time to inspect the documents determined to be released, but I understand he did not avail himself of this opportunity. The determination also stated that the applicable fee for the determination was \$920.00
3. By email dated 12 April 2011, the applicant's solicitor at the time, Mr George Karzis, requested the agency to waive the fee of \$920.00 in light of the fact that the applicant was not employed at the time.
4. By letter dated 15 April 2011, the agency declined to waive the fee, noting that the applicant was in receipt of income at the time he made the application, that he 'should have been aware a fee would be applicable for the Determination', and that, although he was suspended from practising for a period of 16 days, he is now able to work as a veterinarian.
5. By letter dated 12 April 2011, the applicant requested my external review of the Board's determination under section 39 of the FOI Act.
6. In the course of my review the applicant advised by email dated 22 May 2012 that he was willing to reduce the scope of his application to:

...any written report submitted in relation to [Applicant] to the Veterinary Surgeons Board pursuant to section 59 of the Veterinary Practice Act 2003.

7. I conducted my review on the basis of this revised request. On 24 September 2012 I confirmed the agency's determination that the relevant document was exempt from disclosure.
8. I understand that, also during the course of my review, discussions took place between the applicant, my officers and the Crown Solicitor's Office regarding the waiving of the fee, but that resolution of this issue was not reached.
9. By letter dated 25 January 2013 the agency sought payment of the amount of \$920.20. The applicant subsequently contacted this office and sought review of this fee 'as I never saw any documents'.
10. I made enquiries of the Presiding Member of the Board and the Board provided an explanation of its actions by way of letter from the Crown Solicitors Office dated 27 March 2013.

Review of fees and charges

10. Section 53(3) of the FOI Act provides:

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.

11. I consider that the applicant sought a review of the \$920.20 fee by way of the email dated 12 April 2011 from Mr Karzis to the Registrar, and that the agency's letter dated 15 April 2011 comprised a review of the fee pursuant to section 53(3) of the FOI Act.
12. Section 53(4) of the FOI Act empowers me to review the agency's decision and make a determination of what is fair and reasonable in the circumstances:

(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...

Response to my provisional determination

13. I provided my tentative view about the agency's decision to the parties by provisional determination dated 4 April 2013. I informed the parties that, subject to my receipt and consideration of submissions from the parties, I proposed to vary the agency's determination pursuant to section 53(4) of the FOI Act.
14. The applicant concurred with my provisional determination that he should pay half the fee of \$920.0. The agency provided submissions in response to my provisional determination by letter dated 23 April 2013.
15. Firstly, the agency submitted that there was not a separate application for review by the applicant in relation to the costs, and that the agency did not make a fresh determination by its letter dated 15 April 2011. Section 53 of the FOI Act does not specify a format for requesting a review of a charge. I remain of the view that the email from Mr Karzis dated 12 April 2011 and the agency's letter dated 15 April 2011

comprised a request for a review of the charge and a decision about that request respectively.

16. The agency also submitted that, even if the agency did make a fresh determination, the applicant's original application for external review of 12 April 2011 related to the whole of the determination and was treated by the parties as including the issue of costs. I acknowledge that the applicant did seek a review of the costs decision at the time he applied to this office for an external review of the agency's original determination in relation to the documents. However, an attempt to settle that issue at the time was not fruitful, and it is clear that the external review determination dated 24 September 2012 did not deal with costs. Accordingly, I am of the view it is appropriate that I consider this issue now.
17. I have considered the agency's remaining submissions in my reasons below.

Consideration of the agency's determination

15. The first issue I have considered is how the agency calculated the amount of \$920.20. The agency documented that 30.75 hours were spent on the application and has advised that

...The time was spent in finding, sorting and compiling the documents, and in consultation. The documents were held across multiple files...
16. The agency has advised that it did not charge for those hours spent considering files in respect of which the Board was acting in its quasi-judicial capacity (7 in total). It also did not charge for the first two hours of work undertaken on the application, in accordance with the *Freedom Information (Fees and Charges) Regulations 2003*. Thus, the final calculation was 21.5 hours charged at \$10.70 per 15 minutes (calculated by reference to Schedule 1 of the *Freedom Information (Fees and Charges) Regulations 2003*).
17. I comment that it would have been preferable that the agency's account of its time contained further details and, in particular, identified the hours it took for each type of task (photocopying, locating documents, collating and so forth). I also note that the applicant did not receive any 'breakdown' of how the fees were calculated. However, I accept that the manner in which the fee was calculated was in accordance with the relevant legislation. Further, given the amount of documents involved, and the broad scope of the application, I accept that processing the application indeed took as long as it did.
18. That said, in my view, \$920.20 is a considerable sum of money in the context of an FOI application. Further, in my view, the applicant could not have known that the processing of his application, despite being broad in its scope, would attract such a fee.
19. Section 17 of the FOI allows agencies to require advance deposits whether the cost of dealing with an application is likely to exceed the application fee:
 - (1) If, in the opinion of an agency, the cost of dealing with an application is likely to exceed the application fee, the agency may request the applicant to pay to it such reasonable amount, by way of advance deposit, as the agency may determine.
 - (2) If, in the opinion of an agency, the cost of dealing with an application is likely to exceed the sum of the application fee and of any advance deposits paid in respect of the application, the agency may request the applicant to pay to it such reasonable amount, by way of further advance deposit, as the agency may determine.

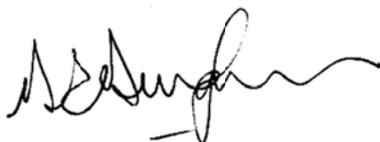
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- (3) The aggregate of the application fee and the advance deposit or deposits requested under this section may not exceed the agency's estimate of the cost of dealing with the application.
 - (4) A request for an advance deposit must be accompanied by a notice that sets out the basis on which the amount of the deposit has been calculated.
 - (5) The amount of an advance deposit requested by an agency in respect of an application must be paid to the agency within such period as the agency specifies in the request.
 - (6) The period between the making of a request under this section and the payment of an advance deposit in accordance with the request is not to be taken into account in calculating the period within which the relevant application is to be dealt with.
 20. I acknowledge that this does not create a legal obligation on the agency to require an advance deposit. That said, the purpose of section 17 seems to me to be, firstly, to ensure that the agency does not complete work the costs of which it cannot recover and, secondly, to ensure that an applicant is fore-warned of the likely cost involved and afforded the opportunity to decline to proceed with the application if that cost is prohibitive.
 21. I reiterate my view that applicants cannot be expected to know the likely cost of an application; they cannot know how the agency's documents are organised, how many are involved or how long it would take to sort and compile them. By contrast, it must have been clear to the agency at the outset that the cost of dealing with the applicant's application was going to be high, and certainly higher than the application fee. It is therefore my view that it would have been appropriate for the agency, at the very least, to provide the applicant with an estimate of the cost involved. It may also have resulted in the narrowing of the scope of the application which occurred at the external review stage. In these circumstances I lean to the view that it is not fair and reasonable to charge to applicant the amount of \$920.20.
 22. On the other hand, I acknowledge that the agency undertook the necessary work to process the application. Further, although the applicant submitted that he did not see any of the documents he requested, I note that he was provided access to those documents determined by the agency to be released, but that he chose not to access them. I also note that he was at the relevant time represented by a solicitor who arguably should have been aware that the cost involved in such a wide application may have been high.
 23. It was with these factors in mind that I came to the provisional view that it was fair and reasonable in the circumstances that the applicant pay the agency half of the original bill of \$920.20.
 24. In its response to my provisional determination, the agency made a number of submissions in support of its view that I should confirm its claim for costs in the amount of \$920.20.
 25. The agency submitted that it is inconsistent to argue, on the one hand, that the applicant could not have known that the processing of his application could attract such a fee and, on the other, that the applicant was represented and presumably would have been advised of the charges levied under the FOI Act. I do not accept this is the case. Both points were taken into account in weighing up whether or not it was reasonable to fail to provide the applicant with notice of the potential cost of dealing with his

application and, ultimately, whether it is fair and reasonable that the applicant pays the original bill in full.

26. Further, the agency submitted that solicitors acting for a person seeking access to documents by way of FOI request could be expected to inform their client of the anticipated cost of the exercise and that, insofar as the solicitor may have failed to provide that advice, that is a matter between the applicant and the solicitor. I am nevertheless of the view that agencies should err on the side of caution and provide applicants with notice of expected costs where they are high, even where the applicant is represented by a solicitor.
27. The agency also submitted the following:
- that the agency engaged with the applicant's solicitor prior to processing the application and determined that he did not wish to pursue access to documents relating to his registration, thereby reducing the cost to the applicant
 - that a file note of a telephone conversation between the applicant's solicitor and Ms Kate Hodder of the Crown Solicitor's Office indicated that the applicant knew the due date for the determination and, accordingly, 'It would seem that the applicant was actively involved in understanding the FOI process in which he had engaged, through his solicitor.'
 - that it is not relevant to the fee charges that the applicant did not receive copies of the documents. The applicant was invited to inspect the applicable fee but declined and, under the FOI Act, that does not negate the fee.
 - that at the 11th hour the applicant significantly narrowed the scope of his request such that the bulk of the documents that had been retrieved and collated and sorted were no longer subject to the request
 - that 'The applicant cannot seek access to a large number of document... then change his mind at the last minute and seek to avoid payment for the time spent by the Board in dealing with his request...'
28. I do not disagree with these submissions. Nevertheless, I reiterate my view that the agency should have provided the applicant with an estimate of the likely costs involved in processing the application. In these circumstances, I remain of the view that the full fee should not be payable by the applicant, and that it is fair and reasonable in the circumstances that the applicant pays the agency half of the original bill of \$920.20

Determination

29. In light of my views above, I vary the agency's determination pursuant to section 53(4) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

26 April 2013