

Determination [Redacted]

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

Applicant	[redacted]
Agency	Wattle Range Council
Ombudsman reference	2018/11031
Agency reference	WR159290
Determination	The determination of the agency is varied.

REASONS

Application for access

1. By application dated 8 January 2018, made under the *Freedom of Information Act 1991 (the FOI Act)*, the applicant requested access from the agency to:

All notes, communication, letters, emails and recordings related to property [address 1] or [the applicant's brother] and/or dealings in relation to these parties in last 5 years.
2. The applicant agreed to amend the scope of their application on 30 January 2018. Documents were sought for the previous two years only.
3. Pursuant to section 53 of the FOI Act, the agency required fees and charges of \$2163.20 to be paid by the applicant in relation to the following:
 - \$1036.80 for search and retrieval time associated with processing the application (81 x 15 minute increments at \$12.80 each)
 - \$614.40 for sorting, compiling and scanning documents (48 x 15 minute increments at \$12.80 each)
 - \$512 for third party consultation (40 x 15 minute increments at \$12.80 each).

Background

4. By determination dated 14 March 2018 the agency found that 179 documents fell within the scope of the applicant's request. The agency determined to release most of the documents in full and some of the documents in part.
5. The agency determined to impose fees and charges in the amount of \$2163.20. The agency imposed no charges in relation to photocopying as the applicant had requested the documents to be provided electronically. The applicant was advised of the fees and charges in the determination dated 14 March 2018.
6. The applicant did not pay the fees and thus has not yet had access to any of the documents.

7. By email dated 14 March 2018, the applicant requested that the agency review the fees and charges. By email dated 16 March 2018, the agency advised the applicant that the fees and charges remained unchanged.
8. For ease of reference, the procedural steps relating to the application are also set out in the appendix.

Jurisdiction

9. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under sections 39 and 53 of the FOI Act.

Provisional determination

10. I provided the parties with my tentative views by way of my provisional determination dated 15 November 2018. I informed the parties that, subject to my receipt and consideration of further submissions, I proposed to vary the agency's determination.
11. The applicant provided a response to my provisional determination on 21 November 2018. In their response, the applicant relevantly submitted:
 - they felt that my review was very fair and reasonable
 - they stated they were unsure why they were required to pay for the time for two staff to review the FOI material, those staff being the FOI Officer and the CEO
 - they indicated they felt they were being made to carry the cost of both persons processing their application due to the inability of the FOI officer.
12. I clarify that the agency is not permitted to impose fees and charges for costs associated with the consideration of the documents and the application of any exemption clauses under the FOI Act. Therefore the agency is not permitted to charge for 'reviewing the FOI material' and I did not include any such charges in my provisional determination.
13. The agency provided a response to my provisional determination on 29 November 2018 by way of a letter from the Chief Executive Officer (CEO). The agency provided numerous submissions which I will address individually.
14. The agency submitted the following under the heading 'background':

By way of background, Council has had extensive exchanges with the complainant over the past 2 years. Throughout this period, we received numerous complaints from Council Officers about [the applicant's] behaviour towards them, and after investigating those complaints I subsequently concluded that [the applicant's] behaviour amounted to bullying and harassment...

[The applicant] has repeatedly threatened to refer one of my planning, compliance and enforcement officers to both your office and the ICAC for unsubstantiated corruption. I have repeatedly advised [the applicant] of [their] rights and requested that [they] report and substantiate any corruption claim to allow an appropriate authority (including this Council) to investigate [their] concerns and to enable natural justice to be followed. [The applicant] has repeatedly refused to do so.

Council believes that the FOI in question relates to undisclosed matters that were being managed by the above Council officer in relation to an enforcement issue with the complainant's brother. The scope of the FOI was very broad, the applicant has refused to pay the fees and charges for many months, and [the applicant] has not pursued access to the FOI documents. It was only when Council sought payment of the fees and charges via the issuing of a formal invoice that [the applicant] lodged [their] complaint with your office.

Given [the applicant's] repeated threats, bullying and vexatious behaviour, this Council remains concerned that the FOI was intended to influence Council's compliance and enforcement activities and continue to bully and intimidate its officers.

It is for the reasons outlined above that I became personally involved in the document search and review process of this FOI. It should be noted that my time is charged at the designated FOI rate and that only time spent searching and reviewing documents has been charged in accordance with the FOI process. It is for these same reasons that I ensured that the FOI process was followed compliantly by a trained and accredited FOI Officer and that the fees and charges were overseen and authorised by another independent FOI officer.

15. I reiterate my comments made above, and in my provisional determination, that an agency is not empowered to impose any fees and charges for 'reviewing' documents.

16. The agency submitted the following under the heading 'fees and charges':

In relation to *Freedom of Information (Fees and Charges) Regulations 2003*, the applicant lodged [their] FOI with Council on the 30 January 2018. It is Council's understanding that the fees and charges applicable at the time of lodgement are the designated fees to be charged. On that basis the FOI charges applicable at this time are the ones that are gazetted for the period "01.07.2017 - 30.6.2018", which states that \$12.80 is chargeable for each 15-minute block. It is our understanding that the \$13.10 value utilised in your provisional determination is for the period "1.7.2018 to 31.8.2018" which came into effect after the FOI application was received and determined.

17. I have reviewed the *Freedom of Information (Fees and Charges) Regulations 2003* and I confirm that the agency is correct. I have amended this determination where relevant to reflect that the applicable fees and charges were \$12.80 per 15 minute increment.

18. In relation to my discussion on the amount which could fairly be charged for the scanning of the documents, the agency submitted that I had incorrectly stated that the documents comprised 374 pages. The agency submitted that the documents comprised 432 pages. I have reviewed the documents and I have amended this determination where relevant to reflect that the documents comprise 432 pages.

19. The agency submitted the following under the heading 'consultation':

Some documents required redaction to protect the business details of other third parties.

20. I advise that an agency is not empowered to impose charges for the time taken to redact documents, as this forms part of the consideration of the documents. I remind the agency that it is only empowered to charge for finding, sorting, compiling, copying and consulting.

21. The agency submitted the following under the heading 'fair and reasonable':

In your provisional determination of what is "fair and reasonable", Council requests that you also consider what is fair and reasonable for this Council...we are a regional Council and do not have access to the people and software of a larger metropolitan Council. We have one accredited FOI officer who works part time and whose primary role is a Governance Officer. The other accredited FOI officer is a departmental manager.

The nature of the FOI application was broad in description and this impacted on Council's ability to process the application within the prescribed timeframes. In an attempt to deal with the application promptly and efficiently (which is a key principle of administration under section 3A of the [FOI] Act) Council allocated additional resources to help process the application. Even though additional resources were applied, we still had to request an extension of time. The applicant responded to our notification of extension with the

following ... "Your request for extension in my view is exceptionally reasonable taking into account the timeframe of the search".

The records system used by Council is designed to capture and store records that are not easily extracted. Retrieving a document from of (sic) our records system involves opening the record with the document attached and saving a copy of the document to an external drive. There is no 'drag and drop' functionality. The records system operates on a network and is only as fast as the network/internet speeds available in our area. Regional internet speeds are significantly slower than in metropolitan areas.

We would also like you to consider whether it is fair and reasonable that the ratepayers of [the Council] should be absorbing the costs associated from the time expended to process this FOI application, particularly given the vexatious and querulent nature of the applicant. Rather, Council believes that the charges applied were reflective of the time and effort expended on the application - as requested by the applicant.

It should be noted that Council has already conceded a number of hours that were involved with the application that were not charged. Council also made every effort to reduce the scope of the application with the applicant. I can advise that Council was able to reduce the scope of the search to the past 2 years, rather than the 5 years that was initially requested. However, the applicant did not want to reduce the scope of the FOI further than this and therefore the scope of the application remained broad in nature.

Council is required to act consistently with the requirements of the FOI Act. The Act details the fees and charges that Council may require an applicant to pay. Council has honestly recorded the time spent processing this application and charged in accordance with the Act.

There is no benefit to Council in spending longer on an application than what is required to do so diligently. As detailed above Council has limited resources. This application, effectively diverted our officers' resources from their core role for the best part of a month to the detriment of the organisation and the broader community.

22. My consideration of what is fair and reasonable must be based on the circumstances at hand and the information that is before me. In addition, I must reach a determination which is fair and reasonable both for the applicant and the agency.
23. However, I am not persuaded that significant allowances should be made given the agency is a regional council. There are approximately 300 agencies within South Australia that are subject to the FOI Act, many of which are small agencies and/or are located in regional environments as opposed to metropolitan environments. In conducting a review under section 53(4) I consider that I may take into account the circumstances of the agency. However, to place too much weight on the particular challenges faced by a regional council would result in applicants living in regional areas having to pay comparatively more than applicants living in metropolitan areas. I do not consider that would be fair and reasonable.
24. I also comment that regardless of the size and location of the agency, there is an expectation that agencies will hold public documents in such a form as can be easily retrieved.
25. I do not consider that the agency's submissions regarding the diversion of its resources in order to process this application to be persuasive. Section 18(1) of the FOI Act allows an agency to refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

26. The agency did not determine this application under section 18(1). Having dealt with the application, I do not consider that the agency can now relevantly argue that the processing of the application constituted a diversion of its resources.
27. I have addressed the agency's further submissions, where relevant, in the body of this determination.

Relevant law

28. 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.

(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 for a further review and the 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.

29. The regulations referred to in section 53(1) were, at the relevant time, the *Freedom of Information (Fees and Charges) Regulations 2003*. Schedule 1 to the regulations provided that an agency may charge \$12.80 for each 15 minute increment spent by the agency in respect of dealing with an application for access.

Issues in this review

30. This is a review of the determination by the agency to require payment of the sum of \$2163.20 in fees incurred whilst processing the FOI application. It is for me to determine whether those fees were fair and reasonable in the circumstances of the case, or whether the fees should be waived, confirmed or varied.

Submissions of the parties

The applicant

31. The applicant objects to certain aspects of the way the agency calculated its fees and charges. Specifically they complain:
- the agency lists a 'search and retrieval time' for the Chief Executive Officer (CEO) but the CEO located zero documents
 - the agency charged for scanning and the applicant does not believe it is entitled to do so
 - it is unclear why the agency charged so much for third party consultation
 - the agency charged for both the FOI officer's time and the CEO's time for 'sorting and compiling'
 - the agency charged for two full days (with dates specified) and the applicant is sceptical that two full days were actually spent on their application.
32. The applicant submits that \$1000 would be a reasonable amount for fees and charges, but that the amount of \$2163.20 is excessive and unjustified.

The agency

33. In its review of the fees and charges, the agency advised the applicant:

The hours documented in the fee worksheet are those hours spent processing your application. Time documented by myself, as the Accredited Freedom of Information Officer and [the CEO] as the Principal Officer of the Agency, relates to the time we have spent processing your application.

34. The agency has provided me with a checklist which includes a Fee Worksheet. The Fee Worksheet indicates that fourteen employees searched for documents. I understand the Fee Worksheet has previously been provided to the applicant.
35. The agency provided the following submissions to my external review:

Initial fee estimate was undertaken by Council's Accredited Freedom of Information Officer (AFOIO) and based on simple search of records system (and not having reviewed any documents)...In hindsight this did not indicate the full extent of the documents that would meet the scope of the application. Hence the original estimate was significantly less than the final fees charged. Council did not seek an advance deposit in good faith.

In commencing a thorough search for documents relevant to the scope, the AFOIO found that the more documents were reviewed, additional related documents that Council held were discovered. The majority of documents found were outside the system that the fee estimate was based on. Due to the nature of [their] employment as a Real Estate Agent, the applicant corresponds with council on a regular basis, across most departments. In conducting a thorough and adequate search of our systems hundreds to thousands of documents were appearing in the search queries regarding assessment to determine relevance to the application. The AFOIO kept a record of the search findings showing the number of documents that were appearing in each search (Document 123).

The search was difficult due to relevant officers being on leave during the application timeframe, turnover of staff over the two year period that the application applied to requiring extraction of information from archived material and being able to conduct a thorough search for documents that met the broad scope of the application. Council believes it was worth going to the level it did to search for documents, because each unique search (whether by system or by specific officer) returned relevant information to the application.

Council's AFOIO expressed concern part way through that it may be difficult to meet the 30 day deadline to process the application as more relevant documents were continually being discovered and she was finding the application to be impacting her ability to complete other work. The AFOIO spoke to me (Council's principal officer, on 12 Feb 2018) about workload and the potential to seek an extension of time under section 14A of the Act...Council has limited human resources, particularly in professional roles, with Freedom of Information application processing only making up a minor percentage and rare occurrence of the officer's ordinary work. Council would not be justified in having an officer purely dedicated to FOI applications. To help ensure that Council could best meet the requirements of the Act I offered my time and that of Council's IT Officer to help complete the search for relevant documents. The decision to extend the timeframe was deferred pending three afternoons of dedicated time in the hope of avoiding the need for extension and being able to complete the application in the 30 day timeframe.

Time was set aside for 14-16 March 2018 (Document 28, 29 and 31).¹ Council's IT Officer (as the only person with security permission to do so) accessed archived emails as identified in search results using various search terms for quick onscreen review by the AFOIO. Those documents that had potential to meet the scope of the application were then extracted for the CEO to compile and reference. Subsequently the CEO and AFOIO commenced review of all documents for relevance to the application, including assessing against criteria set out by the FOI Act and sorting which documents would require third party consultation. Undertaking this process, gave Council confidence that we had adequately sourced all relevant records that Council held in relation to the FOI request and had done our best to deal with the application within the required timeframes. With the number of documents discovered and processed, it was clear that adequate third party consultation would not be able to be completed within the 30 days, and I determined to grant the AFOIO's request for extension...

In undertaking third party consultation, Council's AFOIO had to contact numerous parties, often on multiple occasions (by phone and email) and did not receive formal responses from some parties. The AFOIO consulted with State Records regarding the appropriate process to follow in these circumstances (Document 61 and 124).

A Fee Worksheet (Document 90) was prepared by the AFOIO detailing the working out of fees and charges. This was provided as part of the determination letter to the applicant (Document 7).

Internal search documents were used to help determine the fees and charges (Document 125). The Fee worksheet was conservative for example if an officer undertaking an internal search did not record time searching for information, the time was not charged (e.g. forms from [employee 1], [employee 2] and [employee 3]).

Council utilises an internal review system with FOI fees and charges as standard practice (utilising the State Records template worksheet). The AFOIO processing the application was the recommending officer. I was initially requested to approve the fees, however requested another officer review the fees and charges who was not party to the application processing. The worksheet was then approved (signed) by Council's only other Accredited FOI Officer (a more senior officer than the officer processing the application) who also has delegated authority under the FOI Act...

In relation to the request to reduce fees, the AFOIO took the request to the CEO along with the fee worksheet and internal search documents outlining how the fees had been determined. The CEO indicated that he thought the fees were reasonably charged.

Council believes that the fees and charges detailed to the applicant are in accordance with section 53(2aa) being in relation to finding, sorting, compiling and copying documents relevant to the application and undertaking consultation with third parties in accordance with the FOI Act. Council also believes that the fees had been calculated based on those outlined in Schedule 1 of the *FOI (Fees and Charges) Regulations* current at the time of processing the application. Due to the applicant's request to receive

¹ These documents referred to in the agency's submission are evidence of Calendar appointments.

documents as email copy only on the application form, there were no charges for copying...

It should also be noted that the Director Corporate Services reached agreement with the applicant at the time the FOI was lodged to reduce the scope from five years to two, which reduced the volume of work and therefore the cost of processing the application considerably.

Consideration

36. Pursuant to section 53(4) of the FOI Act I may, according to what I determine is fair and reasonable in the circumstances, waive, confirm or vary the fee required by the agency. In making my determination, I have considered the submissions of the parties and I have considered how the agency calculated the amount of \$2163.20.

Search and retrieval

37. The agency has charged \$1036.80 for search and retrieval of documents, which is a total of 81 x 15 minute increments or over 20 hours.
38. The applicant submits that the agency lists a 'search and retrieval time' for the CEO but the CEO located zero documents. It is unclear why the applicant believes the CEO located zero documents, as the agency does not appear to have disclosed to the applicant how many documents were located by each person who undertook a search.
39. The applicant submits that the agency has charged for two full days of searching for documents, and they are sceptical that two full days were in fact spent on their application. The applicant appears to have formed this impression from the Fee Worksheet.
40. I provide the relevant extract from the Fee Worksheet below:

Actual Charge	[Person conducting search]	Minutes
Search and retrieval time	[IT Officer] 14 Feb	240
	[CEO] 14 Feb	240
	[FOI Officer] 14 Feb	240
Sorting, compiling and scanning	[FOI Officer] and [CEO] (15-16 Feb)	720

41. It is unclear why the agency has included the dates on which these activities took place for the CEO, FOI Officer and IT officer, noting that the agency did not include the dates on which the other 11 persons conducted their searches. This seems to have caused some confusion for the applicant.
42. Nevertheless I accept that the 'minutes' column demonstrates that on 14 February 2018, 240 minutes or 4 hours, were spent searching for documents by each of three persons (a total of 12 hours). On 15 and 16 February 2018, 720 minutes were spent (by two persons) sorting, compiling and scanning. This means on 15 and 16 February 2018, the FOI Officer and the CEO together spent 720 minutes, or 12 hours (6 hours each) sorting, compiling and scanning, according to the Fee Worksheet.
43. This is consistent with the agency's submissions to my external review, which state that time was set aside for three persons to devote three of their afternoons to dealing with the application. The agency has also provided evidence of Outlook Calendar appointments at the CEO's office on those dates which are listed to be 'Uninterrupted'.

44. The Calendar appointments indicate that on 14 February 2018, five hours were set aside from 12pm-5pm. On 15 February 2018, five hours were set aside from 12pm-5pm. On 16 February, three hours were set aside from 2pm-5pm. The Fee Worksheet indicates that the allotted time was 13 hours over three days. Given the amount charged by the agency, it appears that in fact only 10 hours were spent working on the applicant's application (noting that for these 10 hours, two to three employees were working simultaneously).
45. The fee schedule indicates that 14 different agency employees conducted searches for documents. Of those 14 employees:
- five worked in the business unit 'Corporate Services'
 - six worked in the business unit 'Development, Health and Compliance'
 - one was an FOI officer
 - one was an IT officer
 - one was the CEO.
46. In my provisional determination, I stated that I was not persuaded it was necessary for 14 different employees to conduct searches and that it was unclear to me why 11 employees over two business units each conducted searches. I considered that the usual practice would be for one employee per business unit to conduct a search, unless there were particular employees who had, for example, communicated with the person named in the FOI application. I invited further submissions from the agency about the reasons so many persons were involved in the search and retrieval process.
47. In response to my provisional determination, the agency relevantly stated:

[The Council] is a small organisation and customers can contact a range of officers on a number of matters depending on the situation. Likewise, it is normal for customers to liaise directly with the relevant officers, rather than through their direct supervisor or departmental manager.

As previously discussed, the FOI application scope was very broad and specifically included "all notes, communication, letters, emails & recordings...". As discussed with [Legal Officer] from your office the property listed in the application had been damaged by fire and it subsequently required demolition.

During the timeframe of the application, Council had numerous compliance related activities in relation to the property. All relevant staff had direct contact with the complainant. Regardless of whether the FOI officer asked, or a department manager on behalf of an FOI Officer, this list of personnel who had contact with the complainant would have been required to search and retrieve the relevant information.

The personnel who were involved in the search and retrieval are listed below and their rationale for inclusion is attached. It was necessary to ask each of these officers otherwise Council would not have been able to locate all documents to which access had been requested. In a significant number of cases, documents were discovered as a direct result or including these officers in the search process.

Corporate Services

- a) Rates Officer - had documents relating to rates notices, return to sender rates notices kept in their work area.
- b) Finance Officer debtors - drafted invoice to the property owner to recoup the fees that council incurred demolishing the property, requests for invoice kept in file on their desk.
- c) Accounts Payable - paid invoices in relation to the property, stores copies of the invoices in folder on their work area.
- d) Director - had to deal with applicant and implications for reporting to Council, sale of property for lack of payment of rates.

- e) Finance Manager - email archive searched returned emails between applicant and officer.
- f) IT Officer - only person able to access archived email material. With some staff movements, some staff who were no longer employed with Council had dealings in relation to the property, their materials could only be accessed via this archive.

Development Services

- g) General Inspectors x 2: Fire prevention notice was issued on property, officers were requested to search because they may have had notes in their field books.
 - h) Environmental Health Officer (EHO): property had asbestos, Council had to undertake asbestos removal as part of demolition process, this was part of the EHO's role.
 - i) Planning Officer - notes in field book following compliance visits.
 - j) Director - had a number of dealings, including personal notes from liaising with applicant, [the applicant's brother] and in relation to the property.
 - k) Development, Health and Compliance Manager - key person who liaised with the applicant, [the applicant's brother] and in relation to the property.
 - l) Admin Officer - undertakes considerable document management for the development team and had been directly liaising with third parties in relation to the matter in supporting the Director and Manager.
48. The agency has provided a list of search terms used. I note that one of the search terms used was the name of the applicant. I comment that the name of the applicant is not specifically included within the scope of the application for access. However, I also note that the agency had obtained an Authority to Act, which enabled the agency to communicate with the applicant on [their] brother's behalf in relation to the dispute regarding the property listed in the application for access. To the extent necessary to find documents relevant to that matter, I accept that the agency may have needed to search for documents relating to the applicant.
49. However, the agency has submitted that it had extensive dealings with the applicant which were unrelated to the issue raised in the application for access, due to the applicant's occupation. It would therefore appear to me that to use the applicant's name as a generic search term would be likely to return a large amount of irrelevant, out of scope documentation.
50. The agency has provided a master spreadsheet which demonstrates how many documents were found during its searches, referred to in the agency's submissions as Document 123. I have considered Document 123 and note that it lists 1975 separate documents. I note that only 179 documents were deemed to be in scope. This means that 1796 documents were considered by the agency only to be discarded as being outside the scope of the application for access.
51. Document 123 demonstrates that the agency did not merely find and then discount these additional 1796 documents. The master spreadsheet includes the following columns: the author of the document, who the document was sent to, the subject/title of the document, whether it was sent or received by the agency, whether the document had any other attachments, the size of the document and the date the document was created. This would appear to indicate that some time was put into creating the master spreadsheet, despite the fact that the overwhelming majority of the documents detailed within were out of scope.
52. In my provisional determination, I expressed the view that the agency appeared to have searched for documents too broadly, returning too many results which were out of scope. I stated that I appreciated that the agency may be limited by the search capacities within the record keeping system it uses. However, I did not consider that the applicant should bear the cost of this. Given the agency was aware that a search for the applicant's name would return a large number of results, I considered that the agency

should have used more tailored search terms in order to locate the documents which were in scope.

53. In its response to my provisional determination, the agency relevantly submitted:

With regard to using the applicant's name in the search process, it is clear that the FOI application uses the wording "...and/or dealings in relation to these parties". [The applicant's brother] formally authorised [the applicant] to act on his behalf when dealing with this Council in relation to matters concerning his property at [address 1]. [The applicant] contacted Council on multiple occasions in relation to this property. Council therefore considers that a search using the applicant's name is reasonable as [they were] a person that dealt with Council in relation to the parties specified in the application.

In undertaking searches, the complainant has three different email addresses (including a work one) which [they] had corresponded with Council on. During the search, each of these addresses returned results relevant to the FOI, therefore failure to have used [the applicant] in the search criteria would have compromised the overall search integrity.

Please note that it is Council's responsibility to ensure that a search is thoroughly completed. Our accredited FOI Officer has undergone appropriate training at State Records of SA. During this training it was strongly emphasised by Records SA of the importance of sufficiency of search, including the need to make reasonable attempts to locate all documents to which access has been requested and not narrowing the scope. Council believes it has acted both reasonably and appropriately by using the applicant's name in the search criteria to ensure it has made a reasonable attempt to locate all documents to which access was requested.

In relation to points 31, 32, 33 and 34 in your [provisional determination], simple searches were more successful at returning relevant results than complex searches. To help demonstrate this, a search using the criteria of [the applicant's name] and [reference number] [address 1] returned 4 relevant results; a search using the criteria of [the applicant's name] and [address 1] returned 3 results; and a search using the criteria of [the applicant's name] and [the street number of address 1] returned 14 relevant results.

Council's document search capability is limited and unfortunately there was no ability to circumvent the search process that was utilised. The large number of documents that were found to be unrelated were a function of undertaking a search of Council's email and records systems. This is not unusual for a Council of this size and complexity.

When a search was undertaken a large multiple of individual record 'hits' were returned. Each of these individual records may have been associated with their own record trails involving two or more persons. Unfortunately, the search functionality of our systems does not return the full trail, therefore individual trails of other persons in the same original string had to be individually searched to ensure all records/documents were recovered.

54. I acknowledge that agencies must deal with a range of factors when processing an application for access. On the one hand, agencies must conduct reasonable searches for documents. On the other hand, unnecessarily broad searches may be subject to review and result in the agency being unable to recover the costs of those searches from the applicant.
55. I comment that agencies are required to conduct *reasonable* searches. Agencies are not required to spend an inordinate amount of time searching in order to verify that every document that could possibly exist has been located. Whilst I do not intend to discourage agencies from searching thoroughly, agencies must also be mindful of their finite resources and the need to utilise their time as effectively and efficiently as possible.
56. I also comment that an agency can reasonably be expected to hold its records in such a way that the records are logically searchable. Given that the application for access

relates to a specific property, which the council has indicated was the subject of specific enforcement actions, I query why the council has not held documents relating to this property in one particular location (or locations), whether that be in hard copy or electronic. It is reasonable to expect that agencies are able to search through their records using a property search, and that correspondence relating to a particular issue (or enforcement action) would be recorded as part of that particular file or entry.

57. I remain of the view that it is not fair and reasonable for the applicant to bear the entirety of the costs of the agency's searches, given it appears the agency has searched broadly and used search terms which were anticipated to return a large number of irrelevant results. Similarly the applicant should not bear the costs associated with the method of record keeping utilised by the agency.
58. In light of the above, I am satisfied that it would be unreasonable for the applicant to be charged for over 20 hours of searching.
59. Of the time spent searching for which the agency is seeking to impose charges, approximately eight hours comprises the searches undertaken by the 11 employees across two business units. I am prepared to accept the agency's submissions regarding the reasons it was necessary for 11 employees to conduct searches. Based on the information before me, it appears that approximately 100 of the 179 documents were located through the searches conducted by the 11 employees. Accordingly, I have formed the view that it is fair and reasonable for the agency to impose charges relating to the eight hours of search and retrieval by the 11 employees.
60. Of the time spent searching for which the agency is seeking to impose charges, the remaining twelve hours comprises the searches undertaken by the FOI Officer, CEO and IT Officer on 14 February 2018. It appears likely to me that the majority of the out of scope documents identified in Document 123 were located through searches undertaken on 14 February 2018. Noting the documents which appear to have already been located by the 11 employees, it would appear that these three employees only located approximately 79 additional documents in these 12 hours.
61. I have discussed in this determination my view that it appears the agency searched too broadly for documents. Further, based on the information before me, including the agency's submissions, it appears likely to me that some of this 12 hours was spent considering and reviewing the documents, for which the agency is not empowered to impose fees and charges.
62. In its first submissions to my external review, the agency stated:

Council's IT Officer (as the only person with security permission to do so) accessed archived emails as identified in search results using various search terms for quick onscreen review by the AFOIO. Those documents that had potential to meet the scope of the application were then extracted for the CEO to compile and reference. Subsequently the CEO and AFOIO commenced review of all documents for relevance to the application, including assessing against criteria set out by the FOI Act and sorting which documents would require third party consultation.
63. It therefore appears that on 14 February 2018, the only person actually searching for documents was the IT Officer. I therefore consider it would not be fair and reasonable to charge for the time of the CEO and FOI Officer on 14 February 2018. In my view, in all of the circumstances, it would be reasonable to charge for two hours of searching through archived emails on 14 February 2018. In reaching this view I have balanced the fact that 1796 out of scope documents were found and considered, indicating inefficient searching methods, with the fact that searching through archived emails presents particular challenges which are often unavoidable by an agency.

64. It is my view that it is reasonable for the agency to charge the applicant for ten hours of searching in total. It is fair that the applicant is charged for 40 x 15 minute increments, amounting to \$512.

Sorting, compiling and scanning

65. The agency has charged \$614.40 for sorting, compiling and scanning, which is a total of 48 x 15 minute increments or 12 hours.
66. The applicant submits that the agency is not entitled to charge for scanning. I note that the applicant requested the documents to be provided to them electronically and that some of the documents were originally in hard copy.
67. In my provisional determination, I expressed the view that it was reasonable for the agency to impose a charge for the scanning of a document. However, I did not consider that the agency should charge \$12.80 per 15 minutes for time spent scanning documents. I considered that it would be reasonable for the agency to charge \$0.20 per page scanned, which is the amount set in Schedule 1 to the *Freedom of Information (Fees and Charges) Regulations 2003* for photocopying pages of a document.

68. In response to my provisional determination, the agency submitted:

The fees charged for scanning, sorting and compiling documents were derived from the time taken to carry out these administrative tasks. It is Council's understanding that we would have also been able to charge for the time spent copying documents under the provisions of the FOI Act that would be in addition to any photocopying charges, however no hard copies were requested or provided.

Council's FOI Officer expressly referred to her State Records training notes when determining fees and charges in this regard, and they clearly show that the time taken to copy a document should be charged in addition to the per-page photocopying charges.

69. Whilst I do not necessarily agree that it is clear that the FOI Act and Regulations empower an agency to charge twice for photocopying, being a charge for the time taken as well as a charge per page photocopied, it is not necessary for me to determine this issue for the purpose of this review.
70. The agency did not undertake photocopying in its processing of this application. However, the agency did undertake scanning. I remain of the view that it is appropriate for the agency to charge *once* for scanning the documents. Given there were not additional costs associated with photocopying, such as the cost of paper and ink, incurred by the agency, I consider it would not be fair and reasonable for the agency to charge twice for the scanning the documents.
71. The agency has not indicated the amount of time being charged separately for scanning, as it is grouped together with sorting and compiling.
72. Given the agency located 179 documents, comprising 432 pages, I consider it fair and reasonable that the agency charges \$86.40 for scanning the documents.
73. The agency's submissions on sorting and compiling, which was conducted on 15 and 16 February 2018, state that:

Subsequently the CEO and AFOIO commenced review of all documents for relevance to the application, including assessing against criteria set out by the FOI Act and sorting which documents would require third party consultation.

74. The agency's submissions appear to indicate that on 15 and 16 February, part of the CEO and FOI Officers' time was spent considering the documents against the exemption clauses set out in Schedule 1 to the FOI Act. It does not appear to me that anything else could be meant by the phrase 'assessing against criteria set out by the FOI Act'.
75. Section 53 of the FOI Act allows fees to be imposed for finding, sorting, compiling and copying documents, as well as time spent undertaking consultation. Section 53 does not allow fees and charges to be imposed for time spent considering the application of exemption clauses and determining whether to disclose the documents.
76. I note that there were 179 documents within scope. Many of the documents were one page only. The largest document is 10 pages. In my view, it would be reasonable for the agency to have spent three minutes per document on sorting and compiling. This amounts to 35.8 x 15 minute increments, or approximately nine hours.
77. Accordingly, I consider that in the circumstances of this matter, it is fair and reasonable that the applicant is charged \$458.24 for sorting and compiling the documents.

Consultation

78. The agency has charged \$512 for time spent undertaking consultation. This was calculated as 600 minutes, or 10 hours, of third party consultation.
79. The agency has provided documents relating to third party consultation, including emails to third parties attaching consultation letters and documents, as well as other email correspondence between the agency and the third parties. I understand as part of its third party consultation, the agency also sought advice from State Records. I do not consider that the agency can impose a fee for the time spent seeking advice from State Records.
80. It appears that the agency consulted with eight entities (persons or businesses) as part of dealing with the FOI application.
81. I do not consider that the time taken to consult with eight entities could have amounted to the ten hours claimed by the agency. I have noted the agency's submissions and the documents provided in support of its submissions.
82. In my provisional determination I stated that, even taking into account additional tasks which are not specifically recorded in the documents, such as drafting a template consultation letter, filing emails away in records management systems, locating the correct contact details for each third party and attaching the correct documents to each specific consultation email, I did not consider that the agency could, or should, have reasonably spent more than three hours completing the consultation. This included allocated time for telephone calls with third parties who did not respond by the due date. I stated that I had included some time for these, although the agency had not provided file notes of these conversations, because it could be reasonably inferred from the documents that such telephone calls took place.
83. In its response to my provisional determination, the agency stated:

Phone conversations were not brief with these third parties. They included explanations about the FOI process including why they were being consulted; that Council was considering releasing documents that were relevant to them; requesting them to review the documents; explaining about needing to meet the exemption criteria (not just because they didn't want to); information about their rights to review if the FOI Officer determined to release their records and they did not agree etc. It is reasonable and appropriate that

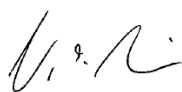
Council consult with third parties on these matters as they often have no prior knowledge of the FOI process, they have rights and it is important that they understand them.

The contact with Records SA has more than likely been inadvertently included in the consultation time. The FOI Officer estimates that this would have been between 20-30 mins (2 phone calls and an email). Council is happy to remove this time from the fees and charges schedule.

84. Of the eight interested parties, based on the documents provided by the agency, only two did not respond by the due date. However, in a telephone conversation between my Legal Officer and the agency, the agency indicated that the FOI Officer had in fact had a telephone conversation with all eight interested parties. However, the agency indicated that it was unable to provide any evidence that these telephone conversations took place or the length of the telephone conversations. My Legal Officer enquired as to how the FOI Officer knew she took ten hours to undertake the third party consultation if she had not recorded the time spent. The FOI Officer indicated that she had put aside particular time to complete the third party consultation.
85. In my view, the agency could reasonably have taken up to two hours to complete the relevant paperwork and letters required for the third party consultations. However, I am unable to accept that it would be fair and reasonable to charge for the total of the remaining eight hours of consultation. Noting that there are eight interested parties, this would mean that the FOI Officer had a one hour telephone call with every interested party. This would be an extraordinarily long time, even if the FOI Officer diligently and thoroughly explained to the interested party their rights.
86. Whilst I accept that it is possible that the FOI Officer had a one hour phone conversation with each interested party, I note that the agency has no evidence of the duration of these calls. Noting that the interested parties were each provided with an email and a letter setting out the purpose of the consultation and their rights, I consider that it would be fair and reasonable for the agency to include charges for one 15 minute phone call per interested party, noting that the level of engagement by each party is likely to have varied. It would be unreasonable and excessive to impose charges for a one hour telephone conversation with each interested party.
87. It is my view that it is reasonable for the agency to charge the applicant for four hours of consultation time. This equates to 16 x 15 minute increments, amounting to \$204.80.
88. Accordingly I consider that it is fair and reasonable that the applicant is charged a total amount of \$1,261.44 for the processing of the application, comprising:
- \$512.00 for finding documents
 - \$86.40 for scanning documents
 - \$458.24 for sorting and compiling documents
 - \$204.80 for consultation.

Determination

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



Wayne Lines
SA OMBUDSMAN

11 December 2018

APPENDIX

Procedural steps

Date	Event
8 January 2018	The agency received the FOI application.
30 January 2018	The applicant amended the scope of the application.
19 February 2018	The agency determined to extend the time to deal with the application with a section 14A determination.
14 March 2018	The agency determined the application.
14 March 2018	The applicant sought a review of the fees and charges.
16 March 2018	The agency informed the applicant of the outcome of the review of the fees and charges.
16 October 2018	The applicant sought a further review of the fees and charges by the Ombudsman.
17 October 2018	The Ombudsman advised the agency of the review and requested submissions and documentation.
31 October 2018	The agency provided the Ombudsman with its submissions and documentation.
15 November 2018	The Ombudsman provided the parties with his provisional determination for comment.
21 November 2018	The applicant provided a response to the Ombudsman's provisional determination.
29 November 2018	The agency provided a response to the Ombudsman's provisional determination.