



Determination

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

Applicant:	████████████████████
Agency:	Department for Correctional Services
Ombudsman reference:	2022/01991
Agency reference:	CEN/22/0058; CEN/22/0080; CEN/22/0082; CEN/22/0083; CEN/22/0084; CEN/22/0085; CEN/22/00121; CEN/22/0122; CEN/22/0123; CEN/22/0124; CEN/22/0142; CEN/22/0143; CEN/22/0144; CEN/22/0145; CEN/22/0147; CEN/22/0148; CEN/22/0184; CEN/22/0185 and other unknown references
Determination:	The determination of the agency is reversed.
Date of Ombudsman's determination:	14 July 2022
Issues considered:	Whether applicant demonstrated financial hardship
Exemption clauses relied upon:	N/A
Legislation considered:	<i>Freedom of Information Act 1991</i>

Summary of the original application:

Request for waiver of application fee

REASONS

Application for access

1. By 21 separate applications under the *Freedom of Information Act 1991 (the FOI Act)* the applicant requested access to the agency's documents. ...

Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

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 9 May 2022. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. By email dated 23 June 2022 the agency provided submissions in response. I have considered these submissions in this determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹ On application for access to documents, or on application for review by an agency of its determination, an application fee of \$38.25 is payable by the applicant to the agency.
7. Where a person liable to pay an FOI application fee satisfies the agency that they hold a concession card or that payment of the fee would cause financial hardship, the agency must waive or remit the fee.²
8. Section 53(3) of the FOI Act requires an agency to review a fee or charge upon request of an applicant. Section 53(4) further provides:
 - (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.
9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. In my view this includes both a determination to refuse to waive an application fee and the external review process.

¹ *Freedom of Information Act 1991*, section 12.

² *Freedom of Information (Fees and Charges) Regulations 2018*, regulation 5.

Issues in this review

10. Having regard to the agency's submissions and the applicant's request for a fee waiver, it is for me to determine what is fair and reasonable in the circumstances of this particular case and waive, confirm or vary the application fee accordingly.

Consideration

11. 'Financial hardship' is not defined in either the FOI Act, or the *Freedom of Information (Fees and Charges) Regulations 2018 (the regulations)*. The term 'hardship' has no fixed legal meaning and should therefore be interpreted in the statutory context of the legislation in which the term appears.³ Given that the objects of the FOI Act promote access to agency documents, I consider it appropriate to apply a slightly more lenient threshold of what constitutes financial hardship than might be applied in other contexts.
12. It has been observed that:

...“financial hardship” means hardship caused to the applicant by reason of the financial burden of being obliged to meet the costs of the application from its own resource. ... It is not enough, ... for the applicant to assert that if it is obliged to meet its own costs, it will deplete the funds otherwise available to it to pursue its objects. Every successful applicant, no matter how wealthy, would suffer financial hardship on that basis.⁴
13. In all of the circumstances I consider that financial hardship will be established if I am satisfied that payment of the application fee by the applicant would result in the applicant being unable to pay for necessary expenses from his own resources.
14. The applicant lodged a total of 18 FOI applications before submitting a completed financial hardship claim form. The applicant requested that the form be applied to all pending FOI matters. After the applicant submitted the form, but before the agency had provided a response, the applicant lodged a further three FOI applications. Noting that the agency's Financial Hardship Claims Guideline stipulates that an assessment of financial hardship will remain valid for a period of 14 days, I consider it appropriate that my assessment also extend to the later three FOI applications.
15. The *Freedom of Information (Fees) Notice 2021* prescribes that a fee of \$38.25 is payable upon lodgement of an FOI application. The same fee is also payable upon lodging an internal review application.
16. In my experience, many FOI applications lodged with the agency become deemed refusals. Additionally, where a determination is made within time it is rarely, if ever, made by the agency's principal officer. Both of these factors mean that an internal review is required in most instances where an FOI application is lodged with the agency. In light of this, I consider that in assessing whether payment of the application fee would cause the applicant financial hardship, it is appropriate for me to consider both application fees totalling \$76.50 per application.
17. In its response to my provisional determination the agency submits that it is unreasonable for me to consider the combined application fees as there are a number of circumstances in which an internal review may not be required. Whilst I agree that the FOI Act envisages that an internal review will not be necessary for every FOI application, as outlined above, this is certainly the case for most of the applications lodged with this agency.

³ *McKechnie v VCAT* [2020] VSC 454, at [101].

⁴ *Brighton-Stangstins v Australian Competition and Consumer Commission* [2008] AATA 773, at [42].

18. Section 53 permits me to make my decision based on a determination of what is fair and reasonable in the circumstances. In circumstances in which the agency rarely makes an initial determination within time, leaving the applicant no choice but to apply for an internal review, I remain satisfied that it is fair and reasonable for me to consider both application fees.
19. In any event, I am satisfied that the applicant has established that even payment of one fee of \$38.25 would cause him financial hardship.
20. In his financial hardship claim form the applicant states that the number of FOI applications pending is relevant as ten pending applications essentially means that the applicant is seeking waiver of \$382.50 rather than \$38.25, the former being a substantially higher amount. With 21 FOI applications pending and the fees for each matter totalling \$76.50, the applicant seeks waiver of a total amount of \$1,606.50.
21. That said, in considering whether an application fee should be waived I do not agree that the total amount should be the figure considered. It would not be appropriate to excuse every individual fee on the basis that the total cumulative payment cannot be made. To do so would allow applicants to take advantage of this process to establish financial hardship by lodging multiple applications at once or superficially splitting an application into multiple applications in order to raise the total amount of fees to an unpayable amount.
22. It is my view that the correct approach is to consider whether the applicant can pay \$76.50 for the first FOI matter. If financial hardship is not established, the applicant can request a new assessment for subsequent FOI matters and it should then be taken into account that the applicant now has \$76.50 less.
23. Despite the applicant requesting some explanation from the agency in his review application, in both its initial assessment and its review decision the agency neglected to provide any explanation for its decision, stating simply:

It is the decision of the Department that you have not demonstrated that payment of the charge will cause financial hardship and consequently, your claim has been rejected.
24. In my view the agency ought to provide reasons for its decision not to waive a fee. An agency's decision might be primarily based on missing or misunderstood information. If this is the case, by providing reasons for its decision, the applicant can then address those deficiencies in a review request.
25. In its submissions to my Office the agency stated that:

I have attached an excel spreadsheet that was created by the FOI Team reviewing ██████████ general accounts and it shows the average amount of money he has in his account over the last three months. This is to ensure that the hardship is assessed taking into account every [sic] changing financial circumstances. The threshold for the financial hardship with DCS is \$100 or less, which ██████████ does not meet the threshold for as he averaged \$200+ during the period he was lodging the applications.
26. My concern with this submission is that it indicates that the agency's assessment was not in accordance with its own guideline. It appears in fact that the agency may have not even considered the information provided in the financial hardship claim form or review request, merely reviewing the applicant's account balance to reach a conclusion.
27. I also query the basis on which the agency concluded that financial hardship is only established if an applicant has access to less than \$100. Again noting that the total

amount of fees per FOI matter is \$76.50, the agency appears to hold the view that it is reasonable for an applicant to deplete more than two thirds of their money to progress an application. In my view this expectation falls far short of being reasonable.

28. Finally, having reviewed the excel spreadsheet provided, I consider that the agency's method of ascertaining the average amount of money which the applicant had access to is flawed. Even if I accept that it might be reasonable to review the applicant's account balance over a period of time rather than only at the time of lodging an FOI application, the agency appears to have failed to take into account how and why that balance fluctuated.
29. The agency has calculated out a mean average of the applicant's balance for the three months prior to each application being lodged. The issue with this approach is that the final figure is distorted by a few outliers within the data set. The applicant's balance largely sat between \$100 and \$200 at most times, however at one stage in late November 2021 or early December 2021 his balance jumped to over \$3,000. This might be an error or alternatively might reflect an instance when the applicant received money from an external source which was immediately used almost in full. Either way, absent an explanation as to where the money originated from or how it was spent, I am not inclined to accept that this figure is a true representation of the money ordinarily available to the applicant, however this one figure has substantially swayed the mean average.
30. In light of the above, I consider that a mode or median average might be more appropriate. By either measure the average amount of money held by the applicant during the period of time when the applications were lodged sits somewhere between \$100 and \$140.
31. I acknowledge that the applicant submitted that at the time of lodging the financial hardship claim form his account balance was \$60.00. Although this might be the case, I consider that the average of \$100-\$140 is the more appropriate figure for me to take into account. Again, accepting only the balance at the time of lodging the FOI application might allow applicant's to take advantage of the fee waiver process by timing the lodgement of applications strategically. I now turn to consider the remainder of the information provided in the financial hardship claim form.
32. The applicant has not provided his resettlement balance stating 'this money is not to be used for anything other than resettlement'. Having reviewed the information obtained from the agency by my Legal Officer about this, I agree that the resettlement balance should not be taken into account. The money is not accessible to incarcerated applicants and cannot be withdrawn or transferred.
33. The applicant submits that he earns approximately \$32 per week in prison wages, and that he spends approximately \$60 per week on telephone and other necessary expenses. Put simply, the applicant's income covers approximately half of his expenses.
34. The applicant has also provided substantial further information about other upcoming expenses including replacing his sunglasses and exercise footwear, and repairing his broken watch. The applicant submits that the former are necessary for medical purposes and the latter is necessary to ensure he adheres to his commitments.
35. I am satisfied that these are expenses which could be characterised as necessary, but which the applicant is unable to immediately meet.

36. In all of the circumstances it is clear that the applicant's income is insufficient to meet his ordinary and necessary living expenses from his own resources. Payment of the FOI fee would further diminish the applicant's capability to pay for necessities.
37. I acknowledge that since lodging the financial hardship claim form the applicant has been released on parole and the information in the form may no longer reflect his current financial circumstances. However section 53 requires me to waive, confirm or vary the fee based on a determination of what is fair and reasonable in the circumstances. It is my view that it is most fair and reasonable to reach my decision based on the information available to the agency in making its decision.
38. In its response to my provisional determination the agency submits that:
- ...you have determined that it is *fair and reasonable* in the circumstances to only consider information that was available to the Agency at the time of making its decision. With respect, I submit that approach is inconsistent with the general operation of the FOI Act and is the opposite of what is fair and reasonable in the circumstances. By way of example, section 39(11) of the FOI Act provides that on external review you may, based on the circumstances existing at the time of the review, confirm, vary, or reverse the determination the subject of the review. While that provision directly relates to determinations made under that division and does not apply to a review under section 53(4) of the FOI Act, it illustrates that the scheme of the FOI Act generally involves the consideration of circumstances arising at the time a decision is made.
39. I disagree with this submission. As the agency has noted, section 39(11) specifically requires me to consider the circumstances at the time of conducting my review. The same wording could have been utilised in section 53 but was not; I can only conclude that this was intentional.
40. I consider that my interpretation of section 53 is the preferred one as it more closely aligns with the objects of the FOI Act which favour disclosure of information. It is my view that section 39(11) requires a consideration of the current circumstances as there may be good reason why a document which was appropriately exempt when considered by an agency could subsequently be disclosed upon review. A consideration of only the information available to the agency has the potential to result in an absurd outcome, for example me determining that a document must remain exempt despite it having been made public. Clearly such an outcome would be contrary to the objects of the FOI Act.
41. Similarly, I consider that if I were required to consider the circumstances as they exist at the time of reviewing whether an application fee ought to be waived, this would have the potential to result in unfair prejudice to the applicant. In this particular matter, it is my view that the agency's initial decision to refuse to waive the application fees was the incorrect one.
42. It is important to again note that this matter differs from an external review conducted under section 39. Rather than considering the extent to which access to a document should be granted, this review considers whether the applications are even valid. As I consider that the agency's refusal to waive the application fees was incorrect, it follows that my view is that the applications were in fact valid between 29 December 2021 and 9 February 2022. I am not reviewing a determination to refuse access to documents; I am reviewing the correctness of a conclusion as to the validity of the applications.
43. In light of this, unless the applicant's circumstances had changed so drastically that a waiver of the application fees would appear to be ridiculous, I remain satisfied that the most fair and reasonable course of action is for me to consider the information which was available to the agency in making its initial decision.

44. In any event, I remind the agency that it bears the onus of justifying its determination,⁵ and note that the agency initially declined to comment on the applicant's current circumstances. The agency now submits that the applicant holds a concession card. Accordingly, even if I were to consider the circumstances existing at the time of this review, I would reach the same conclusion that the application fees ought to be waived.

Determination

45. The agency advised in response to my provisional determination:

It was identified through a recent case note, that the applicant has received a medical certificate stating that he is unfit for work until the end of August, which has been provided to Centrelink. Further to this, the Agency has received a new FOI application from [REDACTED] where a photocopy of his concession card was attached.

In light of this recent information, the Agency will be processing the 18 applications...

46. It is my view that this submission indicates that as of 21 June 2022, the date of the agency's submissions, the agency had revised its view such that it had agreed to waive the 21 application fees.
47. In light of my assessment above, I waive the application fee for the 21 FOI applications lodged by the applicant between 29 December 2021 and 9 February 2022. That said, in light of the agency's submissions above, it is my view that the 21 applications became valid on 21 June 2022 when the agency agreed to waive the application fees.



Wayne Lines
SA OMBUDSMAN

14 July 2022

⁵ *Freedom of Information Act 1991*, section 48.

APPENDIX 1

Procedural steps

Date	Event
7 January 2022	The agency received two FOI applications dated 29 December 2021.
11 January 2022	The agency received two FOI applications dated 5 January 2022.
14 January 2022	The agency received three FOI applications dated 6 January 2022.
19 January 2022	The agency received five FOI applications dated 8 January 2022.
28 January 2022	The agency received six FOI applications dated 20 January 2022.
7 February 2022	The applicant lodged a financial hardship claim form.
14 February 2022	The agency determined that the application fee would not be waived for 14 of the FOI applications.
15 February 2022	The agency received three FOI applications dated 9 February 2022.
22 February 2022	The agency determined that the application fee would not be waived for an additional 2 FOI applications.
4 March 2022	The agency received the review application dated 22 February 2022. The application sought review in relation to all applications made since 1 December 2021 which had not yet been processed due to the application fee not having been paid.
17 March 2022	The agency reviewed the application fee and decided not to waive it.
4 April 2022	The Ombudsman received the applicant's request for external review dated 4 April 2022.
4 April 2022	The Ombudsman advised the agency of the external review and requested submissions and documentation.
12 April 2022	The agency provided the Ombudsman with its submissions and documentation.
9 May 2022	The Ombudsman issued his provisional determination and invited submissions from the parties.
23 June 2022	The agency provided submissions in response to the provisional determination.