

Determination

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

Applicant	Mr Michael Brown MP
Agency	Department for Energy and Mining
Ombudsman reference	2019/05861
Agency reference	F2019/000872
Determination	The determination of the agency is confirmed.

REASONS

Application for access

1. The applicant originally sought, by letter dated 14 June 2019, external review of the agency's decision to combine 24 separate applications made under the *Freedom of Information Act 1991* (the FOI Act) to the agency on 6 March 2019 into one application.
2. Each of the applicant's FOI applications sought access to

All documents (including but not limited to reports, briefings, email, notes, minutes, plans and other documents) mentioning or related to Tindo Solar

with a different date range.
3. The applicant advised that he sought the requested information in separate applications with defined date ranges following a previous application to the agency for the same information within a date range spanning a two year period, which the agency had estimated would involve approximately 180 hours of work to complete and a significant charge of \$10,397 to the applicant.
4. On 19 June 2019 I wrote to the applicant advising that the agency's decision to combine his separate applications into one was not a determination under the FOI Act and accordingly was not within my jurisdiction under that Act to review¹.
5. The applicant then applied by letter dated 24 June 2019 to amend his initial application, seeking instead an external review of the agency's procedures by which it arrived at an estimated cost of processing the combined application of \$15,872.20, to ensure that 'this determination is an accurate and reasonable reflection of what is required to process this application.'
6. Following further discussion between the applicant's office and my Senior Legal Officer it was confirmed that the applicant sought review of the agency's determination under section 17(1) of the FOI Act to request payment of an advance deposit, including whether the advance deposit requested was a reasonable amount.

¹ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5 at [30]

Background

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

Jurisdiction

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

Provisional determination

9. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 27 October 2020. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to confirm the agency's determination.
10. The agency and applicant did not provide submissions in response. My views remain the same.

Relevant law

11. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.²
12. Section 53 of the FOI Act covers the application of fees and charges to the processing of any request for access to documents under the Act.
13. Section 53(2a) provides that an agency can only require a fee or charge in respect of the costs to the agency of finding, sorting, compiling and copying documents necessary for the proper exercise of a function under the Act and in undertaking any consultations required by the Act.
14. Section 53(1) provides for the fees and charges to be fixed by regulation and section 53(2)(b) requires that access to documents must be provided to Members of Parliament without charge unless the work generated by the application exceeds a threshold stated in the regulations. This threshold is set at \$1,000 by regulation 6 of the *Freedom of Information (Fees and Charges) Regulations 2018* (the Regulations).
15. At the time of the agency's determination, Regulation 4 and Schedule 1 of the Regulations set the charge for processing an FOI application, where the documents do not relate to the personal affairs of the applicant, at \$13.80 per 15 minutes (or \$55.20 per hour).
16. Section 17(1) of the FOI Act enables the agency to request an advance deposit where, in its opinion, the cost of dealing with an application is likely to exceed the application fee. In this case the applicant is a Member of Parliament so the effect of section 53(2)(b) and regulation 6 is that the agency may only take advantage of section 17(1) where the agency estimates the cost of dealing with the application will exceed \$1,000.
17. The 'request' for an advanced deposit is a separate decision from that of the 'amount the agency has 'determined' the advanced deposit will be.

² *Freedom of Information Act 1991*, section 12.

18. Section 17(4) requires a request for an advance deposit to be 'accompanied' by a notice that sets out the basis on which the amount of the deposit has been calculated.
19. Section 17(5) provides that the amount of the advance deposit requested by the agency must be paid to the agency within the period specified in the request.
20. The effect of section 17(1) is that the amount of the advance deposit requested by an agency is a determination for the purposes of section 39(1)³. In this case the request, and thus the determination, was made by the principal officer of the agency meaning that the applicant was not required to seek internal review of the determination before requesting that I undertake external review.
21. The effect of failing to pay an advanced deposit is that the agency may refuse to continue to deal with the application. Such a determination would be reviewable. However, it would be the subsequent refusal and not the calculated amount of the advanced deposit that will be subject of the determination. In practice, it may be that I will conduct external review in relation to both determinations together. In this case, the applicant did not pay the advanced deposit and the agency refused to continue dealing with the application. The applicant did not seek review of the subsequent refusal to continue with his application and instead only seeks review of the amount of the advanced deposit. This means that my determination will have little effect on his application, but may provide further guidance for future matters.
22. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
23. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Issues in this review

24. The issue in this review is whether the amount of the advance deposit which the agency determined to request from the applicant in respect of his 24 applications for access to documents is a reasonable amount.
25. In order to reach a decision on whether the amount of the advance deposit requested by the agency was reasonable, I must look at a number of issues:
 - a. The decision of the agency to treat the applicant's 24 separate applications as one application
 - b. The manner in which the agency has calculated the time it would take to process the applications
 - c. Whether the estimated charges have been calculated in accordance with the Regulations.

Consideration

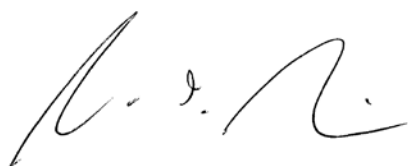
26. While it is beyond my review to consider whether treating the applications as one for the purpose of section 17 and 18 was valid, its reasonableness is relevant to my consideration of the reasonableness of the amount the agency has determined the advanced deposit to be.

³ *El Shafai v Central Adelaide Local Health Network* [2017] SACAT 5

27. In considering its reasonableness, the almost identical nature of the terms of the application and the fact they were made on the same day are relevant considerations.
28. The result of the applications being treated as one for the purpose of section 17 is that the cost was passed on to the applicant. It also reflected the overall costs on the agency, of finding, sorting and compiling the documents and consulting any interested parties, together. The agency was bound to deal with the applications together, since duplicating the work would have been significantly more costly and because the applications were almost identical except for separate successive date ranges. The approach reflected the overall cost and made the cost recoverable.
29. The agency gave itself 15 minutes per document to find, sort and compile. This does not include the potential consultation required. In my view this is a reasonable amount of time to afford to each document. The agency referred to duplicate documents being identified within the number of documents already reviewed. Bearing in mind the large number of documents, I consider that such time would necessarily include time taken comparing documents to identify duplicates.
30. I have reviewed the estimated costs contained within the agency's determination, and I conclude that the amounts are correctly calculated under the Regulations existing at the time of the determination.
31. The agency's requirement that the deposit be 50% of the anticipated cost of dealing with the application was not unreasonable. I bear in mind that the agency had already conducted some level of sorting of 1300 documents already. This appears to be more than half the documents expected to be identified within scope.

Determination

32. In light of my views above, I confirm the agency's determination.



Wayne Lines
SA OMBUDSMAN

19 November 2020

APPENDIX 1

Procedural steps

Date	Event
6 March 2019	The agency received 24 FOI applications.
13 March 2019	The agency's principal officer determined to extend the time for dealing with the applications to 4 June 2019.
30 May 2019	The agency's principal officer requested an advanced deposit and determined that the amount of the advanced deposit should be \$7,936.40. In doing so it treated the applications as one, for the purposes of sections 17 and 18.
18 June 2019	The Ombudsman received the applicant's request for external review.
6 August 2019	A Senior Legal Officer wrote to the applicant confirming that the Ombudsman has jurisdiction to review determinations of the amount of an advanced deposit requested under section 17(1).
26 March 2020	The applicant confirmed by telephone call that he wished to seek external review of the amount of the advanced deposit.
12 May 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
3 June 2020	The agency provided the Ombudsman with its submissions and documentation.
27 October 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.