

OmbudsmanSA

Decision

Review – section 53 *Freedom of Information Act 1991*

Applicant	Hon Michelle Lensink MLC
Agency	Minister for Education and Child Development
Ombudsman reference	2013/08279
Agency reference	12MECD4270
Decision	The charges are varied.

REASONS

Application

1. On 11 July 2013 the applicant asked the agency to review the fees and charges for dealing with an FOI application under section 53(3) of the *Freedom of Information Act 1991* (the FOI Act).
2. The application underpinning this request, as narrowed, was for access to:

All emails which refer directly or indirectly to Mr David Pisoni MP excluding any email correspondence from MediaMonitoring3@sa.gov.au

1. Between Minister Portolesi's ministerial staff and
 - a. other Ministerial offices;
 - b. media outlets;
 - c. The Premier's Office.
2. Between August 2012 and when the Minister ceased to be the Minister for that Portfolio [21 January 2013] [the narrowed application].¹

Background

3. For ease of reference, the procedural steps behind the application and relevant to the decision making process are set out in the appendix.

Jurisdiction

4. By letter received on 26 August 2013 the applicant sought a further review by the Ombudsman of the agency's fees and charges determination.
5. This review is within the jurisdiction of the Ombudsman by virtue of sections 53(4) and 53(4a) of the FOI Act.

¹ A broader application was originally made on 5 December 2012. The scope of the application was narrowed on a number of occasions, culminating in the terms as they appear above on 30 May 2013.

Provisional decision

6. I provided my tentative view about the agency's determination to the parties, by my provisional decision dated 11 December 2013. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to waive the agency's fee pursuant to section 53(4) of the FOI Act as I did not consider that it would be fair or reasonable to charge the applicant for dealing with the narrowed application in the circumstances. Briefly stated, my reasons were based on the following factors:
 - the agency did not appear to have retained documents in accordance with relevant legislation and policy
 - difficulties associated with locating relevant documents, as submitted by the agency, were a consequence of the portfolio reshuffle on 21 January 2013, at which time external review and appeal rights were available to the applicant
 - according to the agency, delays had reduced the number of snapshots available for Telstra to restore and therefore the likelihood of retrieving relevant emails.
7. The applicant and the agency provided submissions in response dated 17 December 2013 and 6 January 2014, respectively.
8. The agency's submissions following my provisional decision focussed on the costs of searching hard copy records. This represented a significant departure from the submissions made earlier in my review.²
9. I subsequently invited and obtained further submissions from the applicant and the agency.
10. I have considered these further submissions in this decision.

Relevant law

11. An agency must undertake a review of a fee or charge at an applicant's request, and may reduce the fee and charge if it thinks fit.³
12. A person dissatisfied with an agency's decision on a 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.⁴
13. Under section 53(2)(b) of the FOI Act:

The regulations—

...

 - (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,

² Prior to my provisional determination, the agency's submissions had centred on the costs of finding documents in electronic backup tapes held by Telstra.

³ *Freedom of Information Act 1991*, section 53(3). An agency is also empowered to waive, reduce or remit a fee or charge more generally: *Freedom of Information Act 1991*, section 53(2a).

⁴ *Freedom of Information Act 1991*, section 53(4). The 'application for further review must be directed to the Ombudsman unless the determination of the fee or charge was made by a police officer, or the Minister responsible for the administration of South Australia Police in that capacity ...': *Freedom of Information Act 1991*, section 53(4a).

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.

14. Regulation 6 of the *Freedom of Information (Fees and Charges) Regulations 2003 (the Regulations)* provides that an applicant who is also a Member of Parliament:
 - is entitled to access to the documents without charge unless the work generated by the application involves fees and charges (calculated in accordance with Schedule 1) totalling more than \$1 000.
15. Section 53(2aa) of the FOI Act limits the fees and charges that may be imposed on an applicant to the agency's costs 'of finding, sorting, compiling and copying documents', and undertaking consultations required by the FOI Act.
16. The amounts payable are fixed by the Regulations,⁵ and they are set out in Schedule 1.⁶ Among other fees and charges, the Regulations specify the fee is \$11.70 for each 15 minutes spent by the agency dealing with an application.⁷

Issues in this review

The relevant agency

17. The application for access was addressed to the Ministerial Office of the Hon Grace Portolesi MP. At the relevant time, Ms Portolesi was the Minister for Education and Child Development, and did not hold any other ministerial portfolios.
18. On 21 January 2013 the Hon Jennifer Rankine MP succeeded Minister Portolesi as the Minister for Education and Child Development.
19. The term 'agency' is defined in section 4(1) of the FOI Act. It includes 'a Minister of the Crown'. The agency for the purposes of this review is the Minister for Education and Child Development. It is immaterial that the identity of the Minister changed following receipt of the application for access. Nevertheless, I accept that the change has had consequences for the agency.

What is a fair and reasonable fee or charge?

20. In conducting this review it is necessary for me to consider what is fair and reasonable in the circumstances, so that I may decide whether to waive, confirm or vary the charge imposed by the agency.

Submissions

The agency

21. It is unclear what, if any, emails the agency holds within the scope of the narrowed application. Relevant emails may exist either in:
 - backup tapes held by Telstra
 - the agency's hardcopy files
 - the email accounts in the local area network of government employees
 - the agency's records management database, RecFind
 - a combination of the above.

⁵ *Freedom of Information Act 1991*, section 53(1).

⁶ *Freedom of Information (Fees and Charges) Regulations 2003*, regulation 4.

⁷ *Freedom of Information (Fees and Charges) Regulations 2003*, Schedule 1, clause 2(1)(b).

22. Prior to my provisional decision, the agency advised the applicant that locating the emails sought would require 'Telstra [to] restore mailbox services to previous Minister's office staff (due to portfolio reshuffle)'.⁸ The agency determined to pass the cost of Telstra finding the emails (\$13,800⁹) onto the applicant pursuant to section 53(2aa) of the FOI Act. The agency indicated that costs associated with sorting, compiling and consulting with respect to any emails located, would be absorbed by the agency within the \$1,000 limit afforded to Members of Parliament.
23. Nevertheless, the agency conceded that it might not be possible to retrieve the emails sought by restoring mailboxes. The agency explained that:
- ... the intention of Telstra restores is for disaster recovery purposes only and costs are incurred by the agency when undertaken. It is also to be noted that only snapshots in time are preserved therefore the longer the period of time between the request for documents and the timeframe being searched, the likelihood of the email remaining in existence is diminished.¹⁰
24. The agency further advised that when an employee transfers to another agency, so too does their mailbox. The Department for Education and Child Development (DECD) (and presumably the agency) cannot access mailboxes transferred to other agencies,¹¹ nor can they authorise Telstra to restore the mailboxes of employees who have transferred to other agencies.¹² Of the 25 individuals who held email accounts within Minister Portolesi's ministerial office during the period covered by the narrowed application, the mailboxes for 14 have been transferred to other agencies.¹³
25. A Telstra 'restore' of SAGEMS backup tapes would be required to search for any deleted emails (even if a mailbox exists in the name of a current government employee¹⁴) and to search deleted mailboxes. As at 24 September 2013, five mailboxes had been deleted.¹⁵
26. Both prior to and following my provisional decision the agency made submissions about its records management database, RecFind, which the agency accepts may contain relevant emails. The agency explained that RecFind 'indexes the file or document into content abstracts (a short paragraph relating to the subject matter)'. Key topics or subject matters within the abstract may be searched, but it is not possible to exclude Media Monitors when conducting searches.
27. Given the above submissions, my provisional decision was that it would not be fair or reasonable to charge the applicant for dealing with the narrowed application.

⁸ Letter to the applicant dated 21 February 2013.

⁹ This was the amount determined following internal review. The Telstra quote underpinning it also included a less expensive option. The agency previously determined to charge the applicant \$13,520.

¹⁰ Telstra is obliged to retain information for specified periods depending on the type of snapshot involved. The minimum retention period is 7 days for daily snapshots. The maximum retention period required is 10 years for annual snapshots. The snapshots are taken at specified times.

¹¹ Prior to my provisional decision, the agency submitted that the applicant would need to make separate applications for access to the relevant agencies. According to the 'DECD Standard - Corporate Mailbox Transfers' mailbox contents can only be transferred with the approval of the person's former DECD line manager and the DECD Chief Information Officer (or delegate). The Standard only applies to DECD corporate mailboxes. It provides that:

'Electronic mail messages, being DECD property and possibly DECD records, will not normally be considered for transfer outside of DECD...

The contents of a DECD mailbox that is requested for transfer may need to be examined by ICT Services staff and/or the former line manager...'

¹² According to the agency, the other agencies would need to authorise the restores directly.

¹³ On 23 January 2013 one mailbox was transferred to the Department of the Premier and Cabinet and 13 mailboxes were transferred to the Department of Further Education, Employment, Science and Technology (DFEEST). This figure does not include a second mailbox that appears to have been held by Minister Portolesi, and which was also transferred to DFEEST or mailboxes transferred to DECD.

¹⁴ A current government employee would be able to undertake a direct search for any emails retained on their local area network (LAN) drive.

¹⁵ The deletions occurred on 30 January, 18 March, 20 March, 10 July and 11 July 2013.

28. In response to my provisional decision, the agency submitted a different basis for its determination to charge the applicant to find relevant emails. It no longer sought to pass on the costs of Telstra finding the documents. Rather, the agency submitted that in accordance with its obligations under the *State Records Act 1997* (SR Act) and its General Disposal Schedule, its practice was to add official business records, including emails, to the relevant hard copy file.
29. The agency submissions dated 6 January 2014 included the follow points:
- if no relevant subject matter was identified, the agency would be required to search each of the 2605 hard copy files created¹⁶ between August 2012 and 21 January 2013 in an attempt to locate relevant emails. The agency estimated that it would take 217 hours to search the files (allowing five minutes to search each file). At a cost of \$46.80 (or \$11.70 per 15 minutes) per hour this would equate to \$10155.60
 - it would be important to factor in costs associated with 'careful review and redaction of documents', in accordance with my external review determination dated 27 June 2013,¹⁷ and recommendations 41 to 43 of the Independent Education Inquiry¹⁸
 - the agency queried whether the applicant had perused released emails and other documents covering the same period, including 386 pages available on the DECD website, to determine whether any were relevant to her application
 - further information, such as a subject matter, would enable the agency to use its electronic records database to identify relevant hard copy files to search
 - proceeding with the application in its current form would be a 'costly exercise', and a decision to waive the fees and charges associated with it would result in the agency bearing the entire cost, which would represent 'a significant diversion of its financial resources'
 - complying with my suggestion to 'ensure that Telstra retains the maximum number of snapshots' had already cost the agency an additional \$5188.77.
30. In an email to my office dated 7 February 2014, a representative of the agency indicated that if the applicant pays 'the fees and charges associated with the 'finding' process, the Minister is prepared to absorb any additional costs'. The representative noted, however, that it was difficult to identify the quantity of documents within the scope of the application, if any, prior to undertaking the 'finding' process.

The applicant

31. The applicant has noted that the FOI Act does not appear to impose a duty on agencies to retain records in an 'accessible manner'. In an email to my office prior to my provisional decision she expressed the following concerns:

... I believe that my application has been disadvantaged by the actions of the agency through refusing my application in the first instance, which has led to the cost now being above the threshold even though the scope has been considerably narrowed. Furthermore, the mailboxes were not maintained by the agency even though there was an active application.

...

I am concerned that the cost to restore mailboxes can be a barrier to the FOI process.¹⁹

32. The applicant agreed with my provisional decision.

¹⁶ The agency has limited its submissions to files created during the period covered by the request. This may be too narrow. The agency may also need to search files that were open during this period.

¹⁷ Ombudsman SA reference: 2013/00263.

¹⁸ South Australia, Royal Commission 2012-2013, *Report of Independent Education Inquiry* (2013).

¹⁹ Email dated 1 July 2013.

33. I subsequently provided the applicant with a copy of the agency's submissions dated 6 January 2014, and sought further submissions from her on the basis that I was considering confirming the agency's determination. In response, the applicant submitted that:
- the agency previously agreed to absorb the costs of sorting and compiling the documents and undertaking any required consultations within the \$1000 afforded to Members of Parliament. This submission appears to be based on an incorrect assessment that the estimated cost as at 6 January 2014 included estimated costs of copying documents and undertaking consultations, in addition to the cost of finding the relevant documents
 - she assumed that 'the agency will ensure that it complies with the FOI Act and redact any identifying information'
 - some of the agency's submissions related to what 'might be considered her agency's poor storage arrangements', noting previous comments by me that such costs should not be passed on to an applicant
 - she did not intend to narrow the scope of her application further.

Consideration

34. On 6 January 2014 the agency submitted that the agency's practice with respect to official business records, including emails, was to print electronic records and add them to its hard copy files. Assuming the agency acted in accordance with this practice, it no longer appears that official records were disposed of contrary to section 23 of the SR Act.²⁰ As such, I do not consider it necessary to consider the criteria for the retention and disposal of official records or the consequences of premature disposal further.²¹
35. I accept that the agency will be required to search at least 2605 hard copy files to find relevant emails. I am not satisfied, however, that five minutes, on average, would be needed to search each file. I consider that two minutes, on average, would be a more accurate estimate. In saying this I am mindful that:
- files may vary dramatically in size (from a few pages to hundreds of pages)
 - the application for access is limited to emails. In my view, the format of emails makes them readily identifiable among other documents. Once an email has been identified, it should be fairly straightforward to exclude emails that:
 - are from MediaMonitoring3@sa.gov.au
 - do not refer directly or indirectly to Mr David Pisoni MP
 - were not created between August 2012 and 21 January 2013
 - were not between Minister Portolesi's ministerial staff and other ministerial offices, media outlets or the Premier's office.
36. Assuming that the agency spent two minutes per file, on average, to find the relevant documents (or 86.83 hours in total), at a cost of \$46.80 per hour, the total cost would amount to \$4063.64. This amount does not include any costs associated with sorting, compiling and copying documents, or undertaking necessary consultations. Nevertheless, I note the agency's preparedness to absorb costs in addition to 'finding' costs within the \$1000 limit afforded to Members of Parliament.
37. I have also had regard to the tortuous history of this application and associated matters. The agency's actions have resulted in significant delays in reaching this point. I note that:
- the agency refused to deal with the original application made on 5 December 2012 under section 18(1) of the FOI Act, without first complying with section 18(2)

²⁰ This practice accords with advice about appropriate record's management practices received from State Records of South Australia by email dated 9 July 2013.

²¹ I have therefore not reproduced sections from my provisional determination discussing these issues in these reasons.

- for almost a year, the agency's position was that finding the documents would necessitate Telstra to restore mailboxes for former ministerial staff
- the agency sought to pass on the significant cost of Telstra undertaking this work to the applicant
- the processing of this application may have been facilitated had the agency located emails at an early stage in the process, or taken steps to preserve them in a more accessible form prior to the portfolio reshuffle.²²

38. It is true that the scope of the initial application for access was extremely broad, and encompassed all documents that referred directly or indirectly to Mr Pisoni. Nevertheless, I am mindful that at the first available opportunity, the applicant narrowed the scope of her application to emails created from 21 October 2011, and narrowed the scope further on subsequent occasions, culminating in the narrowed application on 30 May 2013.

39. In the circumstances, I consider that it would be fair and reasonable to charge the applicant \$3500 for dealing with the narrowed application.

Decision

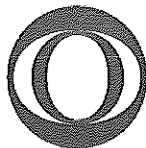
40. In light of my views, I vary the agency's fee pursuant to section 53(4) of the FOI Act.



Richard Bingham
SA OMBUDSMAN

18 February 2014

²² At the time the applicant's external review and appeal rights had not expired, and the applicant had sought my external review of the agency's determination (although the agency was only notified of this after the reshuffle) - Ombudsman SA reference: 2013/00685.



OmbudsmanSA

Appendix - 2013/08279

Procedural steps

Date	Event
5 December 2012	Application dated 3 December 2013 received by agency under the <i>Freedom of Information Act 1991 (the FOI Act)</i> for access to: all correspondence, reports, memoranda, emails and any other relevant documents which refer directly or indirectly to Mr David Pisoni MP. ¹
28 December 2012	The agency purported to make a determination refusing to deal with the application under section 18(1) of the FOI Act.
7 January 2013	The agency received the application for internal review of the determination, dated 4 January 2013.
11 January 2013	The agency purported to confirm the original determination. In so doing, the agency noted that the dealing with the application would require 'scoping in excess of 1095 documents, an estimated processing time would equate to more than 76 hours'.
18 January 2013	Ombudsman SA received the applicant's request dated 17 January 2013 for an external review of the determination. ² The applicant submitted that the agency had failed to comply with section 18(2) of the FOI Act. A representative of the applicant provided supporting documentation to Ombudsman SA and advised that the applicant was prepared to narrow the application for access to: all emails which refer directly or indirectly to Mr David Pisoni MP from the 21 October 2011 to the present day excluding any email correspondence from MediaMonitoring3@sa.gov.au.
21 January 2013	The Hon Jennifer Rankine MP succeeded the Hon Grace Portolesi MP as the Minister for Education and Child Development.
4 February 2013	The Ombudsman reversed the agency's determination and noted that the applicant had agreed to narrow the scope of the application as set out above. The Ombudsman recommended that the agency recommence dealing with the application, and reminded the agency of section 18(2) of the FOI Act.
21 February 2013	The agency asked the applicant to further narrow the scope of her application pursuant to section 18(2) of the FOI Act. The agency advised that in its current form, the application would involve the Department for Education and Child Development (DECD) 'requiring Telstra [to] restore the mailbox services to [the] previous Minister's staff (due to the portfolio reshuffle) in order to locate the information you are after. This will incur major costs to DECD'.
12 March 2013	The agency received the applicant's response dated 7 March 2013, in which she advised that she had 'already considerably narrowed the scope' of her application.
2 April 2013	The agency determined to refuse to deal with the application under section 18(1) of the FOI Act, noting that the applicant had not further narrowed the scope of her application.
8 April 2013	The agency received an application for internal review dated 5 April 2013.

¹ The application was addressed to the Ministerial office of the Hon Grace Portolesi MP. At the relevant time she was the Minister for Education and Child Development. She did not hold any other ministerial portfolios.

² Ombudsman SA reference: 2013/00685.

15 April 2013	The agency confirmed its determination dated 2 April 2013 to refuse to deal with the application under section 18(1) of the FOI Act.
1 May 2013	Ombudsman SA received the applicant's request dated 29 April 2013 for an external review of the determination. ³
7 May 2013	A representative of the applicant provided supporting documentation to Ombudsman SA.
13 May 2013	A representative of the applicant advised that the applicant was specifically interested in: <ul style="list-style-type: none"> - emails between the Ministers [sic] office and other Ministerial offices; - media outlets; - the Premiers [sic] office.
17 May 2013	The Ombudsman advised the agency of the external review and scheduled a meeting with the parties.
27 May 2013	Meeting at Ombudsman SA with the parties. The agency agreed to forward a breakdown of costs to the applicant and the applicant agreed to consider whether she could further narrow the scope of her application.
30 May 2013	The agency provided the applicant with a breakdown of the estimated costs to retrieve emails which may be within the scope of the application. The total cost was estimated to be \$67,380.
	The applicant narrowed the scope of her application to: <ol style="list-style-type: none"> 1. Emails between Minister Portolesi's ministerial staff and <ul style="list-style-type: none"> - other Ministerial offices; - media outlets; or - the Premier's office. 2. Between August 2012 and when the Minister ceased to be the Minister for that portfolio.
12 June 2013	The agency responded to the narrowed application by advising that: <p>The total cost of the request is \$13,520 (as calculated by DECD IT section). The Telstra restores of the mailboxes are where the expense is being incurred.</p> <p>As discussed at the meeting, it may be best to search on Recfind rather than email. If you are able to provide the subject matter, the author, and the approx. timeframe (eg month) of what you are searching for we may be able to locate documents within the scope of your request.</p>
	Ombudsman SA asked for the applicant's views regarding the agency's costs estimate dated 12 June 2013.
17 June 2013	The applicant requested a copy of the advice from Telstra underpinning the costs estimate dated 12 June 2013.
25 June 2013	The agency provided the applicant with a copy of Telstra's quotes dated 24 June 2013 and estimated timeframes to carry the work out, depending on whether the work was to be done during or outside business hours: <p>Outside business hours - \$13,800 and 2 weeks</p> <p>During business hours - \$9,200 and 4 weeks.</p>
	Ombudsman SA asked for the applicant's views regarding the Telstra's quotes.
1 July 2013	The applicant advised Ombudsman SA that she remained concerned about the costs.
3 July 2013 to 8 July 2013	Ombudsman SA made enquiries of State Records.
9 July 2013	State Records provided a response to Ombudsman SA.

³ Ombudsman SA reference: 2013/04436.

	Ombudsman SA advised the applicant to seek a review of the fees or charges under section 53(3) of the FOI Act, and if dissatisfied to return to the Ombudsman for a review under section 53(4).
11 July 2013	Ombudsman SA advised the parties of conclusion of external review to enable the applicant to seek a review of the fees and charges under section 53 of the FOI Act (which the agency appears to have decided to pass onto the applicant).
	The applicant requested a review of fees and charges by the agency.
22 July 2013	The agency sought advice from the Crown Solicitor's office.
2 August 2013	The agency received advice from the Crown Solicitor's office.
16 August 2013	An accredited FOI officer of the agency decided to charge the applicant Telstra's predicted fee of \$13,800
26 August 2013	Ombudsman SA received the applicant's request for a review dated 23 August 2013
11 September 2013	The Ombudsman advised the agency of the request for review and requested submissions and documentation
25 September 2013	The agency provided the Ombudsman with submissions and documentation by letter dated 24 September 2013
11 December 2013	The Ombudsman provided his provisional decision to the parties.
19 December 2013	Ombudsman SA received submissions from the applicant by letter dated 17 December 2013.
6 January 2014	Ombudsman SA received submissions from the agency by letter dated 6 January 2014.
7 January 2014	The Ombudsman sought further information from the agency and further submissions from the applicant.
	Ombudsman SA received further information from the agency by email.
15 January 2014	Ombudsman SA received further submissions from the applicant by letter dated 9 January 2014.
3 February 2014	Ombudsman SA sought further submissions from the agency.
7 February 2014	Ombudsman SA received further submissions from the agency by email.