

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2009164
Decision Ref: D0172009**

Participants:

Ljiljana Maria Ravlich
Complainant

- and -

**Attorney General; Minister for
Corrective Services**
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal to deal with application – documents relating to a Minister’s diary, daily itinerary and credit card expenditure – “stopping the clock” – section 20 – reasonable steps to change application – diversion of a substantial and unreasonable portion of agency’s resources.

Freedom of Information Act 1992 (WA): ss. 12, 13(3), 20, 32; Schedule 1, clause 3; Glossary in Schedule 2, clause 4(2).

Freedom of Information Act 1982 (Cth): s.24

Freedom of Information Act 1989 (NSW)

Re Conservation Council of Western Australia and Department of Conservation and Land Management [2005] WAICmr 5

Re Mineralogy Pty Ltd and Department of Industry and Resources [2008] WAICmr

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Cainfrano v Director General, Premier's Department [2006] NSWADT 137

Langer and Telstra Corporation Ltd [2002] AATA 341

Re SRB and SRC and Department of Health, Housing, Local Government and Community Services (1994) 33 ALD 171

DECISION

The Minister's decision to refuse to deal with the complainant's access application, in accordance with section 20 of the *Freedom of Information Act 1992*, is confirmed.

Sven Bluemmel
INFORMATION COMMISSIONER

14 August 2009

REASONS FOR DECISION

1. This complaint arises from a decision made by the Attorney General; Minister for Corrective Services ('the Minister') to refuse to deal with an access application made by Hon Ljiljana Ravlich MLC ('the complainant') under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. On 6 March 2009, the complainant applied under the FOI Act to the Minister in the following terms:

"I wish to gain access to the following information from the 23rd September 2008:

- *Your diary*
- *Your daily itinerary documents; and*
- *Documents detailing the expenditure on your Ministerial credit card".*

3. By letter dated 16 March 2009, the Minister's FOI coordinator wrote to the complainant advising that her application was "...very broad both in terms of the time period and the number of persons involved that would need to be consulted. It is also unlimited in relation to subject matters". After referring to the obligation on agencies to assist an applicant to change an application to reduce the amount of work needed to deal with it under s.20 of the FOI Act, the Minister's FOI coordinator asked the complainant to narrow the scope of her access application by:

"(a) Specifying a two week period for the [Minister's] diary and itinerary documents;

(b) Identifying, by reference to subject matter and relevant persons, the aspects of that diary and itinerary documents that fall within the scope of your FOI application".

4. The FOI coordinator also advised that "...in view of the above request for you to more precisely delineate the scope of your FOI application, the 45 day clock in respect of all three matters mentioned in your FOI application has been stopped while I await your clarification".

5. By letter 19 March 2009, the complainant's office responded as follows:

"In response to your letter of the 16th March...please be advised that the documents required are as follows:

- *Electronic diary*
- *Day sheets*
- *Contentious Issues Briefing*
- *Requests for contentious issue notes*
- *Credit Card Acquittal Spreadsheets*

- *Meetings with stakeholders; other Ministers and/or their representatives; government agencies outside the Minister's portfolio responsibilities and non-Government agencies"*
6. By letter dated 26 March 2009, the FOI coordinator advised the complainant that "...your 19 March 2009 letter widens (rather than clarifying or narrowing) the scope of the FOI application. For example, the request for "Contentious Issues Briefing" and "Meetings with stakeholders" appear to be new and additional applications". The FOI coordinator repeated her request for the complainant to narrow the scope of the application to that in her letter of 16 March 2009 and advised that the "45 day clock ... continues to be stopped while I await your clarification".
 7. By email dated 31 March 2009, the complainant's Electorate/Research Officer advised the FOI coordinator that "[the complainant] has decided that she will not further narrow the scope or redefine that which is sought. As such I request that you give us your decision in relation to this application".
 8. On 20 April 2009, the Minister advised the complainant that he had decided to refuse to deal with her access application under s.20 of the FOI Act. The Minister stated in his notice of decision:
 - An estimate based on a two-week sample of the diary discloses over 50 folios of diary entries and over 60 third party names (not including additional attachments to his diary). This would require his office to expend considerable resources on deleting exempt matter and undertaking third party consultations.
 - Dealing with the complainant's application in its current form would require the FOI coordinator (who also has other time-consuming responsibilities as his executive officer) to expend considerable resources, potentially requiring a great deal of time to review all of the documents the subject of the complainant's request, make a decision on access, delete any exempt matter and undertake extensive third party consultation.
 - His office has limited resources that are fully committed to essential operations. The work involved in dealing with the complainant's application, in its current form, would divert a substantial and unreasonable portion of his office's resources away from its other important policy functions and its efforts to assist the public concerning a wide range of queries and issues which West Australians raise each day with his office.
 - It is apparent from the complainant's responses that further discussions with her would not resolve the matter.
 9. Since the Minister is the agency's principal officer for the purposes of the FOI Act, the complainant had no right of internal review. Consequently, on 24 April 2009, the complainant applied to the Information Commissioner for external review of the Minister's decision.

REVIEW BY THE INFORMATION COMMISSIONER

10. Following the receipt of the complainant's application for external review, the Minister produced to me his FOI file maintained in respect of the complainant's access application, which includes a sample of documents identified by the Minister as coming within the scope of the access application. My office also obtained further information from the Minister's office. Following my examination and consideration of all of that material, I wrote to the parties on 16 June 2009, outlining my preliminary view of this complaint. It was my preliminary view that the Minister's decision to refuse to deal with the complainant's access application, pursuant to s.20(2) of the FOI Act, was justified. In summary, it was my preliminary view that:
- It is reasonable to expect that, as a former Minister of the State Government, the complainant is well versed in the amount of work involved in dealing with her application and the ways in which it could be reduced to a manageable level. Both as the recipient of FOI access applications and as an FOI access applicant, the complainant has considerable experience and knowledge in the workings of the FOI Act.
 - The assistance provided by the Minister's office to change the scope of the complainant's access application was reasonable in the circumstances.
 - The complainant's proposal to change the terms of the application increased, rather than reduced, the amount of work involved in dealing with the application.
 - The work involved with dealing with the application in its present form would divert a substantial and unreasonable portion of the Minister's resources away from his office's other operations.
11. In light of my preliminary view, I invited the complainant to withdraw her complaint or, alternatively, to provide me with further submissions relevant to the matter for my determination. I also invited the Minister to provide me with any further submissions he wished to make in response to my preliminary view. The complainant declined to withdraw her complaint and provided me with further written submissions. The Minister provided no further submissions.

Preliminary issue – 'stopping the clock'

12. As noted at paragraphs 4 and 6, when the FOI coordinator wrote to the complainant on 16 March and 26 March 2009 about changing the scope of the application, she advised that the 45 day 'clock' was stopped while the scope of the complainant's application was clarified.
13. The FOI coordinator's advice regarding 'stopping the clock' on both occasions is misconceived. The 45 day period permitted period may be extended by agreement with an applicant or if allowed by the Information Commissioner: s.13(3). However, there is no other provision in the FOI Act for the 45 day

permitted period for an agency to deal with an application to be suspended, or for the statutory ‘clock’ to stop, during discussions to clarify or reduce the scope of an application or during the s.20 process. While the 45 day ‘permitted period’ for dealing with an application does not commence until all of the requirements for a valid application under s.12 have been met – which includes the provision of sufficient information to enable the agency to identify the requested documents – the Minister dealt with this matter under s.20 and not under s.12.

REFUSAL TO DEAL - SECTION 20

14. Section 20 of the FOI Act relevantly provides as follows:

“20. Agency may refuse to deal with an application in certain cases

- (1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.*
- (2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency’s resources away from its other operations, the agency may refuse to deal with the access application.”*

15. Section 20 is designed to ensure that the operations of government agencies are not unduly impeded by agencies having to deal with unreasonably voluminous access applications. It is one of a number of provisions aimed at striking a balance between, on the one hand, the public interest in open and accountable government and, on the other hand, the public interest in the ongoing effective operation of agencies.
16. A decision made by an agency under s.20(2) of the FOI Act cannot be justified where the agency has not satisfied its obligations under s.20(1). That is, when an agency considers that dealing with an access application would divert a substantial and unreasonable portion of its resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it: see *Re Conservation Council of Western Australia and Department of Conservation and Land Management* [2005] WAICmr 5.
17. When considering a complaint about an agency’s refusal to deal with an access application in accordance with section 20 of the FOI Act, the Information Commissioner’s function on external review is to decide whether the agency:

- (1) took reasonable steps to help an access applicant to change an application to reduce the amount of work needed to deal with it; and
 - (2) was justified in deciding that the work involved in dealing with the application in its present form would divert a substantial and unreasonable portion of the agency's resources away from its other operations.
18. The first point involves a consideration of the history of the matter between the parties from the date the access application was received, including the nature and degree of assistance offered to the applicant by the agency. The second involves a consideration of the number and type of documents involved in the access application, the usual work of the agency and an estimate of the resources needed to deal with the application in accordance with the statutory requirements of the FOI Act: see *Re Mineralogy Pty Ltd and Department of Industry and Resources* [2008] WAICmr 39.

The complainant's submissions

19. In response to my preliminary view, the complainant submits:
- The Minister did not take reasonable steps to help change the access application – the Minister did not at any time provide information regarding the amount of documents covered by the access application.
 - The complainant's position as a former Minister cannot be taken into account in dealing with any access applications made by her, given that her duties as a Shadow Minister and a Member of the Western Australian Parliament render her too busy to deal with each individual access application personally. The daily business of the access application is the responsibility of the complainant's research officer who has not previously worked in a Ministerial office and who is not aware of the amount of work that an access application would entail.
 - The Minister took advantage of the lack of knowledge of the complainant's research officer by not supplying enough information to enable her to make an educated decision on the scope of the access application and by not providing enough advice to enable her to make the correct decision.
 - Some proper arrangement may have been reached if the Minister had informed the complainant's research officer of the great deal of work involved in the access application.
 - Having been given a list of documents held by another Minister in relation to a similar access application, the complainant's research officer believed that similar categories of documents would be held in every ministerial office. Accordingly, the research officer thought she was narrowing the scope of the application, in her letter dated 19 March 2009, by selecting items from the listings provided by the Minister. If the Minister had advised the complainant's research officer that 'day sheets' and 'daily

itinerary' referred to the same type of document, she would have quite willingly chosen one or the other.

- The limited resources of a ministerial office should not be a reason not to comply with the intent of the FOI Act, as this would allow ministerial offices to refuse to deal with FOI applications as a matter of course.

Has the Minister taken reasonable steps to help the complainant change the access application?

20. As referred to above, the first question for me to consider is whether the steps taken by the Minister to assist the complainant to change her application are reasonable in the circumstances.
21. The complainant claims that at no time did the Minister provide information regarding the amount of documents covered by the access application. As noted in paragraphs 3 and 6, the Minister's office contacted the complainant on two occasions with suggestions as to how the scope of her application could be changed to reduce the amount of work needed to deal with it. On both occasions, only limited information was provided regarding the amount of work involved in dealing with the application and why it was too big to deal with, which took the form of advising that the application was "*...very broad both in terms of the time period and the number of persons involved that would need to be consulted. It is also unlimited in relation to subject matters*".
22. The Minister's office did not refer, on either occasion, to the approximate number of folios of diary entries involved based on a sample of the Minister's diary. However, that information was conveyed in the Minister's decision. While it is possible that the complainant may have been more amenable to reducing the scope of the access application if the Minister's office had conveyed that information earlier in the process, I do not consider that the obligation under s.20(1) to take reasonable steps to help an access applicant to change an application to reduce the amount of work needed to deal with it necessarily requires an agency to inform an applicant of the number of documents involved in dealing with their application, especially when the very act of obtaining that information may involve significant additional work for an agency.
23. While s.20 of the FOI Act places agencies under a duty to assist applicants, I consider that an element of reasonableness must be implied in the overall process, if the legislation is to work satisfactorily. In *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137, President O'Connor of the Administrative Decisions Tribunal of New South Wales ('the NSW ADT'), reviewed a decision by the respondent agency to refuse to deal with an FOI application – under the equivalent to s.20 in the *NSW Freedom of Information Act 1989* – for documents relating to the NSW Premier and the Sydney Markets or Flemington Markets. In examining the factors relevant to an assessment of the kind required in that case, President O'Connor considered that whether the applicant has taken a co-operative approach in redrawing the boundaries of an application is a relevant factor. I agree with that view.

24. In my view, the assistance provided by the Minister's office to change the scope of the complainant's application was reasonable in the circumstances. The FOI coordinator, in my opinion, presented the complainant with practical suggestions on reducing and clarifying the scope of her application. Following that assistance, the complainant took no steps to change her application so as to reduce the amount of work needed to deal with it. For example, although the complainant changed her request from 'diary' to 'electronic diary' and 'daily itinerary' to 'day sheets', I am informed by the Minister's office that his 'daily itinerary' and 'day sheets' are one and the same thing, as are his diary and electronic diary. Therefore, the amount of work involved in dealing with that part of the complainant's application did not change. In addition, although the complainant changed the description of documents sought in relation to the Minister's credit card expenditure from 'documents detailing the expenditure on the Minister's Ministerial credit card' to 'Credit Card Acquittal Spreadsheets', the complainant extended the scope of her application to include 'Contentious Issues Briefing', 'Requests for contentious issue notes' and 'Meetings with stakeholders' and others. As such, I accept as correct the Minister's claim that the terms of the complainant's letter of 19 March 2009 increased, rather than reduced, the number and type of documents sought, thereby increasing rather than reducing the work involved in dealing with the application.
25. I accept that the complainant's research officer may have held a genuine but mistaken belief that she was narrowing the scope of her application by the proposal set out in her letter dated 19 March 2009. However, when the Minister's office advised her that her proposal would expand rather than narrow the categories of documents, the research officer advised that the complainant had "*decided that she [would] not further narrow the scope or redefine that which is sought*" and did not contest the Minister's view that the scope has been extended rather than reduced.
26. As stated in my preliminary view provided to the parties, in my opinion it is reasonable to expect that the complainant, as a former Minister of the State Government, is well versed in the amount of work involved in dealing with her application in its current form and the ways in which its scope could be changed to a manageable level. As a former Minister with a government diary; as the former recipient of FOI access applications; and as a party to a number of previous FOI access applications, the complainant has considerable experience and knowledge of the workings of the FOI Act. If an application of the same kind were made to the Minister by a member of the public who was unfamiliar with the work involved in dealing with an application of this kind, my view as to the degree of assistance required from the Minister in order to satisfy his obligation under s.20(1) might be different.
27. I do not accept the complainant's submission that her knowledge and experience cannot be taken into account because her research officer, and not the complainant, has the day to day responsibility for the complainant's access applications. Whatever the complainant's internal office arrangements for the day to day handling of the access application may be, the application was made in the complainant's name, not in the name of one of her officers. There is

nothing before me to suggest that the complainant's officer was not acting on the instructions of, and on behalf of, the complainant. In addition, there is nothing on the information before me to establish that the Minister was aware of that officer's state of knowledge or took advantage of it.

28. The complainant claims that 'some proper arrangement' may have been reached if the Minister had informed the complainant's research officer of the great deal of work involved in the access application. I understand this claim to mean that the complainant would have been prepared to both accept that advice, if it was provided, and agree to reduce the scope of her application. However, the complainant has been advised of the amount of work involved in dealing with the access application in its present form on two occasions: firstly, by the Minister in his decision and, secondly, by me in my preliminary view letter. Following receipt of that advice, the complainant could have reconsidered her application on either occasion and submitted a revised application in reduced form to the Minister. However, as I understand it, she has not done so.
29. Based on the information currently before me, I find that the steps taken by the Minister to help the complainant to change her access application to reduce the amount of work required to deal with it were reasonable in the circumstances of this matter.

Substantial and unreasonable diversion of resources

30. The words 'substantial' and 'unreasonable' have been the subject of much judicial consideration: see, for example, the cases referred to in *Langer and Telstra Corporation Ltd* [2002] AATA 341. In *Langer*, the Deputy President of the Commonwealth Administrative Appeals Tribunal ('the AAT'), having considered the interpretation of the phrase "*substantially and unreasonably divert the resources of the agency*" in s.24 of the *Freedom of Information Act 1982* (Cth) ('the Cth FOI Act') - the equivalent to s.20 of the FOI Act - said at [115]:

"... it seems to me that the work involved in processing a request will only substantially and unreasonably divert the resources of an agency if the work is real or of substance and not insubstantial or nominal and if it is unreasonable having regard to factors, such as workload ..."

I consider that statement to be a useful guide to the interpretation of s.20 of the FOI Act.

31. In *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171 at 179, the Full AAT stated that the resources, the subject of section 24 of the Cth FOI Act "*... cannot mean the whole of the resources of a large Department of State. To find this would make the section meaningless. We consider it means the resources reasonably required to deal with an FOI application consistent with attendance to other priorities.*" I agree with the view expressed by the AAT.

32. President O'Connor also made the following observations in *Cainfrano*, at [44]-[45]:

“What scale of request may be seen as ‘substantially and unreasonably’ diverting an agency’s resources admits of no ready or precise measure.

The need for a balanced approach which takes heed of the impact on the agency, and the extent to which the applicant has sought to revise the request to make it manageable, was addressed by Branson J in Radicic v Australian Postal Commission (1999) 59 ALD 157; [1999] FCA 574 at [28]:

‘The FOI Act is concerned with the provision of access to documents and does not, by its provisions, require the handing over of large portions of the records of a government agency to allow an individual to search them for himself or herself.’”

33. President O'Connor also observed, at [50]:

“While FOI procedures may allow for ‘alternative discovery’ of documents, the FOI Act expects the activity to be kept within reasonable, manageable bounds”.

I also agree with those views.

34. I have examined a copy of a two-week sample of the Minister’s diary and daily itinerary held on his FOI file. I consider that those documents contain substantial amounts of personal information, as defined in the FOI Act, about third parties.
35. Under the FOI Act, the Minister is required to consult with all third parties and afford them their rights of review prior to the disclosure of any personal information, unless the Minister intends to release the documents with the personal information deleted from those documents. This also impacts upon the reasonableness of the scope of an access application. Based on my examination of the sample documents, it is more probable than not that the requested documents will contain matter which is potentially exempt under clause 3(1) of Schedule 1 to the FOI Act and consequently will require editing to delete that material.

The Minister’s resources to deal with the complainant’s application

36. In response to my office’s request for further information, the Minister’s office advises that there is currently one officer in the office who is able to perform the duties associated with the FOI Act – the Executive Officer – and that officer is the only staff member whose duties expressly include dealing with FOI applications.
37. The position of Executive Officer is 0.8 of a Full-Time Equivalent. In addition to dealing with all FOI applications received in the Minister’s office, the duties

of the Executive Officer include supervising and training of all administrative staff; day to day running of the Minister's office; coordinating Cabinet Submissions and Executive Council minutes; all financial functions; ministerial correspondence and emails; parliamentary questions; annual reports; liaising with departments and senior officers; telephone inquiries; and liaising with the Minister and Chief of Staff.

38. I am informed that the Executive Officer performs all of the activities associated with dealing with an FOI application including receiving the application; identifying and locating the requested documents; examining documents; editing documents; consulting with third parties; preparing the notice of decision; meeting with the Minister to discuss and finalise the notice of decision; photocopying documents; and maintaining the FOI file.

The work involved in dealing with the complainant's application

39. In assessing the amount of work involved in dealing with the complainant's access application, I consider that it is a reasonable approach to use a two-week sample of the Minister's diary to estimate the total number of documents which fall within the scope of the complainant's application and the total amount of work involved in dealing with it. In my view, to require the Minister's office to identify the precise number of documents falling within the scope of the complainant's access application, examine all of those documents to identify potentially exempt matter and identify the number of third parties referred to in those documents would defeat a key purpose of s.20, which is to avoid processing FOI access applications that would divert substantial and unreasonable resources away from operational activities: see [33] of *Re Mineralogy*.
40. Based on my examination of the two-week sample of the Minister's diary and daily itinerary, there are well in excess of 50 entries and 60 third party names in those documents. Using that conservative estimate to project the number of entries and third parties over the 5-6 month period of the complainant's request, that part of the complainant's request alone – that is, not including the complainant's request for Contentious Issues Briefing; Requests for contentious issue notes; Credit Card Acquittal Spreadsheets; and Meetings with stakeholders and others - would involve some 1200 entries and 1440 third parties.
41. If the act of examining each entry in the diary and daily itinerary were to take an officer of the Minister one minute per entry (a reasonable estimation in my view), the initial examination of those documents would take approximately 1200 minutes or 20 hours. That does not include the time required to either edit the exempt information in each entry or consult with the extensive number of third parties. If the Minister decided to give the complainant access to edited copies of the documents, after deleting any potentially exempt information, it would be necessary to add on a substantial period of time for deleting any exempt matter (but no additional time for third party consultation because the Minister would not be required to consult with any third parties if exempt matter was deleted from the documents): see s.32(6).

42. In the alternative, if the Minister decided to give the complainant full access to all of the requested documents, the Minister would be required to consult with all third parties in accordance with s.32 of the FOI Act and an additional and substantial period of time would be added on for those third party consultations to take place.
43. The complainant states that the limited resources of a ministerial office is not a reason to not comply with the intent of the FOI Act. However, the resources of the Minister's office are relevant to the extent that I must decide whether dealing with the access application in its present form would divert a substantial and unreasonable portion of the Minister's resources away from his office's other operations.
44. Having considered the number and type of documents involved in the access application, the usual work of the Minister and an estimate of the resources to be devoted to the task of dealing with the application in accordance with the statutory requirements of the FOI Act, I am satisfied that the work involved in dealing with the complainant's access application would divert a substantial and unreasonable portion of the Minister's resources away from his office's other operations.

Documents of an agency

45. Although it is not an issue that has been raised by the parties and not a matter which I am required to determine in the circumstances of this complaint, I note that some of the documents falling within the scope of the complainant's application may not be documents of an agency and, as such, may not be accessible under the FOI Act. Under clause 4(2) of the Glossary to the FOI Act, a document will only be a document of a Minister if it is in the possession or under the control of the Minister in the Minister's official capacity and if it relates to the affairs of another agency (*not being another Minister*). Therefore, entries in the Minister's diary and daily itinerary which relate to his appointments with other Ministers (and which do not relate to the affairs of another agency, not being another Minister); appointments in his capacity as a Member of Parliament or as the Member for Bateman; or appointments in his private capacity may not be documents of an agency, in this case, the Minister.
46. Having said that, I do not consider that the amount of work involved in dealing with the complainant's access application would be significantly reduced on that basis. Dealing with the application would still involve a process of examining every diary or daily itinerary entry over a 5 to 6 month period and potentially removing or editing all of the entries that are not 'documents of an agency'. In my view, the work involved in carrying out that process would still divert a substantial and unreasonable portion of the Minister's resources away from his office's other operations.

CONCLUSION

47. For the reasons given above, I find that the Minister has taken reasonable steps to help the complainant change the access application but that the work involved in dealing with the application would divert a substantial and unreasonable portion of the Minister's resources away from his office's other operations. Therefore, I find that the Minister's decision to refuse to deal with the complainant's access application under s.20 of the FOI Act is justified and I confirm the decision.
