The Tribunal found that when releasing emails to an applicant, an agency cannot charge for search time[[1]](#footnote-1) or charge for providing emails ‘as written document’[[2]](#footnote-2) because those documents are electronically ‘available in discrete form in documents of the agency’.[[3]](#footnote-3)

The Tribunal set aside the agency’s decision to impose access charges and so it ordered the agency to refund the sum of $658.87 to the Applicant. You can read the Tribunal’s decision [here.](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/440.html?context=1;query=%22review%20and%20regulation%20list%22;mask_path=au/cases/vic/VCAT)

Facts and Background

EBT (the **Applicant**), a former employee of Monash University (the **Respondent**), made a request under the *Freedom of Information Act 1982* (Vic) (the **FOI Act**) for a variety of documents, including emails sent to or received by staff of the Respondent relating to the Applicant.

The Respondent released to the Applicant 3 documents in full, 9 documents in part, 13 documents outside of the FOI Act and refused access to 25 documents in full.

The Respondent also imposed charges totalling $658.87 for access to the requested documents (the **Access Charges**), calculated in accordance with item 7 of the *Freedom of Information (Access Charges) Regulations 2014* (the **Regulations**).

The Applicant paid the Access Charges, but sought this review after OVIC issued the required certificate.

**The storage and processing of disputed documents**

The disputed emails were electronically stored in different areas – on individual computers, shared drives and Gmail, but accessible to the staff member who created or received the email.

The Respondent directed the relevant staff members (including a consultant and six employees) to conduct a ‘thorough and diligent search’ for relevant emails and forward them to the Respondent’s FOI Officer, who then printed out the documents and gave them to the Applicant.

**Calculation of Access Charges**

The Respondent calculated the Access Charges as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Staff Member** | **Search Time (hours)** | **Hourly Pay grade** | **Total Charges** |
| 1 | 1 | $55.39 | $55.39 |
| 2 | 1.5 | $200 | $300 |
| 3 | 1.5 | $286 | $429 |
| 4 | 1.5 | $62.73 | $94.10 |
| Total |  |  | $878.49 |
| Less 25% discount for administratively released documents |  |  | -$219.62 |
| **Total access charges payable** |  |  | **$658.87** |

The Respondent explained to the Applicant that the Access Charges:

* did not include a charge for three of the Respondent’s officers where their search duplicated that of another staff members;
* included a 25% discount for the documents released outside of the FOI Act; and
* did not include a charge for a full hour if the time taken was less than an hour.[[4]](#footnote-4)

**Submissions**

The Respondent

The Respondent contended that in accordance with *Re Halliday and Corporate Affairs*[[5]](#footnote-5), section 19 of the FOI Act applied to information stored electronically in contradistinction to ‘a document in writing’. Further, the emails were stored on a disc that contained other information. Consequently, the Respondent was required to produce a new disc containing the information sought.

Further, the Respondent submitted that although the Applicant was seeking ‘personal affairs information’, section 22(1)(h)(iii) of the FOI Act did not apply due to the carve-out for documents produced under section 19. The Respondent also submitted the Access Charges were reasonable given the information provided.

The Applicant

The Applicant argued that a ‘document in writing’ need not be in a hardcopy form, and could be electronically stored if it was appropriately described. The Applicant referred to OVIC guidance which stated that an email is an example of a document[[6]](#footnote-6) and that documents held in TRIM, on a shared drive, are in the possession of an agency[[7]](#footnote-7).

The Applicant submitted that the Respondent’s contention meant any hard-copy document scanned into an electronic document management system (such as TRIM) would cease to be a document once it was filed in an electronic equivalent of a filing cabinet. The Applicant asserted this approach did not support the object of the FOI Act or facilitate disclosure of information at the lowest reasonable cost.

Lastly, the Applicant submitted that section 19 ‘only applied when the agency had to *create* a document that did not already exist in a written form’, such as a document created from various spreadsheets[[8]](#footnote-8).

Tribunal Decision

Although the Tribunal accepted information stored electronically, on a computer or disc, is not stored discretely, it found documents like emails could still be available in a discrete form.

The Tribunal found emails had unique identifying features such as a sender, recipient(s) and date. Consequently, even if an email is electronically stored, once retrieved it still remains in a discrete form. The Tribunal noted an email cannot be altered unless it is forwarded to another person, in which case the original email develops into a different email. It held this interpretation is consistent with the object of the FOI Act and the requirement to interpret such legislation to facilitate and promote the disclosure.

The Tribunal concluded that emails maintained electronically by the Respondent remained available in discrete form as documents of the agency. It noted that while some of emails were held by a contractor, that consultant was an ‘officer of the agency’ and consequently his emails were held by the Respondent.

The Tribunal found that if agency officers were required to retrieve their own emails in order to facilitate a ‘thorough and diligent search’, the cost of recovery should not exceed the 1.5 units specified by item 1 of the Regulations.

Given the emails and other information sought by the Applicant related to their personal affairs information, the Tribunal found that the Respondent should not have asked the Applicant to pay the Access Charges due to section 22(1)(h) of the FOI Act. To that end, the Tribunal ordered that the decision of the Respondent to impose the Access Charges be set aside and the Access Charges be refunded in full to the Applicant.

Further Information

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1. *The Freedom of Information (Access Charges) Regulations 2014 (Vic),* Item 1. [↑](#footnote-ref-1)
2. Ibid Item 7. [↑](#footnote-ref-2)
3. *The Freedom of Information Act 1982* (Vic), section 19(1)(b). [↑](#footnote-ref-3)
4. Cf. Item 1 of the Schedule to the Regulations which provides a rate per hour or part of an hour. [↑](#footnote-ref-4)
5. (1991) 4 VAR 327. [↑](#footnote-ref-5)
6. OVIC, *What is a document, and what is actual or constructive possession?* December 2019 (Agency Practice Note 9: D19/8746), page 1. [↑](#footnote-ref-6)
7. Ibid, page 2. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)