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## Notice of Decision and Reasons for Decision

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Applicant:	'BW5'
Agency:	Victorian Institute of Teaching
Decision date:	5 August 2020
Section considered:	Section 17
Citation:	'BW5' and Victorian Institute of Teaching ( <i>Freedom of Information</i> ) [2020] VICmr 216 (5 August 2020)

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FREEDOM OF INFORMATION – waiver of application fee – hardship

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision not to waive or reduce an application fee under section 17.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied payment of the application fee under section 17(2) will cause hardship to the Applicant.

Accordingly, I have determined under section 17(2B) to waive the application fee payable by the Applicant.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

5 August 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency for access to documents and sought a waiver of access fees, as follows:

I wish to make a Freedom of Information request under the Freedom of Information Act.

I seek to have a copy of my Victorian Institute of Teaching decision issued on [date] that has been signed - not a copy and paste - by ALL panel members. The hearing was held on [date]. These panel members being [named persons].

[Details redacted]

I wish to make a Freedom of Information request under the Freedom of Information Act.

I seek phone records, emails or other correspondence - including phone calls attempted but not answered - by [named persons] (both of the Victorian Institute of Teaching) AND one, or more, of the panel members for my VIT hearing ([date]). I seek this information for the [two dates]. The panel members being [named persons]. I know that [named person] has referred to one phone call to a panel member so there must exist at least one.

[Details redacted]

Finally, as I am housed at the [location] Immigration Transit Accommodation in [a specified suburb] I have no access to funds or monies and thus request that the fee be waived.

2. In its decision dated [date], the Agency states:

Validity of request

I have decided to refuse to comply with your request on the basis that it does not comply with s 17 of the Act in two respects, each of which are elaborated upon below:

- (a) you have not provided sufficient information for the VIT to identify the documents sought; and
- (b) you have not paid the application fee required under s 17(2A) in circumstances where the VIT has determined not to waive the application fee on grounds of hardship for reasons detailed below.

3. The Agency's reasons are outlined in its decision letter.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1)(c) of the Agency's decision to refuse to waive the payment of the application fee under section 17(2B).
5. I have examined copies of correspondence exchanged between the Applicant and the Agency.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

7. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Agency's submission dated [date];
  - (c) copies of correspondence exchanged between the Applicant and the Agency concerning the Applicant's FOI request provided by the Agency on [date]; and
  - (d) information provided with the Applicant's review application and correspondence received from the Applicant throughout the review.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
9. Further, I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

***Correspondence exchanged between the Applicant and the Agency regarding a fee waiver***

10. On [date], the Agency wrote to the Applicant, inviting them to provide further information in support of their request for the application fee to be waived:

One procedural requirement is for a request for access to be accompanied by an application fee of 2 fee units (s 17(2A), FOI Act). From 1 July 2019 that amount is \$29.60. That application fee may be waived or reduced if payment of the fee would cause hardship to an applicant (s 17(2B), FOI Act).

The term "hardship" is not defined in the FOI Act. Accordingly, it has its ordinary meaning - severe suffering or privation, particularly from the comforts or necessities of life; severe oppression or need. In the context of the FOI Act, the term "hardship" is generally considered to mean financial hardship.

Your email was not accompanied by, nor has the VIT since received, any application fee in relation to your request. In those circumstances, your request cannot be considered as having been validly made until either the fee is paid, or a decision is made to waive or reduce the application fee based on hardship (and if reduced, the reduced amount paid).

I note that in your email of [date] you stated:

"Finally, as I am housed at the [location] Immigration Transit Accommodation in [a specified suburb] I have no access to funds or monies and thus request that the fee be waived (sic)."

I also note that in your email of [date] to [named Agency officer], you stated:

"I am in the [location] Immigration Transit Accommodation and have no access to funds nor any access to earning an income. Consequently, I have no means to pay the requested \$29.60 fee."

So that VIT [the Agency] may properly consider your application for fee waiver on hardship grounds, could you please provide any further evidence you wish to rely upon in support of your application that payment would cause you hardship (severe privation of the comforts of necessities of life). Upon receipt of that evidence, a decision will be made in relation to whether to accept your application for fee waiver.

11. By email dated [date], the Applicant wrote to the Agency:

Please find Letter from Management at the [location] Immigration Transit Accommodation. We do not have employment and we do not have trust accounts. This is because individuals without visa are not permitted to work in Australia. Hence no income.

I also do not possess a bank account as it was closed about 12 months ago.

I have also included [specified] identification and my passport.

Quite simply, I do not have any access to any funds.

12. The attached letter dated [date], signed by an unnamed [Commonwealth Government agency] officer on official letterhead states:

The detainee does not currently hold a valid visa and is subsequently an unlawful non-citizen in immigration detention.

[The Applicant] continues to have been in held detention from [date].

As [the Applicant] is currently in immigration detention [they] do not have the ability to attend a physical bank branch.

The letter attests only to the immigration status of the person mentioned above. It does not attest to the identity of the above named person or to the identity of the bearer.

13. On [date], the Agency wrote to the Applicant, again inviting them to provide further information in support of their fee waiver request:

Before the [Agency] makes a determination as to whether payment of the application fee would cause you hardship, I invite you to provide any further evidence in light of the fact that:

- (a) the necessities of life appear to be provided to you during your incarceration; and
- (b) although you have provided evidence of your lack of access to a bank, you have not provided any evidence to suggest that you do not have access to other funds.

14. The Agency suggested the Applicant view OVIC's website concerning the types of evidence the Applicant may consider providing, noting such information is 'indicative only and not exhaustive'. The Agency drew particular attention to the following statement:

If you request the application fee to be waived or reduced, you should provide evidence of hardship – for example, a concession or health care card, a bank statement, or statutory declaration outlining why payment would cause you hardship.

15. The Applicant responded to the Agency via email on [date], stating:

I ask you - how would I have a Health Care Card when I am in the [location] Immigration Transit Accommodation? As your government is reviewing my right to live in Australia I do not have access to a health care card and I am not allowed to earn an income. Does that make sense?

Secondly, how do I prove a negative? I have no funds. How do I prove I have no funds? If I have no funds how do I show you I have no funds?

16. On [date], the Agency wrote to the Applicant stating:

I remind you that in our letter of [date] we provided information about different types of evidence that might be provided in support of an application for waiver of the application fee. That included

more than just a health care card, and examples were provided merely as illustrations and not as an exhaustive list.

Please provide any final additional information by [date]. Unless further material is provided, a decision about whether or not to waive the application fee will be made on the information provided to date.

17. In response, the Applicant sent an email to the Agency on [date] indicating they would seek review or oversight of the matter by an independent body.
18. By decision dated [date], the Agency determined not to waive the application fee:

I have decided not to waive the application fee of \$29.60 on the basis that I am not satisfied on the material provided by you that payment of the fee would cause you hardship. That is, payment would not cause severe privation of the comforts or necessities of life or give rise to severe oppression or need. The reference to "hardship" does not, in my view, include circumstances where a person is physically unable to pay due to structural or institutional reasons.

Accordingly, as your request was not accompanied by the application fee, and a decision has been made to not waive the application fee, this is a second basis on which no valid request exists.

***Waiver of application fee in accordance with section 17(2B)***

19. There are three requirements that must be met for an FOI request to be valid under section 17:
  - (a) the request must be made in writing;
  - (b) the request must provide sufficient information as is reasonably necessary to identify the documents requested; and
  - (c) the request must include an application fee or a request for the fee to be reduced or waived.
20. The application fee is 2 fee units, which is currently \$29.62.<sup>1</sup>
21. A request is not valid until an application fee has either been paid (whether in full or reduced) or waived by the agency under section 17(2B), which provides:

An application fee may be waived or reduced, whether or not the fee has been paid, if the payment of the fee would cause hardship to the applicant.
22. In support of its decision not to waive the application fee, the Agency submits:
  - (a) The onus is on the Applicant to establish payment of the application fee would cause the Applicant hardship.
  - (b) The granting or refusal of an application for waiver of the application fee should be considered and determined on the circumstances surrounding the particular applicant and request. The granting or refusal of an application for waiver should not be regarded as automatic for any class of applicant.
  - (c) Section 17(2B) is discretionary in nature such that 'even if the applicant is able to provide evidence of hardship, it is still a matter for the exercise of discretion of the agency as to whether to reduce or waive the application fee' and there is no obligation for an agency to do so.

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<sup>1</sup> Section 17(2A). The value of a fee unit is set by the Government and increases with indexation each year. See <https://www.dtf.vic.gov.au/financial-management-government/indexation-fees-and-penalties> for the current fee unit.

The Agency acknowledges in exercising its discretion, it 'must take into account the objects of the Act in s 3 of the FOI Act, but noting the purpose of the provision introducing the fee'.

As for the purpose of the introduction of an application fee, the Agency quotes the second reading speech for the introduction of section 17(2B) in the Freedom of Information (Amendment) Bill 1993:

The introduction of an application fee of \$20 for all applicants will ensure that applicants are genuinely interested in obtaining and paying for documentation. Agencies can begin to process a request with the knowledge that applicants have made an initial payment, thereby signalling a settled intention to proceed with the application. The Bill allows for the application fee to be waived or reduced in cases of hardship. The application fee is set at a lower rate than the application fee payable under the Commonwealth Act.<sup>2</sup>

- (d) The concept of 'hardship' is not defined in the FOI Act, therefore, it is to be given its ordinary meaning. The Agency relies on the definition of 'hardship' in the *Oxford English Dictionary*, namely, 'severe suffering or privation', and 'privation' meaning, 'lack of the usual comforts and necessities of life'. Accordingly, it submits it must consider whether payment of the application fee would 'severely deprive the applicant of the usual comforts and necessities of life'.
- (e) The second reading speech for the fee provisions of the *Freedom of Information Act 1982* (Cth) (**Cth FOI Act**) were in the mind of the Victorian Parliament when introducing the application fee under section 17. For example, at the time of the second reading speech, section 30A(1)(b)(i) of the Cth FOI Act stated:

the payment of the fee or the part of the fee would cause or caused financial hardship to the applicant or a person on whose behalf the application was made.

Provisions of the current Cth FOI Act provide an agency must take into account whether or not the payment of the charge would cause financial hardship to an applicant, when determining whether or not to reduce or not impose a charge, without limiting other matters the agency may take into account.<sup>3</sup>

Accordingly, the Agency submits certain guidance material relevant to the Cth FOI Act may assist, including:

- (i) Financial hardship to the applicant has to be judged by considering both the applicant's financial circumstances or means, and the magnitude of the fee which is sought.<sup>4</sup>
- (ii) Financial hardship means more than that an applicant having to meet a charge from his or her own resources.<sup>5</sup> It is not enough for an applicant to assert that if they are obliged to meet the amount payable, it will deplete the funds otherwise available to them to pursue other objects, otherwise every person, no matter how wealthy, would suffer financial hardship on that basis.<sup>6</sup>
- (iii) Where waiver is sought on the basis of financial hardship, an agency is entitled to seek such information as it wishes from the applicant concerning their means.<sup>7</sup>

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<sup>2</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 1993, 1738.

<sup>3</sup> See section 29(5). The Agency also cites section 66(2) of the Cth FOI Act which concerns recommendations as to costs by the Administrative Appeals Tribunal.

<sup>4</sup> Attorney General's New Explanatory Memorandum 29, Fees and Charges, December 1992 at [83]-[84].

<sup>5</sup> *Bailey and Commonwealth Tertiary Education Commission* [1986] AATA 397 in relation to a \$16.25 internal review charge.

<sup>6</sup> See cases discussed in *Van De Wiel and Civil Aviation Safety Authority* [2006] AATA 207 at [12].

<sup>7</sup> Attorney General's New Explanatory Memorandum 29, *Fees and Charges*, December 1992 at [85].

- (iv) The amount of information sought must be proportional to the amount of the charge involved. In a usual situation where the amounts are not large, a detailed inquiry into the applicant's means may not be justified. In most cases, an inquiry as to income, estimated weekly commitments and available cash in bank or similar accounts may be sufficient to assess hardship. However, it is submitted that further inquiry is required in circumstances where the comforts or necessities of life are being provided by the state, such as when a person is incarcerated.
- (v) Financial hardship arises where payment will lead to a person suffering an appreciable financial detriment.<sup>8</sup>
- (vi) Whether or not hardship arises is an objective test; it is not about whether the applicant believes they would suffer hardship.<sup>9</sup>
- (vii) Payment causing a person to suffer temporary inconvenience is not sufficient to amount to hardship.<sup>10</sup>

(f) There is no other legal basis on which an agency can waive or reduce the application fee other than hardship.

23. In relation to the circumstances of the Applicant, the Agency submits the following matters are relevant considerations:

- [the Applicant] does not state that [they] does not have a bank account. [Their] evidence is that [they] cannot physically access a branch because [they are] in the [location] Immigration Transit Accommodation. However, [the Applicant] must have access to a computer from which [they] regularly and promptly sends emails and, if [the Applicant] has a bank account, may be able to access it via computer or by telephone (using [a] friend's telephone).
- [the Applicant] has not produced any bank statements. Nor does [the Applicant] say [they do] not have any. [Their] circumstances raise questions about how [they] survived in terms of having access to funds before [they were] detained. [The Applicant] has not addressed this in [their] material.
- [The Applicant] did not provide any statutory declaration about [their] circumstances to address how payment would deprive [them] of the comforts or necessities of life when these things are provided by the state.
- There is no evidence about any other assets, liquid or otherwise, which [the Applicant] may or may not have.
- The test of hardship is about the effect payment would have on an applicant. It is not about whether there may be some physical or structural impediment to gaining access to funds.

24. During this review, OVIC staff requested the Applicant provide a signed statement concerning their current financial position confirming, in part, they:

- (a) do not have a weekly income or the ability to earn an income as they are detained in immigration detention; and
- (b) do not have property or assets, other than 'about \$50 in a bank account'.

25. With respect to their bank account, the Applicant states they do not have access to their bank account as they cannot 'go to the branch'. Following a request from OVIC staff for a copy of the Applicant's bank account statement, the Applicant submits they do not have access to a bank account.

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<sup>8</sup> *Van De Wiel and Civil Aviation Safety Authority* [2006] AATA 207 at [17].

<sup>9</sup> *Van De Wiel and Civil Aviation Safety Authority* [2006] AATA 207.

<sup>10</sup> *Dedes and Commissioner for Taxation* [2008] AATA 331 at [25].

***Will payment of the application fee cause the Applicant hardship?***

26. The FOI Act provides a general right for all persons to seek access to documents held by government, and is recognised as an important information right.
27. The requirement under section 17(2A) for a person to pay an application fee (currently \$29.62) represents an administrative fee or charge. Given the object of the FOI Act, it is not intended by Parliament to impose a barrier to a person making an FOI request. Nor is it Parliament's intention the application fee cover the cost of an agency processing an FOI request, given the relatively low application fee amount.
28. The decision of an agency to waive or reduce an application fee involves a measure of discretion that '[must] be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information'.<sup>11</sup> Further, the 'lowest reasonable cost' objective should be interpreted broadly to promote the public's right to seek access to documents held by government.
29. I agree with the Agency's submission, the granting or refusal of an application fee waiver is to be considered and determined on the circumstances surrounding the particular applicant and their request. As submitted by the Agency, it follows the granting or refusal of an application fee waiver should not be regarded as automatic for any particular category of applicant.
30. I also agree with the Agency's submission, the word 'hardship' in section 17(2B) should be given its ordinary meaning in the absence of a definition in the FOI Act. However, I consider the Agency's adoption of a dictionary meaning for 'hardship' as 'the deprivation of the usual comforts and necessities of life' and the requirement it placed on the Applicant to show 'how payment would deprive [the Applicant] of the comforts or necessities of life when these things are provided by the state', required the Applicant to satisfy an unnecessarily high bar in order to obtain an application fee waiver.
31. In my view, the meaning of 'hardship' can encompass a lesser degree of financial suffering than the definition adopted by the Agency. As such, payment of an application fee need not result in 'the deprivation of [an applicant's] usual comforts and necessities of life' in order that an application fee waiver or reduction be granted. Nor it is necessary for an applicant to satisfy an agency by way of evidence that the payment of an application fee would deprive the applicant 'of the comforts or necessities of life'.
32. In this regard, I note the Agency's submission, as quoted above, with which I agree:

The amount of information sought must be proportional to the amount of the charge involved. In a usual situation where the amounts are not large, a detailed inquiry into the applicant's means may not be justified. In most cases, an inquiry as to income, estimated weekly commitments and available cash in bank or similar accounts may be sufficient to assess hardship.
33. However, I do not agree with the Agency's view, 'further inquiry is required in circumstances where the comforts or necessities of life are being provided by the state, such as when a person is incarcerated' beyond any usual inquiries made in relation to any other person seeking an application fee waiver.
34. In this case, I have reviewed correspondence between the Agency and the Applicant and correspondence between the Applicant and OVIC staff during the review regarding the Applicant's financial situation.

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<sup>11</sup> Section 3(2).



35. While I note the Agency submits the Applicant did not provide a bank statement, a statutory declaration about their financial circumstances or evidence about 'any other assets, liquid or otherwise, which [the Applicant] may or may not have', I am satisfied the Applicant has provided sufficient information and demonstrated to my reasonable satisfaction:
- (a) they do not have an income or the ability to earn an income as they are in immigration detention; and
  - (b) they do not have property or assets other than 'about \$50 in a bank account'.
36. Accordingly, I am satisfied payment by the Applicant of the application fee under section 17(2) would cause hardship to the Applicant.

### **Conclusion**

37. On the information before me, I am satisfied payment of the application fee would cause hardship the Applicant.
38. Accordingly, I have determined under section 17(2B) to waive the application fee payable by the Applicant.

### **Review rights**

39. The Agency may apply to VCAT for review of my decision<sup>12</sup> within 14 days from the date it is given this notice of decision.<sup>13</sup> Accordingly, my decision does not take effect until the review period expires.
40. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
41. The Agency is required to notify the Information Commissioner in writing, as soon as practicable, if it makes an application to VCAT for review of my decision.<sup>14</sup>

### **Other matters – validity of the FOI request under section 17(2)**

42. In its decision letter, the Agency also determined the Applicant's FOI request was not valid on grounds it did not comply with section 17(2).
43. Section 17(2) requires an applicant's FOI request must provide 'such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document'.
44. On [date], the Agency wrote to the Applicant, inviting them to clarify the terms of their request in respect of section 17(2):
- (a) In the second part of your request, you refer to "phone records, emails or other correspondence – including phone calls attempted but not answered...". It is unclear what you mean when you refer to "phone records". Could you please clarify what is meant by that phrase; what you consider to be "phone records", particularly in light of the words following, "including phone calls attempted but not answered".

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<sup>12</sup> Section 50(3D).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).

- (b) In the same passage, you refer to “emails or other correspondence” and follow that with the words “including phone calls attempted but not answered”. It is unclear what this combination of words is intended to mean. For example, it is unclear how an unanswered phone call could be classified as either an “email” or “other correspondence”. Could you please explain what you mean and what documents are sought.
- (c) Subject to clarification of the previous two matters, the VIT understands that you seek documents of the relevant kind sent on [dates], by either or both of [Name] or [Name], to one or more of the panel members named. Please confirm that understanding is correct.

45. On [date], the Applicant responded to the Agency in relation to the above inquiries.

46. On [date], the Agency advised the Applicant it interpreted their request to be for the following:

- 1. A copy of the decision made on [date] by a panel of the [Agency], comprising [named persons], signed by each of them.
- 2. A copy of the following documents:
  - (a) All records on telephone bills of phone calls made or attempted by [an Agency officer] or [an Agency officer] from their [Agency] telephone to [named persons] on [dates].
  - (b) All emails or faxes from [named Agency Officers] to [named persons] on [date].

I note that you are willing to receive copies of the telephone bills with records of any other calls deleted.

47. The Agency requested the Applicant confirm whether the above interpretation was correct.

48. While the Applicant responded to the Agency via email on [date], their correspondence only referred to their request for waiver of the application fee.

49. On [date], the Agency wrote to the Applicant seeking confirmation as to whether the Agency’s understanding of the terms of the FOI was correct.

50. On [date], the Applicant responded suggesting the matter be referred to VCAT or the Victorian Ombudsman.

51. On [date], the Agency made its decision to refuse to process the Applicant’s request on grounds it was not valid under section 17:

Although your email of [date] appeared to clarify the request, VIT needed to make certain of its understanding of how that request was amended before it could consider the request as having been validly made. You did not confirm its understanding of your amended request despite being asked twice to do so – the VIT provided you a reasonable opportunity to do so which you have not taken up.

Accordingly, the VIT considers that you have not provided such information as is reasonably necessary to enable it to identify documents sought, which is a pre-requisite to there existing a validly made request. It has concluded that no valid request exists on this basis.

52. During this review, OVIC staff confirmed the terms of the Applicant’s request as follows:

- (1) A copy of the decision made on [dates] by a panel of the Victorian Institute of Teaching in relation to my VIT tribunal hearing, comprising [named persons], signed by each panel member. These signatures are not to be a copy and paste but originals.
- (2) A copy of the following documents:

- (a) All records or telephone bills of phone calls made or attempted by [named persons] from their VIT telephone to [named persons] on [dates].
- (b) All emails or faxes from [named persons] to [named persons] on [dates].
- (3) I also want a copy of the minutes of my VIT tribunal hearing conducted [date]

I note that you are willing to receive copies of the telephone bills with records of any other calls deleted.

53. While I consider the original terms of the Applicant's FOI request were sufficiently clear, having considered the above clarification provided by the Applicant, I consider the terms of their request, as set out in the above paragraph, are sufficiently clear to enable to the Agency to process the request in accordance with the FOI Act and the Professional Standards.