

ICO Hearing 52-01515
Decision

Department of Children and Family Services

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

18 April 2016

Summary:

In June 2015 an applicant made a request under the Freedom of Information Law 2007 for emails relating to his case with the Department of Children and Family Services (DCFS). DCFS did not hold the records, and called on the services of the Computer Services Department (CSD) to search for possible deleted emails. CSD would charge a fee for this service, which DCFS intended to pass on to the applicant. The issues in dispute were whether DCFS was allowed to charge a fee, and if so whether the proposed fee was reasonable, and whether it should be waived.

The Acting Information Commissioner, Mr. Jan Liebaers, found that the FOI Law plainly allows that a fee may be charged for conducting a search for records. However, the fee being charged by DCFS was not reasonable and it should be recalculated taking into account the actual hourly rate of the CSD staff member tasked with the search.

As to a possible fee waiver, the Acting Information Commissioner found that he had not been presented with evidence that the applicant was of inadequate means, and that there was no convincing evidence that there was any other good reason to waive the fee for conducting the search for the requested records.

Statutes¹ Considered:

Freedom of Information Law 2007

Freedom of Information (General) Regulations 2008

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A. INTRODUCTION

- [1] On 10 June 2015 the Applicant submitted a request to the Department of Children and Family Services (DCFS) for “a copy of all emails received from any agent at DCFS by myself from 2013-2014, and equally unearth any email that may have been deleted.”
- [2] On 22 June 2015 the Applicant requested an update of the request and was provided with an acknowledgement letter from the Information Manager (IM). In the emailed response, the IM requested confirmation from the Applicant to proceed with a search for all emails between a named Social Worker at DCFS, and the Applicant. The Applicant confirmed, writing, “...yes, I would like a copy of all emails sent between [the social worker] and I, including those that she elected not to respond to.”
- [3] On 24 July 2015 the Applicant requested an update and DCFS responded to the applicant on the same day stating that the Department was taking a 30-day extension under section 7(4).
- [4] On 31 July 2015 the Applicant was asked to provide a date range for the requested records and advised that there may be fees relating to the search for the records if a date range was not

¹ In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified. At the time the request in this case was made the 2015 revision of the FOI Law had not yet been gazetted, and therefore this Decision is made under the 2007 version of the FOI Law.

provided. On 3 August 2015 the Applicant confirmed the date range was from 10 to 26 February 2014.

- [5] Apparently, the emails were not contained in DCFS' filing system, and DCFS contacted Computer Services Department (CSD) which offered two search alternatives: option one allowed CSD to recover emails for the specific dates mentioned, the recovery would be quick and at no cost, however, lengthy emails and deleted emails would not be recovered; and option two provided a much broader search which would incur a cost as this type of search would recover all emails, including lengthy and deleted ones. CSD estimated that the second search would require two to three restores, with each restore taking approximately ten hours with five of those hours requiring manual labour at a projected cost of CI\$108.00 per hour totaling CI\$1,620.00. DCFS stated that any costs would have to be borne by the Applicant. On 3 September 2015, the Applicant agreed to option one.
- [6] On 11 September 2015 the Applicant was provided with the records located by CSD. However, the Applicant advised that some of the requested emails were still missing. The Applicant noted three specific emails which should have been a part of the records already released. The Applicant felt certain there should be more records because the Applicant sent the three missing emails to DCFS. DCFS advised the Applicant that they did not have the requested records and a further search which would enable CSD to recover deleted emails would incur a cost to the Applicant.
- [7] On 16 September 2015 DCFS provided the Applicant with a revised fee estimate of CI\$540.00.
- [8] On 18 September 2015 the Applicant was not satisfied with having to pay a fee and applied to the Chief Officer (CO) in the Ministry of Community Affairs, Youth and Sports (MCAY&S) for a fee waiver under regulation 15(1).
- [9] On 30 September 2015 the CO acknowledged receipt of the request and on 30 October 2015 the request was denied by the CO.
- [10] On 6 November 2015 the Applicant appealed to the ICO and on 13 November 2015 the ICO accepted the appeal.
- [11] On 7 December 2015 the ICO confirmed with the Applicant that he did not want to request an amendment/annotation of the Social Inquiry Report relating to his case, but he did want that document to be changed and DCFS to acknowledge that it was poorly done.
- [12] The appeal could not be informally resolved and the matter was referred to for a formal decision.

B. BACKGROUND

- [13] DCFS explains on its website that it exists to “encourage and promote self-sufficiency; to advocate, motivate and educate individuals and families, empowering them to realize their full potential thus functioning effectively as members of our society. This [is] achieved through the provision of therapeutic services and community based programmes...”.
- [14] DCFS falls under the Ministry of Community Affairs, Youth and Sports which has a budget of over nineteen million dollars for the 2015/16 financial year.²

C. PROCEDURAL AND OTHER ISSUES

Contents of the Fact Report

- [15] Before I examine the issues brought forward by the Applicant in regards to the Fact Report I would like to remind public authorities and applicants that the Fact Report, as outlined in the ICO Appeals Policies and procedures, is created to provide a chronological synopsis of the request which lists the issues under review and the records in dispute. The Fact Report is not intended to list all the actions of any of the parties or be a vehicle for any party to deliver their arguments. Only undisputed facts critical to understanding the matters at issue are required in the Fact Report.
- [16] The Applicant’s submission outlines two points which he would like to see corrected and recorded as matters of fact. DCFS contends that the items the Applicant wishes to have changed are matters of opinion and not facts.
- [17] The first item the Applicant wanted included in the Fact Report relates to the circumstances of 11 September 2015, namely the three emails the Applicant claims are missing. The Applicant asked that the following sentence be included, “The applicant is certain of this, as well, because during a phone conversation with the social worker who completed the social inquiry report, she made mention that she had in fact seen the emails.”
- [18] DCFS asserts that there is no record of a telephone conversation between the social worker and the Applicant regarding the emails, and the Applicant has no corroborating evidence related to the supposed admission by the social worker. Therefore this statement should not be included as fact.
- [19] While the parties are not in agreement as to whether the social worker admitted to viewing the three missing emails or not, there is no proof either way so I cannot agree that the Applicant’s assertion is factually correct. However, the Applicant is free to argue that point in the arguments

² Cayman Islands Government *Annual Budget Statements: Year Ending 30 June 2016* p 411.

submitted to me, and I do not believe the Applicant has been disadvantaged in any way by not including his disputed version of events in the Fact Report.

- [20] The second item the Applicant wanted added to the Fact Report relates to the circumstances of 7 December 2015. The Applicant wanted the circumstances to reflect that not only did he desire that DCFS acknowledge that the report was poorly done but also,

that the report was completed with the intent to inappropriately and fraudulently sway a Grand Court decision, or offer an explanation for what is perceived to be a fraudulent report. The applicant is comfortable with an annotated document, so long as it equally acknowledges the previous misleading information, and takes measures to correct the trauma caused as a result of the social inquiry report, which continues to this day.

- [21] This change does not add anything to the factual nature of the report and raises another issue which is not before me at this time, namely a request to amend or annotate the Social Inquiry Report which the Applicant takes issue with. Again, I do not believe this change to the Fact Report was necessary and rejecting its inclusion did not disadvantage the Applicant in any way. This change was therefore not made to the Fact Report.

Late time extension by DCFS

- [22] Under section 7(4) a public authority must respond to a request within 30 calendar days. It may extend that 30 days for up to a maximum of another 30 days where there is reasonable cause for such extension.

- [23] The Applicant's request was made on 10 June 2015 and DCFS failed to take an extension until 24 July 2016. Even if DCFS could argue that the initial request did not have enough information to reasonably identify the records being sought, and that is why it sought clarification on 22 June 2015, the extension was late.

- [24] Public Authorities, including DCFS, need to recognize that processing time cannot be extended once the initial time allotted has already expired. Applicants must be informed of any extension before expiry of the initial period for responding.

- [25] Consequently, DCFS did not meet its obligation to respond to the Applicant within the statutory timelines.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [26] The issues under review in this Hearing are:

1) Is the Public Authority allowed to charge a fee for searching for the requested records, and, if so:

- a. is the proposed fee reasonable in the circumstances of this case; and,
- b. should the fee otherwise be waived pursuant to regulation 15(1)?

E. CONSIDERATION OF ISSUES UNDER REVIEW

1) Is the Public Authority allowed to charge a fee for searching for the requested records, and, if so:

- a. is the proposed fee reasonable in the circumstances of this case; and,
- b. should the fee otherwise be waived pursuant to regulation 15(1)?

[27] Section 13 provides:

(1) The communication of information may be made conditional upon the payment by the person making the request of a reasonable fee which shall not exceed the actual cost of searching for, reproducing, preparing and communicating the information.

(2) The Cabinet may make regulations providing-

(a) for the manner in which fees are to be calculated;

(b) maximum fees payable, which shall not exceed the cost referred to in subsection (1); and

(c) that no fee is to be charged in relation to certain cases.

(3) For purposes of clarification, no fee shall be charged for a request for information but if the information is to be provided, the fee shall, in accordance with subsection (1), be charged for the provision of that information.

[28] Regulation 15(1) provides:

(1) No fee shall be charged where the chief officer or information manager is of the view that the applicant is of inadequate means or for any other good reason.

The position of DCFS:

[29] DCFS writes that when it believes the cost of complying with a request would be excessive it should be allowed to charge fees to recover those costs and this would include charging for time spent searching for the records.

[30] DCFS did an internal search for the records but could not locate the records. It now requires Computer Services Department (CSD) to search for the emails to verify whether they may have

been deleted by the employee to which they were sent. DCFS opines that it is not the entity charging the fee but rather it is CSD, which falls under the Ministry of Home Affairs, that is charging the fee and DCFS has no authority to waive the fee under these circumstances.

- [31] DCFS admits that if CSD was not willing to waive the costs of doing the search on its behalf then DCFS would be required to absorb the cost of searching for the emails. However, it argues that as the Applicant already has a copy of the emails in his possession it would be a waste of time and resources to absorb the cost for conducting the search.
- [32] Even if DCFS was able to waive the fee it states that the Applicant has not provided a good reason to do so. It submits that “there is no evidence that the fee waiver or reduction of fees associated with this request is in the public interest or likely to contribute significantly to public understanding of the operations or activities of the government”.

The position of the Applicant:

- [33] The Applicant believes no fee should be charged at all because DCFS wrote that if a very specific date range was provided for the emails being sought then no fee would be levied. A specific date range was provided by the Applicant.
- [34] The Applicant argues that the fee is unreasonable because the manpower costs of CSD providing services to the rest of government should be absorbed by the entities receiving CSD’s services. Even though a cost is being “passed-along” by CSD to DCFS it is within DCFS’ authority to absorb that cost.
- [35] If the fee is not considered unreasonable then the Applicant argues that there are nonetheless good reasons for it to be waived and there is also a public interest in doing so.
- [36] The Applicant alleges a social worker deliberately deleted emails sent to her related to setting up a meeting with the Applicant. This alleged deletion of the emails enabled the social worker to create an allegedly fraudulent Social Inquiry Report by including a sentence in it which stated that the social worker contacted the Applicant and attempted to set up a meeting but never received a response.
- [37] The Applicant writes that if the social worker did write that allegedly incorrect statement in the Social Inquiry Report, then DCFS might somehow be “harboring renegade social workers” and it would be in the public interest to expose and remove such people. The Applicant alleges that locating the deleted emails may reveal discriminatory policies or procedures used by DCFS.
- [38] The Applicant also writes that fees should not be charged because the Applicant does not have the financial means to pay, something “DCFS is well aware of, as they completed the Social Inquiry Report which covered personal finances”.

Discussion:

Is the Public Authority allowed to charge a fee for searching for the requested records?

- [39] DCFS argues that when the cost of complying with a request is excessive it should be able to charge fees to recover those costs. Its submission does not relate this argument to the fee provisions in the FOI Law or Regulations.
- [40] The Applicant does not argue that a fee cannot ever be charged for searching, but rather states that a fee is unreasonable under the circumstances of this case, or in the alternative, even if it is reasonable, the fee should be waived for the above stated reasons.
- [41] Section 13 states that a fee may be charged for the actual cost of searching for records and provides that Cabinet may make regulations which outline the maximum fee payable.
- [42] A review of the regulations and Schedule 3, which lists specific fees, reveals that there is no explicit maximum fee, or any fee at all, indicated for conducting a search for records.
- [43] However, given the specific wording of section 13 (which states that a fee may be charged for searching) and the permissive nature of the regulations (which Cabinet “may” make) I do not believe that the absence of a specific fee for conducting a search in Schedule 3 precludes a public authority from charging a reasonable fee for that purpose.
- [44] The burden of proof is on DCFS to show that it is legally authorized to charge a fee under the circumstances of this case. In my opinion it has not convincingly addressed this question.
- [45] **Nonetheless, a plain reading of the FOI Law clearly indicates that a fee may be charged for searching for records and, particularly as neither party argued against the ability of DCFS to charge for searching for records, I find that DCFS is allowed to do so under the circumstances of this case.**

Is the amount of the proposed fee reasonable in the circumstances of this case?

- [46] DCFS has not addressed the question of the reasonableness of the proposed fee of \$540. It explains that that amount covers 5 hours of work by a CSD administrator at an hourly rate of \$108, but no further explanation is provided as to why \$108 is being charged per hour or how that figure was otherwise arrived at.
- [47] The Applicant’s first argument as to why the fee is unreasonable is that DCFS told him that if a specific date range for the records being sought was provided then no fee would be charged.
- [48] DCFS did mention in an email exchange with the Applicant on 31 July 2015 that if a date range was not provided a fee could be charged, after which the Applicant provided a date range for the search. DCFS then gave the Applicant two search options: option 1 provided for a cost-free search to recover emails for the specific dates provided however, lengthy emails and

deleted emails would not be recovered; option 2 provided for a much broader search which would incur a cost as this type of search would recover all emails, including lengthy and deleted ones. The Applicant chose option 1. When the three emails in question were not located the Applicant wanted a further search conducted which meant moving on to option 2.

[49] DCFS argues that the Applicant's assertion that no fees would be charged if specific dates were provided is therefore not reasonable. He was clearly provided with two different search options, one where fees would be charged and one where fees would not be charged. He ended up choosing both options.

[50] The Applicant's argument that the fee is unreasonable because he was told he would not be charged a fee if he provided specific dates is untenable under these circumstances. He was clearly given a choice and was given fair warning regarding the possibility that a fee may be charged if he chose option 2.

[51] Section 13 requires that the fee to be charged must be reasonable and must not exceed the actual cost for searching. In stating that it must not exceed the actual cost the provision implies that the actual cost is the maximum chargeable. What is reasonable will be determined on the circumstances of each case.

[52] As I wrote above, DCFS has not provided any detailed basis for the \$108 per hour fee, even though it carries the burden to show how and why this fee is reasonable. Without corroborating evidence I do not accept that the hourly rate of a CSD administrator is \$108.

[53] In this case the Applicant is requesting DCFS to search its back-up systems for three emails which may have been deleted. I doubt that this is a standard exercise for DCFS or CSD. The search involves the specialized skills of CSD staff, which would not normally be within the skill set of an IM. Under the circumstances, and absence any other logical explanation, I believe a reasonable fee would be the exact hourly rate of the CSD administrator needed to conduct the search. For avoidance of doubt this means the regular hourly rate for that person's position on the Cayman Islands government salary scale, excluding pension and medical costs. For example, if the CSD administrator was on point 7 of salary scale grade L and made \$51,348 per year, then that person's hourly rate would be \$28.53 per hour. That hourly rate would then be multiplied by five hours which would be the fee that can be charged by DCFS.

[54] **Based on the above I find that the fee being charged by DCFS is not reasonable and it should be recalculated taking into account the actual hourly rate of the CSD administrator who is tasked with the search. If CSD is unwilling or unable to recalculate the fee then DCFS may only pass on a fee to the applicant which reflects the actual hourly rate of the CSD administrator. Any additional costs charged by CSD must then be borne by DCFS.**

Should the fee otherwise be waived pursuant to regulation 15(1)?

- [55] Under regulation 15(1) a Chief Officer or IM has the authority to waive a fee if the applicant is of inadequate means, or for any other good reason.
- [56] DCFS explains that the fee which is at issue here is being charged by CSD in order to recover the costs for searching for records belonging to DCFS. DCFS states that it cannot waive the fee on CSD's behalf and so would have to absorb the fee itself if it felt that there was a good reason to waive the fee or if the Applicant was of inadequate means.
- [57] DCFS argues that the Applicant has not provided a justifiable reason for a fee waiver. I assume this means *inter alia* DCFS does not have evidence as to whether the Applicant is of inadequate means. In contradiction to this, the Applicant states that DCFS already has all the information it needs about his finances which were examined as part of a Social Inquiry Report. Unfortunately, neither the Applicant nor DCFS has supplied me with any concrete, up-to-date evidence regarding the Applicant's financial situation. Without information such as bank statements or letters which indicate the Applicant is receiving government social assistance, or other such evidence, I am unable to make a finding as to whether the Applicant is of inadequate means.
- [58] DCFS argues that the Applicant is already in possession of the records being sought so it sees no reason to waive the fee to search for a record already in the Applicant's possession. This seems reasonable, except that the Applicant is trying to confirm that the emails were received by DCFS and then deleted. The Applicant's copies of the emails do not show that. The Applicant also believes the production of the emails showing they were received by a social worker at DCFS will prove that a fraudulent Social Inquiry Report was submitted to the Grand Court. In addition, the Applicant alleges the deletion of the emails may indicate that "DCFS is harboring renegade social workers...". The Applicant also states that discriminatory policies and procedures of DCFS will be revealed if it can be shown the emails were deleted. The Applicant states that under these circumstances disclosure would be in the public interest.
- [59] The Applicant argues further that CSD provides IT services to the DCFS, which implies that searching for records under the FOI Law is one of the services it needs to provide routinely, and those costs should be absorbed by DCFS and not passed on to an applicant.
- [60] While I accept that the requested emails are not currently held by DCFS, the latter has not provided any explanation as to what may have happened to these emails.
- [61] DCFS agrees that costs passed on to it by CSD would need to be absorbed if DCFS wishes to waive the fee. However, as the Applicant already has a copy of the requested records DCFS believes it is not reasonable that it should be expected to waive the fee just to conduct a search for a record that is already in the possession of the Applicant. I agree with DCFS on this point.
- [62] If the Applicant wishes to dispute the contents of the Social Inquiry Report the Applicant already possesses what appears to be good *prima facie* evidence that emails were sent to the social worker, and that at least one sentence in the Social Inquiry Report may be incorrect. On the basis of the emails in his possession the Applicant could request that the report be amended. If

the Applicant does so, DCFS must either agree to amend or annotate the report in accordance with sections 28-29.³

- [63] The question of the fee waiver is in my opinion not a matter of public interest, but rather a private interest of the Applicant. The requested emails relate to one sentence in a Social Inquiry Report which is 13 pages long. I am not convinced that evidence of one social worker deleting three emails, which appear to have only marginal bearing on a Social Inquiry Report related to a single family, would provide evidence that DCFS is “harboring renegade social workers” or that it has discriminatory policies and procedures, as alleged by the Applicant.
- [64] **Based on the above reasoning I find that there is no evidence before me that the fee should be waived because the Applicant is of inadequate means. I also find that there is no convincing evidence that there is any other good reason to waive the fees for searching for the requested records, on the basis outlined above.**

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007* I make the following findings and decision:

Findings and decision:

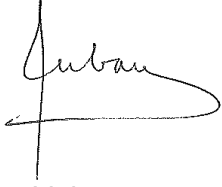
For the reasons explained above, I find that DCFS is authorized to charge a fee for searching for the requested records. However, the fee they have proposed to the Applicant is not reasonable, and it needs to be recalculated. I also find that DCFS’s decision not to waive the fee in this case was reasonable and should not be overturned.

Consequently, I require that DCFS, as soon as possible and no later than 45 days from the date of this Decision, i.e. by 2 June 2016, provide the Applicant with a new fee estimate which takes into account the actual costs of searching for the requested records on the basis explained above.

Pursuant to section 47 of the *Freedom of Information Law, 2007*, the Applicant or the relevant public body may within 45 days of the date of this Decision appeal to the Grand Court by way of a judicial review of this Decision.

If a judicial review is sought, I ask that a copy of the application for leave be sent to my Office immediately upon submission to the Court.

³ See: Information Commissioner’s Office *Hearing Decision 35-01213/01313 Ministry of Education, Employment and Gender Affairs* 14 March 2013

A handwritten signature in black ink, appearing to read 'Liebaers', with a long horizontal stroke extending to the right.

Jan Liebaers
Acting Information Commissioner

18 April 2016