Decision and Reasons for Decision

Application Number:	**F6 & F10/14-15**
Complainant:	**Ferg Ferguson (formerly Stephen Ferguson)**
Respondent:	**Department of Education**
Date of Decision:	**9 March 2016**
Hearing Number:	**2 of 2016**
Catchwords:	**FREEDOM OF INFORMATION** Refusal of access to information because it would require an unreasonable diversion of resources (s 25) Whether 'back-up tapes' constitute a 'record' within the definition of a 'record' (s 4)

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Reasons for Decision

1. This is a determination under s 114 of the *Information Act*. I hold a delegation under s 128 of the Act to exercise the powers and functions of the Information Commissioner to conduct a hearing in accordance with Part 7, Division 2, and to make a determination of the complaint in accordance with s 114.

2. This decision relates to two Complaints to the Information Commissioner made by Mr Ferg Ferguson (the 'Complainant') arising from the refusal by the Department of Education (the 'Respondent') to provide access pursuant to s 18 of the *Information Act* to government information the Complainant maintains is held by the Respondent. As shall be noted below, the two Complaints raise similar, although not identical, issues.

3. After considering the material provided by the parties, I concluded, pursuant to s 121(1) of the *Information Act*, that the matters should be heard together. Further, neither party contended that an oral hearing was necessary, and I have concluded that the hearing could be conducted 'on the papers'.

4. The Complaints to the Information Commissioner are as follows:
   4.1. Complaint F6/14-15 dated 7 December 2014 ('Complaint F6') arising from a decision on review dated 15 September 2014 made by Officer 0 of the Respondent (the 'F6 Review Decision'); and
   4.2. Complaint F10/14-15 dated 26 February 2015 ('Complaint F10') arising from a decision on review dated 26 February 2015 made by Officer 1 of the Respondent (the 'F10 Review Decision').

Background facts

Complaint F6

5. Complaint F6 relates to an application under s 18 of the *Information Act* made by the Complainant by email on 1 March 2014. In that email, the Complainant sought access to the emails of five named individuals containing the following search terms: 'cardfightback', 'card fightback', 'cfb', 'cfb team', 'cardfightback.wordpress.com', and 'card blog'. The Complainant stipulated that the search need only be conducted in the Northern Territory Government's (the 'NTG") backup system for the following periods:

end of May 2013	*end of October 2013*
end of June 2013	*end of November 2013*
end of July 2013	*end of January 2014*
end of September 2013	*end of February 2014*

6. On 14 March 2014, the Complainant was provided with a quote in the sum of $4,928.00 for the cost of retrieving the above-noted information. This consisted of the sum of $2,464.00 for retrieving from the backup system the information relating to the email accounts of Officer 2, Officer 3 and The Chief Executive Officer (CEO) based on the search terms stipulated in the request, and $2,464.00 for retrieving from the backup system the information relating to the email accounts of Officer 4 and Officer 5. On 15 March 2014, the Complainant advised the Respondent that he would like to proceed only with the former, being the retrieval of the requested information from the email accounts of Officers 2, 3 and the CEO.

7. It is common ground between the parties that the payment relating to the retrieval was not received from the Complainant. Further, it is common ground that the application fee as stipulated in s 18(2A) of the *Information Act* was not paid by the Complainant. Regulation 5 of the *Information Regulations* provides for an application fee in the sum of $30.00 for an application relating to non-personal information and no fee for an application relating to personal information.

8. Due to a change in personnel within the Respondent, the Complainant's application for access to the above-noted information was not dealt with within 30 days as required by s 19(1) of the *Information Act*. Despite repeated requests by the Complainant for a decision, by 14 August 2014 no decision had been provided and the Complainant lodged with the Respondent an application for internal review. I note that, pursuant to s 19(3), the failure to notify the Complainant of the Respondent's decision is deemed to be a refusal of access to the information requested.

9. In the F6 Review Decision, access to the information requested was refused on the following grounds:
    9.1. the information requested does not fall within the definition of 'record' in s 4 of the *Information Act* and, therefore, the information is not held by the Respondent within the meaning of s 28(1) of the Act; and
    9.2. providing access to the information requested would unreasonably interfere with the operations of the Respondent within the meaning of s 25 of the *Information Act*.

10. In the F6 Review Decision, Officer 0 estimated that the process of restoring the information from the backup system requested in the Complainant's email of 1 March 2014 would be 32 hours, and the examination of the information restored would take an additional 8 hours. Officer 0 noted, however, that it was not possible to estimate with any accuracy at that stage in the process the time required to examine the information restored.

Complaint F10

11. Complaint F10 relates to an application for access to government information lodged by the Complainant with the Respondent on 9 December 2014. In the application, the Complainant requested:

> *Archive Retrieval of* [a named individual's] *emails, monthly back ups:*
>
> *Sept 2013*
> *Oct 2013*
> *Nov 2013*
> *Feb 2014*
> *March 2014*
>
> *Search for my personal info only. Name and info identifying me without name mentioned.*
> *Happy to pay retrieval + processing fees.*

12. On 17 December 2014, the Respondent sought clarification from the Complainant regarding the scope of the application. In response, the Complainant agreed to narrow the above-noted search of Officer 3's emails in the monthly backup tapes noted above to "my personal information only".

13. In a decision dated 27 January 2015, the Respondent denied access to the information sought on one ground only; namely that the emails in the backup system did not meet "the description of "records" in the *Information Act*, and, therefore, the information [was] not held by the Department".[1] The reasons provided in support of this decision are in essence the same as those stated in relation to the F6 Review Decision.

14. The Complainant sought a review of the 27 January 2015 decision. As has been noted above the F10 Review Decision was provided by Officer 1 of the Respondent on 26 February 2015. As a preliminary matter, Officer 1 stated that it was her opinion that the Complainant in his application had used the word 'archive' incorrectly "in the context in which you are seeking the backup emails of a staff member".[2] Officer 1 then refused access on the same grounds as were set out in the decision of 27 January 2015.

15. In my view nothing turns on the Complainant's use of the word 'archive'. The relevant issue is whether the emails requested constitute a 'record' within the

[1] Letter from Officer 6 of the Respondent to the Complainant dated 27 January 2015.

[2] Letter from Officer 1 of the Respondent to the Complainant dated 26 February 2015.

meaning of s 4 of the *Information Act* held by the Respondent within the meaning of s 6 of the Act. This is discussed below.

16. Relevant to both Complaint F6 and Complaint F10 is the evidence of Officer 7, an employee of NEC IT Services Australia Pty Ltd ('NEC'). NEC is the contractor retained by the Department of Corporate and Information Services (the 'DCIS') to maintain the Respondent's email system. In a statutory declaration dated 16 September 2015, Officer 7 stated:

> *As agreed with the Northern Territory Department of Education backups are conducted on a daily (Monday-Thursday), weekly (Friday), monthly (Last Friday of the Month) and yearly (Last Friday of the year) cycle. Retention policies are configured to dictate how long a successful backup instance is stored:*
>
> *i) Daily backups are retained for a period of 2 weekly cycles*
> *ii) Weekly backups are retained for a period of 4 weekly cycles*
> *iii) Monthly backups are retained for a period of 12 monthly cycles*
> iv) *Yearly backups are retained for a period of 7 yearly cycles*.

17. In its submissions dated 18 September 2015, the Respondent stated that the monthly backup tapes specified in the Complainant's requests no longer exist, and that "this was a conclusive answer to the request, inasmuch as a search cannot be conducted in a space requested to be searched if that space no longer exists". Of course, at the time the application for access in Complaint F6 was received on 1 March 2014, all of the backup tapes referred to in the application had not yet been overwritten. In the case of Complaint F10, the application was made on 9 December 2014, which meant that only the backup tapes for February and March 2014 had not yet been overwritten. Finally, the tapes containing the yearly backup, made in December of each year, were not requested by the Complainant to be searched in either the application the subject of Complaint F6 or the application the subject of Complaint F10. The effect this has on the outcome of this hearing is discussed below.

Preliminary matter

18. On 10 February 2016, at my direction, the office of the Information Commissioner wrote to the parties to bring to their attention the fact that I know the Complainant in a professional capacity due to my part-time position as Professor of Law at Charles Darwin University. The Complainant was a former student, which of course would be known to the Complainant but not to the Respondent.

19. The Respondent indicated that it had no concerns with my hearing the matter. The Complainant did object to my hearing the matter on the basis that I had found

against him in an earlier decision,[3] which indicated to the Complainant that I was biased towards the government. Further, he noted that if he had known that I was to hear the matter he may have tailored his submissions accordingly.

20. Neither of the grounds stated by the Complainant establish either actual bias or an apprehension of bias. The High Court of Australia (the 'High Court') stated in *Bienstein v Biensten* (2003) 195 ALR 225 at [30] that:

> *A judge is disqualified from determining a case if the judge is biased or a party or a member of the public might reasonably apprehend that the judge is biased. Bias exists if the judge might not bring an impartial and unprejudiced mind to the resolution of the issues*.

21. The High Court went on to note that "[a] judge should not disqualify himself or herself on the basis of bias or a reasonable apprehension of bias unless substantial grounds are established". In *Ebner v Official Trustee Bankruptcy* (2000) 205 CLR 337 at [8], Gleeson CJ, McHugh, Gummow and Hayne JJ in a joint judgment articulated the steps that a judge should follow when considering a submission based on apprehended bias:

> *The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits*.

22. The above principles apply equally to the Information Commissioner or a Delegate of the Information Commissioner hearing a complaint under Part 7, Division 1 of the *Information Act*. Suffice to say that the reasons articulated by the Complainant based on my findings on the merits in a previous decision, or the fact that the Complainant may have worded his submissions differently if he had known I was hearing the matters, do not establish the "logical connection" required to satisfy the second step articulated in *Ebner* above. I have decided that I am not disqualified from hearing the matters based on either actual or apprehended bias.

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3 *and the Department of Education* (F8/13-14, No 1 of 2015, 6 May 2015).

Consideration of Complaint F6 and Complaint F10

Information requested not a 'record'

23. In both the F6 Review Decision and the F10 Review Decision the Respondent acknowledged that the Complainant was seeking access to emails. The Respondent formed the view, however, that because the applications for access specifically requested access to emails held in the NTG backup system, rather than, for example, the NTG's Tower Records Information Management ('TRIM') system, such email accounts did not fall within the scope of the word 'record' as defined in s 4 of the *Information Act*. Further, having determined that the emails held in the NTG's backup system did not constitute a record, the Respondent concluded that it did not hold the information requested pursuant to s 28 of the Act.

24. A critical component of the Respondent's reasoning was that backup tapes are not required to be kept. The Respondent noted that the *Records Disposal Schedule for Administrative Functions of the Northern Territory Government* (November 2013) provides at page vii that public sector organisations are to "[e]nsure that all copies of temporary records are destroyed in any format (including backups) unless otherwise stated in a disposal schedule". Given that there was no requirement to retain backup tapes, the Respondent concluded that information on a backup tape was not "recorded information in any form (including data in a computer system) that *is required to be kept by a public sector organisation as evidence of the activities or operations* of the organisation" within the definition of 'record' in s 4 of the *Information Act* (emphasis mine).

25. In a submission to the Information Commissioner, the Respondent summarised its position as follows:

> *Since not required to be kept, backups are not a 'record' under section 4 of the Act. Since a backup is not a record, it is also not "government information" within the meaning of section 15 of the Act. Since section 15 does not apply to backups, the right created by that section cannot apply to backups, with the result that the present access application cannot be based on section 15. In other words it is a request for information to which the Act does not apply.*
> *Another basis that yields the same result is that backups are not "government information" held for the purposes of section 28 of the Act, as stated at page 6 of the* [F6 Review Decision].[4]

[4] Submission by the Respondent to the Information Commissioner in Complaint F6/14-15 dated 13 March 2015 at [26].

26. The Respondent's reasoning is flawed. Whether recorded information, such as an email, constitutes a record within the meaning of s 4 of the *Information Act* is determined by reference to the informational content of the email, not by reference to the system in which the information is stored. Further, whether a public sector organisation holds such information is determined by reference to s 6 of the Act. To understand why this is so, reference must be made to the relevant provisions of the Act, the methods by which information, and in particular emails, are stored by the NTG, and the purpose or object underlying the Act.

27. Pursuant to s 15 of the *Information Act*, "[e]very person has a right … to access government information other than personal information". The term 'government information' is defined in s 4 of the Act to mean "a record held by or on behalf of a public sector organisation and includes personal information". Section 6 establishes when a public sector organisation holds government information. Section 6(1) provides:

> *(1) A public sector organisation holds government information if the organisation has possession or control of the information:*
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> *(a) whether alone or jointly with another person or body; and*
> *(b) whether the information is in the Territory or elsewhere.*

28. Finally, s 4 of the Act, as has been noted above, defines the word 'record' to mean,

> *recorded information in any form (including data in a computer system) that is required to be kept by a public sector organisation as evidence of the activities or operations of the organisation, and includes part of a record and a copy of a record*.

29. The definition of 'record' in the *Information Act* is broad enough to encompass emails or other documents held in electronic form: *Langer v Telstra Corporation* [2002] AATA 341 at [85]. While the definition in *Langer* considered the definition of 'document' in the *Freedom of Information Act 1982* (Cth), the definition of 'record' in the *Information Act*, by making express reference to "data in a computer system", is even clearer on this point. Further, as is stated in the *Records Management Standards for Public Sector Organisations in the Northern Territory* (August 2010) (the 'Records Management Standards') at page 6:

> *Records are identified as such because of their content not their format. Almost all business is now conducted electronically, especially using email functionality. During the normal course of conducting business, individuals must make a decision about what constitutes a record based on the informational content of the message or document they create or receive. They must then capture this record into the corporate records management system in accordance with the business rules the organisation has for such capture*.

30. While generally emails determined to be a record will be entered into TRIM, the Respondent accepted that "staff errors may arise in relation to the placing of records into TRIM".[5] In the Respondent's submission dated 18 September 2015 in relation to Complaint F6, Officer 8, for and on behalf of the Respondent, stated at [103]:

> *In any event, whether or not errors by staff occur in relation to placing emails and other data into TRIM cannot be relevant to the status of emails and other data on backup tapes. The character of backups does not change depending on whether or not staff are more or less efficient in managing records and using TRIM*.

31. While it may be correct that the character of backups does not change depending on whether staff are more or less efficient in entering records into TRIM, the fact remains that it is the informational content of the email that determines whether the email is, or is not, a record. Put another way, the character of the informational content of the email does not change depending on whether the email is entered into the TRIM system, or captured in the NTG's backup system.

32. The receipt of an application by a public sector organisation pursuant to s 18 of the *Information Act* enlivens the obligation on such organisation to conduct a search. Whether such a search includes the backup systems will depend on the circumstances.

33. The general approach of an agency to conducting a search under the *Freedom of Information Act 1982* (Cth) was explained by the Australian Information Commissioner in the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (as revised October 2014) (the '93A Guidelines') at [3.83]:

> *Whether it is necessary for an agency to conduct a search of its backup systems for documents will depend on the circumstances. For example, if the agency is aware that its backup system merely duplicates documents that are easily retrievable from its main records system, a search of the backup system would be unnecessary. On the other hand, if the agency is aware that its backup system may contain relevant documents not otherwise available or* ***if the applicant clearly includes backup systems in the request****, a search of the backup systems may be required (provided it does not involve a substantial and unreasonable diversion of agency resources, see [3.99])*.[6]

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[5] Respondent's submission dated 13 October 2015 and signed by the Acting Chief Information Officer, for and on behalf of the Respondent at [21].

[6] Emphasis mine. See also *'HL' and Department of Defence* [2015] AICmr 73 at [12].

34. The same reasoning applies to an application for access to government information under s 18 of the *Information Act*. The Respondent argued that [3.83] of the 93A Guidelines was irrelevant because the definition of 'document' in s 4 of the *Freedom of Information Act 1982* (Cth) includes in the definition "any other record of information", and, therefore, is wider than the definition of 'record' in s 4 of the *Information Act*.[7]

35. This distinction is without foundation. The definition of 'record' in the Act is equally wide in that it "means recorded information in any form (including data in a computer system)". Whether the recorded information "is required to be kept by a public sector organisation as evidence of the activities or operations of the organisation", must be ascertained from the informational content of the recorded information. Such content can be ascertained only once the information is retrieved following a search properly conducted by the public sector organisation in receipt of an application for access pursuant to s 18 of the Act.

36. The objects of the *Information Act* are set out in s 3. Of particular relevance is s 3(1)(a)(ii) which provides that:

> *The objects of this Act are:*
>
> *(1) to provide the Territory community with access to government information by:*
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> *…*
>
> *(ii) creating a general right of access to information held by public sector organisations limited only in those circumstances where the disclosure of particular information would be contrary to the public interest because its disclosure would have a prejudicial effect on essential public interests or on the private and business interests of persons in respect of whom information is held by public sector organisations; …*

37. Further, s 62A of the *Interpretation Act* provides that:

> *In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object*.

38. The construction of the definition of 'record' in s 4 of the *Information Act* pressed by the Respondent does not promote the object of creating a general right of access to information held by the Respondent as expressly stated in s 3(a)(ii) of the Act. If the Respondent's submission was accepted, the system from which the

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[7] Respondent's submission dated 13 October 2015 and signed by the Acting Chief Information Officer, for and on behalf of the Respondent at [23].

recorded information was retrieved would be determinative, regardless of whether an analysis of the content of such information, once retrieved, indicated that the recorded information was such that it was required to be kept by a public sector organisation as evidence of the activities or operations of the organisation. Such a conclusion is contrary to the objects of the Act and must be rejected.

39. The Respondent relied on s 28 of the *Information Act* in support of its claim that it did not hold the records sought by the Complainant. As has been noted above, whether a public sector organisation holds government information is determined by s 6 of the Act. A determination of whether the Respondent holds government information is based on the concepts of possession or control of the information (s 6(1)). Either will suffice.

40. Dealing first with the concept of possession, the authorities generally support the proposition that "an agency will be in possession of documents, so as to make them documents of the agency, when the agency actually holds those documents": *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 at [29]; see also *Sullivan and Dept of Industry, Science and Technology and Australian Technology Group Pty Ltd Party Joined* [1996] AATA 610 at [50]. In the context of documents held in electronic form, Beaumont J in *Beesley v Australian Federal Police* (2001) 111 FCR 1 held that the concept of constructive possession will apply. If an agency has "the right to immediately receive a document, even if there is not actual (but notional) receipt at the relevant time",[8] the document in electronic form will be in the possession of the agency within the meaning of the *Freedom of Information Act 1982* (Cth).[9]

41. While the provisions of the *Freedom of Information Act 1982* (Cth) considered in *Beesley* were not identical to the wording of s 6 of the *Information Act*, a similar conclusion as to the concept of possession should be applied. Section 6 expressly provides that a public sector organisation may possess or control information jointly with another person or body (s 6(1)(a)), and is taken to hold such information notwithstanding that such information has been transferred to the archive services (s 6(2)). This suggests that more than one public sector organisation could be in possession or control of a record at the same time. Such a conclusion is particularly relevant to government information held in the NTG backup system because it is the DCIS, and external contractors retained by the DCIS such as NEC, that may physically hold the backup tapes from which the emails would be retrieved.

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[8] *Beesley v Australian Federal Police* (2001) 111 FCR 1 at [71].

[9] *Beesley v Australian Federal Police* (2001) 111 FCR 1 at [71]-[72].

42. The word 'control' "is wide enough to include many types of possession which are not commensurate with full ownership".[10] While not a defined term in the *Information Act*, the *Macquarie Dictionary* defines the word 'control' as "to exercise restraint or direction over; dominate; command".[11] Provided the government information in the backup tapes had not been overwritten or destroyed, a topic which I will discuss below, the Respondent could direct the DCIS to retrieve the information requested.

43. Consequently, the Respondent would hold the government information requested pursuant to the access provisions of the *Information Act* because it had possession or control of the information within the meaning of s 6 of the Act. Its assertion that it did not hold the information within the meaning of s 28 was without foundation.

Yearly backup

44. The Respondent submitted that it had no obligation to search the yearly backup tapes because such a search was not requested by the Complainant. While it is correct that the Complainant did not include the months of December 2013 or December 2014 in his applications for access, this fact does not relieve the Respondent of the obligation to search the yearly backups. The records for which the Respondent is required by the access provisions of the *Information Act* to search are the emails in the backup system that may relate to the search terms identified by the Complainant. It is not the specific backup tapes identified by the Complainant that constitute such a record. The emails may be found in the yearly backup tapes, and the Respondent has an obligation to search such tapes.

45. The Respondent maintained that "[t]here is no basis to conclude that the December monthly backup (which serves as a yearly backup) … would even include any of the emails that may have been in the monthly backups requested by the applicant".[12] This submission misses the point. While it is likely that some emails which were in the monthly backup tapes were deleted from the email system by the time the yearly backup tapes were produced, it can be assumed that emails which fall within the Complainant's search terms still may be found on the yearly backups. If so, the Complainant has a right enforceable under s 15 of the

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[10] *Johnstone Fear & Kingham & the Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 324.

[11] *Macquarie Dictionary* (6th ed, Macquarie, 2013) at 328.

[12] Submission by the Respondent to the Information Commissioner in Complaint F10/14-15 dated 18 September 2015 at [57].

Information Act to access unless, on inspection, it is determined that the recorded information is exempt in the public interest pursuant to Part 4 of the Act.

46. To decide otherwise would mean that the records requested by the Complainant have been overwritten, and any decision which stipulated that access should be granted to such records would be otiose. Such an outcome would be contrary to the objects of the *Information Act*, which objects have been discussed above.

47. Finally, s 25 of the *Information Act* also provides a basis on which an organisation may decide to refuse access to the information requested. As shall be discussed below, however, the Respondent has not met its onus in this regard.

Non-payment of application fee

48. In submissions to the Information Commissioner dated 18 September 2015, the Respondent raised for the first time the fact that the $30.00 application fee in Complaint F6 had not been paid by the Complainant. A similar issue does not arise in Complaint F10 because, as has been noted above, the application was limited to records that contain personal information about the Complainant which, pursuant to reg 5(1)(a) of the *Information Regulations*, attracts no application fee.

49. I note that the non-payment of the application fee was not raised in the F6 Review Decision, notwithstanding the statutory requirement in s 41(a) of the *Information Act* that the Respondent was to include reasons for the outcome of its review of the initial decision. It is the Respondent's submission that the failure to raise the non-payment of the application fee in the F6 Review Decision was an "oversight",[13] payment of such a fee is mandatory (s 18(2A)), the onus was on the Complainant to apply for a waiver of the fee, and there was no obligation on the Respondent to raise with the Complainant the question of waiver of the fee. Finally, the Respondent submits that there is no room in the *Information Act* for an implied waiver.

50. The simple answer to the Respondent's submission is that, when the *Information Act* and regulations are read together, it is clear that the stipulation in s 18(2A) that "[t]he application is to be accompanied by the application fee" is not a mandatory requirement. Section 156(1) provides that "[a] public sector organisation *may* charge an application fee or a processing fee". Further, reg 5(1)(a) of the *Information Regulations* relevantly provides that "a public sector organisation *may* charge" an application fee of $30.00 for an application relating to non-personal

[13] Submission by the Respondent to the Information Commissioner in Complaint F6/14-15 dated 18 September 2015 at [168].

information. There is no statutory requirement to charge such a fee, and there is no evidence that the non-payment of an application fee was raised with the Complainant prior to the inclusion of this ground in the Respondent's submissions of 18 September 2015.

51. Further, pursuant to s 156(6) of the *Information Act*, a public sector organisation or the Commissioner may waive a fee payable under s 156(1) if, having regard to the following matters, the organisation or Commissioner considers a waiver appropriate:
    51.1. the circumstances of the application or complaint, which would include a consideration of the matters noted in s 156(6)(a); and
    51.2. the objects of the Act.

52. The Respondent failed to provide the Complainant with a decision on the application for access which is the subject matter of Complaint F6 within time stipulated in s 19(1) of the *Information Act*. It was not until 15 September 2015 that the Complainant received any reasons from the Respondent for the refusal to provide access to the information requested, and those reasons were contained in the F6 Review Decision which is the subject of Complaint F6.

53. The objects of the Act relevant to this matter have been set out above. To raise at a very late stage of the process the non-payment of the application fee as a reason for refusing access does not advance the objects of creating a general right of access to information held by public sector organisations (s 3(1)(a)(ii)). The Respondent in the circumstances of this case must be taken to have waived the application fee relating to Complaint F6. If I am incorrect in this conclusion, and having regard to the matters referred to in s 156(6)(a) and (b), I consider that a waiver of the is fee appropriate in the circumstances of Complaint F6.

Access unreasonably interferes with operations – s 25

54. In Complaint F6, but not in Complaint F10, access to the government information requested by the Complainant was refused because providing access would unreasonably interfere with the operations of the Respondent within the meaning of s 25(1) of the *Information Act*. Section 25 provides:
    (1) A public sector organisation may decide to refuse access to the information because providing access would unreasonably interfere with the operations of the organisation.
    (2) A public sector organisation may only decide to refuse access under subsection (1) if the organisation and the applicant are unable to agree on a variation of the information identified in the application.

55. Given the change in personnel at the Respondent after the application for access to information was made by the Complainant on 1 March 2014, the evidence of negotiation to vary the scope of the information sought was slight. It consisted of the negotiation between the Complainant and the Respondent referred to above regarding processing fees, and a letter from Officer 6 of the Respondent to the Complainant dated 17 June 2014. This notwithstanding, the discussions evidenced in the email correspondence between the Complainant and Officer 9 of the Respondent on 14-15 March 2014, and Officer 6's letter of 17 June 2014, does constitute an attempt by the parties to agree to a variation of the information identified in the application within the meaning of s 25(2) of the Act.

56. The law pertaining to a refusal of access based on s 25(1) of the *Information Act* was canvassed by me in an earlier decision involving the same parties: *Ferguson and the Department of Education* (F8/13-14, No 1 of 2015, 6 May 2015). In this decision, therefore, I shall summarise the governing principles which were discussed in some detail in the decision of 6 May 2015.

57. First, s 25(1) allows a public sector organisation to refuse access to the information requested if to provide such access "would constitute interference beyond what, on an objective assessment of the facts of a particular case, is reasonable": *Ferguson and Department of Education* (F8/13-14, No 1 of 2015, 6 May 2015) at [22]. The onus is on the Respondent to prove unreasonable interference with its operations.

58. Secondly, given that the *Information Act* creates a statutory right of access to information held by public sector organisations, s 25(1) should be applied only in a clear case of unreasonable interference: *The Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [6]; *Chief Commissioner of Police v McIntosh MP* [2010] VSC 439 at [32]; *Ferguson and the Department of Education* (F8/13-14, No 1 of 2015, 6 May 2015) at [24].

59. Thirdly, while case law from other jurisdictions[14] suggests that 40 hours is a reasonable presumptive ceiling for determining whether a Freedom of Information request constituted a substantial and unreasonable diversion of an agency's resources, such a presumptive ceiling does not apply to a consideration of s 25(1) of the *Information Act*. "The result in any particular inquiry will turn on its individual facts, which mitigates against the application of any such presumptive

[14] See, for example, *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137 at [62], [64] (reversed in part: *Cianfrano v Director General, Premier's Department (GD)* [2006] NSWADTAP 48); *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 at [26].

ceiling": *Ferguson and the Department of Education* (F8/13-14, No 1 of 2015, 6 May 2015) at [26].

60. In the F6 Review Decision, Officer 0 estimated that it would take 32 hours to restore from the backup system the emails requested, and at least another 8 hours to examine the emails to determine whether any third parties needed to be notified (s 30), and whether any exemptions to disclosure applied. Officer 0 expressed the opinion that "[i]t is not possible to estimate the above processes with any accuracy at this stage of the processing required under the *Information Act*".

61. It is important to note that the estimate of 32 hours to retrieve the emails from the backup system was based on the Complainant's request of 1 March 2014. As has been noted above, on 15 March 2014 the Complainant indicated that he would proceed only with the restoration of the email accounts of Officers 2, 3 and the CEO. This variation was not referred to in the F6 Review Decision. It follows, therefore, that the estimate of the time to restore the emails from the backup system would be only 16 hours, not 32 hours. It can also be assumed that the time it would take to examine the emails would be less than the estimated 8 hours; namely 4 hours.

62. If I accept Officer 0's opinion, which was the only evidence led by the Respondent as to the time it would take to deal with Complainant's application for access in Complaint F6, it would take an estimated 20 hours to restore the email accounts requested and examine the documents. While Officer 0 expressed the view that "even 20 hours could constitute an unreasonable interference with the agency's operations", the basis of this opinion was not articulated clearly. In particular, no factual evidence, in the form of statutory declarations or otherwise, was provided to substantiate the estimated time of 20 hours.

63. The onus is on the Respondent to prove an unreasonable interference with its operations. The Respondent has failed to meet this onus.

Decision

Complaint F6

64. The emails in the NTG's backup system requested by the Complainant in his application of 1 March 2014 as amended by his letter of 15 March 2014 fall within the definition of 'record' in s 4 of the *Information Act*, and are held by the Respondent within the meaning of s 6 of the Act. Further, the Respondent failed to establish that access to the information requested would unreasonably interfere with the operations of the Respondent within the meaning of s 25 of the Act.

65. It follows that the F6 Review Decision should be revoked pursuant to s 114(1)(b) of the *Information Act* and the following decision substituted. The Respondent shall grant access to the information requested by the Complainant unless, on inspection, it is determined by the Respondent that the information may be exempt in the public interest pursuant to Part 4 of the Act. If the Respondent makes such a determination, the records are to be provided to me pursuant to s 87(2)(e) of the Act, and I will determine whether access to the information should be provided pursuant to Part 3, Division 2 of the Act.

Complaint F10

66. The emails in the NTG's backup system requested by the Complainant in his application of 9 December 2014 fall within the definition of 'record' in s 4 of the *Information Act*, and are held by the Respondent within the meaning of s 6 of the Act. It follows that the F10 Review Decision should be revoked pursuant to s 114(1)(b) of the Act and the following decision substituted. The Respondent shall grant access to the information requested by the Complainant unless, on inspection, it is determined by the Respondent that the information may be exempt in the public interest pursuant to Part 4 of the Act. If the Respondent makes such a determination, the records are to be provided to me pursuant to s 87(2)(e) of the Act, and I will determine whether access to the information should be provided pursuant to Part 3, Division 2 of the Act.

Conclusion

67. Why the Complainant sought emails in the backup system rather than in the TRIM system was not clear from the evidence. Further, why he sought only emails in the backup system relating to specific months also is unclear. Whatever the reason, the overwriting of the monthly backup tapes after an application for access had been received potentially relating to information on those tapes is far from satisfactory. While some of the information sought by the Complainant may be retrieved from the yearly backup tapes, it has to be acknowledged that some information requested may have been overwritten. This is not a criticism of the DCIS or the NEC, as the tapes were disposed of in accordance with the agreement with the Respondent as stated by Officer 7 in his statutory declaration of 16 September 2015.

68. Upon receiving the applications from the Complainant in both matters, the Respondent should have informed the Complainant of the disposal schedule for information in the backup system. Preferably, the Respondent should have then directed the DCIS to retain the information on the relevant backup tapes until the

Complainant's applications were dealt with. If the Respondent was not prepared to issue such a direction to the DCIS, the Complainant could then have made a request to the Information Commissioner to issue an order under s 87(2)(e) of the *Information Act* to produce a record.

69. Whether the Information Commissioner issued such an order would be a matter for the Commissioner and would depend on the facts of the particular case. If the Complainant had been informed of the disposal schedule by the Respondent at the time the applications for access were made, however, he would at least have been afforded the opportunity to take appropriate action in the event the Respondent refused to direct the DCIS to retain the relevant backup tapes.

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Les McCrimmon
Delegate of the Commissioner
9 March 2016