# Decisions and Reasons for Decision

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| **Application Number:** | **F8/13-14** |
| **Applicant:** | **Stephen Ferguson** |
| **Respondent:** | **Department of Education** |
| **Date of Decision:** | **06/05/2015** |
| **Hearing Number** | **1 of 2015** |

**Contents:**

## Introduction

1. This is a determination under section 114 of the *Information Act* (NT). 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. In a Complaint to the Information Commissioner dated 14 February 2014 (the 'Complaint'), Mr Stephen Ferguson (the 'Complainant') sought a reconsideration of the decision of the Department of Education (the Respondent) to refuse access pursuant to s 25 of the *Information Act* (NT). The Complainant also submitted that insufficient reasons for the decision to refuse access pursuant to s 25 were provided by the Respondent.

3. In a Prima Facie Decision under s 110 of the *Information Act* (NT) dated 2 September 2014, a delegate of the Information Commissioner found that there was sufficient prima facie evidence to substantiate the matters which were the subject of the Complaint.

4. On 18 November 2014, a mediation was held in accordance with s 111 of the *Information Act* (NT). The mediators confirmed, by way of Certificate of Mediation, that the parties were unable to resolve the complaint.

5. By Amended Directions for Hearing dated 30 March 2015, the Information Commissioner directed, inter alia, that if either party contended that an oral hearing was necessary, that party must have notified the Information Commissioner of such contention by 14 April 2015 and give reasons for requesting an oral hearing. No request for an oral hearing was made by either party.

6. After considering the material provided by both parties, I concluded that an oral hearing was not necessary and that the hearing could be conducted 'on the papers'. The material considered by me consisted of written submissions of the parties, supported by affidavit evidence.

## Background

7. By an application dated 28 June 2013, the Complainant sought from the Respondent pursuant to the *Information Act* (NT) access to certain personal and government information. It appears to be undisputed that, over a number of months, Mr X for the Respondent, and the Complainant

corresponded in an attempt to specify in greater detail the information identified in the Complainant's initial application. The final iteration of the Complainant's application requested access to the following information:

7.1. all government and personal information relating to the term 'cardfightback' and six associated terms; and

7.2. all personal information concerning the name Stephen Ferguson and "whistleblower" or "whistle blower".

8. July 2011 to 8 July 2013 was the agreed timeframe for which the above-noted information was sought. As to the format of records to be searched, the Complainant requested that searches of the following be included:

8.1. the TRIM system;
8.2. all emails – sent or received, cc-ed & bcc-ed;
8.3. all hard copies that constitue a record;
8.4. all other computer records including documents kept on the business drive (Z:);
8.5. handwritten notes and Post-it notes;
8.6. file notes;
8.7. hard copy or electronic diaries;
8.8. draft documents – hard copy or electronic;
8.9. loose papers that may be relevant;
8.10. database entries;
8.11. relevant information created for work purposes on personal equipment;
8.12. relevant text messages that constitute a record;
8.13. relevant information created for work purposes in personal email accounts;
8.14. any items/documents /records that have been created but not entered into TRIM;
8.15. meeting minutes relating to the search terms.

9. The Complainant requested that the areas of the Respondent to be searched include the following:

9.1. Information Services;
9.2. Staff Group;
9.3. Ministerial Liaison;
9.4. Executive Services.

10. Finally, in addition to the specific areas to be searched, the Complainant requested that the records of 8 specified individuals also be included in the search.

11. Mr Y, on behalf of the Respondent, deposed to the fact that, in total, the Complainant's FOI request extended to forty staff. In particular, it related to 26 staff in Information Technology and Information Services, 4 staff in Ministerial Liaison, 4 staff in Executive Services, and 6 staff named and still working for the Respondent.

12. In a letter from the Respondent to the Complainant dated 9 December 2013, Mr X, after summarising the attempts made by the parties to clarify the scope of the initial request, and to vary the scope of the request, advised the Complainant that:

> *The department has considered your proposal and determined that your extended application would unreasonably interfere with the operation of the agency hence it has refused access to the information as outlined in section 25 of the Act.*

13. No further reasons for the Respondent's decision to refuse access were provided in the 9 December 2013 letter. Mr X did, however, provide a statement regarding the Complainant's rights of review and complaint as required by s 20(b) of the *Information Act* (NT).

14. On 10 December 2013, the Complainant applied for an internal review of the Respondent's decision to deny access. By letter dated 29 January 2014 Mr Z, on behalf of the Respondent, advised the Complainant that an internal review had been conducted and that the decision of 9 December 2013 was confirmed in full. The following substantive reasons for the decision were set out in the 29 January 2014 letter:

> *In coming to my decision I have taken into consideration not only the intent and objectives of the Information Act but also the following factors and process:*
> *(a) The scope of your original application;*
> *(b) the correspondence that occurred between Mr X and yourself regarding attempts to agree on a variation of the scope;*
> *(c) estimations of potential time required to process your application in its original form as well as with a reduced scope;*
> *(d) consultation with Freedom of Information expert practitioners regarding decisions and developments in other jurisdictions;*

*(e) the following publications: Federal Information Commissioner report on fees and charges; Federal Information Commissioner submission to the Hawke review; Hawke Review Report;*

*(f) decisions from tribunals in other jurisdictions which confirmed that the use of greater than about 30-40 hours to process and FOI application could represent a substantial and unreasonable diversion of the resources of an agency;*

*(g) the size and capacity of public sector organisations in the Northern Territory compared with those in other jurisdictions.*

15. In the Decision on Prima Facie Evidence pursuant to s 110(3) of the *Information Act* (NT), a delegate of the Information Commissioner found on the prima facie evidence that:

    15.1. s 25 of the Act does not specifically require the initial decision maker to provide reasons for decision, however, the provision of reasons to the Complainant would normally be considered a reasonable expectation;

    15.2. the lack of detail provided in the Respondent's reasons of 29 January 2014 did not satisfy the statutory obligation on the Respondent under s 41(a) of the *Information Act* (NT) to provide reasons for the outcome of the review;

    15.3. the Respondent complied with s 25(2) of the *Information Act* (NT) in that it only decided to refuse access under s 25(1) of the Act after the Complainant and Respondent, after two months of negotiation, were unable to agree on a variation of the information identified in the application;

    15.4. there was insufficient prima facie evidence to substantiate the Respondent's refusal of access to the information requested under s 25(1) of the *Information Act* (NT) on the grounds that providing access would unreasonably interfere with the operations of the Respondent.

16. Following the Decision on Prima Facie Evidence, and in advance of the mediation of the matter mandated by s 111 of the *Information Act* (NT), the delegate of the Information Commissioner allowed the Respondent additional time within which to lodge material in support of the Respondent's decision to deny access. Such additional material was contained in a letter to the OIC dated 19 September 2014 from Mr W, on behalf of the Respondent. A copy of this letter was provided by the OIC to the Complainant.

17. The primary purpose of the Respondent's letter of 19 September 2014 was to provide further reasons for the Respondent's decision to deny

access, pursuant to s 25 of the *Information Act* (NT), to the information sought by the Complainant. These reasons, so far as they are relevant, will be canvassed below.

**Law relating to s 25 of the *Information Act* (NT)**

18. The *Information Act* (NT), s 25, states:

> *(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*.

19. Dealing first with the pre-requisite contained in s 25(2) of the *Information Act* (NT), I am satisfied that the Respondent did comply with its obligations under this section. As evidenced by the Respondent's letter to the Complainant dated 9 December 2013, the Respondent corresponded with the Complainant from 19 September 2013 to 3 November 2013 in an attempt to vary the scope of the Complainant's FOI request. That such attempts were made was not disputed by the Complainant. While the parties were unable to reach agreement on the scope of such variation, the Respondent did endeavour to assist the Complainant to amend the application as is required by s 25(2) of the Act: *Chapman v Commissioner of Police, New South Wales Police* [2004] NSWADT 35 at [40] (reversed on other grounds *Chapman v Commissioner of Police* [2004] NSWADTAP 16).

20. Section 25(1) of the *Information Act* (NT) differs from the equivalent provision in other Australian jurisdictions in that s 25(1) requires that the Respondent prove that providing access to the information requested would unreasonably interfere with its operations. In other Australian jurisdictions, the statute generally requires that the Respondent prove that dealing with the application "would require an unreasonable *and substantial* diversion of the agency's resources".[1] Despite this difference in wording, the decisions from other Australian jurisdictions are of assistance in delineating the scope of s 25(1) of the *Information Act* (NT),

[1] *Government Information (Public Access) Act 2009* (NSW) s 60(1)(a) (Emphasis mine). See also: *Freedom of Information Act 1989* (ACT) s 23(1); *Freedom of Information Act 1982* (Cth) s 24AA(1)(a); *Right to Information Act 2009* (Qld) s 41(1); *Freedom of Information Act 1991* (SA) s 18(1); *Right to Information Act 2009* (Tas) s 19(1); *Freedom of Information Act 1982* (Vic) s 25A(1); *Freedom of Information Act 1992* (WA) s 20(1).

however, “do not provide strong and unequivocal guidance”: *Davies and Department of Prime Minister and Cabinet* [2013] AICmr 10 at [28].

21. The purpose of the Victorian equivalent of s 25(1) of the *Information Act* (NT), namely, s 25A(1) of the *Freedom of Information Act 1982* (Vic), was considered by the Chernov JA of the Court of Appeal of Victoria in *The Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [49].

> *The purpose is, as I have said, to balance the object of the Act to give persons access to government information with the need to ensure that scarce resources of agencies are not substantially and unreasonably diverted from their core activities of implementing government policy in order to deal with voluminous request for information.*

22. Section 25(1) of the *Information Act* (NT) aims to strike a similar balance between the provision of access to government information and the need to ensure that scarce resources of public sector organisations are not unreasonably diverted from their core activities. Section 25(1) allows a public sector organisation to refuse access to the information if to provide such access would constitute interference beyond what, on an objective assessment of the facts of a particular case, is reasonable.

23. In determining what constitutes ‘reasonable’, as opposed to ‘unreasonable’, interference, some guidance can be gleaned from Administrative Appeals Tribunal of Australia (AATA) decision in *SRB and SRC and Department of Health, Housing, Local Government and Community Services* [1994] AATA 79; (1994) 19 AAR 178, wherein the AATA held at [34]:

> *The judicial process of determining the existence of an unreasonable situation was discussed by Wilcox J in Prasad v Minister for Immigration [1985] FCA 47; 65 ALR 549 at 561. In administrative review it is not necessary to show (as was pointed out in Prasad) that the extent of the unreasonableness is overwhelming. It is this Tribunal's task to weigh up the considerations for and against the situation and to form a balanced judgment of reasonableness, based on objective evidence. (cf Searle Australia Pty Ltd v Public Interest Advocacy Centre 108 ALR 163 at 187 and Re Shewcroft and Australian Broadcasting Corporation (1985) 2 AAR 496 at 501).*

24. Given that the *Information Act* (NT) creates a statutory right of access to information held by public sector organisations, it follows that 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]. As the Australian Information Commissioner noted in *Davies and Department of Prime Minister and Cabinet* [2013] AICmr 10 at [28]:

> *Ultimately it is a question of fact in the individual case whether a particular FOI request to the agency or minister imposes, upon them, a 'substantial' and 'unreasonable' workload, viewed in the context of the agency's other operations or the minister's functions.*

25. Similarly, under s 25(1) of the *Information Act* (NT), it is a question of fact in the individual case whether a particular FOI request to a public sector organisation imposes upon that organisation an unreasonable interference with the operations of the organisation. It has been suggested in reported decisions from other jurisdictions[2] that 40 hours is a reasonable presumptive ceiling for determining whether an FOI request constituted a substantial and unreasonable diversion of an agency's resources from its other operations. The Respondent submitted that the same presumptive ceiling of 40 hours should apply to a consideration of s 25(1) of the *Information Act* (NT).

26. I do not agree that such a presumptive ceiling applies to a consideration of s 25(1) of the *Information Act* (NT). The result in any particular inquiry will turn on its individual facts, which mitigates against the application of any such presumptive ceiling. Further, which factors assume importance in any case will depend, unsurprisingly, on the particular facts of the case. For example, if the information sought relates to a matter of significant public importance it may be that it would be reasonable for a public sector organisation to spend more time on that request as compared to a request that is of only personal interest to the applicant. Conversely, however, the "demonstrable importance of the document or documents to the applicant may be a factor in determining what in the particular case is a reasonable time and a reasonable effort": *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137 at [62(b)] (reversed on unrelated grounds: *Cianfrano v Director General, Premier's Department (GD)* [2006] NSWADTAP 48). This simply illustrates that whether providing access would unreasonably interfere with the operations of an organisation depends on the facts of the particular case, and the application of a presumptive ceiling does not shed light on the reasonableness or otherwise of the application.

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[2] 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].

A number of factual matters were raised by both the Complainant and the Respondent, some of which related to the ongoing matters between the parties which were irrelevant to a determination of the issues raised in the Complaint. Of the relevant issues raised, two assumed primary importance in the determination of this case. Those issues were the estimate of time required to process the Complainant's request, and the public interest, if any, in the information sought by the Complainant.

**Estimate of time required to process Complainant's application**

**Respondent's submissions**

27. The estimated time required to process the Complainant's request is difficult to ascertain with certainty in this case given the conflicting evidence presented by the Respondent. In Mr W's letter of 19 September 2014, it was estimated that a total of 161 hours would be required for the Respondent to process the Complainant's application. This estimate was based on a sample search of the electronic and hard copy records of two officers using the search terms requested by the Complainant. Mr W estimated that the records of 40 members of the Respondent's staff fell within the scope of the Complainant's request, but for the purpose of the overall estimate, a more conservative figure of 30 members of the Respondent's staff was chosen. The reason for relying on 30 for the purpose of the estimate was not adequately explained.

28. In the Respondent's submission dated 2 March 2015, it was estimated that approximately 515 hours would be required to process the Complainant's request. The affidavit evidence filed in support of this estimate consisted of the following:

    28.1. affidavit of Witness A, sworn on 2 March 2015, in which A deposes to undertaking a search of the hard copy records of one of the officers of the Respondent falling within the scope of the Complainant's request using the nominated search terms. A deposes to the fact that the search took a total of 10 hours and 28 minutes;
    28.2. affidavit of Witness B, sworn on 2 March 2015, in which B deposes to undertaking a search of the hard copy records of Mr Y using the nominated search terms. B deposes to the fact that the search took a total of 6 hours and 50 minutes;
    28.3. affidavit of Witness C, sworn on 2 March 2015, in which C deposes to undertaking a search of:

28.3.1. two electronic records management systems maintained by the Respondent using the nominated search terms; the TRIM-DET system which indexes hard copy documents, and the TRIM-EDRMS system which indexes electronic records. The time required to conduct this search was 1 hour and 50 minutes;

28.3.2. the email folders, Z Drive and PC user profile of the Mr X of the Respondent using the nominated search terms. In total, these searches took approximately 3 hours and 36 minutes;[3]

28.3.3. the emails of another officer falling within the scope of the Complainant's request using the nominated search terms. In total, these searches took only 13 minutes;

28.4. affidavit of Witness D, sworn on 2 March 2015, in which D deposes to undertaking a search of the electronic documents accessible to the FOI officer of the Respondent on the Respondent's Risk Management file within the Z drive. For reasons which are not clear, D only searched two of the six associated terms to 'cardfightback' and 'Stephen Ferguson' and 'whistleblower'. Why D did not search all of the nominated search terms is not explained. In total, the searches D conducted took 2 hours and 23 minutes.

29. Based on this evidence, the Respondent submits that the average estimated time it would take to conduct the search of the hard copy records of 40 officers is 346 hours, and the searches of electronic records is 129 hours and 50 minutes. For reasons which are not entirely clear, the Respondent's estimate of the time required to conduct electronic searches is based on 20 staff rather than 40 staff.

30. In addition, the Respondent submits that the time expended by officers of the Respondent to prepare the original decision on the Complainant's application must also be included in the estimate of the time it would take to process the Complainant's request. The Respondent estimated the time expended to prepare the original decision to be 39 hours based on an estimate made by Mr X. Mr X, as has been noted above, was the officer of the Respondent who prepared the initial decision.

31. No affidavit evidence of Mr X was relied on by the Respondent at the hearing, and, therefore, there is no basis on which I can determine whether the figure of 39 hours is an accurate estimate. For the purpose of

[3] Not included in this figure is approximately 5 hours of search time expended on searches which did not work, as such searches, it is assumed for the purpose of the overall estimate, would not be conducted in relation to all 40 officers included in the Complainant's request.

this decision, therefore, I have placed no reliance on the estimate of 39 hours.

32. The Respondent's evidence established that, prior to May 2014, it relied on the services of a part time information and privacy officer, but that this position was made full-time in May 2014. Mr Y deposed to the fact that, given the work commitments of other staff in the Corporate Services Division, such staff did not have the capacity to divert attention away from their regular duties for a significant period of time to assist the officer whose responsibility it is to deal with FOI requests.

33. In addition, evidence was led as to the number of applications under the *Information Act* (NT) dealt with by the Respondent during the period the Complainant's request was being processed by the Respondent; 56 applications in total for the 2012-2013 and 2013-2014 financial years, with an additional three applications that were not accepted. Finally, Mr X deposed to the fact that, in the past 12 months, the average time taken to process each application under the *Information Act* (NT) to access information was in excess of 20 hours, however, how much in excess of 20 hours was not stipulated.

**Complainant's submissions**

34. The Complainant took issue with the Respondent's estimate of the time it would take to conduct a search of the hard copy and electronic records based on the search terms stipulated by the Complainant. The primary argument put forward by the Complainant was as follows:

    34.1. the Complainant has, over the years, submitted 40 FOI search requests to the Respondent;
    34.2. cumulatively, the 40 search requests took the Respondent approximately 22 hours to process;
    34.3. 40 is number of staff the Respondent asserts falls within the search request at issue in these proceedings;
    34.4. therefore, the Respondent's estimate of 515 hours to process the FOI request at issue in these proceedings is incorrect.

35. The Complainant also maintained that it is not reasonable to assume that the 40 staff included in the search will have the same amount of material that must be searched. The Complainant submitted, therefore, that it was not reasonable to apply an average time figure across all 40 staff for the purpose of estimating the time required to process the request.

36. Finally, while it appears from the Decision on Prima Facie Evidence at [16] that the Complainant raised with the Delegate of the Information Commissioner the possibility of splitting his FOI request into smaller, more manageable 'chunks', this proposed solution was not pressed in the Complainant's submissions at hearing. In any event, it is not a viable approach to a request that falls within the purview of s 25(1) of the *Information Act* (NT): *Shewcroft and Australian Broadcasting Corporation* [1985] AATA 42; (1985) 2 AAR 96; *Mineralogy Pty Ltd and Department of Industry and Resources* [2008] WAICmr 39 at [68].

**Respondent's Reply**

37. In Reply, the Respondent argued that it would be unsafe to base any conclusions on the previous FOI requests submitted to the Respondent by the Complainant because:

    37.1. generally, there was no evidence that the previous FOI requests were comparable to the FOI request under consideration in this case; and
    37.2. in particular, with one exception, there was no evidence of the search terms on which the previous FOI requests were based.

***Consideration of the estimate of time required to process the application***

38. I agree with the Respondent's submissions that there is a lack of sufficient evidence to establish that the Complainant's previous FOI requests to the Respondent were comparable to the request under consideration in this case. In the circumstances, the fact that the Complainant's 40 earlier FOI requests to the Respondent took only 22 hours to process is irrelevant to a consideration of the Respondent's reliance on s 25(1) in this case.

39. While I agree with the Complainant that no evidence has been led by the Respondent to establish that all 40 staff included within the parameters of the FOI request had the same amount of material to search, s 25(1) of the *Information Act* (NT) does not require that the Respondent lead such evidence. When relying on s 25(1), the Respondent was entitled to rely on a sample size of various files when making its estimate. Provided that the person making the estimate had knowledge of the Respondent's records system and had experience working with the Respondent, such evidence is properly before the decision maker: *Cainfrano v Director General, Premier's Department (GD)* [2006] NSWADTAP 48 at [36].

40. In this case the person making the estimate, Mr Y deposed to the fact that he has held executive positions in the Northern Territory public service

since 1998. Mr Y also deposed to the fact that in the current role, he is responsible for the Corporate Services Division of the Respondent, which comprises the following work units: Finance; Human Resources; IT and Information Services; Planning and Infrastructure; Corporate Communications; Ministerial Liaison/Secretarial; Legal Services; and, Risk Management. I am satisfied that Mr Y had the required knowledge and experience to make an estimate of the time required to process the Complainant's FOI request based on the sample searches conducted. The weight to be given to the estimate provided is a matter for the decision maker based on all the available evidence.

41. Having considered the evidence presented by the Respondent, I find that there is credible evidence to establish that it would take at least 270 hours to conduct a search of hard copy records based on the nominated search terms. This figure is based on 6 hours and 50 minutes per staff member multiplied by 40 staff. I also find that it would take at least 70 hours to conduct a search of the electronic records. This figure is based on 1 hour and 50 minutes to search the Respondent's two electronic records management systems, plus 3 hours and 36 minutes multiplied by 20 staff to search the electronic records of the Respondent's staff falling within the scope of the Complainant's request.

42. When determining whether the estimated total of at least 340 hours required to provide access is an unreasonable interference with the operations of the Respondent, not all the resources of the Respondent should be taken into account. Rather, "what is to be considered is the resources reasonably required to deal with an FOI application with attendance to other priorities": *Challita v NSW Department of Education and Training* [2009] NSWADT 116 at [43] (affirmed *Challita v NSW Department of Education and Training (GD)* [2009] NSWADTAP 70); see also *SRB and SRC and Department of Health, Housing, Local Government and Community Services* [1994] AATA 79; (1994) 19 AAR 178 at [29].

**Relevance of public interest to s 25 of the *Information Act* (NT)**

43. In addition to the estimate of time required to process the Complainant's FOI request, both parties argued that public interest considerations were relevant to a determination under s 25(1) of the *Information Act* (NT). The Respondent suggested that the question of whether providing access to the information requested would unreasonably interfere with the operations of the Respondent has at its core public interest considerations. In support of this proposition, the Respondent relied on

*QVFT and Secretary, Department of Immigration and Citizenship* [2012] AATA 501 at [8]-[9]. In that case, the Tribunal stated:

> *I noted in the first reasons for decision that the question of whether disclosure will be unreasonable has, at its core, "public interest considerations" (and cited the decision of the Federal Court Colakovski v Autralian Telecommunications Corporation (1991) 29 FCR 429).*

44. A careful reading of *QVFT* and *Colakovski* indicates that these comments were made not in the context of the s 24AA(1)(a)(i) of the *Freedom of Information Act 1982* (Cth), which is the Commonwealth equivalent of s 25(1) of the *Information Act* (NT), but, rather, were made in the context of the personal affairs exemption contained in s 41 of the *Freedom of Information Act 1982* (Cth) then in force.[4] To suggest, therefore, that a consideration of s 25(1) of the *Information Act* (NT) always has at its core public interest considerations is stating the proposition too broadly. The importance of public interest considerations will depend on the facts of an individual case.

45. This is not to suggest that a consideration of the public interest is irrelevant to a determination of whether providing access to the requested information would unreasonably interfere with the operations of an organisation. The public interest in the information requested is a relevant factor to consider. As was stated by O'Connor DCJ (President) in *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137[5] at [48]:

> *It seems to me that some regard must be had to the degree of public significance of the matters the subject of the request, and anything that is known about the context to which the application belongs.*

46. In *Cainfrano*, the documents sought related to the restructure and ultimate disposal by the government of the Sydney and Flemington Markets, which clearly was a matter of public interest. The request submitted by the Complainant, in contrast, relates to the government and personal information of the Complainant relating to the word 'cardfightback' and all associated terms, and to the words 'whistleblower' and associated spellings. The Respondent submitted that there was no identifiable public interest arising from the information sought by the Complainant.

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[4] Section 41 of the *Freedom of Information Act 1982* (Cth) was repealed by the *Freedom of Information Amendment (Reform) Act 2010* (Cth) (No 51, 2010), Sch 3, cl 27.

[5] Reversed in part for unrelated reasons: *Cianfrano v Director General, Premier's Department (GD)* [2006] NSWADTAP 48.

47. Apparently, the word 'cardfightback' is associated with a website critical of the Respondent. The Complainant submitted that the information on the site would be of public interest, as would knowing what the Respondent was doing about the claims made on the site. No evidence was led by the Complainant to substantiate the assertion that the information on the site was in the public interest. There is no basis, therefore, on which I can ascertain whether there is any "public significance of the matters the subject of the request".[6]

48. Further, the Respondent submitted that the Complainant's request does not seek any documents relevant to the policies of the Respondent or the implementation of such policies which, depending on the policies sought, may raise a matter of public interest. I agree. The request made by the Complainant relates to the government and personal information of the Complainant relating to the search terms identified, and by its terms does not appear to relate to matters of broader public interest.

49. While the term 'public interest' is not defined in the *Information Act* (NT), the concept of public interest has been described by the Australian Law Reform Commission as,

> *something that is of serious concern or benefit to the public not merely of individual interest. It has also been held that public interest does not mean 'of interest to the public' but 'in the interest of the public'*.[7]

50. There is nothing in the material before me to suggest that the subject matter of the Complainant's FOI request related to a matter 'in the interest of the public'. It was obviously a matter of importance to the Complainant, as the evidence indicated an extensive history of interaction between the Complainant and the Respondent regarding 'cardfightback'. At its core, however, the information sought in the Complainant's FOI request was a matter of individual interest to the Complainant, not in the interest of the public at large.

**Determination regarding s 25(1) of the *Information Act (*NT)**

51. I find that the Respondent was entitled to refuse access to the information sought by the Complainant because providing access would unreasonably interfere with the operations of the Respondent. On an objective view of the facts in this case, the following factors assumed particular importance:

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[6] *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137 at [48].
[7] Australian Law Reform Commission, *Open Government: A review of the federal Freedom of Information Act* (ALRC 77, 1996) at [8.13].

51.1. the fact that it would take the Respondent at least 340 hours to provide the information requested;
51.2. the fact that no public interest in the information requested by the Complainant has been established; and
51.3. the competing commitments of the Respondent's staff.

**Insufficient reasons**

52. The Complainant alleges that Mr X, in his letter of 9 December 2013, failed to provide sufficient reasons for refusing the FOI request. Mr X, as has been noted above, was the author of the notice of decision provided to the Complainant by the Respondent pursuant to s 19 of the *Information Act* (NT).

53. Pursuant to s 19(2) of the *Information Act* (NT), a notice provided to an applicant under s 19(1)(b) must be in accordance with s 20 of the Act. Section 20 provides that a notice of decision is to contain "the matters required to be specified under sections 21 to 30", and a statement setting out the applicant's right to review that decision under Division 4 of Part 3 of the Act.

54. Mr X's letter of 9 December 2013 sets out the detail of the information requested, the attempts made to vary the scope of the application, the statutory basis on which the application was refused together with a copy of the section relied upon by the Respondent to refuse access, and a statement outlining the formal procedure for review. The basis upon which the Respondent determined that the Complainant's request would unreasonably interfere with the operations of the Respondent was not provided in the initial notice.

55. In the Decision on Prima Facie Evidence dated 2 September 2014, the delegate of the Information Commissioner stated at [19]:

> *When considering section 25, the Act does not specifically require the initial decision maker to provide reasons for decision at first instance. In an administrative matter such as this however, where the decision has serious consequences on the complainant's ability to access government information, the provision of reasons for decision to the Complainant would normally be considered to be a reasonable expectation.*

56. I agree that some explanation of why providing access to the information requested would unreasonably interfere with the operations of the

Respondent should have been provided to the Complainant in the initial notice. One object of the *Information Act* (NT) is to create a general right of access to information held by public sector organisations, limited only by specified exceptions and exemptions.[8] At the very least, this requires those handling access applications to adopt "a general attitude favourable to the provision of the access claimed": *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 at 627. When access was denied based on an assertion that providing the information would unreasonably interfere with the Respondent's operations, the Complainant was entitled to be informed of the factual basis upon which the Respondent believed s 25(1) applied in the particular case.

57. A failure to give sufficient reasons for the refusal of access under s 25(1) was also evident in the internal review of the initial decision conducted by Mr Z. Pursuant to s 41(a) of the *Information Act* (NT), the Respondent had a statutory obligation to include reasons for the outcome. When a statutory requirement to provide reasons exists, this "must be read as meaning that proper, adequate reasons must be given": *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478, which was cited with approval in *Dornan v Riordan* (1990) 24 FCR 564 at 573.

58. While, as has been noted above, the generic factors that influenced the decision to uphold the initial decision were stated, no specific information was provided to the Complainant as to why the provision of access to the information requested would unreasonably interfere with the operations of the Respondent. As was stated in *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137 at [11]:

> *It will be seen that* [the Director General, Premier's Department] *did not give any reasons in support of the claim relating to unreasonable diversion of staff resources. This, in the Tribunal's view, is unsatisfactory. An agency should provide the particulars that have led it to such a conclusion. Otherwise the applicant is not in a position to make any assessment of the agency's justification, leading to the possibility that the dispute will be forced to the Tribunal, and the Tribunal's processes become the vehicle through which reasons are obtained.*

59. The processes of the OIC were the vehicle through which reasons for refusing access under s 25(1) were finally provided to the Complainant. Such information was only provided to the Complainant in the Respondent's 19 September 2014 letter to the OIC, which was after the

[8] *Information Act* (NT) s 3(a)(ii).

Decision on Prima Facie Evidence was handed down. This is unsatisfactory, and contrary to the express requirement in s 41(a) of the *Information Act* (NT) to include proper, adequate reasons for the decision reached on internal review.

**Decision**

60. Having regard to the following factors, I find that the work involved in providing access to the information requested by the Complainant would unreasonably interfere with the operations of the Respondent within the meaning of s 25(1) of the *Information Act* (NT):

    60.1. the estimated time it would take the Respondent to provide the information requested;
    60.2. the fact that no public interest in the information requested by the Complainant has been established; and
    60.3. the competing commitments of the Respondent's staff.

61. Under s 114(1) of the *Information Act* (NT), I:

    61.1. confirm the decisions of the Respondent dated 9 December 2013 and 29 January 2014 to refuse access to the information requested pursuant to s 25(1) of the Act;
    61.2. find that the Respondent, in its decisions of 9 December 2013 and 29 January 2014, failed to give to the Complainant sufficient reasons for refusing his FOI request.

62. Under s 114(2) of the *Information Act* (NT), I can make orders that I consider are necessary or incidental to give effect to a decision under s 114(1). If I had the power I would have ordered that the Respondent provide to the Complainant a written apology for failing to give the Complainant sufficient reasons for refusing the Complainant's FOI request pursuant to s 25(1) of the *Information Act* (NT). I do not consider, however, that such an order is necessary or incidental to give effect to my decision under s 114(1), and, therefore, no such order will be made in this case.

**……**
Leslie Alexander McCrimmon
**Hearing Commissioner**

06/05/2015