



Your Ref
Our Ref LEX 638

'Me'
Right to Know

By email: foi+request-10170-5b0553d2@righttoknow.org.au

Dear Me

Your Freedom of Information request - charge decision

I refer to your request, received by the Department of Education (department) on 17 April 2023, for access under the *Freedom of Information Act 1982* (Cth) (FOI Act) to the following documents:

1. Any emails or written correspondence that are:
 - a. dated 7 March - 29 November 2022, and
 - b. related to the amendment to s 67CC(2) (including documents that do not directly mention s 67CC(2) but form part of the considerations that resulted in an amendment to s 67CC(2) being sought), and
 - c. not already released via [FOI request to Services Australia with reference number] LEX71589, and
 - d. sent or received by an entity acting on behalf of the Department of Education (e.g., employee, contractor, etc.). This includes emails or written correspondence sent directly to or received directly from an external source (e.g., a minister's office).
2. Any documents in the possession of the Department of Education that explain or could be perceived to explain why, from page 2, 'we [the Department of Education?] are looking at amending s 67CC(2)(d)'
3. Any documents in the possession of the Department of Education that confirm who the 'we' is in 2 above
4. Any documents in the possession of the Department of Education, not covered by point 2 above, that provide information as to what caused, prompted, or contributed to, the Department of Education making the 28 July 2022 request for advice (page 2).
5. I am not clear whether the 'comprehensive layperson explanation for internal use only' was later published. Assuming it was not published, or that the internal version is different to

the published version, I request the final version of the 'comprehensive layperson explanation for internal use only'.

6. A document setting out, from page 5, any/all 'Minister's Rule changes by 1 July 2023' that are consequent to or otherwise relate to the amendment to s 67CC(2)

7. [A document containing] The names of any CCS claimants, where the Department of Education considered those claimants' claims as part of considering s 67CC(2) amendments (e.g., as an example of why the amendment was needed, or a case study of what the amendment would achieve, or similar). I will grant extensions of time to consult with the relevant third party CCS claimants

8. To the extent not included in point 5 above, a copy of (from page 9) 'the taper graph demonstrating the new CCS rates and a very handy layperson explanation of the amendments in the ED'

9. Documents that set out why the Department of Education thought it mattered to make it so that, from page 15 at [73], 'It would not matter whether or not the child received care for which another individual was receiving CCS.'

10. Documents that set out why, from page 15 at [74], the 'policy intent' needed to be clarified.

11. Documents... that consider and/or justify, from page 15 at [75], the retrospective application of the amendment.

12. Copies of any emails or written correspondence related to [FOI request to Services Australia with reference number] LEX71589 that were sent or received by an SES or equivalent (regardless of which department the SES worked for, and regardless of whether they were in the 'to', 'from', 'cc', or 'bcc' field).

13. Copies of any emails or written correspondence related to [FOI request to Services Australia with reference number] LEX71589 that were sent or received by a minister, minister's office, or ministerial staff (regardless of which minister, and regardless of whether they were in the 'to', 'from', 'cc', or 'bcc' field).

14. Correspondence internal to the Department of Education related to [FOI request to Services Australia with reference number] LEX71589

15. Correspondence sent to/from the Department of Education/Services Australia and vice versa related to [FOI request to Services Australia with reference number] LEX71589

Scope of your request

As advised in the charge notice issued to you on 1 May 2023, we have included some additional text, in square brackets, in some parts of your request to indicate our interpretation of the scope of these parts.

We also advised you that, for efficiency, we have excluded duplicate documents and only included final email chains (rather than each individual email separately) in the scope of your request and calculated the charge on that basis. We invited you to let us know if you did not agree with this approach in a response to the charge notice. As you have not advised otherwise, we will proceed on the basis that you have no concerns about this approach.

In an email dated 2 May 2023 following correspondence with the department, you asked whether excluding part 15 of your request would be 'sufficient to fall under the charge threshold and/or for DoE to voluntarily waive the charge.'

In response, amongst other things, the department advised you that if you were to revise the terms of your request to remove part 15, the charge would be recalculated and reduced to reflect the fewer number of pages captured by the scope of your request. As you have not advised that you wish to revise your request in this manner, we will proceed on the basis that part 15 remains part of your request.

My decision

I have decided to affirm the imposition of the charge. However, I have recalculated the charge and the adjusted charge is \$290.00 (adjusted charge).

The reasons for my decision, including relevant sections of the FOI Act, are set out at **Attachment A**.

Payment details

If you would like the department to continue processing your request, you must respond to the department within 30 days after receiving this notice. If you do not respond within 30 days, your request will be taken to have been withdrawn and no further action will be taken by the department.

As the adjusted charge exceeds \$25, you are required to pay a deposit of \$72.50, which is 25% of the total adjusted charge amount, within 30 days of receiving this notice. You may, of course, elect to pay the adjusted charge in full at this point.

Payment can be made by credit card by completing the attached credit card authorisation and sending a scanned copy to foi@education.gov.au.

If you are unable to pay by credit card, please contact us on the above email.

Time limits for processing your request

Under the FOI Act, the time limit for processing your request was suspended from the day you received the department's preliminary assessment of the charge. As I have decided to affirm the imposition of the charge, the time limit for processing your request remains suspended until the day following payment of the adjusted charge (in full or the required deposit) or, if applicable, the day following a decision not to impose the adjusted charge.

You can ask for a review of my decision

If you disagree with any part of the decision, you can ask for a review. There are two ways you can do this. You can ask for an internal review by the department or an external review by the Australian Information Commissioner.

You can find information about your rights of review under the FOI Act, as well as information about how to make a complaint at **Attachment B**.

Further assistance

If you have any questions, please email foi@education.gov.au.

Yours sincerely

Alison

Alison
Authorised decision maker
Freedom of Information Team
Department of Education

27 June 2023

REASONS FOR DECISION

Preliminary matters

In your correspondence dated 28 May 2023, you make several contentions that the charge is 'void'. Specifically, you contend as follows:

The relevant guideline further state [sic] that 'charges are discretionary and should be justified on a case by case basis', and 'the notice to an applicant of a charge fully explains and justifies the charge'. DoE's letter dated 1 May 2023 gives no such justification. It simply says 'I [the decision-maker] have decided you are liable to pay a charge.' Given the 1 May 2023 letter fails to fulfil a mandatory requirement, the decision is infected with jurisdictional error and therefore no decision at all. Consequently, the statutory timeframes for dealing with this FOI request were not 'paused', and DoE has exceeded those timeframes. Charges cannot be imposed on an FOI request that is out of time. Further, at this stage the FOI request is, arguably, deemed to be refused. Should the DoE decide to proceed with the request at no charge within 28 days of this letter, I will not use the deemed refusal as a basis to seek review.

The relevant guideline further states 'a charge must not be used to unnecessarily delay access or to discourage an applicant from exercising the right of access conferred by the FOI Act'. Given that there is no stated justification for the charge, and that Services Australia is processing a near identical FOI request at no charge, and that I know for other reasons that Services Australia disagrees with DoE's instructions to Services Australia regarding s 67CC(2) such that the documents in question could embarrass DoE, it is reasonable to conclude that a contributing factor for DoE to impose a charge is to make access more difficult. This is a mandatory irrelevant consideration, and its consideration similarly makes the decision to impose a charge void for jurisdictional error and prohibited because a decision on the FOI request itself is consequently out of time.

As previously advised, under section 29 of the FOI Act, an agency may impose a charge in respect of a request for access to a document or for providing access to a document. The charge must be assessed in accordance with the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations).

As summarised in the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines), section 29(1) of the FOI Act provides that an applicant must be given a notice in writing when an agency decides the applicant is liable to pay a charge set out in Schedule 1 of the Charges Regulations. Section 29(1) of the FOI Act provides as follows:

(1) Where, under the regulations, an agency or Minister decides that an applicant is liable to pay a charge in respect of a request for access to a document, or the provision of access to a document, the agency or Minister must give to the applicant a written notice stating:

(a) that the applicant is liable to pay a charge; and

- (b) the agency's or Minister's preliminary assessment of the amount of the charge, and the basis on which the assessment is made; and
- (c) that the applicant may contend that the charge has been wrongly assessed, or should be reduced or not imposed; and
- (d) the matters that the agency or Minister must take into account under subsection (5) in deciding whether or not to reduce, or not impose, the charge; and
- (e) the amount of any deposit that the agency or Minister has determined, under the regulations, that the applicant will be required to pay if the charge is imposed; and
- (f) that the applicant must, within the period of 30 days, or such further period as the agency or Minister allows, after the notice was given, notify the agency or Minister in writing:
 - (i) of the applicant's agreement to pay the charge; or
 - (ii) if the applicant contends that the charge has been wrongly assessed, or should be reduced or not imposed, or both--that the applicant so contends, giving the applicant's reasons for so contending; or
 - (iii) that the applicant withdraws the request for access to the document concerned; and
- (g) that if the applicant fails to give the agency or Minister such a notice within that period or further period, the request for access to the document will be taken to have been withdrawn.

The charge notice issued to you on 1 May 2023 addressed each of the matters listed above and included a table on page 3 setting out the preliminary assessment of the charge as well as the basis on which the assessment was made. This table stated that the charge was calculated using an estimate of 6 hours search and retrieval time at a rate of \$15.00 per hour (totalling \$90.00) and 11.5 hours decision-making time including consultation with relevant third parties, after the deduction of 5 hours at a rate of \$20.00 per hour (totalling \$230.00). Further, beneath the table, you were advised as follows:

On the basis that duplicate documents are excluded from the scope of your request and only final email chains are included in the scope of your request (as discussed above), I am advised that the department has in its possession approximately 20 documents with approximately 155 pages relevant to your request.

Accordingly, the charge notice set out both the preliminary assessment of the charge and the basis for the calculation, consistent with the relevant requirements of the FOI Act and was, thus, issued in accordance with the FOI Act. On this basis, the statutory timeframe was validly suspended from the day the charge notice was issued such that there was no 'deemed refusal' of your FOI request to void the issuing of a charge.

In your email dated 28 May 2023, you state that 'there is no stated justification for the charge'. As noted above, the charge notice issued to you on 1 May 2023 addressed each of the matters set out in section 29(1) of the FOI Act and included a break down of how the charge was calculated. Section 29(1) of the FOI Act does not require any further justifications for the

imposition of the charge and, as previously advised, the decision to impose a charge is discretionary. On this basis, the charge was validly issued under the FOI Act.

What you requested

1. Any emails or written correspondence that are:
 - a. dated 7 March - 29 November 2022, and
 - b. related to the amendment to s 67CC(2) (including documents that do not directly mention s 67CC(2) but form part of the considerations that resulted in an amendment to s 67CC(2) being sought), and
 - c. not already released via [FOI request to Services Australia with reference number] LEX71589, and
 - d. sent or received by an entity acting on behalf of the Department of Education (e.g., employee, contractor, etc.). This includes emails or written correspondence sent directly to or received directly from an external source (e.g., a minister's office).
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3. Any documents in the possession of the Department of Education that confirm who the 'we' is in 2 above
4. Any documents in the possession of the Department of Education, not covered by point 2 above, that provide information as to what caused, prompted, or contributed to, the Department of Education making the 28 July 2022 request for advice (page 2).
5. I am not clear whether the 'comprehensive layperson explanation for internal use only' was later published. Assuming it was not published, or that the internal version is different to the published version, I request the final version of the 'comprehensive layperson explanation for internal use only'.
6. A document setting out, from page 5, any/all 'Minister's Rule changes by 1 July 2023' that are consequent to or otherwise relate to the amendment to s 67CC(2)
7. [A document containing] The names of any CCS claimants, where the Department of Education considered those claimants' claims as part of considering s 67CC(2) amendments (e.g., as an example of why the amendment was needed, or a case study of what the amendment would achieve, or similar). I will grant extensions of time to consult with the relevant third party CCS claimants
8. To the extent not included in point 5 above, a copy of (from page 9) 'the taper graph demonstrating the new CCS rates and a very handy layperson explanation of the amendments in the ED'
9. Documents that set out why the Department of Education thought it mattered to make it so that, from page 15 at [73], 'It would not matter whether or not the child received care for which another individual was receiving CCS.'
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12. Copies of any emails or written correspondence related to [FOI request to Services Australia with reference number] LEX71589 that were sent or received by an SES or equivalent (regardless of which department the SES worked for, and regardless of whether they were in the 'to', 'from', 'cc', or 'bcc' field).

13. Copies of any emails or written correspondence related to [FOI request to Services Australia with reference number] LEX71589 that were sent or received by a minister, minister's office, or ministerial staff (regardless of which minister, and regardless of whether they were in the 'to', 'from', 'cc', or 'bcc' field).

14. Correspondence internal to the Department of Education related to [FOI request to Services Australia with reference number] LEX71589

15. Correspondence sent to/from the Department of Education/Services Australia and vice versa related to [FOI request to Services Australia with reference number] LEX71589

On 20 April 2023, the department contacted you about your original request. In this correspondence, the department advised you, amongst other things, that it would treat the names, signatures, position titles, staff identification numbers and direct contact details of Commonwealth employees as irrelevant in accordance with section 22 of the FOI Act, unless you advised otherwise.

On the same day, you responded to this email and advised as follows:

I'm happy for APS and EL staff details to be redacted.

For SES, I don't agree to their names being redacted (although I do agree) to redacting their context numbers and similar).

On 1 May 2023, the department sent you a preliminary assessment of the charge payable to process your request. On the same day, you asked for further information about how the charge was calculated.

On 2 May 2023, the department advised you that the charge is not calculated based on individual parts of your FOI request and provided you with a further explanation about the basis on which the preliminary assessment of the charge payable for the processing of your request was calculated. The department also responded to your question about whether one part of your request accounted for the majority of the pages captured by the scope of your request by advising you that the majority of pages fall within the scope of part 15 of your request.

As noted previously in this letter, on 2 May 2023, you asked whether excluding part 15 from the scope of the request would be 'sufficient to fall under the charge threshold and/or for DoE to voluntarily waive the charge.'

The department provided you with further information about the basis on which charges are calculated, including that there is no 'charge threshold' in the manner you described in your 2 May 2023 email. The department also advised you that it would recalculate the charge if you were to revise the terms of your request to remove part 15.

On 4 May 2023, you provided commentary about the FOI process and asked whether the department 'intends to continue requiring a processing charge.'

On 8 May 2023, the department advised you that the processing charge has been imposed consistent with the charges regime provided under the FOI Act and the Charges Regulations. The department also referred you to the options available to you in responding to the charge notice as set out in the letter sent to you on 1 May 2023, including your option to seek reduction or non-imposition of the charge.

On 28 May 2023, you sought waiver of the charge on the basis that access to the documents is in the general public interest and the interest of a substantial section of the public. You also raised other issues regarding the validity of the charge notice and I have addressed these in the discussion appearing earlier in this decision.

What I took into account

In reaching my decision, I took into account:

- your original request dated 17 April 2023
- other correspondence with you, including your request for waiver of the charge dated 28 May 2023
- the documents that fall within the scope of your request
- consultations with departmental officers about the nature of the documents and the operating environment and functions of the department
- the FOI Guidelines
- the Charges Regulations
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided to affirm the imposition of the charge. I have recalculated the charge and the adjusted charge is \$290.00. My findings of fact and reasons for this decision, as well as how the adjusted charge was calculated, are discussed below.

Preliminary assessment of charge

On 1 May 2023, I wrote to you to advise you that I had decided to impose a charge of \$320.00 for processing your request.

My preliminary assessment of that charge was calculated as follows:

Search and retrieval time: 6 hours, at \$15.00 per hour

\$90.00

Decision-making time (*after deduction of 5 hours): 11.5 hours, at \$20.00 per hour

\$230.00

TOTAL **\$320.00**

*The FOI Act provides that the first five hours of decision-making time are free of charge and this is reflected in the calculation.

As a preliminary matter, I have reviewed my calculation of the charge.

On review, I have noted that some publicly available information was included in the calculation of the preliminary assessment of the charge. Accordingly, I have excluded this publicly available material from the calculation of the charge and have re-assessed the calculation of the charge as follows:

Search and retrieval time: 6 hours, at \$15.00 per hour \$90.00

Decision-making time (*after deduction of 5 hours): 10 hours, at \$20.00 per hour \$200.00

TOTAL **\$290.00**

*The FOI Act provides that the first five hours of decision-making time are free of charge, and this is reflected in the calculation.

To assist you to understand how the adjusted charge was calculated, I note that the publicly available information is contained in attachments to email correspondence. Accordingly, the exclusion of this information does not affect the number of documents captured by the scope of the request, nor does it reduce the time taken to search for and retrieve these documents. As such, the difference between the preliminary assessment of the charge and the adjusted charge is a reduction in the decision-making time from 11.5 hours to 10 hours.

Your contentions

On 28 May 2023, you contended that the charge for processing your request under the FOI Act should be reduced or not imposed on the grounds of public interest. Specifically, your correspondence provided:

It is also in the general public interest, as set out in FOI Act s 3(2)(a). The DoE made various decisions about s 67CC(2), potentially contrary to the advice of Services Australia, and while proceedings were on foot. Disclosing the documents is the only way for the public to understand what decision the DoE made and why. Therefore, disclosing the documents is the only way for the public to be able to provide input that could lead to 'better-informed decision-making'.

It is also in the general public interest, as set out in FOI Act s 3(2)(b). The government's decisions around s 67CC(2) and childcare subsidies are of particular public interest. They were an issue at the most recent federal election, and election promises were made about them. How the DoE has chosen to understand and action the government's instructions about these election promises is necessary for the public at large to fully participate in Australia's representative democracy.

Substantial section of the public

The amendments to s 67CC(2) are directly relevant to a substantial section of the public. A cohort of the public was entitled to more child care subsidy before the amendments than after them. These documents will directly inform that cohort as to what their CCS entitlement was and when.

In particular, despite that cohort being entitled to more CCS before the amendments, neither Services Australia nor DoE has or is undertaking to rectify the underpayment of CCS to that cohort. Disclosure of these documents will assist that cohort to understand why they were underpaid and remain underpaid.

Altogether, the original decision to impose a charge is no decision at all. As a result, the DoE's decision on the FOI request itself is out of time. Therefore, a charge cannot be imposed. Even if the charge decision is valid and the FOI request is still within time, a charge should not be imposed because it's in the interest of a substantial section of the public and the public in general to provide access to the documents.

Financial hardship

Under section 29(5)(a) of the FOI Act, I am required to consider whether payment of the adjusted charge would cause financial hardship to you.

Paragraph 4.101 of the FOI Guidelines relevantly provides:

Financial hardship exists when payment of the debt would leave you unable to provide food, accommodation, clothing, medical treatment, education or other necessities for yourself and your family, or other people for whom you are responsible.

You have not contended that payment of the charge, in full or in part, would cause you financial hardship. Accordingly, there is no basis upon which I can make a decision to reduce or not impose the adjusted charge on financial hardship grounds.

Public interest

Under section 29(5)(b) of the FOI Act, I am required to consider whether giving access to the documents would be in the general public interest or the interest of a substantial section of the public.

Paragraph 4.107 of the FOI Guidelines relevantly provides:

An applicant relying on s 29(5)(b) should identify or specify the general public interest or the substantial section of the public that would benefit from this disclosure (s 29(1)(f)(ii)). This may require consideration both of the content of the documents requested and the context in which their public release would occur. Matters to be considered include whether the information in the documents is already publicly available, the nature and currency of the topic of the public interest to which the documents relate, and the way in which a public benefit may flow from the release of the documents.

The FOI Guidelines also note at paragraph 4.109 that the 'public interest' is a broad concept that cannot be exhaustively defined. The FOI Guidelines provide examples that illustrate the circumstances in which the giving of access may be in the general public interest or in the interest of a substantial section of the public. These include where:

- the document relates to a matter of public debate, or a policy issue under discussion within an agency, and disclosure of the document would assist public comment on or participation in the debate or discussion, and
- the document will add to the public record on an important and recurring aspect of agency decision making.

The documents to which you have sought access relate to amendments made to section 67CC(2) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the FA Administration Act) and why these amendments were proposed. While I accept that there is a public interest in the Child Care Subsidy and the changes to the Child Care Subsidy recently announced by the Government, particularly to those families affected by the amendments, I am not satisfied the documents requested would materially advance public discussion or debate about these issues. I am advised that there is a large volume of publicly available material explaining the amendments to the FA Administration Act, including, in particular, the Explanatory Memorandum and the Minister's second reading speech about the measures contained in the Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022, which amended the FA Administration Act. This material is publicly available on the Australian Parliament House website and, I am advised, sets out the reasoning behind the amendments. I am further advised that there is also information available on the department's website about the changes to the Child Care Subsidy. On this basis, I do not consider a material public benefit would flow from the release of the documents and, accordingly, I am not persuaded that giving access is in the general public interest or the interest of a substantial section of the public.

Other matters

Under section 29(5) of the FOI Act, I may take into account other matters in determine whether or not to impose the charge.

As set out above, I have reviewed the preliminary assessment of the charge and have recalculated the charge to exclude publicly available information from the calculation. The adjusted charge was calculated on the basis that it would take the department an estimated 6 hours to search for and retrieve documents within the scope of your request. The adjusted charge also included an estimate of 15 hours to make a decision on your request. For the purpose of calculating the adjusted charge, the decision-making time is reduced to 10 hours after the deduction of five hours free decision-making time.

The decision-making process will include examining each page captured by the scope of your request to make a decision on access, redacting pages, consulting with other Australian Government agencies, consulting with departmental officers and writing a statement of reasons of the decision.

The amount of a charge should reflect an appropriate contribution towards the time and effort involved in processing the request. I am satisfied that the adjusted charge represents a conservative contribution towards the cost of processing your FOI request, taking into account the above factors.

Conclusion

For the reasons set out above, I have decided not to alter the charge by reduction or non-imposition on the grounds of financial hardship or public interest. However, I have recalculated the charge and the adjusted charge is \$290.00.

YOUR RIGHTS OF REVIEW

Asking for a formal review of an FOI decision

If you believe the decision is incorrect, the FOI Act gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

- an internal review officer in the department and/or
- the Australian Information Commissioner.

There are no fees for applying for a formal review.

Applying for an internal review by an internal review officer

If you apply for internal review, a different decision maker to the decision maker who made the original decision will review your request. The internal review decision maker will consider all aspects of the original decision afresh and decide whether the decision should change.

An application for internal review must be made in writing within 30 days of receiving this letter. You can lodge your application by email to foi@education.gov.au.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can lodge your application in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Complaints to the Australian Information Commissioner

Australian Information Commissioner

You may complain to the Australian Information Commissioner about action taken by an agency in the exercise of powers or the performance of functions under the FOI Act.

A complaint to the Australian Information Commissioner must be made in writing and can be lodged in one of the following ways:

Online:

https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Email: foidr@oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001