



Australian Government
Department of Defence

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FOI 180/15/16

Ms Jane Quinn

By email: foi+request-1462-d453f53c@righttoknow.org.au

Dear Ms Quinn

NOTICE OF DECISION ON REQUEST FOR REVIEW OF CHARGES

1. I refer to your request of 29 December 2015, which we received on 4 January 2016, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

I am requesting the original application documents, approved protocols and any documented amendments relating to the ADHREC protocols numbered 249/01, 216/00 and 292/02.

Liability to pay charges

2. By letter, dated 5 January 2016 you were advised that, in accordance with section 29 of the FOI Act, I had deemed you liable to pay a charge for the processing of your request and for giving access to the requested documents.

3. By email, dated 6 January 2016, you sought a review of the charges associated with your request on public interest grounds.

Decision maker

4. By arrangements made by Defence under section 23 of the FOI Act, I am authorised to decide on your request for waiver of the processing charges.

Material taken into account

5. In coming to my decision, I had regard to:

- a. your submission in support of remission of the charges;
- b. the relevant provisions of the FOI Act;
- c. the relevant provisions of the FOI (Charge) Regulations;
- d. the Guidelines published by the Office of the Australian Information Commissioner.

Relevant legislation – subsection 29(5) of the FOI Act

6. Subsection 29(5) of the FOI Act provides as follows:

Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charges, the agency or Minister must take into account:

- a. whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the applicant was made; and*
- b. whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.*

Consideration of financial hardship

7. As noted above, I am required to take into account whether access to the requested documents would cause you any financial hardship.

8. The Guidelines provide the following advice:

Whether payment of a charge would cause financial hardship to an applicant is primarily concerned with the applicant's financial circumstances and the amount of the estimated charges. Financial hardship means more than an applicant having to meet a charge from his or her own resources.

An applicant relying on this ground could ordinarily be expected to provide some evidence of financial hardship. For example, the applicant may rely upon (and provide evidence of) receipt of a pension or income support payment; or provide evidence of income, debts or assets.

9. When considering whether to waive a debt due to the Commonwealth, the Department of Finance and Deregulation provides the following definition of financial hardship (in the context of deciding whether to waive a debt):

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 or your family, or other people for whom you are responsible.¹

10. In the absence of any such information in relation to your request I am not satisfied that the payment of the charge, or part of it, would cause you any financial hardship.

Consideration of public interest

11. In relation to 'public interest' considerations, Part 4 - Charges for providing access, paragraphs 4.51- 4.53 of the Guidelines state as follows:

4.51 The Act requires an agency or minister to consider 'whether the giving of access to the document in question is in the general public interest or in the interest of substantial section of the public' (s29(5)(b)). The issue is not whether it is in the public interest to waive or reduce a charge, nor whether it is in the public interest for a particular applicant to be granted access to a document ...

4.52 ... The FOI applicant may benefit from disclosure, but for the purposes of s29(5)(b) there should also be benefit flowing more generally to the public or a substantial section of the public. This will ordinarily require consideration both of the content of the documents and the context of their release -for example, whether the documents relate to a matter of public debate or decision by government.

12. Part 4 - Charges for providing access, paragraph 4.56 of the Guidelines also states as follows:

4.56 ... an agency or minister may also consider whether the range or volume of documents requested by an applicant could be considered reasonably necessary for the purpose of contributing to public discussion...

13. Your email states *these documents will be used for academic research purposes, research which is widely applicable to the general public.* However, you have neglected to explain how the requested material would be applicable to the general public.

14. I note that the three protocols you refer to in your request relate to Malaria. In considering your request for waiver, I turned my mind to Malaria in Australia and found that Malaria was effectively eradicated in the early 1980's. The New South Wales (NSW) Government, in particular NSW Health make available a fact sheet relating to Malaria, in which they advise that (in 2012) approximately 500 cases of Malaria are diagnosed in Australia each year, it further explains that almost all are people who have travelled to Malaria affected countries and didn't take ant-malarial medications. It is my opinion that it therefore follows that the wider Australian community would not routinely be prescribed the medication in question and accordingly the material released would not generally or directly benefit a substantial section of the public.

15. I also took into account that the protocols that you have requested range from 2000 – 2002. I consider that the material would be considered a historical record and does not necessarily portray current and contemporaneous research methodology.

16. Finally, I have also taken into account that the research protocols were tailored to operational Australian Defence Force use at the time of deployment to tropical or sub-tropical areas.

Other considerations

17. I contacted the action area who would be responsible for the processing of your request to discuss the estimate that was originally provided. The area advised that since providing the estimate they had physically located the documents and found that there was well in excess of 100 pages of documents that would need to be considered. Further, the original estimate did not take into account that formal third party consultation will be required.

Charges decision

18. I took into account the guidelines at paragraph 4.58, which states that *the document is required for research purposes for which no commercial benefit will flow to the applicant*. Your email stated that the documents would be used for academic research purposes, however you did not address whether you expect to gain a commercial benefit. I also do not consider that you have sufficiently argued that disclosure would be in the general public.

19. Paragraph 4.11 of the guidelines state *agencies and minister's offices should be guided by the 'lowest reasonable cost' objective in the FOI Act*. After taking all of the above into consideration, I do not consider that the charge is prohibitive when I balance the processes that will be required to be undertaken to process this request. Accordingly, I have decided to impose the charge at \$305.00 as originally estimated.

Way forward

20. If you agree with my decision, and wish to proceed, a deposit of **\$76.25** is required. The deposit is not refundable except in some limited circumstances (for example, if Defence fails to make a decision on your request within the statutory time limit), or may be refundable in part if the final charge is less than the deposit paid.

21. Please complete the authorisation form at Enclosure 1 and return it to the FOI Directorate by 6 March 2016. Upon receipt of the form an invoice will be generated, which may take up to five business days. Details about payment of the invoice are on the form. Our office will not process your request until a receipt is received in our office notifying that the deposit amount has been paid. If you do not respond to this letter within 30 days of receiving it (or by a later deadline if we give you an extension), we will take it that you have withdrawn your request.

22. Alternatively, if you disagree with my decision, you are entitled to apply for internal review of my decision to impose the charges. Such an application should be made within 30 days of receipt of this letter or such further time as the Department may allow. The fact sheet "Freedom of Information – Your review Rights" is at Enclosure 2.

Further advice

23. The Act may be accessed online at <https://www.comlaw.gov.au>

24. Please contact me if you have any question in relation to this matter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'T. Stinson', with a stylized flourish at the end.

Theresa Stinson
Assistant Director – Media Case Management
Freedom of Information

5 February 2016

Enclosures:

1. Payment Authorisation form - Deposit
2. Fact Sheet: Freedom of Information – Your Review Rights