



Australian Government
Department of Defence

Reference: Objective ID: R27481374

FOI 180/15/16 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to Ms Jane Quinn's email received on 13 September 2016, in which it was interpreted that she sought an internal review under paragraph 53A(e) of the *Freedom of Information Act 1982* (FOI Act) of Mrs Theresa Stinson's, Assistant Director, Freedom of Information decision on 5 February 2016, to impose charges in the amount of \$305.00.

2. The applicant's request was for access to the following documents under the FOI Act:

"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"

Contentions that charges should be waived

3. On 5 February 2016, the applicant contended that *'public disclosure of materials related to clinical trials is always in the public interest, no matter how much time has elapsed since their undertaking, to ensure transparency of process and outcomes'*.

4. The applicant also stated *'recent historical reanalysis of trials which investigated efficacy and safety of Paroxetine would indicate that the workings and administration of such trials should always be freely available for public scrutiny, and is absolutely in the public interest'*.

Reviewing officer

5. I am authorised to make this internal review decision under arrangements approved by the Secretary for Defence under section 23 of the FOI Act.

Internal review decision

6. I have made a fresh decision and for the reasons given below, I have decided not to waive the charges associated on public interest grounds. As such, I have upheld Mrs Stinson's decision to impose charges in the amount of \$305.00.

Material taken into account

7. In reaching my decision, I referred to the following:
- a. the applicant's submission in support of remission of the charges dated 6 January 2016;
 - b. terms of the application for an internal review of charges received on 12 September 2016;
 - c. a sampling of the documents subject to the FOI request;

- d. the relevant provisions of the FOI Act;
- e. the relevant provisions of the FOI (Charges) Regulations; and
- f. the Guidelines on ‘*Charges for providing access*’ published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Considerations in making my decision

8. When an applicant seeks reduction or waiver of the charge, in response to a notice under section 29(5) [Charges] of the FOI Act, the decision maker 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 request 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.

9. An agency also has a general discretion to reduce or not impose a charge, and this discretion is not limited to financial or public interest grounds.

10. In the absence of any such information, I am not satisfied that the payment of the charges, or part of it, would cause the applicant any financial hardship.

Guiding principles taken into account

11. I acknowledge that one of the principal objects of the FOI Act is, as far as possible, to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information held by government. However, the FOI Act does not go so far as to say access to information should be free of any cost to the applicant. An agency is required when processing an FOI request to determine whether an applicant is liable to pay a charge.

12. In considering the application for *internal review*, I have also referred to the Guidelines, specifically *Part 4 – Charges for providing access*, which contain guidance about the imposition of charges. In relation to the general guiding principles involved, I have taken into account the following information referred to in paragraphs 4.2 and 4.3, which state as follows:

‘4.2 An agency or minister **has a discretion to impose or not impose a charge**, or impose a charge that is lower than the applicable charge **under reg 3 of the Charges Regulations**. In exercising that discretion the agency or minister should take account of the ‘lowest reasonable cost’ objective, stated in the objects clause of the FOI Act (s 3(4)):

... functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

4.3 A charge must not be used to discourage an applicant from exercising the right of access conferred by the FOI Act. Rather, **charges should fairly reflect the work involved in providing access to documents on request.** Implicit in the lowest reasonable cost objective is a prerequisite for sound record keeping so that an agency's documents can be readily identified and found when an FOI request is received.'

[Bold text is my emphasis]

13. Upon internal review, I sought a sample of the documents from Joint Health Command. I found 846 pages potentially matching the scope of the request. With this in mind, I consider the original preliminary assessment of charges significantly underestimates the work involved in providing access to documents. I note the applicant has not challenged the estimated time involved in processing the FOI request. However, this is a consideration I believe is relevant to this matter. Taking into account there are 846 pages to be reviewed in the processing of the request which is significantly more work than the originally estimated 100 pages, I consider the preliminary assessment more than fair and reasonable. I consider the work involved in processing this request will far exceed the original estimate. As such, I consider the applicant should pay the original estimate as this reflects a contribution to the actual cost.

Public interest considerations

14. I note in the applicant's email of 6 January 2016, she stated '*these documents will be used for academic research purposes, research which is widely applicable to the general public*'. However, I note the applicant did not provide reasons as to how the material would be '*applicable to the general public*'.

15. In relation to 'public interest' considerations, paragraphs 4.54 and 4.55 of the Guidelines state as follows:

'4.54 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 a substantial section of the public***' (s 29(5)(b)). This test is different to and to be distinguished from public interest considerations that may arise under other provisions of the FOI Act. Specifically, the public interest test for waiver in s 29(5)(b) is different to the public interest test in s 11A(5) that applies to conditionally exempt documents. Nor will s 29(5)(b) be satisfied by a contention that it is in the public interest for an individual with a special interest in a document to be granted access to it, or that an underlying premise of the FOI Act is that transparency is in the public interest.

4.55 **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 disclosure.** 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 public interest to which the documents relate, and **the way in which a public benefit may flow from the release of the documents.'**

[Bold text is my emphasis]

16. As the Guidelines explain, an applicant should identify or specify the ‘general public interest’ or the ‘substantial section of the public’ that would benefit from disclosure. Matters to be considered include the way in which a public benefit may flow from the release of the documents.

17. While there may be a public interest in the release of the documents, the question I have considered is whether the giving of access to such documents would be of general public interest or in the interest of a substantial section of the public. I note there is publicly available information relating to malaria and that Defence has provided information to the public regarding anti-malarial trials which is specific to ADF members deployed to East Timor. There is also information relating to the Australian Defence Human Research Ethics Committee (ADHREC) protocols numbered 249/01 and 216/00. In particular, there is a recently published report entitled the “*Inspector-General of the Australian Defence Force Inquiry report into the issues concerning anti-malarial trials of the drug Mefloquine*” dated 8 September 2016. I am not satisfied that the public interest reasons the applicant has stated would justify waiver of charges.

18. I am also not convinced the information that may be released would contribute to the knowledge of a substantial section of the public or how it would contribute to public debate. There are not, in my view, sufficient grounds to justify that the giving of access to documents would be in the general public interest.

19. I have also considered paragraph 4.59 of the Guidelines which states:

4.59 In applying those and related examples, 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 or analysis of an issue.

20. I note that there is already a significant amount of material in the public domain on this issue and believe the public interest has already been satisfied. There is sufficient material publicly available to contribute to public discussion or analysis of the issue.

Deposit required if you wish to proceed

21. Taking the above into consideration, if the applicant wishes to proceed with the FOI request and agrees to pay the charge, a deposit of 25% is required which is **\$76.25**. The deposit is not refundable exempt 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 required.

22. Please complete the attached authorisation form and return it to the FOI Directorate by 10 November 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 the request until a receipt is received in our office notifying that the deposit amount has been paid. If the applicant does 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 the request has been withdrawn.

Mrs Melissa Davidson
Assistant Director – Internal Review

11 October 2016