



5 July 2016

In reply please quote:

FOI Request: FA 16/04/01254-R1

File Number: ADF2016/16398

Mr Dwayne Brewski
C/O Mr James Smith
www.righttoknow.org

BY EMAIL: foi+request-1824-0161ed34@righttoknow.org.au

Dear Mr Smith

Mr Dwayne Brewski, the applicant, has authorised you to receive correspondence about his Freedom of Information (FOI) request on his behalf. Correspondence will not be sent directly to the applicant. In this letter references to 'you' and 'your' relate to the applicant.

Freedom of Information internal review request – charges decision

This letter refers to your request under section 54 of the *Freedom of Information Act 1982* (the FOI Act) for internal review of the decision around your liability to pay charges to process your FOI request received by the Department on 13 June 2016 (FA 16/04/01254-R1).

Background to your request

On 26 April 2016 the Department advised you that, under Section 29 of the FOI Act, you were liable to pay charges to process this request. The charges requested were \$18.30.

On 2 May 2016 Mr Smith asked, on your behalf, that these charges be waived. On 16 May 2016 the Department sent you a Notice of Charges decision advising you that these charges would not be waived.

On 13 June 2016 you sought an internal review of this Notices of Charges decision:

'I encourage the department to release the requested information without charge, as has been the case for the majority of APS agencies to whom this request has been sent.'

Your request for internal review

This letter is to inform you that the Department has finalised the internal review. You will find the decision and the reasons for the decision in the attached Decision Record, this forms the written reasons for the decision required under Section 26(1) of the FOI Act.

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of my decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a review request to the OAIC, please see FOI fact sheet 12 '*Freedom of information – Your review rights*', available online at www.oaic.gov.au.

How to make a complaint about the handling of this FOI request

You may complain to the Australian Information Commissioner if you have concerns about how the Department has handled your request under the FOI Act. Information about how to submit a complaint is also available at www.oaic.gov.au.

Yours sincerely



Patricia Liubescic

Director

Privacy and Reviews Section

Department of Immigration and Border Protection

Email foi@border.gov.au

Attachments

- A - Decision Record
- B – Extract of relevant legislation



Attachment A

DECISION RECORD

Request Details

FOI Request: FA 16/04/01254-R1
File Number: ADF2016/16398

Scope of Request

You have requested a waiver of charges to your FOI request (FA16/04/01254):

'I encourage the department to release the requested information without charge, as has been the case for the majority of APS agencies to whom this request has been sent.'

Authority to make decision

I am an officer authorised under Section 23 of the FOI Act to make decisions to in respect of requests to access documents or to amend or annotate Departmental records.

Relevant material

In reaching my decision, I have considered the following:

- the terms of your request;
- the documents relevant to your request;
- the FOI Act; and
- Guidelines issued by the Office of the Australian Information Commissioner under Section 93A of the FOI Act (FOI Guidelines).

Authority to make decision and role in making the decision

I am authorised under Section 23 of the FOI Act to make a decision on your request for internal review. My role is to make a fresh decision (Section 54C(3) of the FOI Act), taking into account the relevant documents and information.

In reaching my decision, I have considered the following:

- documents held by the Department;
- the FOI Act;
- the FOI Guidelines;
- advice on FOI charges provided by the Office of the Australian Information Commissioner on their website at: www.oaic.gov.au;
- comments made by you in your email of 2 May 2016 seeking a waiver of processing charges for your FOI request; and
- comments made by you in your email of 13 June 2016, seeking an internal review.

Decision and reasons for decision

My decision is to refuse your request to waive charges for processing your FOI request (FA16/04/01254). The reasons for my decision are set out below.

Sections 29(4)&(5) of the FOI Act – Reduction or non-imposition of charges

Section 29(4) of the FOI Act provides the agency or Minister the discretion to decide that a charge to process a FOI request may be reduced or waived:

Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph(1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not imposed.

Section 29(5) of the FOI Act specifies that any decision to reduce or not impose a charge must, at the minimum, consider whether the application of a charge would cause the applicant financial hardship and whether the giving of access to the requested documents is in the public interest:

Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, 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 application 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.*

You have not contended that the payment of the charge (\$18.30) would cause financial hardship. As such, I have not considered this issue.

In your e-mail of 13 June 2016 you have contended that the information you seek should be provided:

“without charge, as has been the case for the majority of APS agencies to whom this request has been sent.”

FOI fact sheet 7: Freedom of Information – Charges, available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-fact-sheets/foi-fact-sheet-7-freedom-of-information-charges>, advises that:

An agency or minister may impose a charge on an FOI applicant in accordance with the FOI Act and Charges Regulations. The charge should fairly reflect the work involved in providing access to documents on request.

An agency may impose charges for processing FOI request at its own discretion. In this case, the Department has elected to impose a charge to facilitate your FOI request. The Department is not able to comment on the approach of other Australian Government agencies regarding the imposition of charges for FOI requests they receive.

Further, in your e-mail of 10 May 2016 you contend that:

Firstly, it is unclear why it would take an employee of the department 1.22 hours to identify relevant documents. Common sense suggests these documents ought to be readily at-hand for any departmental employee seeking such information. If a charge is to be imposed, I suggest a 10 minute search period would be acceptable.

Secondly, I am of the opinion it is in the public interest to see how public service agencies influence, or attempt to influence, the behaviour of employees outside the workplace.

Section 4.31 of the FOI Guideline states that:

An agency or minister can charge for 'the time spent in searching for or retrieving [a] document (Schedule, part I, Item 2). This encompasses time spent:

- *searching a file index to establish the location of a document*
- *physically locating a document and removing it from a file*
- *searching a file to locate a document*
- *consulting relevant officers to determine if a document exists.*

As advised in the notification of charges sent to you on 26 April 2016 your FOI request was assessed as requiring 1.22 hours of search and retrieval activity. I have considered your suggestion that the activity required by your FOI request would require a 10 minute search period. However, noting the advice contained in Section 4.31 of the FOI Guidelines I am satisfied the originally assessed period of 1.22 is a fair and accurate assessment of the minimum time required for the search and retrieval activities required by your FOI request.

Further, Section 4.54 of the FOI Guidelines states:

Section 29(5)(b) will not be satisfied by a contention that it (a disclosure) 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.

Section 4.55 of the FOI Guidelines further qualifies this position:

An applicant relying on Section 29(5)(b) should identify or specify the 'general public interest' or the 'substantial section of the public' that would benefit from this disclosure.

In considering your contention the '*it is in the public interest to see how public service agencies influence, or attempt to influence, the behaviour of employees outside the workplace.*' I concur with the decision sent to you by Ms Nolte-Crimp on 16 May 2016 you do not demonstrate that there is either a 'general public interest' or a 'substantial section of the public' that would benefit from this disclosure.

The Department may impose charges under the FOI Act for the time taken to process your application. This includes charging for the time taken to search and retrieve the documents relevant for your request, the time taken to make a decision on your request and cost associated with photocopying and postage.

The charges for FOI requests under the *Freedom of Information (Charges) Regulations 1982* are set out on the Department's website at:

www.border.gov.au/about/access-accountability/freedom-of-information-foi

These charges do not represent a dollar-for-dollar 'no loss no gain' cost recovery exercise for the Department. Rather, they are intended to **fairly** reflect the work involved in providing access to documents on request. It is a long-standing policy of the Department that, when applicable, the applicant should contribute to the cost of their FOI request. This approach is considered to be fair to both the applicant who may reasonably be expected to bear some but not all costs associated with their FOI request, and the Department which may not be liable for all expenses associated with a particular FOI request.

This practice is common throughout Australian Public Service agencies and endorsed by the OAIC *FOI Fact Sheet 7: Freedom of Information – Charge*, referenced above.

You will note that on the notification of charges sent to you on 26 April 2016 the Department provides for up to five hours of decision making on documents are free of charge. Your FOI request was assessed as requiring 1.5 hours of decision making and, as such, no charge was levied for this service. The only charge sought by the Department is \$18.30 for 1.22 hours of search and retrieval activity. Given the amount of activity required by your request I consider that any reasonable person would be minded to view a \$18.30 charge for this undertaking as fair.

Based on the above, it is my decision to refuse your request to waive charges for processing your FOI request (FA16/04/01254).



Patricia Liubescic
Director
Privacy and Reviews Section
Information Management Branch
Email foi@border.gov.au

5 July 2016



Attachment B

EXTRACT OF RELEVANT LEGISLATION

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
- (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
 - (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii);including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

29 Charges

- (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 the applicant written notice stating:
 - (a) that the applicant is liable to pay the 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 not be imposed; and
 - (d) that 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 notice as 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 notice within that period or further period, the request for access to the document will be taken to have been withdrawn.
- (4) Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph(1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not imposed.
- (5) Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, 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 application 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.

54 Internal review—access refusal decision

- (1) This section applies if an access refusal decision is made in relation to a request to an agency for access to a document, other than a decision made personally by the principal officer of the agency or the responsible Minister.
- (2) The applicant in relation to the request may apply under this Part for the review (the **internal review**) of the access refusal decision.

54B Internal review—application for review

- (1) An application for internal review must be in writing and must be made:
 - (a) within 30 days, or such further period as the agency allows, after the day the decision is notified to the applicant for internal review (the **internal review applicant**); or
 - (b) in the case of an access refusal decision of a kind mentioned in paragraph 53A(b), (c) or (f), within whichever of the following is the longer period:
 - (i) 30 days, or such further period as the agency allows, after the day the decision is notified to the internal review applicant;
 - (ii) 15 days after the day the access referred to in that paragraph was given (or purported to be given).

...

54C Internal review—decision on internal review

Scope

- (1) This section applies if an application for internal review of an access refusal decision or an access grant decision (the **original decision**) is made in accordance with this Part.

Decision

- (2) The agency must, as soon as practicable, arrange for a person (other than the person who made the original decision) to review the decision.
- (3) The person must make a fresh decision on behalf of the agency within 30 days after the day on which the application was received by, or on behalf of, the agency.

Notice of decision

- (4) Section 26 extends to a decision made under this section.