

**Australian Government****Department of the Prime Minister and Cabinet****ONE NATIONAL CIRCUIT
BARTON**

FOI/2012/100

Ms Caitlin Huntington
c/o
Email: foi+request-27-c47788e1@righttoknow.org.au

Dear Ms Huntington

Thank you for your email of 29 November 2012 to the Department of the Prime Minister and Cabinet (the Department) in which you made a request under the *Freedom of Information Act 1982* (the FOI Act) in the following terms:

I wish to obtain copies of all documents on the following file, which is listed in the Department's Indexed List of Files for the period 1 January 2012 to 1 July 2012:

2012/1766 SECTION 44 OF THE CONSTITUTION – BRIEFING – 2012 TO 2014 – (GOVPG)

On 10 December 2012 you agreed to revise the terms of your FOI request as follows:

All documents created by or for a Commonwealth entity (including ministers and members of parliament, the parliamentary departments, the Australian Government Solicitor (AGS) and the Commonwealth Solicitor-General) on the file 2012/1766 SECTION 44 OF THE CONSTITUTION – BRIEFING – 2012 TO 2014 – (GOVPG)

On 17 December 2012 the Department wrote to you notifying that you were liable to pay a charge should you wish to proceed with your request. I enclose a copy of the Department's correspondence.

On 19 December 2012 the Department received an email from you requesting that the charge be waived.

In accordance with arrangements approved by the Secretary of the Department, Mr Gerard Martin, A/g Assistant Secretary, Parliamentary and Government Branch is the authorised decision-maker for your request.

I write to advise you of Mr Martin's decision on your request for a waiver of the charge.

Decision on reduction of charges

Mr Martin has decided not to waive or reduce the charge for your FOI request. Accordingly, the preliminary estimate of the charge in the amount of \$26.95 stands.

Reasons for decision

In considering your submission that the charge should not be imposed, Mr Martin has had regard to subsection 29(5) of the FOI Act which states that, without limiting the matters an agency can take into account in determining whether or not to impose a charge, the agency must take into account:

- whether payment of the charge, or part of it, would cause financial hardship; and
- whether giving access to the documents in question is in the general public interest or in the interest of a substantial section of the public.

Mr Martin notes that you have submitted that the charge should not be imposed for reasons that may be summarised as follows:

- as you wish to receive the documents in PDF form and via email, the photocopying charge should not be imposed;
- you have no private or commercial interest in the documents and that the release of the material would be in the public interest;
- the charge is negligible and the administrative burden upon the Commonwealth in recovering the charge would be greater than the monetary benefit from the charge;
- the charge infringes your implied constitutional right to freedom of political communication;
- the charge is an impediment to you and has been imposed to discourage others from seeking information under the FOI Act.

Financial hardship

Mr Martin notes that you have not contended that payment of the charge would cause you financial hardship and therefore he has not deemed it necessary to consider that matter in making his decision.

Public interest

FOI guidelines published by the Information Commissioner state that in applying the public interest test in section 29(5) of the FOI Act, it is important to identify the general public interest or the substantial section of the public that would benefit from disclosure.¹ The FOI guidelines also state that 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 a matter for decision by government.²

In considering the content of the documents Mr Martin has reviewed the documents to which you have sought access and finds that the majority of documents comprise email correspondence and summaries of information that is already on the public record. Having regard to this, Mr Martin is not persuaded that the release of the material would contribute in any significant way to the public interest objects you have raised in support of release of the documents. On the contrary, while Mr Martin has not made a final decision, his preliminary view is that you may not receive much more information than is already available from public sources.

¹ Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act* (31 October 2011), Office of the Australian Information Commissioner, <<http://www.oaic.gov.au/publications/guidelines.html>>, [4.52].

² Ibid.

Further, Mr Martin is not persuaded that release of the documents would further any public debate or contribute in any significant way to the public interest.

Mr Martin therefore considers that, on balance, having regard to the content and context of the documents and what is already available on the public record, there is a negligible public interest in release of the documents.

Other matters

The FOI guidelines provide that an agency has a general discretion to reduce or not impose a charge, and this discretion is not limited to financial hardship and public interest grounds.³ The FOI guidelines also provide that an agency may consider matters that weigh against those relied upon by an applicant.⁴ In this instance, Mr Martin considers that the following factors are relevant:

- a photocopying charge of \$0.50 is imposed in accordance with the Freedom of Information (Charges) Regulations 1982. As the relevant original documents must remain on file, 2012/1766 SECTION 44 OF THE CONSTITUTION – BRIEFING – 2012 TO 2014 – (GOVPG), photocopies of the documents must be made, with redactions then to be applied to any material which might be found to be exempt. These documents, which would be edited photocopies of the original documents, would then be provided to the applicant via electronic mail;
- the current charges regime, as set out in the Freedom of Information (Charges) Regulations 1982, is not designed as a full cost recovery mechanism. Rather, the FOI charging framework recognises that it is both reasonable and appropriate to require applicants in some instances to contribute to the substantial cost to government for processing FOI requests. Accordingly, Mr Martin does not accept your contention that the imposition of a charge is an infringement on your implied constitutional right to freedom of political communication;
- the FOI Act does not create a ‘free-standing right’ to obtain government information. On the contrary, under section 11 of the FOI Act, an individual’s right to obtain access to documents is subject to the Act and any exemptions under the Act;
- the charge is consistent with the ‘lowest reasonable cost’ objective stated within the objects clause of the FOI Act and is within the Department’s discretion to impose under section 29 of the FOI Act; and
- the charge is a fair reflection of the amount of work required to process your request.

Consideration of matters

Having regard to the other matters outlined above, Mr Martin considers, on balance, that the charge should not be waived or reduced.

Rights of complaint and review

I enclose a statement setting out your rights of complaint and review in relation to Mr Martin’s decision.

³ Ibid, [4.57].

⁴ Ibid, [4.46].

Payment of charges

Processing of your request will resume as soon as the Department receives payment, either in full or a deposit. As outlined above, payment in full is \$26.95 and would entitle you to receive a decision in relation to your request, a schedule which lists the documents relevant to your request, and any documents released.

Alternatively, payment of a deposit for this request is \$20.00 and would entitle you to receive a decision in relation to your request and a schedule which lists the documents relevant to your request. If a deposit is paid, relevant documents would only be released on payment of the balance of the charge. Regulation 14 of the *Freedom of Information (Charges) Regulations 1982* provides that a deposit paid by an applicant is not refundable unless the Department decides to waive the charge or fails to make a decision within the statutory time limit, including any extension.

Payment should be made by cheque or postal order and made out to the "Collector of Public Monies." If you wish to pay by credit card, you should forward a letter or email which sets out the credit card details and authorises the Department to charge the deposit or full amount to the card.

Should you wish to discuss any aspect of your request, you may contact the Department by telephone on (02) 6271 5849.

Yours sincerely



FOI Adviser
Legal Policy Branch

4 January 2013



Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint*.

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
fax: +61 2 9284 9666
email: enquiries@oaic.gov.au
in person: Level 8, Piccadilly Tower
133 Castlereagh Street
Sydney NSW



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.



What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: enquiries@oaic.gov.au

write: GPO Box 2999, Canberra ACT 2601
or visit our website at www.oaic.gov.au



Freedom of information – How to make a complaint

October 2010

You may complain to the Australian Information Commissioner if you have concerns about how an Australian Government agency handled a request for documents under the *Freedom of Information Act 1982* (the FOI Act) or took any other action under that Act. If you are unhappy with the agency's decision about giving or refusing access to documents, you should ask for the decision to be reviewed, which is a separate process.

Disagree with an FOI decision?

If you disagree with an agency's or minister's decision on your request under the FOI Act, you have the right to have the decision reviewed. You can ask an agency to review its decision internally. You also have the right to ask the Information Commissioner to review an agency's or minister's decision. See **FOI Fact Sheet 12 Freedom of information – Your review rights** for more information about the review process.

If you are concerned about the way an agency has handled your matter, you can complain to the Information Commissioner.

What are the powers of the Information Commissioner?

The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or other actions the agency took under the FOI Act. The Information Commissioner cannot investigate a complaint about a minister.

In conducting the investigation the Information Commissioner has the power to:

- make inquiries of an agency
- obtain information from any person
- take possession of, or inspect, any relevant documents.

If the Information Commissioner decides to investigate your complaint, the agency you have complained about will be notified in writing of the complaint. The Information Commissioner conducts investigations of complaints in private.

Who can make a complaint?

Any person can make a complaint about the actions of an agency in relation to an FOI activity. You do not need to have requested documents under the FOI Act.

When should I make a complaint?

You can complain to the Information Commissioner at any time. If your complaint relates to an FOI request you can make the complaint at any stage of the process.

Before making a complaint to the Information Commissioner, you should contact the agency directly to try to resolve your concerns. The Information Commissioner may decide not to investigate your complaint if you have not raised your concerns first with the agency or you have not given the agency a reasonable opportunity to deal with your complaint.



How do I make a complaint?

Your complaint must be in writing and must specify the agency you are complaining about. You can send your complaint to us using the details at the end of this fact sheet. A complaint form is also available on our website at www.oaic.gov.au.

If you need help we can assist you. You can contact us on 1300 363 992 or by email to enquiries@oaic.gov.au.

What information do I need to put in the complaint?

To help the Information Commissioner give the best consideration to your complaint, please provide as much relevant information as possible. Be clear about the issues in your complaint and what action or outcome you would like to see as a result.

Is there a fee for making a complaint?

No. There are no costs involved in making a complaint to the Information Commissioner.

What will happen to my complaint?

An officer of the Information Commissioner will contact you to discuss your complaint and you will be kept informed of the progress of your complaint along the way.

Before deciding whether to investigate your complaint the Information Commissioner may make preliminary inquiries of the agency you have complained about.

If the Information Commissioner decides to investigate your complaint, the Commissioner will write to the agency and request information to assist with the investigation.

Can the Information Commissioner decide not to investigate my complaint?


Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:

- your complaint does not concern an agency's action under the FOI Act
- it is more appropriate for you to complain to another body (such as the agency or the Commonwealth Ombudsman)
- it is more appropriate for you to ask for the decision to be reviewed
- the agency you complained about has dealt with your complaint, or is in the process of dealing with it
- your complaint is frivolous, lacking in substance or not made in good faith
- you do not have sufficient interest in the matter.

If the Information Commissioner decides not to investigate or discontinues an investigation, the Commissioner will notify you and the agency of the reasons for this in writing.

How will my complaint be resolved?

In some cases the Information Commissioner's investigation and intervention may result in the agency addressing the issues that you have complained about. In other cases the Information Commissioner may make suggestions or recommendations that the agency should implement. You and the agency will be notified in writing of the outcome of the investigation.



If an agency fails to take adequate and appropriate action to implement any recommendations, the Information Commissioner may issue a formal implementation notice. This notice requires the agency to explain what action it will take to implement the recommendations. The Information Commissioner may also provide a written report to the minister responsible for the agency, and the report will be tabled in Parliament.

Your name will not be included in the report unless there is a special reason and you were first consulted.

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint and all relevant documents must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

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