



19 April 2017

Our reference: LEX 28561

Mr Justin Warren

By email: foi+request-2952-748c3bc6@righttoknow.org.au

Dear Mr Warren

Freedom of Information Request – Internal Review Decision

I refer to your correspondence, dated 21 March 2017 and received by the Department of Human Services (the **department**) on that same date. You requested an internal review of the decision made by a delegate of the department on 20 March 2017 (LEX 25282) under the *Freedom of Information Act 1982* (the **FOI Act**) (the **charges decision**).

I am an authorised decision-maker under subsection 23(1) of the FOI Act to make internal review decisions under section 54C of the FOI Act. My decision is set out below.

Background

The department received your original request on 14 January 2017 for access under the FOI Act to the following documents:

- ' - The business case document(s) for the Pay As You Go (PAYG) data matching initiative that is the subject of Question on Notice HS 15 from the Senate Community Affairs Legislation Committee Budget Estimates hearing on 3 June 2015.
http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/clacctte/estimates/bud1516/DHS/index
- Documents that describe the algorithm or process used to perform the data matching that identified the "approximately 1,080,000" discrepancies between PAYG data and data reported by DHS customers, as referred to in the Answer to Question HS 15.
- Documents that describe the analysis process for how the value of "historical discrepancies", as described in the Answer to Question HS 15, was determined. Such documents should describe the statistical method, the sampling process used, statistics returned (standard error, mean, confidence interval, etc.), how the likely average debt value was determined, etc.
- [the final version of the Requirements Specification (or similar document)] containing the program specifications/requirements used to define how the data matching process should be implemented by programmers. Such [a document] would refer to, for example, the use of certain fields to match on such as ABN, Business Name, Customer Name, etc.

Where multiple revisions of documents exist, I am only interested in the version current at the time the Department refers to in its answer to HS15.'

On 16 February 2017, the department issued you with a preliminary assessment of charges involved in processing your request. The department also advised you in this correspondence that 37 documents (totalling 355 pages) had been identified as falling within the scope of your FOI request. In accordance with section 29 of the FOI Act, it was determined that you were liable to pay an estimated charge of \$600.00, calculated as follows:

Search and retrieval time: 4 hours, at \$15.00 per hour:	\$60.00
Decision-making time (*after deduction of 5 hours): 27 hours, at \$20.00 per hour	\$540.00
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TOTAL	\$600.00

On 16 February 2017, you wrote to the department by email, contending that the charge of \$600.00 be waived on the grounds that release of the documents is in the public interest.

On 20 March 2017, the department notified you of a decision in relation to the reconsideration of the charges decision. The department also advised you in this correspondence that it appeared that some documents were not within the scope of the original request. Accordingly, the scope of the request was reduced to 13 documents (totalling 287 pages) as falling within the scope of your FOI request. On this basis, the department decided to reduce the assessment of the charge to \$510.00, calculated as follows:

Search and retrieval time: 2.4 hours, at \$15.00 per hour:	\$36.00
Decision-making time (*after deduction of 5 hours): 23.7 hours, at \$20.00 per hour	\$474.00
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TOTAL	\$510.00

On 21 March 2017, you requested an internal review of the department's decision to impose charges for FOI request LEX 25282 on the following terms:

'You have agreed that release of the documents would be in the public interest.

I do not accept your contention that, in order to waive the charges, release of the documents must not only be in the public interest but must also "greatly inform public debate".

You helpfully noted certain paragraphs of the OAIC Guidelines for agencies interpreting the FOI Act (<https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>). That has lead me to review the various cases linked in footnotes on that page.

In 'CF' and Department of Finance [2014] AICmr 73 (<http://www.austlii.edu.au/au/cases/cth/AICmr/2014/73.html>), the Privacy Commissioner found that "The threshold requirement for the public interest test under s 29(5) requires identification of a general public interest or a substantial section of the public whose interest the release of the documents may serve." There is no requirement for the documents to also "greatly inform public debate". That is a much higher threshold that you appear to have invented.

Further, in MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information) [2015] AATA 584 (<http://www.austlii.edu.au/au/cases/cth/AATA/2015/584.html>), The Administrative Appeals Tribunal found that "an agency or minister should always consider whether disclosure of a document would advance the objects of the Act, even though an applicant has not expressly framed a submission on that basis. The objects of the Act include promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government's activities (s 3)."

In its responses to this and many other requests for information the Department appears to be working hard to avoid any and all scrutiny, discussion, comment or review of its activities.

I hereby formally request an internal review of this decision.

On 21 March 2017, you further clarified the scope of your request stating:

'Further to my last letter, I would also like to draw your attention to the following in paragraph 4.74 of the Guidelines that you so helpfully referred to in your latest correspondence:

"If an agency or minister accepts that disclosure of a document would be in the general public interest or that there would be financial hardship to the applicant, it may be difficult for it to justify why a charge has been reduced instead of waived in full."

I do not believe the Department has justified why the charge should not be waived in full.

I further note that in Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2015] AICmr 65 (<http://www.austlii.edu.au/au/cases/cth/AICmr/2015/65.html>) the then Acting Australian Information Commissioner, Mr Timothy Pilgrim, found that the charge should be waived in full. Reference was specifically made to MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of information) [2015] AATA 584 (<http://www.austlii.edu.au/au/cases/cth/AATA/2015/584.html>), where the charges were also waived in full.

The information I have requested has been described by the Department and the government as a critical part of its efforts to recoup some \$4 billion in overpayments over the forward estimates. This is substantially greater than the amount of money at stake in MacTiernan (a mere \$1 billion), and the cost of processing this request is substantially smaller.'

Internal Review Decision on charges

The following is my decision in relation to your request for reduction or waiver of the charge imposed under the FOI Act (the **charge**). I have reviewed the Charges Decision and made a fresh decision on your request. In this regard, I have decided, under section 54C and subsection 29(8) to impose the charge.

You are therefore liable to pay the processing charge of \$510.00.

The reasons for my decision, including the relevant sections of the FOI Act, are set out below.

Information Considered

In reaching my decision, I took into account the following:

- the department's correspondence of 16 February 2017, notifying you of the charge;
- your correspondence of 16 February 2017 contending that the charge should not be imposed;
- the department's correspondence of 20 March 2017, notifying you of the decision to reduce the charge imposed;
- your correspondence seeking internal review of the department's decision to waive the reconsidered charge dated 21 March 2017;
- the contents of the documents falling within the scope of your request;
- the relevant provisions of the FOI Act;
- the *Freedom of Information (Charges) Regulations 1982* (the **Regulations**); and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **Guidelines**).

Relevant legislation

Section 29(4) of the FOI Act provides that, where an applicant has notified an agency that the applicant contends that a charge should be reduced or not imposed in relation to a request under the FOI Act, then the agency may decide that the charge is to be reduced or not imposed.

Section 29(5) of the FOI Act provides that, without limiting the matters that the agency may take into account when making a decision about whether to reduce or not impose a processing charge, the decision maker must consider:

- whether payment of a charge, or part of it, would cause financial hardship to an applicant; and
- 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.

Section 29(8) of the FOI Act provides that, if an applicant makes a contention about a charge as mentioned in subsection 29(4) and the agency makes a decision to reject the contention in whole or in part, then the agency must give the applicant written notice of the decision and the reasons for the decision.

Calculation of the charge

On review of the documents falling within the scope of your request, I confirm that the department originally identified 37 documents (totalling 355 pages) as falling within the scope of your request. On 20 March 2017, the department confirmed that the documents falling within the scope of your request was further reduced to 13 documents (totalling 287 pages) as part of the reconsidered charges decision.

I note that the assessment of charges was based on the time taken in processing these documents.

Waiver or reduction of the charge

I am not satisfied that the department should reduce, or waive the charges imposed under the reconsidered charges decision, on the following basis:

- you have not provided any evidence of financial hardship;
- the documents would not assist members of the public in debate or discussion; and
- you have not put forward other relevant considerations that sufficiently weigh in favour of reducing, or waiving the charges.

Financial Hardship

Paragraph 29(5)(a) of the FOI Act provides that, without limiting the matters an agency may take into account in determining whether or not to reduce or not to impose the charge, the agency must take into account whether the payment of the charge, or part of it, would cause financial hardship to the applicant.

I note that you have not provided any evidence to indicate that payment of the charge would cause financial hardship. On that basis, I have not considered this matter further.

Public interest

In making my decision, I am also required under paragraph 29(5)(b) of the FOI Act to take into account whether the provision of access to the documents that are the subject of the request, is in the general public interest, or in the interest of a substantial section of the public. In other words, there must be a benefit flowing generally to the public or a substantial section of the public from disclosure of the documents in question. This requires me to consider the nature of the documents and the context of their release.

The Guidelines at 4.81 state that in considering the public interest, 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.

I am not satisfied that there are compelling reasons in favour of reducing or waiving the charge, because providing access to the documents is contrary to the public interest as their release would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency. This is because the documents contain material concerning certain compliance and audit processes in relation to the Online Compliance Intervention. The release of the documents would adversely affect and compromise the department's ability to undertake audit and compliance activities.

In *'IN' and Australian Taxation Office* [2016] AICmr 33 (the *IN* decision), the then Acting Australian Information Commissioner agreed that release of documents containing certain processes used by the ATO when conducting audits:

- could reasonably be expected to make it more difficult for the ATO to undertake audit activities generally; and
- have a substantial adverse effect on the proper and efficient conduct of ATO operations.

In my view, the *IN* decision applies in relation to the documents that are the subject of the request, in that there is a public interest in protecting the confidentiality of the department's compliance activities. Therefore, release of the documents would be contrary to the public interest.

Further, while I accept that the Online Compliance Intervention has been the subject of media attention, consideration of the public interest is not primarily concerned with curiosity or commentary. The primary question is whether a benefit will flow to the public generally or a substantial section of the public from disclosure of the information in the documents.

I note that since the department received your initial request, there has been a significant increase in the amount of information that is now in the public domain. For example, the Online Compliance Intervention was discussed before the Community Affairs Legislation Committee Estimates (a transcript is available [here](#)). The department has also made its submission to the Senate Community Affairs References Committee Inquiry on the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative. The department's submission is available via [this](#) page.

In my view, the information contained in the documents (insofar as their disclosure is not contrary to the public interest) already substantially exists in the public domain, and the release of the full documents would not substantially contribute to the public debate, in a way that would justify reducing or waiving the charges above.

In summary, I am not satisfied that you have identified the 'general public interest' or the 'substantial section of the public' that would benefit from disclosure of the documents. I contend that the charges have been set at the lowest reasonable cost noting that they have already been reduced.

In light of these factors, I have decided that there is no public interest in reducing or waiving the charge.

Other grounds for reduction of the charge

In deciding whether charges should be reduced or waived, I have taken into consideration section 29(4) of the FOI Act which provides a general discretion to reduce or not to impose a charge which goes beyond matters relating to financial hardship and the public interest.

I note that you have not provided any evidence to indicate that the charges should be reduced or waived on other grounds. On that basis, I have not considered this matter further.

Conclusion

In conclusion, I consider the department have been correct in their assessment of the charges required in processing your FOI Request 25282. On this basis, I have decided not to reduce the amount of the charge that was notified to you. Accordingly, the charges imposed for the FOI Request 25282 should remain at \$510.00 and no reduction or waiver will apply.

In going forward, no further action on the request will be undertaken until the charges imposed for FOI Request 25282 have been received by the department. After this has occurred, the department will be in a position to continue processing your FOI request.

You can ask for a review of our decision

If you disagree with any part of the decision you can ask for an external review by the Office of the Australian Information Commissioner. You do not have to pay for reviews of decisions. See **Attachment A** for more information about how arrange a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@humanservices.gov.au.

Yours sincerely

Lisa

Authorised FOI Decision Maker
Freedom of Information Team
FOI and Litigation Branch | Legal Services Division
Department of Human Services



Attachment A

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Application for review of decision

The *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of this decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of this decision by the Information Commissioner.

Information Commissioner review

You must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Email: enquiries@oaic.gov.au

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.

Complaints to the Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.