



13 June 2017

Our reference: LEX 29683

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 14 May 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 19 April 2017 (LEX 25282) under the *Freedom of Information Act 1982* (the **FOI Act**) (the **internal review (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

On 14 January 2017, the department received your freedom of information request (LEX 25282) in the following terms:

- ' - 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/claccte/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 6 February 2017, following a request consultation process with the department under section 24AB of the FOI Act, you revised your request as follows:

' - 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 contacted you to advise that 37 documents (totalling 355 pages) had been identified as falling within the scope of your FOI request.

Consequently, the department advised that you are liable to pay a \$600.00 processing charge, in accordance with section 29 of the FOI Act, 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 contacted the department to contend that the \$600.00 charge should be waived on the grounds that release of the documents is in the public interest.

On 20 March 2017, the department wrote to you to provide a decision in relation to your request for reconsideration of the charge. In this notice, the department advised that some of the documents included in the calculation of charges as set out in the letter dated 16 February 2017 were not in fact within the scope of the request. Accordingly, the number of identified documents falling within the scope of your FOI request was reduced to

13 documents (totalling 287 pages). On that 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
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 the same date, you further clarified your submissions as follows:

'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.'

On 19 April 2017, the department notified you of the internal review (charges) decision, namely that the decision-maker was not satisfied that the department should reduce or waive the charges.

You decided to pay the charge in full and, on 5 May 2017, your payment was processed by the department.

On 8 May 2017, the department provided a decision to you, refusing access to all documents because they are subject to exemptions under sections 34 and 37(1)(b) of the FOI Act.

In this decision letter, the decision maker considered the actual cost of processing your request, for the purpose of considering whether to adjust the amount of the charge under Regulation 10 of the *Freedom of Information (Charges) Regulations 1982*. It was found that the actual cost of processing the request was more than the decision on the charge and as a result, no adjustment was necessary.

Internal Review Decision on charges

Section 53A(e) of the FOI Act provides that where the department makes a decision relating to the imposition of a charge or the amount of a charge, the decision can be subject to an internal review.

As outlined in the background above, you previously sought internal review of the department's charges decision on 21 March 2017. The department provided the internal review (charges) decision on this internal review on 19 April 2017.

Section 54E(a) of the FOI Act states that an Applicant cannot seek internal review of an earlier internal review decision.

On that basis, the relevant internal review decision regarding the imposition or amount of the charges is already contained in the internal review (charges) decision dated 19 April 2017.

However, I note that under sections 54L of the FOI Act, you can apply for a review of this decision by the Australian Information Commissioner.

Relevant legislation

Section 53A(e) of the FOI Act states that a 'a decision under s 29 relating to imposition of a charge or the amount of a charge' is an access refusal decision which can be subject to internal review.

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.

Section 54E(a) of the FOI Act states that part VI of the FOI Act, which relates to internal reviews, does not apply in relation to 'a decision on internal review'.

Conclusion

In conclusion, you have already sought internal review of the department's charges decision and the internal review (charges) decision was provided to you on 19 April 2017. Under section 54E of the FOI Act, this decision is not subject to further review and, on that basis, the department has no further submissions.

Further assistance

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

Yours sincerely

Sophie

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 Australian Information Commissioner.

Australian 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.