



9 April 2018

Our reference: LEX 34976

Mr David Brown

Only by email: foi+request-4380-37ad534d@righttoknow.org.au

Dear Mr Brown

Freedom of Information Request - Charges

I refer to your request, dated 16 February 2018, and received by the Department of Human Services (**department**) on that same date, for access under the *Freedom of Information Act 1982* (**FOI Act**) to the following:

'...all the documents published on AusTender website under RFT 1000401959 in relation to the Systems integrator panel for the WPIT program. The RFT was issued on 1 August 2016.'

I have reconsidered the preliminary charge that was notified to you based on your original request and I have decided to reduce the charge by 50% to \$232.78.

Background

The department conducted searches of its records and identified 37 documents, totalling 400 pages, to be within the scope of your request. On the basis of these searches, the department determined that you were liable to pay a charge for the processing of your request, in accordance with section 29 of the FOI Act.

On 7 March 2018, you were notified that you are liable to pay a charge for the processing of your request and that the preliminary assessment of that charge was \$465.55 (**preliminary charge**). The charge was calculated as follows:

Search and retrieval time: 2.77 hours, at \$15.00 per hour:	\$41.55
Decision-making time (*after deduction of 5 hours): 21.20 hours, at \$20.00 per hour	\$424.00

TOTAL	\$465.55
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*The FOI Act provides that the first five hours of decision-making time are free of charge and this is reflected in the calculation.

On 8 March 2018, you responded to the preliminary charge notification, contending that the preliminary charge should be reconsidered (**reconsideration request**) for the following reasons:

- '1. Because the documents concerned were published in a formal ATM on AusTender they should be held together as a group in a single location on your document management system, so no need to hunt around across multiple locations and formats, etc.
2. Because these documents have all been published there is no need to redact information.
- 3a. Because the subject of the request goes to the heart of a multi-billion dollar project (WPIT) involving the nation's health and welfare payments system, and that this documentation is the only detailed account of the project requirements, that it is in the public interest that this material be in the public domain.
- 3b. Further to this point, when DHS was asked for detailed information on WPIT in Senate hearings (Community Affairs Legislative Committee, 11 Feb 2016, p. 197) the Senate was referred to this documentation.
4. I only need this material in PDF format, not printed out (in case that is part of the cost).
5. I require this information to assist with PhD research I am undertaking on digital government, and not for commercial purposes.'

What I took into account

In reaching my decision I took into account:

- the department's correspondence dated 7 March 2018, notifying you of the preliminary charge;
- your reconsideration request dated 8 March 2018;
- the documents falling within the scope of your request;
- consultation with departmental officers about:
 - the nature of the requested information; and
 - the department's operating environment and functions;
- relevant case law;
- the FOI Act;
- the *Freedom of Information (Charges) Regulations 1982 (Regulations)*; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).

Reconsideration of the Charge

I have reconsidered the preliminary charge that was notified to you based on your original request.

Section 29(4) of the FOI Act provides a discretion to reduce or not impose a charge. In making a decision in relation to this discretion, section 29(5) requires me to consider:

- whether giving access to the document is in the general public interest or in the interest of a substantial section of the public; and
- whether payment of the charge would cause financial hardship to the applicant.

The guidelines state, at paragraph 4.71:

'In addition to considering those two matters, an agency or minister may consider any other relevant matter, and in particular should give genuine consideration to any contention or submission made by an applicant as to why a charge should be reduced or waived'.

Given that your submissions cover various issues, I will respond to each issue separately and also include a consideration of the public interest and financial hardship components.

Whether giving access to the documents is in the public interest

Paragraph 4.79 of the Guidelines provides that:

‘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 this 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.’

In *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584, the Administrative Appeals Tribunal found that where release is in the general public interest, or in the interest of at least a substantial section of the public, charges ought to be waived. Conversely, this decision also supports the view that where there is little public interest in the release of information that is within scope, then it is appropriate for the charges to be affirmed.

You submitted that:

‘3a. Because the subject of the request goes to the heart of a multi-billion dollar project (WPIT) involving the nation's health and welfare payments system, and that this documentation is the only detailed account of the project requirements, that it is in the public interest that this material be in the public domain.

3b. Further to this point, when DHS was asked for detailed information on WPIT in Senate hearings (Community Affairs Legislative Committee, 11 Feb 2016, p. 197) the Senate was referred to this documentation.’

The core of these submissions appears to be that it is in the public interest to provide access to the requested documents, owing to the financial and political significance of the WPIT project and the limited information about the project currently in the public domain.

In determining whether something is in the public interest for the consideration of charges, the Guidelines relevantly provide at paragraph 4.83:

‘The ‘public interest’ is a concept of wide import that cannot be exhaustively defined...The following examples nevertheless illustrate circumstances in which the giving of access may be in the general public interest or in the interest of a substantial section of the public:

...

- The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document would better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision-making process.

...

- The document is to be used for research that is to be published widely or that complements research being undertaken in an agency or elsewhere in the research community.’

As you noted, the request for tender from systems integrators for the WPIT project has received some media attention and has been referred to in the 11 February 2016 Community Affairs Legislative Committee Senate hearing. As a result, it is arguable that the documents requested relate to a topic of public discussion as in the first example quoted from the Guidelines above.

However, the fact that the documents requested in this case relate to a topic of public discussion does not necessarily mean that disclosing these documents would benefit the general public or a substantial section of the public and thereby satisfy the *MacTiernan* test. This is particularly the case as the media attention on these tender documents largely stems from technology news websites, a relatively specialised sector.

In my view, disclosure of the documents may benefit the general public by providing information as to the nature of the department's procurement process in general and this tender in particular. I appreciate that the public generally stands to benefit from a degree of transparency in government decision making.

Further, I note you submitted that the documents will be used to assist with PhD research you are undertaking on digital government. I consider that there is a possibility that your research may be published widely or may complement other research being undertaken in the research community, and thereby benefit the public.

Conversely, there are some factors that indicate disclosure would not benefit the public. The documents requested relate to a tender process that has since been finalised. Consistent with the Commonwealth's established tender processes, the documents were available to the public for a certain period of time, which has now passed. A contract now exists between the department and the successful tenderers. This contract is ongoing, and arguably it would not benefit the public to disclose documents that may compromise the commercial interests of the successful tenderers. To do so may dissuade suppliers from submitting tender responses to the department in the future, an outcome that is not in the public interest.

In addition, the Guidelines at paragraph 4.81 state that in considering the public interest, matters to be deliberated include whether the information in the documents is already publicly available. In *Cashman & Partners v Secretary, Department of Human Services and Health* (1995) FCR 301, 307, the Federal Court held that:

'The [Administrative Appeals] Tribunal has consistently, and in my view correctly, accepted that the proper approach to the question of benefit to the general public is that stated in *Cazalas v US Department of Justice* [1983] USCA5 1422; (1983) 709 F 2d 1051 at 1053. In *Cazalas*, it was held that the question of benefit to the general public was concerned with benefits flowing from the fact that information previously withheld by the agency is now accessible to the community.'

In my view, because the documents you have requested were previously publicly available, any benefit to the public in rereleasing these documents is reduced. Indeed, at the time of the 11 February 2018 Senate hearing to which you refer, the documents were on AusTender and therefore 'accessible to the community'.

The cost of searching and retrieving the documents

You submit that:

'1. Because the documents concerned were published in a formal ATM on AusTender they should be held together as a group in a single location on your document management system, so no need to hunt around across multiple locations and formats, etc.'

I have consulted with the relevant business area and have obtained updated information that 50 minutes was allocated to search and retrieve the documents, rather than the estimated 2.77 hours. Accordingly, I have taken this into consideration in my reduction of the preliminary charge.

In reaching this decision, I took paragraph 4.22 of the Guidelines into account, which provides that:

An agency or minister can charge for 'the time spent ... in searching for or retrieving the document' (Charges Regulations, Schedule, Part I, Item 2). This encompasses time spent:

- consulting relevant officers to determine if a document exists;
- searching a file index to establish the location of a document; and
- searching a file to locate a document.

In *'MK' and Department of Defence (Freedom of information)* [2017] AICmr 89, the Information Commissioner accepted the Department of Defence's estimate of 30 minutes for a person to undertake searches for relevant documents on the basis that this was a reasonable estimate of the time it would take to search emails and stored documents, consider the content of the documents found, collate and transfer relevant documents to the FOI officer. Additionally, in *'M' and Department of Agriculture, Fisheries and Forestry* [2013] AICmr 24, the Information Commissioner found a search and retrieval estimate of 12 hours for one document totalling 11 pages reasonable, noting that over 8 hours of this time estimate was to create a new document.

On that basis, I consider that 50 minutes (in total) is a reasonable time estimate to identify and consult with the relevant business area regarding your request, and for that business area to search and retrieve the 37 documents within the scope of your request and provide them to the FOI officer in a readable format.

Redacting the documents

You submit that:

'2. Because these documents have all been published there is no need to redact information.'

No charge for the time it would take to exempt pages and release pages with deletions was included in the preliminary charge for your request.

Rather, in the preliminary charge, the time calculated to make the decision comprised a consideration of:

- the time it would take to read each of the 400 pages of the documents requested; and
- the time it would take to prepare and notify the decision, including the preparation of a statement of reasons and the preparation of a schedule of the documents requested.

Printed documents not required

You submit that:

'4. I only need this material in PDF format, not printed out (in case that is part of the cost).'

No charge for photocopying or printing the documents was included in the preliminary charge and therefore this part of your submission is not applicable.

The purpose of the request

You submit that:

'5. I require this information to assist with PhD research I am undertaking on digital government, and not for commercial purposes.'

To the extent that this submission is relevant, I have considered it in the context of the public interest section above.

Financial hardship

Section 29(5)(a) of the FOI Act provides that, without limiting the matters an agency may consider in determining whether to reduce or not to impose the charge, the agency must take into account whether 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.

Conclusion

The general principle underpinning the charges mechanism under section 29 of the FOI Act was described by O'Connor J in *Re Herald & Weekly Times and Secretary, Department of Finance and Administration* [2000] AATA 506 at [48]:

'Section 29 establishes the prima facie position that charges should be imposed so that the applicants contribute to the cost of processing all their requests.'

Accordingly, I am satisfied that the intention of the legislature in drafting the FOI Act was that a portion of the cost of processing requests is to be borne by the applicant. However, this is qualified by section 29(5)(b) which provides that where release would be in the public interest, the charges may be reduced or waived.

As identified above, I am satisfied that there are public interest factors in favour of reducing the charge associated with processing the documents you have requested. I am also satisfied that based on updated information, the time taken to search and retrieve the documents is lower than originally estimated in the preliminary charge. On these bases, I have decided to reduce the preliminary charge by 50%.

This decision is in line with the lowest reasonable cost principle espoused in *Justin Warren v Department of Human Services (Freedom of information)* [2018] AICmr 16. In that case, the Australian Information Commissioner held that agencies should have regard to the lowest reasonable cost to the applicant, agency and Commonwealth pursuant to section 3(4) of the FOI Act, and that a \$510 charge imposed for 13 documents did not meet this objective.

In contrast, the 37 documents you have requested comprise 400 pages, and are no longer publicly available. Processing your request would include time for search and retrieval, examination of the documents, consultation with relevant third parties and writing the decision. On this basis I am satisfied that the revised charge of \$232.78 is the lowest reasonable cost.

Required Action

If you would like the department to continue processing your request, you must notify the department in writing within 30 days of receiving this notice that you:

- a) agree to pay the charge; or
- b) withdraw the request for access.

Please note that the payment of a charge does not guarantee access to documents, redacted or otherwise.

Further information on options a) and b) is set out below.

Option a) - pay the charge

As the charge exceeds \$25, you are required to pay a deposit of \$58.20 within 30 days of receiving this notice. You may, of course, elect to pay the charge in full at this point.

You may select from one of the following payment methods:

1. Online payment via Government EasyPay - follow [this link](#) and enter the relevant details. You will need your FOI LEX reference number, **LEX 34976**; or
2. Cheque made out to the Collector of Public Monies and posted to Freedom of Information, Department of Human Services, PO BOX 7820, Canberra BC, ACT 2610; or
3. Money order made out to the Collector of Public Monies and posted to Freedom of Information, Department of Human Services, PO BOX 7820, Canberra BC, ACT 2610.

If you elect to pay the charge, please email FOI.Legal.Team@humanservices.gov.au to advise us of your payment. Please quote reference number **LEX 34976** in this correspondence.

Option b) - withdraw your request

If you wish to withdraw your request, you may do so in writing.

Time limits for processing your request

Section 31 of the FOI Act provides that where a notice is sent to an applicant regarding the payment of a charge in respect of a request, the time limit for processing the request is suspended from the date the notice is received until either:

- a) the day following payment of the charge (in full or the required deposit); or
- b) if applicable, the day following the notification to the applicant of a decision not to impose the charge.

You can ask for a review of this decision

I have reconsidered the assessment of charge and have decided to impose a revised charge of \$232.78.

If you disagree with the decision to impose a revised charge, or the amount of the revised charge, you can ask for a review. There are two ways you can do this. You can ask for an internal review from within the department, or 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

Isabella

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



INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an Internal Review Officer in the Department of Human Services (the department); and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the department within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application**:

Online: www.oaic.gov.au

Post: Australian Information Commissioner

GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Department of Human Services' decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the department's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Information Commissioner 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 Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth 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 Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth 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.