



Australian Government
Department of Defence

Freedom of Information
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Our reference: FOI 368/17/18

Mrs Verity Pane

By email: foirequest-4454-5b06323e@righttoknow.org.au

Dear Mrs Pane

NOTICE OF DECISION ON REQUEST FOR REVIEW OF CHARGES

1. I refer to your email, dated 29 March 2018 in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“Summary statistician information to be compiled (if not already compiled) of the number of Code of Conduct complaints received by Defence, about Defence public servants, for the last three financial years, as well as how many of those were investigated by Defence, and of those how many were eventually upheld.

I'd also like those to be broken down by the APS level involved”

Liability to pay charges

2. By email, dated 4 April 2018, you were advised that Mr Cos Cameron, Assistant Director FOI, had decided in accordance with section 29 of the FOI Act, that you were liable to pay a charge for the processing of your request.

3. By email, dated 16 April 2018 you sought a review of the charges associated with your request on the following grounds:

“Defence is clearly abusing the charges provision here, as Defence already collects statistics for internal reporting purposes in line with that requested, as a regular and routine report, but Defence has essentially copied the same charges assessment from another FOI I've made, which met the same response, and just cut and paste the FOI topic in.

I apply for a internal review, specifically seeking breakdown and explanation of the summary calculations, which are opaque and without substantiation in this response.

Is Defence's bad faith culture so endemic that it just carbon copies these estimates, in an effort to circumvent the FOI Act's obligations and aims, by dissuading and penalising those who dare seek to use FOI? Clearly, from the evidence, the answer is yes”

Decision maker

4. By arrangements made by Defence under section 23 of the FOI Act, I am authorised to decide on your request for a waiver of the processing charges.

Material taken into account

5. In coming to my decision, I had regard to:
- a. your submission in support of remission of the charges;
 - b. the relevant provisions of the FOI Act;
 - c. the relevant provisions of the FOI (Charge) Regulations;
 - d. the Guidelines published by the Office of the Australian Information Commissioner (the Guidelines);
 - e. the OAIC review decision in ‘M’ and Department of Agriculture, Fisheries and Forestry [2013] AICmr 24 (13 March 2013); and
 - f. Advice from Defence People Group

Relevant legislation – section 29(5) of the FOI Act

6. Section 29(5) of the FOI Act provides as follows:

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

Consideration of financial hardship

7. As noted above, I am required to take into account whether access to the requested documents would cause you any financial hardship.

8. The Guidelines provide the following advice:

4.75 Whether payment of a charge would cause financial hardship to an applicant is primarily concerned with the applicant’s financial circumstances and the amount of the estimated charge. Financial hardship means more than an applicant having to meet a charge from his or her own resources. The decision in ‘AY’ and Australian Broadcasting Corporation referred to the definition of financial hardship in guidelines issued by the Department of Finance for the purpose of debt waiver decisions:

Financial hardship exists when payment of the debt would leave you unable to provide food, accommodation, clothing, medical treatment, education or other necessities for yourself or your family, or other people for whom you are responsible.

4.76 Different hardship considerations may apply if the request is made by an incorporated body or an unincorporated association. The mere fact that costs for FOI requests have not been budgeted for has been held to be a commercial decision, rather than a matter of a lack of funds.

4.77 An applicant relying on this ground could ordinarily be expected to provide some evidence of financial hardship. For example, the applicant may rely upon (and provide evidence of) receipt of a pension or income support payment; or provide evidence of income, debts or assets. However, an agency should be cautious about conducting an intrusive inquiry into an applicant's personal financial circumstances. Agencies need to have regard to the policy of the Privacy Act, which is to minimise the collection of personal information to what is required for the particular function or activity. For example, in this case, to make a decision as to whether to waive or reduce a charge.

9. In the absence of any such information in relation to your request I am not satisfied that the payment of the charge, or part of it, would cause you any financial hardship.

Consideration of public interest

10. In relation to public interest considerations, Part 4 – charges for providing access,

11. the Guidelines state:

4.79 The Act requires an agency or minister to consider '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' (s 29(5)(b)). This test is different to and to be distinguished from public interest considerations that may arise under other provisions of the FOI Act.

4.80 Specifically, the public interest test for waiver in s 29(5)(b) is different to the public interest test in s 11A(5) that applies to conditionally exempt documents. Nor will s 29(5)(b) be satisfied by a contention that it 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.

4.81 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.

12. You have not advanced any public interest arguments, and there are none that I see relevant in this case.

Consideration of how the charges are calculated

13. In relation to how the charges for an FOI case are calculated,

14. The guidelines state:

4.56 A commonly used tool for estimating charges under s29 is the ‘charge calculator’. The charge calculator is a Microsoft Excel document that was originally developed by the Australian Government Solicitor. In particular, it contains a number of predetermined parameters based on assumptions as to how long an FOI request should take to process.

4.57 A charge calculator cannot produce an accurate estimate without accurate inputs and caution is required in adopting such a resource. Some documents may contain complex material, which might justify longer processing times, while others may be quite straight-forward, and would require significantly less time to review.

4.58 A common parameter that is included in the charges calculator is that the examination of relevant pages for decision making would take five minutes per page, and for exempt material, an additional five minutes per page. Unless the document at issue is particularly complex, it may be difficult for an agency or minister to adequately justify an estimate that it would take 10 minutes to process each page of the relevant documents.

15. In line with the above, I have reviewed the original preliminary assessment of charges. I note that our office sought initial advice from the relevant area, Defence People Group, who advised that the data requested for 2017 was not in a form available for release without adjustments or creating a document. I also note that the original estimate was based on the time it would take to extract and review approximately 116 referrals – with each referral consisting of 1-1.5 pages.

16. I have received further advice from Defence People Group that they have interpreted the request to relate to **Code of Conduct referrals** actioned by the Directorate of Conduct and Performance. Defence People Group has also been able to extract the information in order to produce a document. This information has been extracted from the database so that each referral represents a single line in a spreadsheet. As such, the page count was reduced.

17. As the information is stored in a database and can be extracted, Defence has decided, in this instance, to produce a document and consider this for release.

18. Based on the above, I consider that the original preliminary assessment of charges requires reduction.

Revised preliminary assessment of charges schedule

19. In light of the above, the revised preliminary assessment of charges is as follows:

Search and retrieval time

Searching for documents	4 hours @ \$15 per hour	\$ 60.00
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Decision-making time

Examination of documents	1 hour @ \$20 per hour	\$ 20.00
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Consulting outside of Defence	@ \$20 per hour	\$ -
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Making copies of documents	@ \$20 per hour	\$ -
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Preparing decision notice	3 hours @ \$20 per hour	\$ 60.00
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Other decision making tasks	@ \$20 per hour	\$ -
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Less	% reduction for personal information	\$ -
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Less	5 hours of free decision making time	\$ 100.00
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Other tasks		\$ -
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Copying of documents	pages @ 10 cents per page	\$ -
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Production of CD

GST (Exempt)		Nil
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Total		\$ 60.00
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Deposit required		\$ 20.00
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Charges decision

20. After taking the above into consideration, I do not believe that the charge will cause you financial hardship nor am I convinced that disclosure of the selected documentation which matches the scope of your request is in the public interest. It is my view that a contribution towards the processing of this request is justified. Therefore, I have decided to impose the FOI processing charges at the reduced amount of 60.00.

Way forward

21. If you agree with my decision, and wish to proceed, a deposit of **\$20.00** is required. The deposit is not refundable except in some limited circumstances (for example, if Defence fails to make a decision on your request within the statutory time limit), or may be refundable in part if the final charge is less than the deposit paid.

22. Please complete the authorisation form at Enclosure 1 and return it to the FOI Directorate by 13 June 2018. Upon receipt of the form an invoice will be sent to you within five working days. Details about payment of the invoice are on the form. Our office will not process your request until a receipt is received in our office notifying that the deposit amount has been paid. If you do not respond to this letter within 30 days of receiving it (or by a later deadline if we give you an extension), we will take it that you have withdrawn your request.

23. Alternatively, if you disagree with my decision, you are entitled to apply for an internal review. Such an application should be made within 30 days of receipt of this letter or such further time as the Department may allow. The fact sheet *Freedom of Information – Your Review Rights* is at Enclosure 2.

Further advice

24. The FOI Act may be accessed online at www.comlaw.gov.au/Details/C2011C00803

25. Please contact our office on 02 6266 2200 if you have any queries about your request.

Yours sincerely

Melissa Davidson
Assistant Director
Freedom of Information

Enclosures:

1. Payment Authorisation form - Deposit
2. Fact Sheet: Freedom of Information – Your Review Rights



FREEDOM OF INFORMATION REQUEST - PAYMENT AUTHORISATION

FULL NAME or ORGANISATION Service or PMKEYS ID (if applicable)			
POSTAL ADDRESS:			
CONTACT PHONE NUMBERS:	H	M	B
EMAIL:			
FOI REFERENCE :	FOI 368/17/18		
AMOUNT \$	20.00		

By signing this form you are agreeing to pay the charges notified to you by the Freedom of Information Directorate. The deposit is not refundable except in some limited circumstances (for example, if Defence fails to make a decision on your request within the statutory time limit), or may be refundable in part if the final charge is less than the deposit paid:

PLEASE DO NOT SEND CHEQUES OR MONEY ORDERS TO FOI

Once our office receives this form, the Department of Defence will generate an invoice in order for you to make payment of the agreed charges via one of the payment options.

Our office will not proceed to process your request until a receipt has been received in our office notifying that the deposit amount has been paid.

Please sign below and return this form by one of the following:

- via email to xxx@xxxxxxxx.xxx.xx
- via fax 02 6266 2112
- by post to the address noted above.

Signature: _____