



Australian Government
Department of Defence

Freedom of Information
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Our reference: FOI 434/17/18

Mr Asher Hirsch
Right to Know

By email: foi+request-4542-eafexxxx@xxxxxxxxxxxxx.xxx.xx

Dear Mr Hirsch

NOTICE OF DECISION ON REQUEST FOR REVIEW OF CHARGES

1. I refer to your correspondence, dated 27 April 2018, in which you requested access, under the *Freedom of Information Act 1982* (FOI Act), to:

“the Memorandum of Understanding (MoU) for the transfer of four Australian Defence Force C-130 Hercules aircraft to Indonesia signed in July 2012.”

Liability to pay charges

2. In a letter dated 1 May 2018, you were advised of the decision, in accordance with section 29 of the FOI Act, that you were liable to pay a charge for the processing of your request and for giving access to the requested documents.

3. On 1 May 2018, you sought a review of the charges associated with your request on public interest and financial hardship grounds.

Decision maker

4. By arrangements made by Defence under section 23 of the FOI Act, I am authorised to decide on your request for 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; and
 - d. the Guidelines published by the Office of the Australian Information Commissioner (the Guidelines).

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. Your email of 1 May 2018, advised that *"The payments would cause me financial hardship. I am currently a full-time PhD Candidate at Monash University. This document forms part of my PhD research, however, I have no research funding or any other funding to cover the cost of this request."*

10. I am not satisfied that the payment of the charge, or part of it, would cause you any financial hardship as you have not provided any documentary evidence which supports your claim for financial hardship.

Consideration of public interest

11. In relation to public interest considerations, 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. Your email of 1 May 2018 provided your arguments in favour of the charges being waived. Specifically you stated:

"I believe the release of this document is in the public interest. The Australian community rightly expects that Australia's gifting of military equipment to other countries is publicly available. This MOU has been previously promoted by the Department of Defence in a press release (<https://web.archive.org/web/20121108090343/https://www.minister.defence.gov.au/2012/07/02/minister-for-defence-c-130-hercules-aircraft-gifted-to-indonesia>), indicating its broad public interest. It has also been reported widely in the national media. Further, the documents have been subject to debate and public discussion, and the release of this MOU 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. As mentioned, this document will form part of my PhD research which will be published in a publicly available book."

13. You have stated what the requested material will be used for, and that the results are intended to be published, you have indicated how this would be "in the general public interest or in the interest of a substantial section of the public". I accept your argument in this regard.

14. Paragraph 4.84 of the Guidelines refers to the consideration of the range or volume of documents requested by an applicant when considering whether to impose charges for processing. Our office sought preliminary advice from the relevant area who advised that the document requested consist of seven pages. I acknowledge that the document is a policy document, however we were advised that the document will still need to be reviewed closely prior to release and may require redaction. The Indonesian government will also need to be consulted in order to preserve the international relationship between our two countries. I have taken this into account when considering your arguments, and consider that a contribution to the charge is reasonable in terms of the amount of work required to process the request.

15. Paragraph 4.88 provides other grounds for reduction or waiver or charges. Dot point five states that it may be appropriate to reduce or not impose a charge if “the document is required for research purposes for which no commercial benefit will flow to the applicant”. Your request was made as a representative of Monash University, and you have stated that this document will form part of your research which will be published in a publicly available book. As such, one could assume that research published by the University or linked back to the University could result in a commercial benefit.

Charges decision

16. After taking all of the above into consideration, I do not consider that you have adequately addressed the financial hardship argument to convince me to waive the charges. I am aware that agencies should be seen to be providing access to documents at the lowest possible cost for both the agency, and the applicant. Therefore, I have decided reduce the charges to **\$60.00**.

Way forward

17. 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.

18. Please complete the authorisation form at Enclosure 1 and return it to the FOI Directorate by **29 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.

19. 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

20. Please contact me if you have any queries about your request.

Yours sincerely

Melissa Davidson
Assistant Director
Freedom of Information

Enclosures:

1. Payment Authorisation form
2. Freedom of Information – Your Review Rights



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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 :			
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@xxxxxxx.xxx.xx
via fax 02 6266 2112
by post to the address noted above.

Signature: _____