



Internal review (charges) decision made under the *Freedom of Information Act 1982*

Internal review (charges) decision and reasons for decision of Nick (Position Number 62209913), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Verity Pane

Date of primary decision: 24 October 2018

FOI reference number: FOI 24761

Internal review decision date: 7 December 2018

Internal review reference number: IR 25415

Sent by email: foi+request-4848-05c3e85b@righttoknow.org.au

Dear Ms Pane

1. The purpose of this letter is to give you a decision about your request for internal review under the *Freedom of Information Act 1982 (FOI Act)*.
2. I have made a decision to vary the original decision made by Position Number 62212962, Legal Officer, Information Law Section, Legal Services and Assurance Branch to waive in full the charges for access to documents within the scope of your request.

Authority to make this decision

3. I, Nick (Position Number 62209913), Acting Director, Information Law Section, am an officer authorised by the Secretary of the Department of Veterans' Affairs (**Department**) to review decisions about access to documents in the possession of the Department in accordance with section 54C of the FOI Act.

Summary

3. On 27 September 2018, you made a request for access to documents in the possession of the Department. Your request sought access to:

Under s 17 of the FOI Act, I require DVA to compile from its Human Resource Information Management System, the names and position numbers of all positions identified in the

Internal Review Decision 22524 of FOI 22031 (being all DVA delegates) as at 27 September 2018.

4. On 24 October 2018, the Department provided you with a Charge Notice, advising of a preliminary assessment of charges for processing your request in the amount of \$119.54. You were also advised that a deposit of \$29.88 was required before any further action could be taken on your request.
5. On 25 October 2018, you requested a reduction/waiver of charges associated with your request on the basis that the charges were wrongly assessed. Your request was made in the following terms:

Notably, no charges were levied for the collection of this information released in the prior FOI, which arguably would have taken longer to compile given it involved more than producing a standard position report in DVA's human resource management information system (HRMIS) and required questions to be asked of the officers involved as to the extent of their FOI duties.

It does not take two hours to produce a position report in a HRMIS, rather less than 5 minutes (and that's being for someone unfamiliar with the HRMIS).

I therefore challenge the charges assessment which appears to have been made solely to impede access, and for no other purpose.

6. On 7 November 2018, you emailed the Department requesting an internal review of the charges decision and stated:

The facts are, contrary to your claims, the history panel on the position number in the HRMIS details every occupant that has held that position since it existed in the system. Similarly, these are the positions of the work area compiling this FOI (Information Law), and you are well aware who these people are and what these positions are – yet engage in this charade that this is some deep dark mystical secret that requires hours of research to identify.

Internal review decision

7. Upon internal review of the charges decision, I reviewed the advice from the business area which led to the decision to impose a charge.
8. Based on the information provided to me, I have decided to waive in full the charges decision.

Material taken into account

9. In accordance with section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to refuse access to documents follow.

10. I have taken the following material into account in making my decision:
- the terms of your primary request, dated 27 September 2018;
 - the terms of your request for an internal review, dated 7 November 2018;
 - the types of documents that are in the possession of the Department;
 - the content of the document that fall within the scope of your request;
 - the availability of information relevant to your request, in so far as it determines the practicality and ease in which the Department can create a document under section 17 of the FOI Act;
 - sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth;
 - the guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).
11. A full extract of the FOI Act provisions used to make my decision are provided in **Schedule 1**.

Guiding principles taken into account

11. I acknowledge that one of the principal objects of the FOI Act is, as far as possible, to facilitate and promote the disclosure of information held by government. However, the FOI Act does not go so far as to say that access to information should be free of any cost to the applicant.
12. In considering your application for internal review, I have also referenced the Guidelines in Part 4, section 4.3:

An agency or minister has discretion to impose or not impose a charge, or impose a charge that is lower than the applicable charge under Regulation 3 of the Charges Regulations. In exercising that discretion the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects clause of the FOI Act at section 3(4):

... functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

13. I also considered the following principle at paragraph 4.5 of the Guidelines which is relevant to charges under the FOI Act:
- Charges should fairly reflect the work involved in providing access to documents on request.*
14. The power to reduce or waive FOI charges is a discretionary one, subject to law and government policy.

Public interest considerations

15. I do not accept there is a substantial interest in the requested information within the community in order to reduce or waive FOI charges on public interest grounds. The Guidelines in paragraphs 4.79 – 4.81 state:

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’ [section 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.

Specifically, the public interest test for waiver in section 29(5)(b) is different to the public interest test in section 11A(5) that applies to conditionally exempt documents. Nor will section 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.

An applicant relying on section 29(5)(b) should identify or specify the ‘general public interest’ or the ‘substantial section of the public’ that would benefit from 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.

16. You have provided any reasons as to why disclosure of the information requested would be in the public interest and, as such, I am not satisfied that the application would justify the waiver of charges on those grounds.

Financial hardship

17. The FOI Act in section 29(5)(a) requires me to take into account in making my decision ‘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 application was made’. However, the applicant in this case has not provided any supporting information of this kind. Therefore, I have no information available to me to enable me to come to a decision about financial hardship.

Calculation of charges

18. The Department’s original charges decision in relation to your application set forth the basis of the calculation. As such, I am satisfied that the Department has calculated the charges correctly.
19. However, I acknowledge that the charge is small and the work in identifying the information within scope has largely been done.
20. Consequently, I consider that it is administratively expedient in this case to no longer pursue charges for the provision of the information requested. I have come to this decision because the general discretion to reduce or waive a charge is not limited to financial hardship and/or public interest grounds. There are other factors to be taken into account including the use of Departmental resources where a charge may be waived even though the applicant has not expressly framed the application on that basis.

External review

21. Under section 54L of the FOI Act, you may apply directly to the Office of the Australian Information Commissioner (**OAIC**) to review my decision. An application for review by the OAIC must be made in writing within 60 days of the date of my decision, and be lodged on one of the following ways:

Online: www.oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001

Facsimile: (02) 9284 9666

Email: enquiries@oaic.gov.au

In person: Level 3, 175 Pitt Street, Sydney NSW 2000

22. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAIC: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>

Contact us

23. If you wish to discuss this decision, please contact the Information Law Section in these ways:

Post: Legal Services & Assurance Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: information.access@dva.gov.au

Yours sincerely

Nick (Position Number 62209913)

Director

Information Law Section | Legal Services & Assurance Branch

Legal Assurance and Governance Division



Schedule of relevant provisions in the FOI Act

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).
- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
 - (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of exempt document in subsection 4(1).

17 Requests involving use of computers etc

- (1) Where:
 - (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;

- (b) It appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
- (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
- (c) the agency could produce a written document containing the information in discrete form by:
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

- (2) An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
 - (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and
 Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).
 - (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
 - (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.
(see section 11A).

29 Charges

- (1) Where, under the regulations, an agency or Minister decides that an applicant is liable to pay a charge in respect of a request for access to a document, or the provision of access to a document, the agency or Minister must give to the applicant a written notice stating:
 - (a) that the applicant is liable to pay a charge; and
 - (b) the agency's or Minister's preliminary assessment of the amount of the charge, and the basis on which the assessment is made; and
 - (c) that the applicant may contend that the charge has been wrongly assessed, or should be reduced or not imposed; and
 - (d) the matters that the agency or Minister must take into account under subsection (5) in deciding whether or not to reduce, or not impose, the charge; and
 - (e) the amount of any deposit that the agency or Minister has determined, under the regulations, that the applicant will be required to pay if the charge is imposed; and
 - (f) that the applicant must, within the period of 30 days, or such further period as the agency or Minister allows, after the notice was given, notify the agency or Minister in writing:
 - (i) of the applicant's agreement to pay the charge; or
 - (ii) if the applicant contends that the charge has been wrongly assessed, or should be reduced or not imposed, or both—that the applicant so contends, giving the applicant's reasons for so contending; or
 - (iii) that the applicant withdraws the request for access to the document concerned; and
 - (g) that if the applicant fails to give the agency or Minister such a notice within that period or further period, the request for access to the document will be taken to have been withdrawn.
- (2) If the applicant fails to notify the agency or Minister in a manner mentioned in paragraph (1)(f) within the period or further period mentioned in that paragraph, the applicant is to be taken to have withdrawn the request for access to the document concerned.
- (3) An agency or Minister must not impose a charge in respect of a request for access to a document, or the provision of access to a document, until:
 - (a) the applicant has notified the agency or Minister in a manner mentioned in paragraph (1)(f);
or
 - (b) the end of the period or further period mentioned in that paragraph.

- (4) Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph (1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not to be imposed.
- (5) Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, 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 application 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.
- (6) If the applicant has notified the agency or Minister in the manner mentioned in subparagraph (1)(f)(ii), the agency or Minister must take all reasonable steps to enable the applicant to be notified of the decision on the amount of charge payable as soon as practicable but in any case no later than 30 days after the day on which the applicant so notified the agency or Minister.
- (7) If:
- (a) that period of 30 days has elapsed since the day on which the agency or Minister was so notified; and
 - (b) the applicant has not received notice of a decision on the amount of charge payable;
- the principal officer of the agency, or the Minister, as the case requires, is, for all purposes of this Act, taken to have made, on the last day of the period, a decision to the effect that the amount of charge payable is the amount equal to the agency's or Minister's preliminary assessment of the amount of the charge mentioned in paragraph (1)(b).
- (8) If:
- (a) the applicant makes a contention about a charge as mentioned in subsection (4); and
 - (b) the agency or Minister makes a decision to reject the contention, in whole or in part;
- the agency or Minister, as the case requires, must give the applicant written notice of the decision and of the reasons for the decision.
- Note: Section 25D of the Acts Interpretation Act 1901 sets out rules about the contents of a statement of reasons.
- (9) A notice under subsection (8) must also state the name and designation of the person making the decision and give the applicant appropriate information about:
- (a) his or her rights with respect to review of the decision; and
 - (b) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and

(c) the procedure for the exercise of those rights;

including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(10) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (8).

(11) A notice under subsection (8) is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.