



Charges notice made under the *Freedom of Information Act 1982*

Decision to impose a charge of Leia (Position Number 6221002), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Verity Pane

Notice date: 23 November 2018

FOI reference number: FOI 25080

Documents: Document to be created under section 17 of the FOI Act (Position report relating to the Legal Services & Assurance Branch)

Sent by email: foi+request-4872-dbcf3981@righttoknow.org.au

Summary

1. I have made a decision to impose a charge in the amount of **\$48.68**. A deposit of \$20.00 is required.

Authority to make this decision

2. I, Leia (Position Number 62210022), Assistant Director, Information Law Section, am an officer authorised by the Secretary of the Department of Veterans' Affairs (**Department**) to make decisions about charges applying to requests for access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982* (**FOI Act**).

Background

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

"...Under s 17 of the FOI Act, I seek that you compile a position report from your agency's Human Resource Management Information System (HRMIS/HRMS), for the whole of the Legal Services & Assurance Branch of DVA, as of today (or any date up to decision issue - your choice)..."

4. On 15 October 2018, you advised:

"...I modify my scope, in so far as that if the Legal Services & Assurance part of DVA is referred to by something than the Legal Services & Assuranve Branch (such as Division, Group, etc). that

reference will be taken to refer to that part of the organisation, regardless of its actual description..."

5. On 25 October 2018, the Department provided you with a Charges Notice, advising an estimate of a charge in the amount of \$48.85. You were also advised that a deposit of \$20.00 was required before any further action could be taken on your request.
6. On the same day you sent an email disputing the charge. You specifically noted:

"...While the charges levy is still on the high side, it is tolerable.

However, the issue now is the levy charge is too low to justify it's collection, especially given DVA only accept cheques ...

The bank fee to create a CBA bank cheque to pay the deposit is practically the same as the deposit amount, let alone the costs the CBA charges to send the cheque to DVA, which put the total costs of handling well above the deposit amount (effectively making the real cost much higher to the applicant).

This pushes the not intolerable total charges levy of \$48.85 into the uneconomical to levy and collect category, which the Information Commissioner has ruled is when such charges should be waived in order to comply with the aims and objects of the FOI Act to provide access at the lowest cost possible...

However, you have skipped ahead and imposed a charges levy notice without giving any preliminary notice, so as to make it required that either a tokenistic charge that costs almost as much to arrange as it is to pay is required, or force the stopping of the s 15(5)(b) processing deadline to intentionally cause interference with a reasonable right to access...

The FOI Guidelines explain that the decision to impose a charge is discretionary. A charge should be accurate, should fairly reflect the work involved in providing access to documents on request and must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act.

As per the reasoning of the Information Commissioner in 'ND' and Department of Human Services (Freedom of Information) [2017] AICmr 119 (20 November 2017), the charges notice should be withdrawn (especially since DVA have already foreshadowed they have no real intention of providing access, again highlighting that the sole intent is to cause further delay). The levied amount falls within the range previously identified by the Information Commissioner as uneconomical to levy..."

Material taken into account

7. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to apply a charge to process your request follows.
8. I have taken the following material into account in making my decision:
 - the terms of your request;
 - the Charges Notice, dated 25 October 2018;
 - your correspondence contending the Charges Notice, dated 25 October 2018;
 - the ease in which the Department can retrieve the data/information you have requested to create a document that does not already exist;
 - the content of the document that falls within the scope of your request once the document is created;
 - information received by the relevant business area about the work involved in creating the document you have requested;
 - 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. I also considered section 29 of the FOI Act (Charges) relevant to my decision;
 - the *Freedom of Information (Charges) Regulations 1982* (Charges Regulations); and
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).
9. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 1**.

Decision

10. I have made a decision to impose a charge in the amount of **\$48.68**. A deposit of \$20.00 is required. Detail surrounding the charge is at **Schedule 2**.

Reasons for Decision

11. Section 29 of the FOI Act provides that charges can be imposed for processing requests. Unless a decision is made to waive the processing charge in whole or in part, the combined effect of section 11A(1)(b) of the FOI Act and Regulation 11(1) of the Charges Regulations is that an applicant is required to pay any charge before any access is given.

12. The Charges Regulations specify different rates for the various activities involved in processing a request with the first five hours of decision-making time free for all FOI applicants.

Is the charge wrongly assessed?

13. You have not contended that the charge has been wrongly assessed. Despite this, I reviewed the charges and have adjusted them to be for a total of \$48.68.
14. Although you did not dispute the assessment of the charge, you did state that “...*the issue now is the levy charge is too low to justify it’s collection, especially given DVA only accept cheques ...*” and that the method of payment puts “...*the total costs of handling well above the deposit amount...*”
15. The FOI Guidelines at [4.3], state that a Department has the discretion to impose or not impose a charge. You have requested the Department to create a document for you. In this instance, the Department has used its discretion to impose a charge to process your request.
16. I have however, taken your above concern on board and offer you an alternative method of payment, which can be by electronic funds transfer. There are no additional costs associated with this method of payment.
17. You also alleged that the Department “...*skipped ahead and imposed a charges levy notice without giving any preliminary notice, so as to make it required that either a tokenistic charge that costs almost as much to arrange as it is to pay is required, or force the stopping of the s 15(5)(b) processing deadline to intentionally cause interference with a reasonable right to access...*”.
18. I refer you to the email issued to you on 25 October 2018 where you were provided with the Charge Notice. As you responded to that notice, it is reasonable to conclude that you did receive the preliminary charge prior to this decision being issued; which is the ‘decision’ to issue a charge to process your request.
19. In your response, you refer to case law that you feel supports a view that the charge should not apply. In that particular case, the applicant had already been provided with a copy of the document sought through an earlier FOI request. The issue in contention was about applying a charge for access to the same document but in a different format. Further, the applicant also disputed the calculation of the charge as well as raising public interest considerations. Additionally, the charge that applied related to Part I, Items 2 and 5 of the Charges Regulations Schedule. Those circumstances do not apply to your request.

Would charges cause financial hardship?

20. As you have not advised that payment of the charge would cause you financial hardship, I have not considered a waiver or reduction on the basis of financial hardship.

Is giving access to the document(s) in the public interest?

21. As you have not advised that payment of the charge should be waived or reduced on public interest grounds, I have not considered a waiver or reduction on the basis of public interest.

Your liability to pay a charge

22. As the charge is more than \$25.00 but less than \$100.00, you will need to pay a deposit of \$20.00 before further action can be taken on your request. This amount is set in Regulation 12(2)(a) of the Charges Regulations.
23. The deposit is not refundable except in some limited circumstances (for example, if the Department 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.
24. On payment of the charge in full, or the required deposit, processing of your request will commence. Payment can be made by:

- (a) forwarding a cheque for the required amount to:

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

Required Reference: FOI25080/Verity Pane

Or

- (b) paying by electric funds transfer directly into the Department's banking account using the following details:

Account name: Reserve Bank of Australia

BSB: 092009

Account number: 112084

Required Reference: FOI25080/Verity Pane

Access to the document requested

25. The Department will continue to process your request once the deposit (or the full charge if you prefer) is received. If you pay the deposit, the document will not be released to you until payment of the remaining charge has been made.
26. Please note that payment of a charge does not guarantee full access to the document.

Your rights of review

27. If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal Review

28. Under section 54 of the FOI Act, you may apply in writing to the Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.
29. You can make your application for internal review in one of the following ways:

Post: Legal Services & Assurance, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: information.access@dva.gov.au

Information Commissioner Review

30. Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in 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.

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

Contact us

32. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the following details:

Post: Legal Services & Assurance, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: information.law@dva.gov.au

Yours Sincerely,

Leia (Position Number 62210022)

Assistant Director

Information Law Section | Legal Services and Assurance Branch

Legal Assurance and Governance Division

23 November 2018



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).

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.



Charge made under the FOI Act

PROCESSING CHARGES		
Search and retrieval*		
Task	Time	Cost
Search and retrieval (EL2 at \$73.86 p/hr)	0.25	\$18.47
Search and retrieval (APS6 at \$49.13 p/hr)	0.25	\$12.28
Create section 17 document as requested (EL1 at \$59.77 p/hr)	0.25	\$14.94
Preparation of schedule of documents	0.05	\$2.99
<i>Search and retrieval subtotal</i>	0.80	\$48.68
Decision making		
Task	Time	Cost @ \$20/hr
Examination of documents	0.07	\$1.33
Consultation with third parties	0.00	\$0.00
Preparation of documents for release	0.07	\$1.33
Preparation of notice of access decision	1.00	\$20.00
Decision making subtotal (before deduction of 5 hours)	1.13	\$22.67
<i>Decision making subtotal (after deduction of first 5 hours free)</i>	0.00	\$0.00

ESTIMATED TOTALS AND DEPOSIT	
ESTIMATED TOTAL	\$48.68
REQUIRED DEPOSIT	\$20.00

*charges are based on actual costs incurred in accordance with the Charges Regulations Schedule (Part I, item 3)