



Australian Government
Australian Public Service Commission

D Watson

By email: D Watson <foi+request-4880-a8fd2cee@righttoknow.org.au>

Reference: C18/2246 (Charges review); and C18/1974 (Primary request)

Dear D Watson,

Freedom of Information Request - Determination of contesting of Charge

1. On 22 November 2018, you wrote to the Australian Public Service Commission (the **Commission**), advising that under section 29(1)(f)(ii) of the *Freedom of Information Act 1982* (Cth) (the **FOI Act**), you are contesting the preliminary charge decision by Ms Kerren Crosthwaite of 24 October 2018.
2. This correspondence sets out my determination about the applicable charges in your matter.

Background

3. I refer to your email correspondence received by the Commission dated 13 October 2018, requesting access under the FOI Act to the following documents:

*I refer to the FOI request made of the APSC as set out here:
https://www.righttoknow.org.au/request/hadgkiss_and_lloyd*

Under the FOI Act, I seek access to similar information. Specifically, I seek copies of email correspondence between Mr John Lloyd (in his capacity as Public Service Commissioner or otherwise), and Mr Nigel Hadgkiss (in his capacity as Australian Building and Construction Commissioner or otherwise), from 1 January 2015, onwards.

I am willing to agree to the personal information of any third party individuals or information relating to any third party organisations to be redacted from any relevant document.

Further, I am willing to exclude from the scope of my request:

- *any document attached to any relevant email; and*
- *all but the last email in email chains/threads (but only on the basis that the preceding emails in those email chains will be included in the last email of those email chains)...*

4. On 24 October 2018, the Commission wrote to you advising that you would be liable to pay a charge for the processing of your FOI request.
5. I note that the preliminary assessment of **\$202.94** was calculated in accordance with Schedule 1 of the *Freedom of Information (Charges) Regulations 1982* (the **FOI Regulations**); and as provided under the FOI Act, the first five hours of decision-making time has been calculated and deducted from the preliminary assessment.
6. On 22 November 2018, you wrote to the Commission advising that you wished to contend the charge should not be imposed. In summary you advised that releasing the documents is in the general public interest, and that the charge has been wrongly assessed. You provided a number of contentions to support your claim.

Contentions

7. I note your contentions which I have summarised as follows:
 - The charge should not be imposed due to the public interest in the documents
 - The charge has been wrongly assessed
 - A perceived conflict of interest exists.

Public interest in the documents

8. You advised that the charge should not be imposed, because the giving of the documents is in the general public interest or in the interest of a substantial section of the public and the charge has been wrongly assessed.

The Charge has been wrongly assessed

9. You advised that the charge has been wrongly assessed and cited a previous FOI request which had been lodged to the Commission on 21 July 2018. You advised that the applicant was liable to pay a charge of \$425.14, relating to 57 documents and comprising of 132 pages.
10. You alleged that the charge, despite the requirements of Item 5, Part 1 of the Schedule to the Charges Regulations, was not reduced as required by the Charges Regulations for the first five hours of decision making time, equating to a \$100.00 deduction.
11. You also noted that your request was of a significantly narrower scope than that of the July 2018 request, and that you did not require any attachments, nor any copies of email chains/threads; only requiring the last email in those chains/threads. You also noted that third party consultation had previously been conducted in the July request and would therefore not be required in this request.
12. You advised that the decision making time as assessed in your request, appeared in your view, to be equivalent to 15 hours of decision making time. You also cited a case; '*FF and Australian Taxation Office [2015] AICmr25 [23]*'.
13. You advised that it has generally been accepted that between 30 seconds per page and up to five minutes per page, would be a reasonable estimate of the time required for an agency to assess, edit and make decisions on documents.

14. Further you noted that, if the Commission took the upper limit of five minutes per page, the decision making time would equate to 7 hours and not 15 hours. You advised the decision making time should be closer to 3 hours.
15. You also noted that the incorrectly assessed charge would be hindering public access to documents that are clearly in the public interest as they are likely to disclose misconduct.

Conflict of Interest

16. I note that you have alleged that as an executive Group Manager of the Commission, the decision maker, Ms Crosthwaite, was aware of Mr Lloyd's alleged illegal conduct in public office. You noted that despite having knowledge of Mr Lloyds's misconduct that no steps were taken to report or address allegations of misconduct.

Charges Determination

17. I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.
18. The Australian Information Commissioner provides Guidelines under section 93A of the FOI Act, to which regard must be had, for the purposes of performing a function, or exercising a power, under the FOI Act.
19. Section 29(4) of the FOI Act provides discretion where an applicant has notified an agency that the applicant contends that the charge should be reduced or not imposed, the agency may decide that the charge is to be reduced or not to be imposed.
20. The FOI Act does not limit matters that the agency may take into account in determining whether or not to reduce, or not to impose the charge. However, section 29(5) of the FOI Act specifies that, consideration must be given to whether the payment of the charge, or part thereof, would result in financial hardship to the applicant. Consideration should also be given to whether the giving of access to the document(s) in question, is in the general public interest, or in the interest of a substantial section of the public. I address these considerations below.

Financial Hardship

21. Consideration of whether payment of a charge would cause financial hardship means more than an applicant having to meet a charge from their own resources. Consideration is given to the applicant's financial circumstances and the amount of the estimated charge.
22. I note that you did not provide submissions regarding any financial hardship that may be incurred by payment of the charge, nor have you elected to provide evidence of any financial hardship in support of a reduction to, or waiver of the charge. Accordingly, I am satisfied that the payment of the charge would not cause you financial hardship.

Public Interest

23. I note that you have advised that section 29(5)(b) of the FOI Act requires consideration of whether the giving of access to the documents in question is in the general public interest or in the interest of a substantial section of the public. I note however, that this section of the FOI Act is a different test to the public interest test, which is a consideration in relation to conditionally exempt documents under the FOI Act. I do not consider that this argument applies in this case, noting that this decision is purely based on a charges decision, rather than an access decision.
24. Requests for reduction or waiver of the charge is relevant to paragraph 4.81 of the FOI Guidelines. The Guidelines note that the 'general public interest' or the 'substantial section of the public' should be identified with specificity.
25. Consideration of a waiver or reduction of the charge will not be satisfied by a 'general contention' that release of documents to an individual with a special interest in the documents, will be in the public interest; neither will it be satisfied by a contention that transparency in itself, is in the public interest. Assessment of the public interest in this context, requires consideration of both the content of the documents requested and the context in which the public release would occur.
26. Further, I note that section 3(4) of the FOI Act states the objects of the FOI Act include that 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.
27. I acknowledge that you have commented that the Federal Court and the Merit Protection Commissioner found that illegal conduct had occurred by two senior statutory office holders. You advised that you are of the view that the documents are therefore likely to disclose further misconduct. I have assessed the documents and I have determined that release is not likely to increase public participation in government processes and would result in limited benefit towards public debate or discussion; noting that the documents are generally benign email correspondence and are not relevant to the general subject matter of corruption. Therefore, no public debate is likely to be forthcoming relating to these documents.
28. Consideration of the contentions relating to charges is also outlined in paragraph 84 of the FOI Better Practice Guide for Agencies, refer ([Attorney-General's Department FOI Better practice Guide](#)) providing guidance to agencies in relation to waiving of charges in the management of FOI requests. Specifically, other factors that affect a decision on whether to waive or reduce charges include:
 - whether the FOI request is relatively simple or will require a lot of effort
 - whether the applicant has agreed to reduce the scope, in which case it may be reasonable to waive the charges or reduce them substantially
 - whether the request seeks publicly available information, in which case it may be reasonable to impose charges if the applicant insists that the agency must go through a formal decision-making process, and
 - whether the applicant is repetitively seeking the same or similar material.
29. With the above in mind, noting that there is likely to be a limited benefit towards public debate, yet noting the objects of the FOI Act, I have given consideration to applying a higher discount to the charge for any limited public interest in the documents.

30. I am of the view that a charge is warranted for the processing of your request, as a volume of work and time is required to formally assess each page, line-by-line, make redactions to the documents, write a schedule of documents and formulate a lawful decision in accordance with the operations of the FOI Act. I have also determined that release of the requested documents would not advance public debate or discussion about the topics at hand, particularly in light of the material already available in the public domain and previously released material by the Merit Protection Commissioner. I have found that a full waiver of the assessed charge however is not in the public interest.
31. Having found there is not a notable benefit to a substantial section of the public, and that it is unlikely that release of the documents will greatly inform public debate, I have decided that there may however be an element of public interest in some of the documents. I have therefore decided to apply a further discretionary discount for potential public interest in the documents, amounting to 65%.

Charge assessment and determination

32. Noting that I must have regard to the Australian Information Commissioner's Guidelines, I note that the Guidelines explain that the agency or minister should take account of the 'lowest reasonable cost' objective stated in the objects clause of the FOI Act. Specifically section 3(4) of the FOI Act provides 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.

33. The Guidelines go on to explain that it is important that an estimate of charge is realistic and as accurate as possible. An agency or minister should be mindful that an applicant may think an estimate is set unreasonably high so as to hinder the applicant from pursuing their FOI request.
34. I have considered the decision by the Acting Information Commissioner in '*M' and Department of Agriculture, Fisheries and Forestry [2013] AICmr 24 (13 March 2013)*'. Noting that the Information Commissioner's Guidelines explain that it is open to an agency or minister to impose a charge even though a public interest purpose for disclosure has been established.[17] Once a decision maker has decided that giving access to documents would be in the general public interest, it is still open to them to decide that the full charge should apply. As the Guidelines explain, the issue is not whether it is in the public interest to reduce or not impose a charge, nor whether it is in the public interest for a particular applicant to be granted access to a document.[14] The question is, whether there is a benefit from the release of the documents flowing more generally to the public or a substantial section of the public.
35. I have considered your comments that the charge has been wrongly assessed. As such, I have reviewed the charge and compared the charge with the documents. Based on my assessment I consider that the original estimate decision was fair and reasonable. Having noted that the content is not particularly technical in nature, I note the original decision maker decided to reduce the estimate of decision-making time from five minutes per page to two minutes per page. I consider this an appropriate deduction.

36. Further, I note that Ms Crosthwaite's decision took into account a deduction relevant to the calculation for 'pages released with deletions'. This component of the charge was reduced from the five minutes per page, down to three minutes per page. I consider this an appropriate deduction. However, I note that a further deduction would not be warranted in respect of this calculation component, as the documents contain material which is deliberative, operational as well as personal information of third parties.
37. I have also considered the cost to the Commission in processing your FOI request, noting that the processing charges do not compensate the actual costs and time associated with the processing of your request. The true processing time for your request is longer than the total time considered for the purposes of determining the preliminary assessment of charges.
38. While, I do not believe there is a significant public interest in the content of the documents I have decided to reduce the charge applicable, by increasing the public interest discount from 20% to 65%. Further, I consider this reduction reflects a charge, balancing any public interest in the documents, with the objects and policy of the FOI Act; being that charges can be imposed for processing FOI requests.
39. Further, I note that eight pages of the material which was originally estimated, are now considered to be out of scope of the request, thereby reducing the number of relevant pages from 84 to 76 pages.
40. I have independently considered the calculation of the revised charge and I am satisfied that the estimated overall charge can be reduced to \$71.72. My determination is based on discussions with the relevant line area and knowledge of the time required to draft and settle an FOI decision, mark up the documents, and compile a schedule of documents relevant to your request, in accordance with the FOI Act.
41. I can confirm that, in the event that the work undertaken to finalise your access decision takes less time than originally estimated, an appropriate refund will be assigned to your matter.
42. In summary, I have determined that by increasing the public interest discount from a 20% discount to a 65% discount would result in a significant reduction to the overall charge. As such, I have decided to reduce the charge from **\$202.94 to \$71.72**.

Conflict of interest

43. I have considered your comments and contentions in relation to allegations of a conflict of interest against Ms Crosthwaite.
44. All Australian Public Service (APS) employees are under an ongoing duty to disclose and manage conflicts of interest. These duties arise under the *Public Service Act 1999* (Public Service Act) and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Where a person declares a conflict of interest in respect to a particular FOI request, the request is managed accordingly and may be referred to a different decision maker.
45. Ms Crosthwaite is well aware of her obligations under the Public Service Act, the PGPA Act, and the *Public Interest Disclosure Act 2013*, however it is not clear to me how a failure to report misconduct or unacceptable behavior is related to a conflict of interest.

46. The documents are not connected to nor do they concern with Ms Crosthwaite personally, and it is therefore not apparent to me how a conflict of interest would arise. I am not aware of any conflict of interest and in any case, I consider that this argument would not be relevant as I am making a fresh decision, as required under the FOI Act, relating to a charge decision.

Your action is required

47. Please notify the Commission in writing within 30 days of receiving this notice if you would like the Commission to continue processing your request by indicating whether you:

- agree to pay the affirmed charge of \$71.72
- wish to seek review of the charge determination, or
- withdraw the request.

48. If, within **30 days of receiving** this notice you do not provide a written response in accordance with one of the options listed above, your request will be taken to have been withdrawn.

Option A - pay the charge

49. As the preliminary assessment of the charge exceeds \$25.00, you are required to pay a deposit of \$20.00 (being 25% of the preliminary charge) within 30 days of receiving this notice. You may also elect to pay the charge in full if preferred (\$71.72).

50. The amount due should be paid by electronic funds transfer to:

Bank Account Name: APSC Official Account
BSB: 092-009
Account Number: 121220
Reference: **FOI C18/1974 - Watson.**

51. Should you elect to pay the charge please email FOI@apsc.gov.au once you have made payment. You will be notified of the final determination of applicable charges on release of the Commission's decision in this matter.

Option B - seek review of the charge

52. If you disagree with my decision to impose a charge, you may seek review in the following ways:

- You can ask for an internal review of the decision; or
- You can seek external review of the decision by the Australian Information Commissioner.

53. If you wish to seek internal review of this decision, section 54 of the FOI Act gives you a right to apply. You must apply in writing within 30 days of you receiving this notice. Applications for internal review can be lodged by email to FOI@apsc.gov.au, or by post to the FOI Coordinator at the Australian Public Service GPO Box 3176 Canberra ACT 2601.

54. If you choose to seek internal review, you will subsequently have a right to apply to the Australian Information Commissioner for review of the internal review decision if desired.

55. If you wish to seek external review, section 54L of the FOI Act confers a right to apply directly to the Australian Information Commissioner.

You must apply for such a review in writing within 60 days of receiving this notice. Applications can be made to enquiries@oaic.gov.au. Further information about the Australian Information Commissioner is available at www.oaic.gov.au.

Option C - withdraw your request

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

FOI Legislation

57. A copy of the FOI Act is available from <https://www.legislation.gov.au/Details/C2018C00016>
If you are unable to access this website, please contact our office.

Yours sincerely



Michelle Black
Authorised FOI decision maker

19 December 2018