



Australian Government
Department of Finance

Reference: FOI14/14
Contact: FOI Team
Telephone: (02) 6215 1783
e-mail: foi@finance.gov.au

Elias Housen

via email: foi+request-511-f6e8215c@righttoknow.org.au

Dear Mr Housen,

Freedom of Information Internal Review Request – FOI14/14 - Charges

The purpose of this letter is to provide you with notice of my internal review decision under the *Freedom of Information Act 1982* (FOI Act).

Internal Review Request

On 24 February 2014 via email to the Department of Finance (Finance) you sought an internal review as follows:

I am writing to request an internal review of Prime Minister's handling of my FOI request 'Section 12 of Members of Parliament (Staff) Act'.

Perhaps this was my mistake, but I believe the decision maker should have undertaken an analysis of whether the information should be freely released under public interest grounds.

I would like an opportunity to submit an argument that the information should be released freely under public interest grounds because:

[a] it is a reasonably standard protocol across Government that Determinations are considered to be Legislative Instruments and published online and in the Government Gazette; and

[b] these particular determinations result in the expenditure of Commonwealth funds on the salaries and other entitlements of those employed with the permission of these MOP(S) Act determinations.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.righttoknow.org.au/request/section_12_of_members_of_parliam

As advised previously, on 29 January 2014 PM&C transferred your request, in full, to Finance in accordance with section 16 of the FOI Act as the subject matter of your request is more closely related to the functions of this Department.

Initial Decision

On 29 January 2014 access was sought under the FOI Act to:

... copies of any determinations made under Section 12 of the Members of Parliament (Staff) Act 1984 made after September 18, 2013.

On 18 February 2014 you were notified of Finance's decision to impose charges in respect of the processing of your request and notified of the preliminary assessment of the charge (\$15.50).

Via email of the same day you advised:

I wish to contest the imposition of a charge for this request as the request is estimated to take a total amount of 1.22 hours which is well within the amount of decision making time which is free of charge.

If the search and retrieval time and the photocopying costs are not considered to be part of the decision making time I still request that that charges be withdrawn due to the relatively low cost of those components.

On 24 February 2014 you were notified of the decision not to waive charges.

Internal Review Decision

I confirm that I am an authorised officer for the purpose of subsection 23(1) of the FOI Act.

I have considered your request on its merits. I have decided to affirm the decision not to waive the charges.

Reasons for Decision

In deciding whether to exercise the broad discretion in subsection 29(4), to reduce or not impose a charge, I may consider any relevant matter. However, subsection 29(5) provides that I must consider whether giving access to the documents in question is in the general public interest, or in the interest of a substantial section of the public; and whether the charge would cause financial hardship.

In considering whether charges should be waived, I have had regard to the following:

- the terms of your FOI request;
- the submissions set out in your emails of 18 and 24 February 2014;
- the content of the documents that fall within the scope of that request;
- the relevant provisions of the FOI Act, including the aims and objectives;
- FOI Guidelines and IC Review decisions, as issued by the Australian Information Commissioner.

Estimate of charge

I can confirm that the 1.02 hours, identified in the preliminary estimate of charges, represents time spent for search and retrieval, the more functional aspects of responding to the request, and as such does not represent decision making time. There is no charge for decision making within the estimate, as the estimate for decision making time is less than 5 hours.

While the estimate of charges is low, it is consistent with the objects of the FOI Act and the Guiding principles as identified by the Australian Information Commissioner in the FOI Guidelines:

4.2 An agency or minister has a discretion to impose or not impose a charge, or impose a charge that is lower than the applicable charge under reg 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 (s 3(4)):

... functions and powers given by this Act are to be performed and exercised, as far possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost. [1]

and

4.5 Government policy before the 2010 amendments to the FOI Act required charges to be imposed unless an applicant made a case for a reduction or remission of charges. The Information Commissioner takes the view that this policy is not reflected in the Act as amended in 2010 and that agencies are not expected to exercise the discretion conferred by the Charges Regulations to impose a charge, unless in the agency's view it is appropriate to do so. It is open to agencies to develop their own charging policy consistent with the legislation and these Guidelines

In my view, the amount of \$15 is neither onerous nor an unreasonable. Additionally, it would be reasonable to expect a contribution toward the provision of documents.

I do not agree with your contention that section 12 determinations are Legislative Instruments (see section 5 of the *Legislative Instrument Act 2003*). However, I accept they do provide information about the operation of the employment framework for MOP(S) Act employees. Certain determinations, where they do not contain an unreasonable disclosure of personal information of an individual, have previously been published in the MOP(S) Act Annual Report. The determination the subject of this FOI request is not currently publicly available.

Legislation

Subsection 29(5) of the FOI Act provides:

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.*

Financial hardship

The applicant has not provided any evidence of financial hardship, and in those circumstances, I have not considered this issue further

Public Interest

The threshold requirement is to identify the benefit that would flow from disclosure of the document to the public or a substantial section of the public. The test is different to the question of whether it is in the public interest for access to be granted to the documents as set out in the conditional exemptions (see further discussion below).

A non-exhaustive list of examples of what may constitute 'public interest' for the purposes of paragraph 29(5)(b) of the FOI Act is set out at paragraph 4.58 of the FOI Guidelines. In my view the following are relevant in this case:

- the document/s relate to a matter of public expenditure; and
- the document/s may relate to a matter of public debate, and disclosure may assist public comment on or participation in the debate or discussion.

In my view, part of the threshold requirement for the public interest test under Subsection 29(5), identification of a substantial section of the public whose interest the release of the documents may serve, is not satisfied in respect of the documents captured by your request.

The FOI Guidelines indicate that the decision-maker is required to consider:

4.51 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)).

and whether

4.52 In applying s 29(5)(b) it is important to identify the 'general public interest' or the 'substantial section of the public' that would benefit from disclosure. The FOI applicant may benefit from disclosure, but for the purposes of s 29(5)(b) there should also be a benefit flowing more generally to the public or a substantial section of the public. This will ordinarily require consideration both of the content of the documents and the context of their release – for example, whether the documents relate to a matter of public debate or for decision by government.

Section 29(5)(b) requires me 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'.

I have considered 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)) and I do not consider the documents in the request meet the test. While I acknowledge that the documents maybe of interest to you and may contribute in some way to public debate I do not consider them to be of interest to a substantial section of the public or of general interest.

The FOI Guidelines indicate it is open to an agency or minister to impose a charge even though a public interest purpose for disclosure has been established.

I am not persuaded that a case for waiver, on the grounds of public interest, has been demonstrated.

The public interest test for conditional exemptions

The public interest test for waiver under subsection 29(5) of the FOI Act differs from the public interest test in section 11B of the FOI Act. The fact that giving access would be in the public interest for the purposes of reducing or imposing a charge under section 29 does not mean that giving access to those same, conditionally exempt documents, cannot be, on balance, contrary to the public interest.

No decision on access has been made at this stage.

Liability to pay a charge

My affirmed assessment of the charge to process this request is as follows:

Task	Rate	Units	Charge
Search & retrieval	\$15 per hour	1.02 hours	\$ 15.30
Decision-making	\$20 per hour	0.2 hours	\$ 4.00
<i>less first 5 hours free</i>		5 hours	\$ -100.00
Photocopies	0.10 per page	2 pages	\$ 0.20
TOTAL			\$ 15.50

In accordance with the *Freedom of Information (Charges) Regulations 1982*, this estimate has included 5 hours of decision making time free of charge.

You can agree to pay the charge. If you agree, processing of your request will resume as soon as Finance receives payment, in full.

Payment in full is \$15.50. Payment in full entitles you to receive a decision in relation to your request, a schedule which lists the documents relevant to your request, and any documents released.

Your cheque/money order should be made payable to the Collector of Public Monies and addressed to:

FOI Coordinator
Legal and Strategic Support Branch
Department of Finance
John Gorton Building
King Edward Terrace
PARKES ACT 2600

If you wish to pay by credit card, you should forward a letter which sets out the credit card details and authorises the Department to charge that amount to the card. Please note that the department only accepts Mastercard and Visa.

In accordance with paragraph 29(1)(f) of the FOI Act, within 30 days of the date of this notice, you need to either:

- agree to pay the charge indicated above and forward the deposit; or
- contend that the charge has been wrongly assessed, or should be reduced or not imposed (you should provide full reasons for your contention); or
- withdraw your request.

If you fail to notify this Department in a manner described above within 30 days of the date on this notice, it will be taken that you have withdrawn your request.

Review and Appeal Rights

You are entitled to request a review of my decision to the Office of the Australian Information Commissioner, please refer to Attachment A.

Further Assistance

If you have any questions, please contact the FOI Team on the above contact details.

Sincerely,



Suzanne Pitson
Assistant Secretary
Entitlements Policy Branch

24 March 2014



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with the decision made by the Department of Finance (Finance) under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of documents that has not been agreed to by the Department, or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by Finance, or external review by the Australian Information Commissioner.

Internal Review

If Finance makes an FOI decision that you disagree with, you can ask Finance to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless Finance agrees to extend the application time. You should contact Finance if you wish to seek an extension.

Finance is required to make a review decision within 30 days. If Finance does not do so, the original decision is considered to be affirmed.

How to apply for internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points you are objecting and why.

You can lodge your application in writing through one of the contact details provided at the end of this document.

Review by the Australian Information Commissioner (IC)

The IC is an independent office holder who can review the decisions of agencies and ministers under the FOI Act. The IC can review access refusal decisions (s 54L(2)(a) of the FOI Act), access grant decisions (s 54M(2)(a)), refusals to

extend the period for applying for internal review under s 54B (s 54L(2)(c)), and agency internal review decisions under s 54C (ss 54L(2)(b) and 54M(2)(b)).

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the IC within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

Do I have to go through Finance's internal review process first?

No. You may apply directly to the IC. However, going through Finance's internal review process gives Finance the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.

Do I have to pay?

No. Review by the IC is currently free.

How do I apply?

You must apply for IC review in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online:

<https://forms.australia.gov.au/forms/oaic/foi-review/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_review.

Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Making a complaint

You may make a written complaint to the IC about actions taken by Finance in relation to your application. However, if you are complaining that a Finance decision is wrong, it is treated as an application for review. For further information, see [FOI fact sheet 13 – Freedom of Information: How to make a complaint](#).

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the FOI Act, you must seek external review through the IC prior to applying to the AAT for such a review. The fee for lodging an AAT application is \$816 (from 1 July 2012), although there are exemptions for health care and pension concession card holders and the AAT can waive the fee on financial hardship grounds.

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the IC, the Ombudsman will consult the Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the

complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

Applications to the Ombudsman should be directed to the following address:

Post: Commonwealth Ombudsman
PO Box 442
CANBERRA ACT 2601
Phone: 02 6276 0111
1300 362 072

Finance FOI contact details

FOI Coordinator
Legal and Strategic Support Branch
Department of Finance
John Gorton Building
King Edward Terrace
PARKES ACT 2600
Phone: 02 6215 1783
Email: foi@finance.gov.au
Website: www.finance.gov.au/foi/foi.html