



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

Decision and reason for decision of Nick (Position Number 62209913), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Posty

Charges notice issued: 18 January 2019

Decision date: 4 March 2019

FOI reference number: FOI 26268

Sent by email: foi+request-5198-7cacc216@righttoknow.org.au

Dear Posty

Freedom of Information Request: FOI 26268

1. I have made a decision to impose charges in the amount of \$187.50.

Authority to make this decision

1. 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 make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982* (**FOI Act**).

Summary

2. On 1 January 2019, you made a request, under the FOI Act, for access to documents in the Department's possession. Your request was made in the following terms:

...

All documents as is (that is, redacted or unredacted) from all previously made decisions on your department's FOI log that are currently not available for download direct from the website.

...

In addition I request the total of the number of times any member of the public has asked for access to each non-website published successful documents on the FOI disclosure log

other than the original successful applicant.

3. On 18 January 2019, the Department provided you with a Charges Notice, advising an estimate of a charge in the amount of \$187.50. You were also advised that a deposit of \$46.88 was required before any further action could be taken on your request.
4. On 2 February 2019, you requested a waiver of charges associated with your request on the basis that the release of the documents is in the public interest and on other grounds.

Material taken into account

5. 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 follows.
6. I have taken the following material into account in making my decision:
 - the terms of your request, dated 1 January 2019;
 - the types of documents that are in the possession of the Department;
 - the content of the documents that fall within the scope of your request;
 - 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 Office of the Australian Information Commissioner (**OAIC**) under section 93A of the FOI Act (**Guidelines**).
7. A full extract of all FOI Act provisions used to make my decision are provided in Schedule 1.

Decision

8. I have made a decision to impose charges in the amount of \$187.50.

Reasons for decision

9. 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.

10. 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.
11. I decided that you were liable to pay a charge and advised you of a preliminary assessment of that charge. The charge to be applied to your request was \$187.50.
12. I also advised you that you had the right to contend that the charge had been wrongly assessed, should be reduced, or should not be imposed. Further, you were advised that in deciding whether a charge should be reduced or not imposed, I must take into account:
 - whether payment of the charge, or part of it, would cause you financial hardship;
 - whether giving access to the document is in the general public interest or in the interest of a substantial section of the public; and
 - any other relevant matter.

Is the charge wrongly assessed?

13. Paragraph 4.22 of the Guidelines provides that:

An agency or minister can charge for the 'time spent ... in searching for or retrieving the document (Charges Regulations, Schedule, Part I, Item 2). This encompasses:

...

- *searching a file index to establish the location of a document*
- *searching a file to locate a document*

...

14. I consider the search and retrieval time is a valid and correct calculation, on the basis that as you have essentially made 150 FOI requests in one, it will take an average of five minutes to search, locate and identify the documents for all 150 requests.

Would charges cause financial hardship?

15. 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 documents in the public interest?

16. Part 4 of the Guidelines detail factors I must take into consideration when considering whether public interest may apply. As mentioned in those guidelines, the issue is not whether it is in the public interest to reduce or not to impose a charge, nor whether it is in the public interest for a particular applicant to be granted access to a document. While you as the applicant may benefit from

disclosure of the documents, the question is whether there is a benefit that will flow more broadly to the public or substantial section of the public if the documents are to be released to you.

17. In deciding whether giving access to the documents is in the general public interest or in the interest of a substantial section of the public I have considered both the content of the documents and the context of its release.

18. I have considered:

- 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;
- the public interest argument you put forward in your email, dated 2 February 2019, as to why the charge should be waived;
- whether disclosure would advance the objects of the FOI Act;
- whether you can be expected to derive a commercial or personal benefit or advantage from being given access to the documents and if it is reasonable to expect you to meet all or part of the charge;
- whether the documents are primarily of interest only to you and are not of general public interest or of interest to a substantial section of the public; and
- whether information in the documents has already been published by or commented on by the Department and the documents do not add to the public record; and/or
- whether you have requested access to a substantial volume of documents and significant work is required to process your request.

19. In your email, dated 2 February 2019, you submitted that:

I also dispute this on public interest grounds, these general FOIs have already been granted as decidedly in some form of the public interest of each individual decision to warrant their delivery to the original applicant - I am merely asking that you provide the same to the rest of the public and myself via your website.

20. Section 29(5)(b) FOI Act requires the Department to consider '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.' This is a test that is different to the public interest considerations that may arise under other provisions of the FOI Act.

21. Having considered the Guidelines and the nature of the documents and the context of release, I am not satisfied you have provided compelling reasons as to whether a benefit will flow, to the public generally or a substantial section of the public, should the documents be disclosed.

22. You have not provided compelling reasons in favour of reducing or waiving the charges in the public interest. While I accept that these documents have been previously released, either to the original applicant or to applicant/s requesting specific documents under the Information Publication Scheme, the Department is compliant with the requirements of section 11C of the FOI Act and has provided details of how the documents may be obtained.
23. Based on the above, I have decided that waiving the charges for disclosure of the documents in question is not in the general public interest or in the interest of a substantial section of the public, for the purpose of a decision in accordance with section 29(5)(b) of the FOI Act.

Other grounds for reduction or waiver

24. In deciding whether charges should be reduced or waived, I have taken into consideration section 29(4) of the FOI Act that provides a general discretion to reduce or not to impose a charge, which goes beyond matters relating to financial hardship and/or the public interest test.
25. In your email, dated 2 February 2019, you also submitted that:

I also contend that waiver of the charge would enhance the agency-client relationship with the greater public.

26. While you have provided another ground for waiver of the charges, you have not provided compelling reasons explaining how the waiver of the charge would enhance the agency-client relationship with the public.
27. As explained above, the Department is compliant with the requirements section 11C of the FOI Act and has provided details of how the information may be obtained on our Disclosure Log.

Your liability to pay a charge

28. As the charge is more than \$100.00, you will need to pay a deposit of \$46.88 (which is 25% of the total charges applying to your request) before further action can be taken on your request. This amount is set in Regulation 12(2)(b) of the Charges Regulations.
29. 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.
30. On payment of the deposit, processing of your request will commence. You will be advised of my decision after payment is received. In the event a decision is made to release documents to you, you will not be entitled to access the requested documents until the full charge is paid.
31. Payment can be made by:

- forwarding a cheque for the required amount to:

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

or

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

Account name:	DVA Departmental Head Account
BSB:	092009
Account number:	112084
Reference:	FOI26268/Posty

32. Please note that payment of a charge does not guarantee access to the document, in full or in part.

The time you have to respond and what you need to do

33. You have 30 days to respond in writing to this notice. We therefore expect a response from you by **3 April 2019**.

Supporting or additional information

34. Relevantly, the FOI Act at subsection 11C(3)(c) states:

(3) The agency, or the Minister, must publish the information to members of the public generally on a website:

(c) publishing on the website other details of how the information may be obtained

35. The Department publishes all decisions on the Department's Disclosure Log in accordance with section 11C of the FOI Act. Where documents have not been published, in providing instructions on how specific information released in accordance with a decision on FOI can be obtained, the department is compliant with the requirements set out in the FOI Act.

Your rights of review

36. If you are dissatisfied with my decision, you may apply for internal review or request the OAIC review my 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

37. 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.
38. You can make your application for internal review in one of the following ways:

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

OAIC review

39. Under section 54L of the FOI Act, you may apply to the OAIC 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 2000

40. 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

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

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

Yours sincerely

Nick (Position Number 62209913)

Acting Director

Information Law Section | Legal Services and Assurance Branch

Legal Assurance and Governance Division

4 March 2019



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)).

- (4) 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).