



20 January 2020

Our reference: LEX 48935

Mr Ben Fairless

Only by email: foi+request-5845-56334372@righttoknow.org.au

Dear Mr Fairless

Freedom of Information Request – Reconsideration of Charges Decision

I refer to your revised request for access to documents under the Freedom of Information Act 1982 (FOI Act). You requested access to:

‘Operational Blueprints that are not already publicly available from the list contained on the following URL: <http://operational.humanservices.gov.au/public/Pages/SiteMap/debts.html>.’

On 20 December 2019, you requested that the preliminary assessment of charges for the amount of \$777.00 (**preliminary charge**) that was notified to you on 27 November 2019 be reconsidered by the department.

I have reconsidered the preliminary charge of \$777.00 and have decided to reduce it to \$735.00 based on a re-estimate of the time required to process your request.

My re-assessment of the charge is \$735.00 calculated as follows:

Search and retrieval time: 5 hours, at \$15.00 per hour:	\$75.00
Decision-making time (*after deduction of 5 hours): 33 hours, at \$20.00 per hour	\$660.00
TOTAL	\$735.00

*The FOI Act provides that the first five hours of decision-making time are free of charge and this is reflected in the calculation.

Background

On 27 November 2019, you were notified that you are liable to pay this charge and that the preliminary assessment of the charge was \$777.00 (**preliminary charge**).

On 20 December 2019, you responded to the preliminary charge notification, contending that the preliminary charge should be reconsidered (**reconsideration request**). In that correspondence, you stated that:

‘I contend that the charges of \$777 have been wrongly assessed. The Department has an obligation under Part II of the FOI Act to publish operational information under the Information Publication Scheme. An FOI applicant should not bear the costs of the department complying with its legal obligations.’

In addition, while I believe the charge has been wrongly assessed, even if had not been I would also contend that the charge should be reduced. The requested information relates to how the Department deals with individuals who owe a debt.

There is extensive public scrutiny around how the Department is publishing requests. The "#robodebt" tag, which is used to refer to the Department's Online Compliance program, has a significant number of stories in relation to alleged debts owed to the Department.

I trust that the Department will be able to consider my contentions and waive the charges associated with this request. If the department would like to discuss the matter further, let me know how we can have a chat on the phone.'

What I took into account

In reaching my decision I took into account:

- the preliminary charge;
- your reconsideration request;
- a sample of the documents falling within the scope of your request;
- the relevant case law;
- the FOI Act;
- the *Freedom of Information (Charges) Regulations 1982 (Regulations)*; and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).

Relevant legislation

Section 29(4) of the FOI Act provides that, where an applicant has notified an agency that the applicant contends that a charge should be reduced or not imposed in relation to a request under the FOI Act, then the agency may decide that the charge is to be reduced or not imposed.

Section 29(5) of the FOI Act provides that, without limiting the matters that the agency may take into account when making a decision about whether to reduce or not impose a processing charge, the decision maker must consider:

- whether payment of a charge, or part of it, would cause financial hardship to an applicant; and
- 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(8) of the FOI Act provides that, if an applicant makes a contention about a charge as mentioned in subsection 29(4) and the agency makes a decision to reject the contention in whole or in part, then the agency must give the applicant written notice of the decision and the reasons for the decision.

Reconsideration of the charge – Assessment of the documents

In your correspondence dated 20 December 2019, you provided:

The Department has an obligation under Part II of the FOI Act to publish operational information under the Information Publication Scheme. An FOI applicant should not bear the costs of the department complying with its legal obligations.

Section 8(2)(j) provides that the department must publish its operational information.

Operational information is defined in section 8A(1) of the FOI Act to be:

An agency's operational information is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).

Section 8C(1) of the FOI Act qualifies the department's obligation to publish operational information and relevantly provides:

Exempt documents

(1) An agency is not required under this Part to publish exempt matter.

In *John Paul Murphy and Australian Electoral Commission* [1994] AATA 149, the Administrative Appeals Tribunal has held that FOI exemptions can apply to internal manuals referred to by agencies, which is consistent with section 8C(1) of the FOI Act. Therefore, to the extent that the documents contain exempt material, contrary to your submissions, I am satisfied that they are not required to be published under section 8 of the FOI Act.

Having reviewed the documents, I do not consider that this portion of your submissions warrants a reduction in the value of the preliminary charge.

Section 7 of the Regulations provides certain exceptions to charges, and relevantly provides that:

'No charge if document contains personal information'; and

'No charge if request not dealt with on time'.

I have considered the documents requested and the processing of your request to date. I am satisfied that neither of these exceptions apply.

Further, in your correspondence on 20 December 2019 you provided:

'In addition, while I believe the charge has been wrongly assessed, even if had not been I would also contend that the charge should be reduced.'

As a preliminary step in my reconsideration of whether a processing charge should apply to this request, I have re-examined the calculations which were used to determine the charge and I have revised the charge amount down to \$735.00 (the estimated time has been provided above).

Having examined the documents within the scope of your request, the calculation of the charge and the reasoning behind it, I am of the view that the charge recalculated fairly reflects the work involved in processing your request and is a fair contribution towards the cost of processing your request.

Financial Hardship

Section 29(5)(a) of the FOI Act provides that, without limiting the matters an agency may take into account in determining whether or not to reduce or not to impose the charge, the agency must take into account whether the payment of the charge, or part of it, would cause financial hardship to the applicant.

Relevantly, paragraph 4.75 of the Guidelines states:

'Whether payment of a charge would cause financial hardship to an applicant is primarily concerned with the applicant's financial circumstances and the amount of the estimated charge. Financial hardship means more than an applicant having to meet a charge from his or her own resources. The decision in 'AY' and Australian Broadcasting Corporation referred to the definition of financial hardship in guidelines issued by the Department of Finance for the purpose of debt waiver decisions:

Financial hardship exists when payment of the debt would leave you unable to provide food, accommodation, clothing, medical treatment, education or other necessities for yourself or your family, or other people for whom you are responsible.'

You have not provided any information or submissions, to support the charge being waived for financial hardship.

The Guidelines at 4.77 relevantly provide:

'An applicant relying on this ground could ordinarily be expected to provide some evidence of financial hardship. For example, the applicant may rely upon (and provide evidence of) receipt of a pension or income support payment; or provide evidence of income, debts or assets....'

I do not consider that you have provided sufficient evidence that the charge should be reduced or not imposed on financial hardship grounds. I have, therefore, decided not to reduce the charge on financial hardship grounds.

The Public Interest

In making my decision, I am also required under section 29(5) of the FOI Act to take into account whether the provision of access to the documents is in the general public interest, or in the interest of a substantial section of the public. In other words, there must be a benefit flowing generally to the public or a substantial section of the public from disclosure of the documents in question. This requires me to consider the nature of the documents and the context of their release.

You provided in your correspondence on 20 December 2019:

'The requested information relates to how the Department deals with individuals who owe a debt.

There is extensive public scrutiny around how the Department is publishing requests. The "#robodebt" tag, which is used to refer to the Department's Online Compliance program, has a significant number of stories in relation to alleged debts owed to the Department.'

Paragraph 4.81 of the Guidelines states that:

'An applicant relying on [the public interest ground of waiver] should identify or specify the 'general public interest' or the 'substantial section of the public' that would benefit from this 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.'

In *Cashman & Partners v Secretary, Department of Human Services and Health* (1995) FCR 301 (**Cashman**), 307, the Federal Court stated that:

'The [Administrative Appeals] Tribunal has consistently, and in my view correctly, accepted that the proper approach to the question of benefit to the general public is that stated in *Cazalas v US Department of Justice* [1983] USCA5 1422; (1983) 709 F 2d 1051 at 1053. In *Cazalas*, it was held that the question of benefit to the general public was concerned with benefits flowing from the fact that information previously withheld by the agency is now accessible to the community.'

You have identified a section of the public as 'individuals who owe a debt' and the "#robodebt" tag, which is used to refer to the Department's Online Compliance program, has a significant number of stories in relation to alleged debts owed to the Department.' However, you have not provided what the 'benefits flowing from the fact that information previously withheld by the agency is now accessible to the community' would be.

Beyond what you have provided, I have considered whether it will assist individuals who have a debt in their review. I have considered the following:

- the material provided by the department on its website at the following web addresses:
 - <https://www.humanservices.gov.au/individuals/subjects/compliance-program>;
 - <https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/centrelink-data-matching-activities>;
 - <https://www.humanservices.gov.au/individuals/topics/owing-money-centrelink-debt/30701>;
 - <https://www.humanservices.gov.au/individuals/topics/reviews-and-appeals/34676>; and publicly available on <http://operational.humanservices.gov.au/public/Pages/SiteMap/debts.html>
- the material concerning 'debt' and social security payments available from the Department of Social Services 'Guides to Social Policy Law' available from the following web address: <https://guides.dss.gov.au/search/node/debt>
- the relevant legislation (available from): <https://www.legislation.gov.au/Details/C2020C00033> and <https://www.legislation.gov.au/Details/C2020C00009>; and
- references by Administrative Appeals Tribunal that in reviewing a decision guides do not take the place of legislation, as examples:
 - *Lee and Secretary, Department of Social Services (Social services second review) [2016] AATA 60* relevantly provided [25]:

'...the Secretary laid down policy in the Centrelink E-reference Guide, which was later replaced by Centrelink's Operational Blueprint. Although it is an internal policy and not binding on me...'
 - *Allen; Secretary to the Department of Family and Community Services [2003] AATA 251* relevantly provided:

'...The Guide is simply that, a guide. It cannot take the place of legislation...'

I have considered the above material and give weight to the comments made by the Administrative Appeal Tribunal. Given the extensive amount of material, information, guides and legislation already publicly available, as per *Cashman*, it is difficult to identify any further benefit (beyond the

information already in the public domain) that will occur to individuals who owe a debt, to the extent that warrants the charge to be reduced or not imposed.

Therefore, I am not satisfied that there are sufficient public interest factors in favour of further reducing or waiving the charge associated with the processing of the documents you have requested.

Pay the charge

As the charge exceeds \$25, you are required to pay a deposit of \$183.75 within 30 days of receiving this notice. You may, of course, elect to pay the charge in full at this point.

You may select from one of the following payment methods:

1. Online payment via Government EasyPay - follow [this link](#) and enter the relevant details. You will need your FOI LEX reference number, **LEX 48935**; or
2. Cheque made out to the Collector of Public Monies and posted to Freedom of Information, Department of Human Services, PO BOX 7820, Canberra BC, ACT 2610; or
3. Money order made out to the Collector of Public Monies and posted to Freedom of Information, Department of Human Services, PO BOX 7820, Canberra BC, ACT 2610.

If you elect to pay the charge, please email FOI.LEGAL.TEAM@humanservices.gov.au to advise us of your payment. Please quote reference number LEX 48935 in this correspondence.

Conclusion

As provided above, I have decided not to waive or reduce the charge under either financial hardship or public interest grounds. However, I am not limited to financial hardship and public interest grounds when reconsidering charges as section 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.

I have decided to reduce the charge based on a re-examination of the time required to process your request. I have reduced the charge to \$735.00.

I do not consider that there are any other reasons that justify a further reduction of the charge.

I also note that it is open to you to reduce the charge by reducing the number of documents that fall in scope of your request. The documents can be identified on the department's website at:

<http://operational.humanservices.gov.au/public/Pages/SiteMap/debts.html>

Further assistance

If you have any FOI questions please email FOI.LEGAL.TEAM@humanservoces.gov.au

Yours sincerely

Robert

Authorised FOI Decision Maker
Freedom of Information Team
FOI and Litigation Branch Legal Services Division
Department of Human Services



INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of an FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an Internal Review Officer in the Department of Human Services (the department); and/or
2. the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for an internal review by an Internal Review Officer

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be:

- made in writing
- made within 30 days of receiving this letter
- sent to the address at the top of the first page of this letter.

Note 2: You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the department within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application:**

Online: www.oaic.gov.au

Post: Australian Information Commissioner

GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Department of Human Services' decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to the department's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.