



Australian Government

Department of Immigration and Border Protection

29 May 2014

FOI Request FA 14/04/00800
File Number ADF2014/13356

Mr Ben Fairless

via email to: foi-request-587-c19fe476@righttoknow.org.au

Dear Mr Fairless

Decision following contentions regarding charges

This notice of decision refers to your request received by the Department of Immigration and Border Protection (the Department) on Friday 11 April 2014 seeking access under the *Freedom of Information Act 1982* (the Act) to the following documents:

'a full copy of the email sent from Angela O'Neill to Linda ROSSITER, Janelle RAINERI, Rowan PATTERSON, Steven HOCKING, and Ashley SMITH with the subject "Cases to be allocated and new processes for RTK detention log requests". This email was sent on Thursday, 15 August 2013.'

On Thursday 1 May 2014, in accordance standard departmental processes, I assessed your request for charges under s.29 of the Act. The same day I sent you a notice under s.29(1) of the Act, advising you that the assessed charge was \$221.81. I advised you, as required by s.29(1), that you could contend the charges.

On the same day, you responded and advised that you wished to:

- revise the scope of the request by removing the personal information of third parties from the scope of the request; and
- contend that the charge should not be imposed or waived; and
- contend that the charge was wrongly assessed.

Your response of 1 May 2014 meets the requirements under s.29(1)(f)(ii) of the Act and is a response that complies with s.29(4) of the Act. Therefore, I am required, under s.29(5) of the Act, to consider your contentions. Under s.29(5) of the Act I must take into account, amongst other things, whether paying the charge would cause you financial hardship and whether the release of the documents to you without charge is in the public interest or in the interest of a substantial section of the public.

According to s.29(6) of the Act, an agency must provide the applicant with the final decision on the charges contentions no later than 30 days from the date that the agency has been

people our business

notified of the contention. Therefore, under the Act, the last day that I may provide you with a final decision under s.29(8) of the Act is Saturday 31 May 2014.

However, as the end of the 30 day period provided for in s.29(6) of the Act falls on a non-working day, s.36(2) of the *Acts Interpretation Act 1901* allows me to provide you with the decision on the next working day, Monday 2 June 2014.

My decision is in two parts. The first part is a recalculation of the charge based on the new scope. The second part of the decision relates to your contentions that the remaining charge should be reduced or not imposed and has been wrongly calculated.

Recalculation of charge

Search and retrieval		
Task	Time (hours)	Cost @ \$15/hr
Search and retrieval of relevant electronic document	0.17	\$2.50
Search and retrieval of relevant pages in file	0.75	\$11.25
Search and retrieval subtotal	0.97	\$14.50

Decision making		
Task	Time (hours)	Cost @ \$20/hr
Examination of documents	0.17	\$ 3.33
Preparation of documents for release	0.17	\$ 3.33
Consultation with third parties	0.00	\$ 0.00
Preparation of notice of access decision	3.03	\$60.64
Decision making subtotal (before deduction of 5 free hours)	3.37	\$67.31
Decision making subtotal (after deduction of 5 free hours)	0.00	\$ 0.00

Totals and deposit	
Total	\$14.50
Deposit N/A	

The charge which I will consider when addressing your contentions is the charge remaining after you removed the personal information of third parties from the scope of the request, which is \$14.50.

Your contentions under s.29(4) of the Act

On 1 May 2014, you advise the Department:

\\Scope Changes

I am prepared to exclude from my request the personal identifiers of other clients within the Department ONLY. I would expect this to be individual words/numbers (such as names, addresses, dates of birth, telephone numbers and so on) instead of entire paragraphs.

I would expect that this remove the requirement for 12 hours of consultation with 3rd parties.

\\Charges should not be reduced or imposed\\ I contend that the department should not impose charges as the release of the information is in the public interest, and would serve to better inform the community about the Department's attitude to Freedom of Information and its obligations under the Freedom of Information Act.

\\ Charges are grossly over-estimated // The document in question is a 2 page electronic document which was personally created by you. It details a policy which you personally created and which you would be responsible for. You have an interest in the release of this document.

As the decision maker, I cannot fathom how it will take you nearly a full hour to locate a document which you created. At worst, it should take no more than 15 minutes (\$3.75) to locate the relevant document. Please justify the additional 40 minutes.

You have indicated that it will take you 10 minutes to read the document. The current redacted document contains approximately 322 words. Let's assume this full document is 400 words. The average reading speed for proof reading is 180 words per minute on a monitor for adults. This means you should be able to complete the task of reading this document in just over 2 minutes – A charge of just \$0.66. Please justify the additional 8 minutes.

You have indicated it would take you over 3 hours to prepare a notice of access decision. It would appear that the Department uses templates, which should reduce this time considerably. Please justify spending 3 hours filling in a template?

\\ Summary //

In summary, I contend:

- *That charges should not be imposed for the reasons stated above*
 - *That the Department has grossly over-estimated the cost of this request*
- And I revise my request as detailed in the Scope Changes section above.*

Response to your contentions under s.29(4)

I have decided to impose a charge of \$14.50 under s.29(8) of the Act. The reasons for my decision are set out below.

Information considered

In reaching my decision, I have considered the following:

- *The Freedom of Information Act 1982 (the Act).*
- *The Freedom of Information (Charges) Regulations 1982 (the Regulations)*
- *The current FOI Guidelines prepared by the Office of the Australian Information Commissioner (the OAIC Guidelines).*
- *The 'Freedom of Information Guidelines; Exemptions in the FOI Act' October 2009; prepared by the Australian Government Solicitor (the AGS Guidelines).*
- *The Freedom of Information Memoranda 29 (Attorney-General's Department, November 1992)*

Section 29 of the Act allows an agency to impose a charge in respect of a request. It also provides the procedures an agency must comply with when the charge is assessed, notified and reviewed. A preliminary assessment of the amount of the charge is made and the basis of the assessment is outlined by the agency (s.29(1)(b) of the Act).

The applicant can contend that the charge should be reduced or not imposed (s 29(1)(f)(ii) of the Act). The agency may decide to reduce or not impose the charge (s 29(4) of the Act) or to reject the contentions and impose the charge in full (s.29(8) of the Act). In any event, the agency must notify the applicant of its decision within 30 days of receiving the applicant's contentions (s.29(6) of the Act). When deciding whether to reduce or not impose the charge,

the agency must take into account whether payment of the charge would cause the applicant 'financial hardship' (s.29(5)(a) of the Act). In addition, the agency must consider whether giving access to the documents 'is in the general public interest, or in the interest of a substantial section of the public' (s.29(5)(b) of the Act).

Authority to impose a charge under s.29(8) of the Act

I am authorised under s.23 of the Act to notify you of my intention to impose a charge as per s.29(1) of the Act. Further, I am authorised under s.23 of the Act to consider the contentions you provided under s.29(4) of the Act. My role is to consider those contentions against, the requirements in s.29(5) of the Act and make final decision under s.29(8) of the Act, taking into account the contentions you provided and other relevant documents and information.

Before addressing the test under s.29(5) of the Act, it would be useful to consider the definition of the 'public interest' and explore how it differs from 'the public being interested in' a matter.

The definition of 'the public interest' in relation to charges

The OAIC Guidelines

I note that the OAIC Guidelines (to which I must have regard), state:

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. Often this will 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. In other cases it may be clear from the applicant's request that, if the document sought exists, the Act does not apply to it. In these circumstances, the decision maker would not need to consider the contents of the document.[paragraph 4.55]

There is no presumption that the public interest test is satisfied by reason only that the applicant is a member of Parliament, a journalist or a community or non-profit organisation. It is necessary to go beyond the status of the applicant and to look at other circumstances. The fact that a media organisation may derive commercial benefit from publication of a story based on an FOI request is a relevant consideration, but is not alone a basis for declining to reduce or waive a charge. Nor is an applicant required to show that they will publish the document. The decisive issue is whether disclosure (and any resulting media item) will be of general or identifiable public interest. [paragraph 4.56]

The 'public interest' in relation to charges – definition

As the Act and the OAIC Guidelines do not contain a definition of the 'public interest', decision makers must turn to the common law and other FOI reference material for further guidance, as permitted by s.29(5) of the Act.

I note that the AGS Guidelines contain guidance on the term 'public interest' that is still relevant and which I have extracted below.

What is the public interest [paragraph 1.6.3.1]

The concept of the public interest is not defined in the FOI Act. This omission was deliberate so that decision-makers have to undertake a specific analysis of what constitutes the public interest in any particular matter at the time, rather than relying on set criteria...

The public interest has been described as something that is of *serious concern or benefit to the public*, not merely of *individual interest* (*British Steel Corporation v Granada Television Ltd*). It has been held that public interest does not mean *of interest to the public* but *in the interest of the public* (*Johansen v City Mutual Life Assurance Society Ltd*).

Accordingly, to conclude that on balance disclosure of information would be in the public interest... is to conclude that the benefit to the public at large resulting from disclosure outweighs the benefit to it of withholding the information. It may be relevant to that conclusion that there is a serious public debate about, or concern with, the issues with which the requested documents deal.

In arriving at the balance of public interest in a particular case, it may be necessary to consider the interests of a substantial section of the public as a factor to be weighed. As an example in another field, in *Sinclair v Mining Warden of Maryborough* the High Court held that the interests of the residents of Fraser Island were the interests of a substantial section of the public. In the words of Barwick CJ:

The interest, of course, must be the interest of the public and not mere individual interest which does not involve a public interest. Clearly enough, the material evidenced by the appellant did relate to a public interest not limited to the interests of a less than significant section of the public.

In addition, when discussing whether it is in the 'public interest' to reduce or not impose a charge, the FOI Memoranda 29 states:

88. In this context 'in the public interest' is used in the sense of something which is of benefit to the public.

89. The first question to consider is, therefore, whether the benefit from the release of the information contained in the particular documents will flow to the public at large, or a substantial section of the public, as well as to the specific individual or organisation who or which requested the documents concerned (the question of end use). If no benefit will flow to the public from access, because the information will not be made publicly available, the public interest reason for remission, or reduction or non-imposition, has not been satisfied.

90. The second question is whether, in the light of all the circumstances, making the specific information in the particular documents more widely available would be 'in the public interest' in the above sense (para.88). This requires a consideration of both the contents of the documents as a whole and of the context of their release.

91. The fact that the document may contain information which may be of curiosity value to the public, or a substantial section of the public, does not necessarily mean that giving access to the document is 'in the public interest'. On the other hand, if the giving of access to the specific documents would contribute valuable material to public debate on an issue, doing so will be in the public interest. However, lack of public discussion before release need not mean that the giving of access is not in the public interest. Giving access to information which would benefit the general public, or a substantial section of the public, if it were made more widely known is in the public interest whether or not there is an existing debate (e.g. where giving access would publicise the effects of a dangerous substance, or where public debate about an issue is likely to follow and would benefit the public). (See *Re Bailey and*

Commonwealth Tertiary Education Commission (D166) for a rare example where the AAT commented on a request for remission on public interest grounds. The AAT said that disclosure of documents, which prima facie establish that a Minister issued a misleading press release with regard to expenditure of public monies, was in the general public interest. In that case, however, the AAT held that the public interest had been adequately satisfied by release of other documents in response to an earlier FOI request.)

Document in question

Before continuing, it will assist you to understand these reasons if I set out the facts around the document in question.

The document was provided to you in response to your request for an internal review of the decision by the Department on FA 14/03/00162, in which you asked the Department to provide you with:

'...a copy of all emails, policies, procedures or other documents created by the Department which relate to the Department's use of s15(2)(c) of the FOI Act.

Furthermore I request a copy of all emails, policies, procedures or other documents created by the Department which relate to the Department's handling of complaints that come from the RightToKnow website (<<http://www.righttoknow.org.au/>>)

I wish to exclude clarification requests that were sent from the Department to FOI clients referencing s.15(2)(c).

I do not exclude communication with FOI clients where, for example, there is discussion around the use of s.15(2)(c) or where a FOI client has made a complaint to the Department on the use of s.15(2)(c).

The document (provided to you at internal review) is an internal departmental email between members of the FOI & Privacy Policy team discussing the FOI caseload. The Department had not identified the document as being in scope at the initial decision stage. The review officer identified, searched for and located the document so that it could be considered during the review process. The review officer deleted information that was 'irrelevant' to the request, under s.22(1)(a)(ii) of the Act. This is considered 'release in full' under the Act.

As the document was not identified as being in scope of the request until the internal review stage, it was not included in the documents that the original decision maker considered when undertaking a preliminary assessment of charges and deciding whether or not to impose a charge. Therefore, the Department has not previously imposed a charge regarding this document.

On 11 April 2014, you submitted a new request (this one) for:

'...a full copy of the email sent from Angela O'Neill to Linda ROSSITER, Janelle RAINERI, Rowan PATTERSON, Steven HOCKING, and Ashley SMITH with the subject "Cases to be allocated and new processes for RTK detention log requests". This email was sent on Thursday, 15 August 2013.'

I will now apply the facts and circumstances of your current request to the law. I note that the onus is on the applicant to demonstrate that the public interest weighs in favour of 'not

imposing' a charge.

Section 29(5)(a) – Will payment cause financial hardship?

The charge imposed is \$14.50. You have not claimed that paying the charge will cause you 'financial hardship'. As you have not claimed that paying the charge will cause you financial hardship, I will not consider this element further.

Section 29(5)(b) – Public interest contentions

In relation to the 'public interest', you have contended that:

".. the release of the information is in the public interest, and would serve to better inform the community about the Department's attitude to Freedom of Information and its obligations under the Freedom of Information Act."

I note that, when determining whether to reduce or 'not impose' a charge, a decision maker must consider the 'public interest' in releasing the specific documents in scope without charge. This includes assessing the information in the documents relating to the topic, against the amount of information on the topic already publicly available.

I must consider whether the specific documents within scope will significantly add to the material already available in the public domain, sufficient to justify reducing or not imposing the charge.

Information already in the public domain on the topic

I note that you have requested the Department provide you with a 'full copy' of a document you received access to under a prior request. Further, the document that you have requested 'a full copy of' was published on 11 April 2014 on the Department's FOI 'disclosure log' at:

<http://www.immi.gov.au/About/foi/Documents/FA140300162-R1.PDF>

The document in question is comprised of 2 pages. The reviewer deleted two types of information as 'irrelevant' to your request under s.22(1)(a)(ii), being the third paragraph of the first page, various names in a table in the document (running across the first and second pages) and various names in the last paragraph on the second page.

To minimise the charge that might be imposed and the need for the Department to formally consult the relevant third parties, you advised that identifying information of the third parties could be treated as 'irrelevant' under this request. Therefore, the only additional information that you might receive through this current request is the information contained third paragraph of the first page of the document.

I am satisfied that, in the event the relevant paragraph were released in full, the 'new' information in the document will be made available to a large section of the public (ie the public who access the Right to Know website).

However, I am not satisfied that the additional information you have requested will add to any matter of current public debate or controversy. The paragraph relates to managing resources efficiently in a government department, which is not a controversial issue. In fact, s.44(1) of the *Financial Management and Accountability Act 1997* requires agencies to make 'proper use' of

Commonwealth resources. Therefore, the second limb of the test, which is that the further information released will be of some public benefit, has not been met.

As a result, I am not satisfied that there will be sufficient benefit to the public in the release of the additional information in the document to justify processing this request without imposing a charge on you. I reject your contention that the charge should be waived or reduced on public interest grounds.

In relation to your contention that the request was wrongly assessed, I can advise you that the charge imposed applies to the administration of the request from the time it is received in the Department through to the time a decision is provided to an applicant. As provided under the Regulations, the Department may use an objective method to estimate the charge to impose. I am satisfied that the method for estimating the charge was objective and sound and that the charge was not wrongly assessed.

Therefore, I reject your contention that the charge was wrongly assessed.

Summary of decision

For the reasons above, I have decided, under s.29(8) of the Act, to impose a charge of \$14.50 regarding the processing of request FA 14/04/00800.

Next steps and time in which to respond

You may either agree to pay the charges or seek an internal or external review of my decision. Your full review rights are set out in the next section, headed 'Review Rights'.

The Act provides you with a 30 day period (from the date you are notified of this decision) to either agree to pay the charge or to seek internal review, ending on Saturday 28 June 2014. However, as this date falls on a Saturday, s.36(2) of the Acts Interpretation Act provides that you may respond by the next working day, which is close of business **Monday 30 June 2014**. If you do not respond by this date, the Act will deem your request to be 'withdrawn'.

Section 31 of the Act states that the Department is not obliged to continue processing your request until you agree to pay the charge or until you have sought review of the charge and a decision has been made not to impose the charge.

As the charge is less than \$25.00, the Regulations do not provide you with the option of paying a deposit. Therefore, if you decide to pay the charge, you will need to pay the full amount of \$14.50. Information regarding how to pay the charge is at Attachment A to this decision.

Review rights

Internal review

If you disagree with my decision, you have the right to apply for an internal review by the Department my decision. Any request for internal review must be provided to the Department by the date set out above. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by an officer other than the original decision-maker and the Department must make a review decision within 30 days.

Applications for review should be sent to:

Freedom of Information
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

Or by email to: foi@immi.gov.au

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of my decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a review request to the OAIC, please see FOI fact sheet 12 '*Freedom of information – Your review rights*', available online at www.oaic.gov.au.

How to make a complaint about the handling of this FOI request

You may complain to the Australian Information Commissioner if you have concerns about how the Department has handled your request under the Act. Information about how to submit a complaint is also available at www.oaic.gov.au.

Contacting the FOI Section

If you wish to discuss this matter, I can be contacted using the details provided below.

Yours sincerely



Angela O'Neil
Authorised decision maker
FOI & Privacy Policy Section
Ministerial, Executive and Accountability Branch
Department of Immigration and Border Protection
Email: foi@immi.gov.au



Australian Government

Department of Immigration and Border Protection

Attachment A

Advice about how to pay the charge

The deposit or full payment can be paid by cheque, money order, credit card or Electronic Funds Transfer (EFT).

Cheques and money orders should be made payable to "Collector of Public Monies" and sent to:

FOI & Privacy Policy Section
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2616
AUSTRALIA

If you wish to pay by credit card, please complete the attached credit card authorisation form (CCAF form). Please fill in the amount you wish to pay and sign the form. Please include your departmental reference number (FA14-04-00800) on the form. You may post the hard copy form back to FOI & Privacy Policy section at the above postal address or you may scan the signed form and send the signed scanned form by email to foi@immi.gov.au.

Alternatively, you may pay by making an Electronic Funds Transfer (EFT) directly into to the Department's bank account. The account details are:

Bank: Commonwealth Bank of Australia
BSB: 062987
Acct No: 10016044
Acct Name: DIBP Official Administered Direct Credit Receipts Account

If you choose to pay by EFT, please use the departmental reference number 'FA14/04/00800' as your 'customer reference number' when making the payment. This will allow the Department's Finance unit to identify the payment as an FOI 'charges' payment and will ensure that there are no delays in processing your payment and/or finalising your FOI request. It would also assist me if you could advise me when you have made the payment and provide the EFT receipt number. As you may know, when paying by EFT there is generally a delay between payment by the payer and receipt by the payee.