



3 August 2020

Our reference: LEX 56238
Previous reference: LEX 54082

Mr John Smith

Only by email: foi+request-6267-d5e08e56@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request – Internal Review Charges

I refer to your request dated and received by Services Australia on 7 July 2020, for an internal review of a decision issued to you under subsection 29(6) of the *Freedom of Information Act 1982* (**FOI Act**) on July 2020 (**Reconsideration Decision**).

Background

On 2 April 2020, you made a request under the FOI Act in the following terms:

'I wish to obtain a copy of the final report provided to Services Australia by McKinsey, in association with the tender CN ID: CN3495657-A1.

I also wish to obtain a copy of the powerpoint used by McKinsey to pitch for this contract through the open tender.'

On 27 May 2020, you were notified that you are liable to pay a charge for the processing of your request and that the preliminary assessment of that charge was \$99.00 (**Preliminary Charge**).

On 28 May 2020, you responded to the Preliminary Charge notification contending that Services Australia should waive the preliminary charge. Your request to reconsider the Preliminary Charge was made in the following terms:

'I dispute this charge on two grounds.

The first ground is that it would cause undue financial hardship. I can provide evidence for this if the department insists upon these fees.

The second ground is that usually applicable fees should be waived in this instance, as this FOI request is within the public interest. \$2.6M is a large amount of money for a consulting contract; so there is a public interest in having full transparency regarding this transaction.

McKinsey's activities as a consultant has also been frequently scrutinised in the news media, adding weight to the public interest in transparency regarding this transaction. Finally, transparency regarding the management practices of Services Australia is particularly in the public interest of late; given the public's reliance on Services Australia's systems during this pandemic.



Lastly, I dispute the amount that has been calculated for this charge. It should not take longer than 5 hours to search, consult, and evaluate the document. Certainly it should take far less than 12 hours, and so I dispute the \$99 charge.'

On 16 June 2020, Services Australia responded to your reconsideration request by asking you to provide evidence of your financial hardship. On 17 June 2020, Services Australia received an email attaching a copy of a low income health care card.

On 29 June 2020, Services Australia notified you of the reconsideration of charges decision (**Reconsidered Charge**). The Reconsidered Charge reduced the estimated time taken to process your request by 1.9 hours. This had the effect of reducing the charge to \$61.00.

However, after considering all of the available evidence, the Reconsidered Charge did not reduce or waive the charge on the basis of financial hardship or public interest grounds.

On 7 July 2020, you sought an internal review of the Reconsidered Charge.

Internal Review

Section 53A(e) of the FOI Act allows for internal review of a decision made under section 29 of the FOI Act.

I am authorised under section 23 of the FOI Act to undertake internal review decisions. In accordance with section 54C, I am a person other than the person who made the Reconsidered Charge decision.

What I took into account

In reaching my decision on internal review of the Reconsidered Charges, I took into account:

- Services Australia correspondence dated 28 May 2020, notifying you of the preliminary charge;
- your reconsideration request dated 28 May 2020;
- other correspondence between 16 June 2020 and 17 June 2020;
- the document falling within the scope of your request (the **Requested Document**);
- consultations with Services Australia officers about:
 - the nature of the requested information; and
 - Services Australia's operational environment and functions;
- relevant case law;
- the FOI Act;
- the *Freedom of Information (Charges) Regulations 2019* (**Regulations**); and
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).



Relevant legislation

Subsection 29(4) of the FOI Act provides that, where an applicant has notified an agency that they contend 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.

Subsection 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.

Subsection 29(8) of the FOI Act provides that, if an applicant makes a contention about a charge as mention in subsection 29(4) and the agency makes a decision to reject the contention in whole or part, then the agency must give the applicant written notice of the decision and the reasons for the decision.

Review of the Reconsidered Charge

Although you did not make any submissions regarding the calculation of the Reconsidered Charge, for completeness, I have re-examined the calculations that were used.

In the course of assessing the calculations used in the Reconsidered Charge, I reviewed the Requested Document and considered the time it would take to process the documents in full. I also considered the time taken to search for a retrieve the Requested Document.

The Reconsidered Charge advised that the time taken to search for and retrieve the Requested Document was 2.3 hours. This was based on advice provided by the business area that undertook those duties. Noting that the business area has already undertaken the search and retrieval process, I am satisfied that 2.3 hours is an accurate reflection of the actual time taken, and therefore, I have decided not to revise the search and retrieval component of the Reconsidered Charge.

The Reconsidered Charge estimated that it would take approximately 7.3 hours to process the Requested Document. Having reviewed the Requested Document, I am satisfied that this is an accurate reflection of the actual time that would be required to process the Requested Document.

Having considered the tasks undertaken by Services Australia which relate to search and retrieval and processing of the Requested Document, the calculation of the Reconsidered Charge, and the reasoning behind it, I am satisfied that the Reconsidered Charge calculated fairly reflects the work involved in processing your request and reflects the lowest reasonable cost for the time it will take Services Australia to process your request.

Therefore, I have decided to impose a charge of \$61.00 on internal review.

Other considerations

Your internal review request disputed the Reconsidered Charge on financial hardship and public interest grounds. My consideration of these matters are set out below.



Financial hardship

Paragraph 29(5)(a) of the FOI Act provides that an agency must take into account whether payment of a charge, or part of it, would cause financial hardship to an applicant.

The Guidelines at 4.101 and 4.103 relevantly provide:

'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 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.

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...'

On 17 June 2020, Services Australia received an email which attached a Centrelink low income health card. Whilst the name on the card did not match the name of the FOI applicant, you advised that you were using a pseudonym to lodge your FOI requests through the Right to Know website.

As advised previously, the FOI Act does not require applicants to provide their name when making a freedom of information request. However, on the information before me, I cannot be satisfied that the FOI applicant is the same individual as identified on the Centrelink low income health card. This is because you have not provided any other identifying information, only a copy of the low income health care card itself.

Further, based on the Guidelines as set out above, to establish financial hardship you would need to provide information to substantiate that paying the charge of \$61.00 would leave you unable to provide food, accommodation, clothing, medical treatment, education or other necessities for yourself, your family or other people for whom you are responsible. I am not satisfied that you have provided any information to substantiate that payment of the charge would cause you financial hardship.

Therefore, on the evidence before me, I am not satisfied that payment of the charge would cause you financial hardship, and I have decided not to reduce the charge on this basis.

Public interest

Relevant legislation, case law and Guidelines

Paragraph 29(5)(b) of the FOI Act provides that an agency must also take into account whether the provision of access to the document within scope of your request is either 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.

In *MacTiernan and Secretary, Department of Infrastructure and Regional Development* [2015] AATA 584, the Administrative Appeals Tribunal found that where release is in the



general public interest, or in the interest of at least a substantial section of the public, charges ought to be waived. Conversely, this decision also supports the view that where there is little public interest in the release of information that is within scope, then it is appropriate for charges to be applied.

When discussing the issuing of charges and the consideration of the public interest, paragraph 4.105 of the Guidelines provides:

The FOI Act requires an agency or minister 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' (s 29(5)(b)). This test is different to and to be distinguished from public interest considerations that may arise under other provisions of the FOI Act.

Paragraphs 4.107 and 4.108 of the Guidelines state:

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 (s 29(1)(f)(ii)). 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.

[T]he applicant may be expected to draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.

Your submissions

In your request for internal review you made the following submissions:

'I note the following in your correspondence;

"In addition, Services Australia is obliged to comply with the Commonwealth Procurement Rules (the CPRs). The CPRs govern how Commonwealth authorities procure goods and services to ensure the Government and taxpayers obtain value for money. Among other obligations, the CPRs require Commonwealth authorities (including Services Australia) to report contracts on AusTender. AusTender publication requirements set out in the CPRs are in place to ensure the public has sufficient oversight of government spending. Services Australia has complied with its publication requirements under the CPRs by reporting the relevant contract on AusTender.

In light of the above, I consider that the release of the requested document would not further inform the public debate on this subject. Nor would it provide any scrutiny about the services that have been provided in accordance with the terms of the contract. "

I disagree with the last two sentences especially. The documents regarding this particular \$2.6M contract are out of reach for the public to scrutinize, despite the contract being sizeable and from a notable firm. These documents are not available to the media without fees; and the public should be able to scrutinize sizeable transactions without resorting to lobbying parliament.



I'm surprised that the fees have not been adjusted at all with respect to the public interest, and the only slight adjustment despite my low income card.'

Consideration of public interest

The primary question is whether a benefit will flow to the public generally, or to a substantial section of the public, from the disclosure of the information in the Requested Document. This requires me to consider the nature of the Requested Document and the context surrounding its potential release.

Public interest factors that weigh in favour of reducing or waiving a charge could include:

- where release would promote the objects of the FOI Act, including increasing scrutiny, discussion, comment and review of Government activities;
- where the document is to be used for research that is to be published widely or that complements research being undertaken in an agency or elsewhere in the community;
- where release would facilitate and promoting public access to information, promptly and at the lowest reasonable cost;
- the document is to be used by a community or non-profit organisation in preparing a submission to a parliamentary or government inquiry, for example, on a law reform, social justice, civil liberty, financial regulation, or environmental or heritage protection issue; or
- where release would inform the public on matters of public importance or interest, and assisting participation in debate or discussion.

I have considered your submission that the public cannot access this document through freedom of information processes without charge.

The FOI Act anticipated the application of charges and has provisions directly allowing for it. The general principle underpinning the charges mechanism under section 29 of the FOI Act was described by O'Connor J in *Re Herald & Weekly Times and Secretary, Department of Finance and Administration* [2000] AATA 506 at [48]:

Section 29 establishes the prima facie position that charges should be imposed so that the applicants contribute to the cost of processing all their requests.

This is reinforced by *Tennant and Australian Broadcasting Corporation* [2014] AAT 452, where the Administrative Appeals Tribunal stated at [14-15], when reviewing the principles and considerations in relation to the reduction or waiver of FOI processing charges:

One such matter is the intention discernible in the imposition of the charge that the amount should reflect the time and effort involved in accessing the request documents... In other words, there is an intention that a user pays principle should apply.

I am satisfied that the intention of the legislature, in drafting the FOI Act, was that a portion of the cost of processing requests is to be borne by the Applicant. Further, the imposition of \$61.00 in the context of this request is not unreasonable. Therefore, I do not consider that your submissions are persuasive and I have given them little weight.



Based on all of the information before me, I do not consider that release of the Requested Document would be in the general public interest, or the interest of a substantial portion of the public. Accordingly, I am not satisfied that there are sufficient public interest factors in favour of reducing or waiving the charge associated with the processing of the Requested Document.

Conclusion

I am satisfied that a charge of \$61.00 accurately reflects the lowest reasonable cost for the time that it will take Services Australia to process your request.

I am not satisfied that the charge should be reduced or waived on the grounds of financial hardship or that the release of the document would be in the general public interest or in the interest of a substantial section of the public.

Therefore, I have decided to impose a charge of **\$61.00**.

Required Action

If you would like Services Australia to continue processing your request, you must notify Services Australia in writing within 60 days of receiving this notice that you:

- a) agree to pay the charge; or
- b) withdraw the request for access.

Please note that the payment of a charge does not guarantee access to documents, redacted or otherwise.

If we do not hear from you within 60 days we will take your request to be withdrawn.

Option a) - pay the charge

As the charge exceeds \$25.00, but does not exceed \$100.00, you are required to pay in full, or a deposit of \$20.00 within 60 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 56238**; or
2. Cheque made out to the Collector of Public Monies and posted to Freedom of Information, Services Australia, 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, Services Australia, PO BOX 7820, Canberra BC, ACT 2610.

If you elect to pay the charge, please email FOI.LEGAL.TEAM@servicesaustralia.gov.au to advise us of your payment. Please quote reference number **LEX 56238** in this correspondence.



Time limits for processing your request

Section 31 of the FOI Act provides that where a notice is sent to an applicant regarding the payment of a charge in respect of a request, the time limit for processing the request is suspended from the date the notice is received until either:

- a) the day following payment of the charge (in full or the required deposit); or
- b) if applicable, the day following the notification to the applicant of a decision not to impose the charge.

Address for correspondence

Please send all correspondence regarding your FOI request to me at the following address:

Freedom of Information team
Services Australia
PO Box 7820
CANBERRA ACT 2610

Or by email to FOI.LEGAL.TEAM@servicesaustralia.gov.au.

You can ask for a review of our decision

If you disagree with any part of the decision you can ask for a review. You can ask for an external review by the Office of the Australian Information Commissioner. You do not have to pay for reviews of decisions. See **Attachment A** for more information about how to arrange a review.

Further assistance

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

Yours sincerely

Alana

Authorised FOI Decision Maker
Freedom of Information Team
Employment Law and FOI Branch Legal Services Division
Services Australia



INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Application for review of decision

The FOI Act gives you the right to apply for a review of this decision. Under sections 54L of the FOI Act, you can apply for a review of this decision by the Information Commissioner.

Information Commissioner review

You must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Email: enquiries@oaic.gov.au

An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Complaints to the Commonwealth Ombudsman

You may complain to the 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 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.