



Australian Government
Attorney-General's Department

14/7459

27 June 2014

Mr Brendan Molloy

By Email Only: foi+request-635-960b9b95@righttoknow.org.au

Dear Mr Molloy

Freedom of Information Request no. FOI14/097

I refer to your request under the *Freedom of Information Act 1982* (FOI Act) for documents created by the working group responsible for considering reforms to copyright legislation.

On 16 June 2014 the Department notified you that you were liable to pay a charge of **\$373.33** in respect of the processing of your request. In an email to the Department dated 19 June 2014, you requested a waiver of those charges pursuant to subsection 29(5)(b) of the FOI Act, on the grounds of public interest.

I, Janine Ward, Acting Assistant Secretary, am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests. I have considered your submissions and decided under subsection 29(4) of the FOI Act to reduce the amount of charges applicable to the processing of your request by 50%. The amount you are liable to pay is **\$186.67**. The reasons for my decision under subsection 29(4) are set out below.

Decision and reasons for decision

Under clause 4.47 of the FOI Guidelines issued by the Office of the Australian Information Commissioner, where an applicant contends that a charge should be waived, the agency has a general discretion to decide the case. As you have contended that the charge should be waived on the grounds of public interest I am required to consider whether giving access to the document in question is in the general public interest or in the interest of a substantial section of the public.

The Guidelines, in clause 4.48, further state that any other relevant matter may be considered, in particular any contention or submission made by an applicant as to why a charge should be reduced or waived.

In considering whether or not to reduce or impose a charge, the applicable test is different to the test applied when considering a public interest exemption under section 11 of the FOI Act¹. The Guidelines state that in applying paragraph 29(5)(b), it is important to identify the 'general public interest' or the 'substantial section of the public' that would benefit from disclosure², and there should also be a benefit flowing more generally to the public³.

¹ See *Besser and Department of Infrastructure and Transport* [2011] AICmr 2.

² OAIC FOI Guidelines [4.55].

³ In *Cashman & Partners v Secretary, Department of Human Services and Health* (1995) 61 FCR 301, Beazley J said:

In your email you submitted that “*the request is entirely in the public interest,*” because “*there has been significant media coverage of the issue*”, there is “*significant debate occurring around these proposals*” and “*Over 6000 people have signed a petition against the proposals.*”

You further noted that disclosure of the documents is in the public interest because “*a popularly elected Senator determined that this issue was important enough to raise in Senate Estimates.*”

The Guidelines establish that there is no presumption that the public interest test is satisfied by reason only that the applicant is a community or non-profit organisation, and the fact that the applicant will publish the documents is not material⁴, because this Department is required to publish documents released under the FOI Act on a “Disclosure Log” under section 11C of the Act.

In addressing the flow of benefit to the public, you made the following points:

Considering the significant impact this legislation would have on the Internet-using public (which is over 80% of the population), this request is clearly in the public interest. A substantial group of non-government organisations (such as the EFA, ADA and CHOICE), Pirate Party Australia and other political parties such as the Greens care deeply about this issue (enough that questions were asked in Senate Estimates), and for these reasons this request must be fulfilled without charge.

Given these points, I am satisfied that the public interest requirement is met because these documents relate to a policy issue under discussion, and the disclosure of documents may assist with public comments and participation. However, my position with respect to the public interest test applicable in the assessment of charges will not bear upon any final decision of this Department in relation to the disclosure of the documents requested.

Further, it is open to this Department to impose a charge even though the public interest purpose for disclosure has been established because of the weight of factors against reducing the cost⁵. Under the Guidelines I am entitled to consider matters that weigh against the points you have raised⁶. In *Baljurda Comprehensive Consulting Pty Ltd and Australian Agency for International Development*⁷, the Information Commissioner outlined the following reasons why a decision maker might decide to continue to impose a charge, even where giving access to documents would be in the public interest:

- *the applicant can be expected to derive a commercial or personal benefit or advantage from being given access and it is reasonable to expect the applicant to meet all or part of the FOI charge*
- *the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public*

*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) 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.*

⁴ OAIC FOI Guidelines [4.56], and see *Encel and Secretary, Department of Broadband Communications and the Digital Economy* [2008] AATA 72 at [90].

⁵ OAIC FOI Guidelines [4.50] and see also *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8 (*Baljurda*).

⁶ OAIC FOI Guidelines [4.49].

⁷ *Baljurda*, n5 above at [24]-[25]

- *the information in the documents has already been published by an agency and the documents do not add to the public record, or*
- *the applicant has requested access to a substantial volume of documents and significant work would be required to process the request*

You have requested access to a substantial volume of documents and a significant diversion of departmental resources is required in order to retrieve and assess them. In particular, the notice of charges sent to you by this Department outlined that it would take approximately 11.67 hours to process your request.

Having weighed the factors establishing the public interest and those against the waiver of charges, I consider that, taking into consideration the diversion of resources, the charges applicable should not be waived entirely.

Charges are reduced by 50%, such that the amount you are liable to pay is **\$186.67**.

Your review rights

If you are dissatisfied with my decision in relation to the reduced charge, you may apply for internal review or Information Commissioner review of the 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

Under section 54 of the FOI Act, you may apply in writing to the Attorney-General's Department for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter, and be lodged in one of the following ways:

email: foi@ag.gov.au
 post: Freedom of Information and Privacy Section
 Office of Corporate Counsel,
 Attorney-General's Department,
 3-5 National Circuit
 Barton, ACT 2600

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.

Information Commissioner Review

Under section 54L of the FOI Act, you may apply directly to the Information Commissioner 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: <https://forms.business.gov.au/aba/oaic/foi-review/>
 post: GPO Box 2999, Canberra ACT 2601
 fax: 02 9284 9666
 in person: Level 3, 175 Pitt Street, Sydney NSW

Next steps in processing your request

In accordance with section 31 of the FOI Act, the 30 day time limit is suspended from the date you were notified of the charge until the earliest occurring of the following days:

- the day you pay the amount of the charge or deposit;
- if the amount of the charge is changed following review under the FOI Act – the day you pay the revised charge or deposit;
- if, following review under the FOI Act, a decision is made not to impose a charge – the day you are notified of that decision.

Payment of a deposit

As the charge exceeds \$100, a 25 per cent deposit (**\$46.67**) must be paid to enable the processing of your request to continue (in accordance with regulation 12 of the *Freedom of Information (Charges) Regulations 1982*).

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 refunded in part if the final charge is less than the deposit paid.

Questions about this decision

If you have any questions or wish to discuss this decision with us, please email foi@ag.gov.au or telephone (02) 6141 6666.

Yours sincerely



Janine Ward
Acting Assistant Secretary