



21 August 2020

Our reference: LEX 56248

Mr John Smith

Only by email: foi+request-6466-049f1fac@righttoknow.org.au

Dear Mr Smith

Freedom of Information Request – Reconsideration of Charges

I refer to your email dated 22 July 2020, contending that a charge should not be imposed in relation to the processing of your request dated 6 July 2020, made under the *Freedom of Information Act 1982 (FOI Act)*. You requested access to:

- '- A document that contains the total number of non-APS staff, filling equivalent roles to actual APS staff in your department.
- A document that contains a list of all position titles within your department, that are currently filled by non-APS staff.

Typically these non-APS employees are ostensibly employed through labour hire agencies, and fulfil functionally equivalent roles to their colleagues.

If no such document exists please advise.'

Background

Services Australia has located one document relevant to your request.

On 17 July 2020, Services Australia notified you that in accordance with section 29 of the FOI Act, you were liable to pay a charge for the processing of your request, and that the preliminary assessment of the charge was \$75.00 (**preliminary charge**).

The preliminary charge was calculated as follows:

Search and retrieval time: 5 hours, at \$15.00 per hour:	\$75.00
Decision-making time (*after deduction of 5 hours): 0 hours, at \$20.00 per hour	\$0.00
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TOTAL	\$75.00

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

Reconsideration of the preliminary charge

On 22 July 2020, you responded to the preliminary charge notification, contending that the preliminary charge should be reconsidered (**reconsideration request**). In that correspondence you stated:



'I seek an internal review, in the hope that this charge will not be imposed.

The use of labour hire services in the public service is a matter that has been discussed by many outlets, in both the mainstream and independent media.

Further clarity on the use of labour hire employees throughout government departments, (both Commonwealth and State) is of interest to a substantial section of the public.

Information about the number of labour hire employees working APS-equivalent roles, is not currently available within the DHS annual reports. That is why this FOI request is necessary.

To substantiate this point, let me point out a number of recent articles written about public sector use of labour hire:

Sydney Morning Herald:

<https://www.smh.com.au/politics/federal/union-calls-for-end-to-public-service-labour-hire-20180802-p4zv55.html>

ABC News:

<https://www.abc.net.au/news/2020-07-03/australian-public-service-shrank-before-coronavirus-pandemic-hit/12417662>

<https://www.abc.net.au/news/2019-11-06/nsw-government-splashing-cash-contractors-and-short-term-workers/11673498>

Michael West Media:

<https://www.michaelwest.com.au/boomers-vs-millennials-the-gig-economy-breaks-enters-the-australian-public-service/>

It is also a topic that has been of interest to the CPSU, a union that represents a substantial section of the public (namely, public servant union members)

<https://www.cpsu.org.au/campaigns/scrap-the-cap>

In light of the above, please waive the fee associated with this request; on the ground that this is a public interest inquiry.'

I have reconsidered the preliminary charge and decided to apply a 20% reduction. The reasons for my decision are set out below.

What I took into account

In reaching my decision I took into account:

- the preliminary charge;
- your reconsideration request;
- the document falling within the scope of your request;
- 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

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, 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 mentioned in subsection 29(4), and the agency makes a decision to reject the contention in whole or in part, the agency must give the applicant written notice of the decision and the reasons for the decision.

Reconsideration of the charge

In order to complete a comprehensive reconsideration of the preliminary charges, I have reconsidered the calculations set out in the preliminary charge and set out my conclusions below.

Search and retrieval time

In response to your request, Services Australia conducted searches of its records for any relevant documents. These searches included consultations with the relevant business area within Services Australia to:

- identify the relevant document;
- compile the relevant document; and
- retrieve the relevant document.

The preliminary charge estimated 5 hours of search and retrieval time. The business area that undertook the searches confirmed that this was an accurate reflection of the time taken to complete the task. Accordingly, I have decided not to revise the search and retrieval component of the preliminary charge.

Decision-making time

When calculating the decision-making component of the preliminary charge, I estimated the time required to:



- examine the document; and
- prepare a statement of reasons for the decision.

I do not consider that the decision-making process will exceed 5 hours. Therefore, there is no charge associated with this component of processing your request.

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.

Paragraph 4.103 of the Guidelines provides:

‘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...’

You have not provided any evidence to show that payment of the preliminary charge would cause you financial hardship, and I have decided not to reduce the preliminary charge on this basis.

The public interest

Paragraph 29(5)(b) of the FOI Act provides that an agency must also take into account whether the provision of access to the requested documents 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 the charges to be affirmed.

Paragraphs 4.107 and 4.108 of the Guidelines relevantly provide:

‘An applicant relying on s 29(5)(b) 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.’

I also refer to paragraph 4.105 of the Guidelines which provides:



This test is different to, and can be distinguished from public interest considerations that may arise under other provisions of the FOI Act.

Consideration of the public interest

I have considered the news articles referred to in your reconsideration request.

I have also considered the general public interest in the use of labour hire, consultants and contractors in the public sector. I have found that interest is generally focussed on public service expenditure in this area, rather than specific numbers of contractors employed in the public sector. For example, I direct you to the following articles:

<https://www.afr.com/policy/economy/public-sector-work-pays-for-deloitte-ey-kpmg-and-pwc-20200615-p552m7>

<https://www.canberratimes.com.au/story/6547829/consultants-clean-up-as-aps-stagnates/>

<https://www.canberratimes.com.au/story/6416045/timely-cost-effective-services-australia-defends-increasing-use-of-contractors/>

Services Australia reports on its expenditure on contractors and consultants in its annual report. This report is publicly available and can be accessed on Services Australia's website. Specifically, I draw your attention to pages 248, 291 and 292 of the most recent 2018-19 report which can be accessed via the following link:

<https://www.servicesaustralia.gov.au/organisations/about-us/annual-reports/annual-report-2018-19>

I also note that the work of consultants and the contract management practices of Services Australia are already scrutinised in a number of public forums, including parliamentary committees and the media.

In light of the above, most interest is focussed on public expenditure. This information is already publicly available and I do not consider that releasing the document would otherwise assist the public debate on this topic.

Nonetheless, I accept that in the current economic climate where there is an increased rate of unemployment in the Australian economy, there is a general public interest in the number of individuals being employed through the public service.

As such, I have decided that a 20% reduction in the charge is appropriate. This would reduce the preliminary charge to \$60.00 (**revised charge**).

Conclusion

I consider that the search and retrieval time as well as the decision making time set out in the preliminary charge 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.

However, I am satisfied that the release of the document would be in the general public interest, and that a 20% reduction to the preliminary charge on this ground is appropriate.



I have therefore decided that the reduced charge is reasonable to provide you with a decision on access to the document.

Required action

If you would like Services Australia to continue processing your FOI request, please notify Services Australia in writing within 30 days of receiving this letter that you:

- a) agree to pay the charge (deposit or in full); or
- b) seek review of the revised charge, being
 - i. internal review; or
 - ii. external review.

Alternatively, you may wish to withdraw your request for access to documents. If you wish to withdraw your request, please do so in writing to FOI.LEGAL.TEAM@servicesaustralia.gov.au.

If we do not hear from you within 30 days we will take your request to be withdrawn.

Further information on options a) and b) is provided below.

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

Option a) - pay the charge

As the revised charge exceeds \$25.00 but does not exceed \$100.00, you are required to pay the charge in full, or a deposit of \$20.00 within 30 days of receiving this notice. You may select from one of the following payment methods:

1. Online payment via Government EasyPay – please go to https://www.ippayments.com.au/access/index.aspx?a=85987733&dl=legalservices_hpp_purchase and enter the relevant details. You will need your FOI LEX reference number, **LEX 56248**; 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 56248** in this correspondence.



Option b) – seek review

If you disagree with the decision to impose a charge, or the amount of the charge, you can ask for a review. There are two ways you can do this. You can ask for an internal review from within Services Australia, or 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 for to arrange a review.

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 the following address:

Freedom of Information
Services Australia
PO Box 7820
CANBERRA ACT 2610

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

Further assistance

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

Yours sincerely

Samantha

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



Attachment A

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 a freedom of information 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 an 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 Services Australia; 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 Services Australia 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 the decision; and
- sent to the address for correspondence set out above (or be delivered to any Centrelink service centre).

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 Services Australia 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**:



PO Box 7820 Canberra BC ACT 2610

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 Services Australia's decision on your FOI request
- Include your contact details
- Set out your reasons for objecting to Services Australia's decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the 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 Information Commissioner must be made in writing. The Information Commissioner's contact details are:

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

Commonwealth Ombudsman

You may also 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.