



21 September 2020

Our reference: LEX 58080
Previous reference: LEX 56248

Mr John Smith

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

Dear Mr Smith

Freedom of Information Request – Internal Review of Charges

I refer to your request to Services Australia dated 21 August 2020, seeking an internal review of a decision issued to you under subsection 29(6) of the *Freedom of Information Act 1982 (FOI Act)* on 21 August 2020 (**Reconsideration Decision**).

Background

On 6 July 2020, you made a request under the FOI Act in the following terms:

- 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 there is no such document, please advise.

On 17 July 2020, you were notified that you were liable to pay a charge for the processing of your request and that the preliminary assessment of that charge was \$75.00 (**Preliminary Charge**).

On 22 July 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 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.

...

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

On 21 August 2020, Services Australia notified you of the reconsideration of charges decision (**Reconsidered Charge**). The Reconsidered Charge reduced the charge to \$60.00 on public interest grounds.

On the same day 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.

What I took into account

In reaching my internal review decision, I took into account:

- Services Australia's correspondence dated 17 July 2020, notifying you of the Preliminary Charge;
- your reconsideration request dated 22 July 2020;
- Services Australia's correspondence dated 21 August 2020, notifying you of the Reconsidered Charges;
- your internal review request dated 21 August 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;
- relevant media articles;
- 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 mentioned in section 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.

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 order to conduct an internal review of the charges in this matter, I consulted with the relevant business area. In the course of those discussions I became aware that that the document was created by collating information into a discrete document in accordance with section 17 of the FOI Act. Therefore, I consider that the original charge was incorrectly calculated and the charge should be calculated in accordance with Item 2, of Part 1 of Schedule 1 of the Regulations. Therefore I have corrected that error below and re-calculated the charges for the request.

In accordance with Item 2, I have used the base salary in 2020 from the Services Australia (Non-SES Salaries and Allowances) Determination 2020 (found at Schedule 1, Table A) to calculate the actual cost of the production of the document as follows:

Classification	Hourly rate	Time Creating Requested Document	Apportioned charge
Executive Level 2	\$60.77	3 hours	\$182.31
Executive Level 1	\$52.51	½ hour	\$26.25
APS 5	\$37.93	½ hour	\$18.96

On the basis of the above I have decided that you are liable for a charge of **\$227.52**.

However, I have decided to exercise my discretion to reduce the charge to \$75.00 so that it does not exceed the amount calculated in the Preliminary Charge.

Other considerations

Grounds for waiving or reducing the charge

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 or their organisation.

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 requested that charges be waived on financial hardship grounds for this request. Therefore, I have decided not to reduce the charge on this basis.

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 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:

Stated within your reasons you have mentioned that my request is merely about 'the number' of people employed as contractors. This is false. In addition to numbers, my request asks for the position titles and roles that are being outsourced.

You have also stated that the articles linked only discuss concerns regarding the amounts being spent on the public service. This is also false. The articles also raise the issue of

whether it is a good idea for the Australian government to be outsourcing its core functions, and whether the outsourcing of senior level roles within the public service is good government policy.

That is why my request which asks for position titles & the for extent to which departmental roles have been privatized; firmly fits within the public interests raised within the articles that you have linked.

The extent of the use of labour hire within the public service is not only a matter of numbers. It is also of interest to the public to know whether labour hire is only in low-level roles, or even in high level roles (e.g. Assistant director roles at the department of agriculture are outsourced to labour hire.) The value to the taxpayer in outsourcing senior roles is questionable. That is why I am asking for a list of positions in which labour hire has taken place within your department.

Additionally, your reasons inadequately characterizes the already available information on the procurement expenses of labour hire in the public service. Existing labour hire figures are only provided at an aggregate level for the department. Neither are parliamentary documents available that detail the extent and breadth of labour hire within your department.

The detail is important; because there is a qualitative difference in taxpayer value for money between different levels of outsourcing. For example, the outsourcing of a security guard has different qualitative costs associated with it; than the outsourcing of more senior level roles. Outsourcing senior level roles within the public service causes a loss of public sector expertise, a concern that is raised ****repeatedly**** within the articles I have cited in furtherance of my argument that this is a public interest request.

The Reconsidered Charge decision-maker accepted that there was a limited public interest the documents and exercised their discretion to reduce the charge by 20%. You submit that the waiver applied should have been larger.

Level of public service contractors

Throughout your submissions you discuss the importance of the level and/or role of the individual contractor in determining whether the public is obtaining value for money through the engagement of labour hire staff. The underlying assumption appears to be that there is more value in outsourcing positions with lower classifications than those with higher classifications.

Contrary to your contentions, your request does not seek access to a document that shows the 'position titles and the roles being outsourced.' Rather, you sought access to the total number of non-APS staff (labour hire staff) and the position titles of non-APS staff (noting that they have the title "contractor"). Therefore, the document falling within the scope of your does not include classifications as you have described.

Therefore, I am satisfied that the document would not inform the public on the classification of contractors hired by Services Australia, and as a result, it will not inform the public on matters discussed such as loss of expertise or the comparative cost benefit of labour hire between junior and senior staff. Therefore, I have put minimal weight on these arguments.

Derivative public benefit

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.

As discussed above, I do not consider that you have requested a document that would provide the level of detail necessary to meaningfully add to any public discussion on the value for money of

contractors in the public service. Nor would it add to the public debate in any of the ways you have identified in your contentions. Therefore, I do not consider that this is a factor that favours waiving or reducing the charge in this instance.

Whilst I consider that there may be a public benefit in knowing of the exact number of contracted staff engaged by Services Australia at a specific point in time, I consider that the public interest is limited. I do not consider that the public interest warrants a reduction that is greater than the 20% reduction provided for in the Reconsidered Charge. Therefore, I have decided to reduce the charge to \$60.00.

Other relevant considerations

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 AAT 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 a charge of \$60.00 accurately reflects the lowest reasonable cost for the time that it will take Services Australia to process your request. I also consider that it was the intention of the legislature that applicants bear a portion of the cost of processing FOI requests.

Conclusion in relation to charges

In summary, I consider that there is a limited public interest in the document. Therefore, I have decided to reduce the charge to **\$60.00**.

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;
- b) seek a review; or

Alternatively, you can withdraw your request.

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 58080**; 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 58080** 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. 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 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 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.

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.