



Australian Government

Department of Health

Department References: FOI 2917

Mr James Nugent

via email: foi+request-7625-36d45c99@righttoknow.org.au

Dear Mr Nugent

**NOTICE OF DECISION - FREEDOM OF INFORMATION
INTERNAL REVIEW OF DECISION TO IMPOSE CHARGES**

I refer to your request to the Department of Health (the department) seeking access under the *Freedom of Information Act 1982* (the FOI Act) to the following documents:

any information on the probabilities that were considered in formulating the updated recommendation on 24 July that 'All individuals aged 18 years and above in greater Sydney, including adults under 60 years of age, should strongly consider getting vaccinated with any available vaccine including COVID-19 Vaccine AstraZeneca.'

In particular, what information did ATAGI consider in relation to the probability of:

- developing TTS,
- death after developing TTS,
- catching covid before being vaccinated with AstraZeneca,
- catching covid after being vaccinated with AstraZeneca, and
- death after catching covid?

Internal review - Charge

On 1 October 2021, you requested the department waive the processing charge on the grounds of public interest, and you provided the following information in support of your request for waiver.

I contend the charge should not be imposed on the basis of section 29(5)(b) of the FOI Act - that access to the document in question is in the general public interest or in the interest of a substantial section of the public. This is manifest, but if you need examples of public interest in this topic these articles should suffice:

- <https://www.abc.net.au/news/2021-09-25/low-mortality-rate-astrazeneca-covid-vaccine-clots-tts/100489408>
- <https://theconversation.com/yes-you-can-still-get-covid-after-being-vaccinated-but-youre-unlikely-to-get-as-sick-163870>
- <https://www.afr.com/politics/how-to-halve-the-death-rate-from-covid-19-20210820-p58kih>
- <https://www.theaustralian.com.au/science/only-real-options-are-vaccination-or-risk-death-by-delta/news-story/8ade3ec715c5fdd88694534c2d251ecc>

Internal Review Decision

I am authorised under subsection 23(1) of the FOI Act to make decisions in relation to FOI requests, including requests for internal review of charges decisions.

I am writing to notify you of my decision in response to your request for internal review of the department's decisions to impose charges in relation to your FOI request.

I have decided to waive the charge in relation to your FOI request.

Information taken into account

In making my decision, I had regard to the following:

- the scope of your request
- the content of the documents identified as falling within scope of your request
- your contentions in your email of 1 October 2021 that the charge should be waived
- advice from departmental officers with responsibility for matters relating to the documents sought
- information received from the Office of the Australian Information Commissioner (OAIC)
- the relevant provisions of the FOI Act and the FOI Charges Regulations, and
- the Guidelines issued by the OAIC under section 93A of the FOI Act (the FOI Guidelines).

Grounds for reducing or waiving the charge

Subsection 29(5) of the FOI Act requires a decision maker, in deciding whether or not to waive or reduce the charges, to take into account:

- whether paying the charge would cause financial hardship to the applicant, and
- whether giving access to the documents is in the general public interest or in the interest of a substantial section of the public.

Subsection 29(5) of the FOI Act does not limit the matters an agency may consider in making a decision on whether to impose or waive a charge.

My findings of fact regarding reduction of waiver of the charge on the grounds of public interest, financial hardship and other considerations are set out separately below.

Public Interest

You have contended that the charges should be waived on public interest grounds, and have provided links to articles in which issues related to your FOI request have been canvassed.

There is a difference between something that is 'in the public interest' and something that is 'of interest to' the public or some members of the public. For example, many issues that attract media attention and community interest have no bearing in the good order and functioning of the community and government affairs or the wellbeing of citizens.

Paragraphs 4.105 to 4.107 of the FOI Guidelines relevantly provide as follows:

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 can be distinguished from, public interest considerations that may arise under other provisions of the FOI Act.

Specifically, the public interest in s 29(5)(b) is different to the public interest test in s 11A(5) that applies to conditionally exempt documents. Nor will s 29(5)(b) be satisfied only by a contention that it is in the public interest for an individual with a special interest in a document to be granted access to it, or that an underlying premise of the FOI Act is that transparency is in the public interest.

An applicant relying on s 29(5)(b) should identify or specify the 'general public interest' or the 'substantial section of the public' that will benefit from this disclosure (s 29(1)(f)(ii)). This may require consideration of both 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.

In addition, paragraph 4.97 of the FOI Guidelines provides as follows:

Moreover, an agency or minister should always consider whether disclosure of a document will advance the objects of the FOI Act, even if the applicant has not expressly framed a submission on that basis. The objects of the FOI Act include

promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government's activities (s 3).

I am therefore satisfied that the charge should not be waived or reduced on public interest grounds.

Please note that my decision on public interest goes only to the question of whether the charges should be imposed, and not to the issue of whether any relevant documents should ultimately be disclosed.

Financial hardship

You have not raised the issue of financial hardship or provided evidence to indicate that payment of the charge would cause you financial hardship.

I find that the charge should not be waived or reduced on the grounds of financial hardship.

Other considerations

Subsection 29(5) of the FOI Act does not limit the matters an agency may consider in making a decision on whether to impose or waive a charge. Having taken other matters I consider relevant to your request into account, I have decided to waive the charge on this occasion.

I understand you sent your FOI request to an email address listed on the 'Right To Know' website. Right to Know is a private entity that is not affiliated with the department and is not authorised to provide information or advice to individuals about the process for making FOI requests to the department or other Commonwealth entities.

I have taken into account the delay in the commencement of processing of your FOI request resulting from your reliance on the incorrect information on the Right To Know website.

For your information and future reference, section 15 of the FOI Act sets out the requirements for making a valid FOI request, and subsection 15(2A) lists the ways in which an FOI request can be submitted to a Commonwealth entity.

Subsection 15(2A) of the FOI Act is in the following terms:

The request must be sent to the agency or Minister. The request may be sent in any of the following ways:

- (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
- (b) postage by pre-paid post to an address mentioned in paragraph (a);

(c) sending by electronic communication to an electronic address specified by the agency or Minister.

Consistent with this legislative requirement, the FOI Guidelines published by the OAIC provide as follows:

Table 2: Time of receipt based on mode of delivery

Mode of delivery	Time of receipt (processing period commences on following day)
Pre-paid post to a specified address of the agency or minister	The date the letter is delivered in the ordinary course of post ⁷⁴
Delivery to a central or regional office	The date of delivery
Electronic communication to a specified email or fax address	The date the communication is capable of being retrieved by the agency at the specified email or fax address

3.140 An email or similar electronic communication is received at the time it is capable of being retrieved by the addressee.⁷⁵ This is assumed to be the time it reaches the addressee's nominated electronic address⁷⁶ (this day could be a weekend or public holiday). This rule may be varied by a voluntary and informed agreement between the sender (the applicant) and the addressee (the agency or minister).

The department's FOI internet page provides information about making FOI requests to the department, including information about how to submit an FOI request and the FOI Unit's contact details. The internet page also includes a link to an FOI application form for those who wish to use it:

<https://www.health.gov.au/about-us/corporate-reporting/freedom-of-information-foi>

The nominated email address for sending an FOI request to the department by electronic communication, as set out on the department's website and in the department's FOI application form, is via the email address foi@health.gov.au. The department monitors this email box daily to ensure FOI related requests and queries are actioned as soon as possible, consistent with statutory timeframes set out in the FOI Act.

I understand you sent your FOI request to an ATAGI email address. The officers with access to that email box are working on high priority issues, including the government's ongoing response to the current pandemic. As a result, your email was not actioned for several weeks.

Processing of your FOI request was delayed until the FOI Unit received your request on 23 August 2021 at the email address nominated by the department in accordance with subsection 15(2A) of the FOI Act.

Effect of my decision

As a consequence of this decision, you are not liable to pay the charge imposed in relation to your FOI request.

In addition, the timeframe for providing a decision in response to your FOI request recommences on the day you receive this decision.

FOI review rights

If you are dissatisfied with my decision, under section 54L of the FOI Act, you may apply to the OAIC for review of my decision by the Information Commissioner (IC).

In accordance with subsection 54S(1) of the FOI Act, an IC review application in relation to a decision covered by subsection 54L(2) (access refusal decisions) must be made in writing within 60 days after the day you are notified of this internal review decision.

More information about IC review is available on the OAIC website at:

<https://www.oaic.gov.au/freedom-of-information/reviews/>

The OAIC can be contacted by:

Email: enquiries@oaic.gov.au

Phone: 1300 363 992

Complaints

If you are dissatisfied with actions taken by the department, you may also make a complaint.

Complaint to the department

Complaints to the department are covered by the department's privacy policy. A form for lodging a complaint directly to the department is available on the department's website:

<https://www.health.gov.au/about-us/contact-us/complaints>

Complaint to the IC

Information about making a complaint to the IC about action taken by the department is available on the OAIC website:

<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>

Relevant provisions under the FOI Act

The FOI Act and the FOI Charges Regulations, including the provisions referred to in this letter, can be accessed from the Federal Register of Legislation websites:

<https://www.legislation.gov.au/Details/C2021C00219>

<https://www.legislation.gov.au/Details/F2019L00348>

Contacts

If you require clarification of any of the matters discussed in this letter, you should contact the Freedom of Information Unit at FOI@health.gov.au.

Yours sincerely
Stephen Bouwhuis
General Counsel
Legal Advice and Legislation

11 October 2021