



Australian Government

Department of Immigration and Border Protection

12 May 2015

In reply please quote:

FOI Request FA 15/02/00568

File Number ADF2015/5383

Copy sent by email to: foi+request-921-f99df21a@righttoknow.org.au

Dear CD

Freedom of Information request – Notice of charge decision following applicant contention that charge be reduced or not imposed (s.29(8))

This notice of decision refers to your request received by the Department of Immigration and Border Protection (the Department) on 11 February 2015 seeking access under the *Freedom of Information Act 1982* (the FOI Act) to documents as follows:

I write to you under the Freedom of Information Act 1982 seeking any and all written documentation such as, but not limited to; letters, emails, notes, press releases, statements and faxes held by the "Department of Immigration and Border Protection" that refer to "Freedom" branded food items and/or "Muesli Bars" between the dates of 1/6/14 and 10/2/15.

Following consultation under s.24AB of the FOI Act, you revised the scope of your request on 2 April 2015 to the following:

... any emails held by the Department of Immigration and Border Protection that refer to 'Freedom' branded food items and/or 'Muesli Bars' between the date range of 23/1/15 and 31/1/15.

This revised scope was accepted by the department on 21 April 2015.

On 21 April 2015 the department sent you a notice, advising that you are liable to pay a charge in respect of the processing of your FOI request in accordance with s.29 of the FOI Act.

On 4 May 2015 you sent an email in which you requested a waiver or reduction of charges pursuant to s.29(5)(a) of the FOI Act, on the grounds of financial hardship and pursuant to s.29(5)(b), on the grounds of public interest.

people our business

6 Chan Street Belconnen ACT 2617

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I am an officer authorised under s.23(1) of the FOI Act to make decisions in relation to FOI requests and I am writing to advise you of my decision.

I have decided not to vary the original assessment of the charge. The amount you are liable to pay is **\$622.12**. The reasons for my decision under s.29(4) are set out below.

Reasons for my decision

Discretion to reduce or not to impose a charge

Section 29(4) of the FOI Act provides:

Where the applicant has notified the agency or Minister, in a manner mentioned in subparagraph (1)(f)(ii), that the applicant contends that the charge should be reduced or not imposed, the agency or Minister may decide that the charge is to be reduced or not to be imposed.

In deciding whether to exercise the broad discretion in s.29(4), as the decision maker I may consider any relevant matter. However, s.29(5) provides that I must consider whether giving access to the documents in question is in the general public interest, or in the interest of a substantial section of the public; and whether the charge would cause financial hardship.

Would payment cause financial hardship?

The Australian Information Commissioner has issued Guidelines under s.93A of the FOI Act, to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines provide (at 4.50 – 4.51):

Whether payment of a charge would cause I financial hardship to an applicant is primarily concerned with the applicant's financial circumstances and the amount of the estimated charges. Financial hardship means more than an applicant having to meet a charge from his or her own resources.

An applicant relying on this ground could ordinarily be expected to provide some evidence of financial hardship.

When considering whether to waive a debt due to the Commonwealth, the Department of Finance provides the following definition of financial hardship (in the context of deciding whether to waive the debt)

(see: <http://www.finance.gov.au/resource-management/discretionary-financial-assistance/waiver-of-debt-mechanism/information-for-applicants-debt-waiver.html#ref4>):

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.

However, even if you demonstrate financial hardship, the decision maker may still consider your debt should not be waived.

In your email of 4 May 2015 you advised that you are a student and on a low income earner and that payment of this charge would directly impact your *ability to afford and budget for basic living allowances such as rent and utility bills*.

On 5 May 2015 I requested that you make further submissions to support your contention of financial hardship. I referred to you the Information Commissioner's Guidelines and requested that you respond by 11 May 2015.

You have not provided evidence of your financial circumstances (such as financial statements, a statutory declaration of income, assets and expenditure or other supporting documentation). As your contention that payment of the charge would cause you financial hardship is unsubstantiated, I am not satisfied that the charge would necessarily cause sufficient financial hardship as to warrant a reduction or a waiver of the charges imposed.

Is giving access to the document in the public interest?

Section 29(5)(b) of the FOI Act requires me to consider *whether the giving of access to the document in question is in the general public interest or in the interests of a substantial section of the public*.

The Australian Information Commissioner has issued Guidelines under s.93A of the FOI Act to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. Part 4 of the Guidelines explains the factors I must take into account when considering the public interest in charges decisions.

As the Guidelines explain, the issue is not whether it is in the public interest to reduce or not impose a charge, nor whether it is in the public interest for a particular applicant to be granted access to a document. While you (the FOI applicant) may benefit from disclosure of the documents, the question is whether there is a benefit that will flow more generally to the public or to a substantial section of the public if the documents are released to you.

In deciding whether the giving of access to documents is in the general public interest or in the interest of a substantial section of the public I have considered both of the content of the documents and the context of their release.

I have considered the following:

- 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 arguments you have put forward in your email of 4 May 2015 as to why the charge should be reduced or waived;
- whether disclosure of a document would advance the objects of the Act;
- whether the documents are primarily of interest only to you and are not of general public interest or of interest to a substantial section of the public; and
- whether the information in the documents has already been published by or commented on by the department and the documents do not add to the public record.

I have determined that waiving charges for disclosure of the documents in question is not in the general public interest or in the interest of a substantial section of the public, for the purpose of a decision under s.29(5)(b) of the Act. The reasons for this conclusion are set out below.

Your argument

In your email of 4 May 2015 you provide the following arguments for a waiver of the charges on public interest grounds:

I also ask you to consider under s.29(5) of the FOI Act 1982 the public interest in releasing these documents without charge or at a more affordable rate. As the following ABC article stated, the "decision came after Australia's Department of Immigration and Border Protection intervened, which the department has denied."

As the FOI & Privacy Policy Section of DIBP found so many documents relating to "Freedom Foods" & "Manus Island" but the Department denied intervening in their delivery to Refugees I argue that the release of these documents falls squarely in the public interest.

<http://www.abc.net.au/news/2015-01-30/freedom-muesli-bars-rejected-by-manus-island-detention-centre/6057430>

At the outset I note that the 'public interest' test relating to a request for reduction or waiver of charges is different from the public interest test relating to one or more of the public interest conditional exemptions as contained in Division 3 of Part IV of the Act. It is my understanding that in order to have a charge waived; you have to demonstrate that it is in the public interest that you not be charged for the processing of your FOI request. Further there is a difference between 'what is interesting to the public or what is of interest to the public' and 'the public interest'.

In essence you argue that, as there are 72 pages worth of documents which have been identified by the FOI Section as falling within the scope of your request, this must mean that the department must have intervened and the department's 'denial' was therefore untrue. It is my view that not only is this flawed argument but it is also insufficiently strong to warrant a waiver or reduction of the charge on public interest grounds. The number of pages of the documents does not 'prove' that the department intervened.

The scope of your request is for any emails 'held' by the Department *that refer to 'Freedom' branded food items and/or 'Muesli Bars'*. A document which is 'held' by the department is not necessarily a document authored by a representative of the department. (A 'document of an agency' is defined in s.4(1) of the FOI Act and includes any documents held by the department even if received from another body). The term 'refer' is also very broad and will capture any documents that mention the terms 'Freedom' and/or 'Muesli Bars'.

I can advise that most of the documents (emails) falling within the scope of you request are internal emails between Transfield employees. There are also some email between Transfield and the supplier of the muesli bars.

As I set out in my charges notice to you on 21 April 2015, there are a number of third parties whom I am required to consult with prior to releasing documents to you, as I am satisfied that the documents contain their 'business information' and they may reasonably wish to contend that the documents (or parts thereof) ought to be exempted under s.47G of the FOI Act. These third parties can object to the release of the documents to you and have review rights. The documents will not be released to you until all review paths have been exhausted (should the third party/parties seek a review).

I therefore do not consider that providing you with the documents without charge would necessarily contribute further to the public discussion or analysis of the assertion that the department directed the service provider (Transfield) not to distribute the 'Freedom' branded muesli bars to asylum seekers at the Manus Regional Processing Centre. I am accordingly not satisfied that the public interest test in waiving or reducing the charges has been met.

Exercising the discretion

As the Guidelines explain, even if I were satisfied that a public interest purpose for disclosure had been established (which I am not), it remains open to me, as the authorised FOI decision maker to impose a charge.

For the above reasons I have decided not to vary the original assessment of the charge. I am of the view that no public interest case has been made out for the purposes of s.29(5)(b) of the FOI Act, to persuade me to waive or reduce the charge.

Next steps in processing your request

As the charge exceeds \$100, you must pay a 25% deposit (**\$155.53**), in accordance with regulation 12 of the *Freedom of Information (Charges) Regulations 1982* (the FOI Charges Regulations).

The deposit will be refunded if the Department fails to make a decision on your request within the statutory time limit.

Please note that if you choose to pay the deposit only, while the Department will be under an obligation to provide you with the decision by the due date, the documents will not be provided until you have paid the balance of the charges (s.11A(1)(b) of the Act and Regulation 11 of the FOI Charges Regulations).

How to pay the charge

The deposit can be paid by cheque, money order, credit card or Electronic Funds Transfer (EFT).

Cheques and money orders should be made payable to "Collector of Public Monies DIBP" and sent to:

FOI & Privacy Policy Section
Department of Immigration & Border Protection
PO Box 25
BELCONNEN ACT 2616

If you wish to pay by credit card, please fill out the attached credit card authorisation form and forward to FOI & Privacy Policy Section at the above address, or email to foi@immi.gov.au.

If you wish to pay by Electronic Funds Transfer (EFT) the department's bank account details are as follows:

Bank: CBA
BSB: 062987
Account Number: 10016044
Account Name: DIBP Official Administered Direct Credit Receipts Account

When making the transfer you will need to quote the number of your request – FA 15/02/00568 - so that your payment can be identified by our Finance area. Failure to do so may result in payments not being identified as FOI related and could result in processing delays.

Please advise FOI when you have made the payment made by direct credit so that we can contact the Finance area and they can issue a receipt. You should also be aware that payments by direct credit are not processed in real time. There is at least a one day delay between somebody paying money into the department's account and notification of the payment via our bank account statement.

Time in which to respond

Under the Act you have 30 days from the date of this notice to provide the Department with a response to my decision and either agree to pay the charges or seek an internal review of my decision. Your full review rights are set out in the next section, headed 'Review Rights'.

Therefore, you must provide the Department with a written response as to how you wish to proceed by close of business **Friday 12 June 2015**.

Review rights

Internal review

If you disagree with my decision, you have the right to apply for an internal review by the Department my decision. Any request for internal review must be provided to the Department by the date set out above. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by an officer other than the original decision-maker and the Department must make a review decision within 30 days.

Applications for review should be sent to:

Freedom of Information
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

Or by email to: foi@immi.gov.au

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of my decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a review request to the OAIC, please see FOI fact sheet 12 '*Freedom of information – Your review rights*', available online at www.oaic.gov.au.

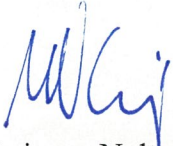
How to make a complaint about the handling of this FOI request

You may complain to the Australian Information Commissioner if you have concerns about how the Department has handled your request under the Act. Information about how to submit a complaint is also available at www.oaic.gov.au.

Contacting the FOI Section

If you wish to discuss this matter, I can be contacted using the details provided below.

Yours sincerely



Marianne Nolte-Crimp
Authorised FOI Decision Maker
FOI Section
Department of Immigration and Border Protection
Email foi@immi.gov.au