



Australian Government
Department of Finance

Reference: FOI 22/85 IR
Contact: FOI Team
E-mail: foi@finance.gov.au

C Drake
Right to Know

By email only: foi+request-9394-d71a9986@righttoknow.org.au

Dear Mr Drake

Freedom of Information Internal Review of Charges Request – FOI 22/85

On 24 September 2022, the Department of Finance (Finance) received your email in which you sought access under the Commonwealth *Freedom of Information Act 1982* (FOI Act) to documents held by Finance. A copy of your request is at **Attachment A**.

Initial Charges Estimate

On 10 October 2022, Finance notified you of the \$164.42 preliminary assessment of the charges payable by you for Finance to process your request, in accordance with the *Freedom of Information (Charges) Regulations 2019* (Regulations).

Contention of the charges

On 12 October 2022, you outlined your contention of the preliminary assessment charge and sought waiver of the charges. A copy of your contention is at **Attachment B**.

Decision on waiver of charges

On 1 November 2022, Finance notified you of the decision maker's decision to affirm the preliminary charges assessment of \$164.42. A copy of this decision is at **Attachment C**.

Internal review request

On 13 November 2022, Finance received your email, in which you sought an internal review of Finance's decision of the charges payable by you for Finance to process your request on the basis of the following:

I request a review of the decision to charge fees for my FoI request on the following grounds:-

1. This topic is a matter of public debate (including multiple published refused FoI requests on the "righttoknow" website).

2. My request relates to the topic of "agency decision making", in particular, its disingenuous behavior in respect to denying FOI request for public-interest information (government web sites) by using:

- a) multiple inappropriate means (including deliberately misrepresenting legal status), and
- b) multiple different and changing excuses, and
- c) by making outgoing requests to formerly agreeable stakeholders in order to change their support, and
- d) obsequiously pretending you cannot "identify" me (the person who made the FOI request) for the purposes of working out what documents relate to me in the context of those generated by your officers during their contact with the third parties involved in my FOI request, and seeking to change their support of my request.

3. My request specifically seeks to reveal to the public as to why or how the previous refusal decision was made, including highlighting any problems or flaws that occurred in the decision making process: specifically - the fact that your department is using an external third party to perform the duties of your department (maintain the list of government domains) and you are using the fact that this third party is performing your department duties as an excuse to deny FOI access by pretending that confidentiality documents between your department and this entity apply to the information which your department administers in such as way as to prevent its release to the public.

The public deserve to know the tricks your department uses to avoid scrutiny, so we can take appropriate steps to restore our right to know what you're doing.

4. My request satisfies practically all of section 4.190 (including proposed legislation, public debate, inquiry submission, and so forth).

5. Your department has made the advanced decision NOT to release one or more items in my request, including the one you know for certain that I most want to receive (the domain list), and has nevertheless decided to levy a fee knowing full-well in advance that you will not be providing me with access to the document even if/when I pay this fee. Charging for an item that you have no intent to release is fraud.

6. I have zero confidence that you have any genuine intent to release any of the controversial documents or other records (most likely phone recordings, since telephone seems a likely means used in this instance to avoid leaving records) that were used to convince the third party to change their tune from "happy to let me have the list" to "object" and/or have been used to threaten the third party into not allowing my access to them. Again - this FOI request relates to misbehavior of your own staff in carrying out their FOI obligations to the public: charging me for items which you know in advance you will not be releasing is fraudulent.

7. I was extremally disappointed that my review of my first request for this domain list upheld the refusal, especially since it's such an absurd idea that a department can simply draft a contract to make government data "confidential" and then use that to deny an FOI request.

It makes it clear that the officer who processed my review is sympathetic to the officer who refused my request, and was not acting impartially, nor in the best interests of the public or the spirit of the FOI act.

Accordingly, I request that this, my request for another review, be carried out by a different representative who has not previously refused (or withheld a refusal) my access to department records, and one who will act in the interest of the public, the spirit of the FOI, and without sympathy or allegiance to the former FOI officers involved in this dispute.

On 14 November 2022, Finance emailed you to confirm which decision your internal review request related.

On 15 November 2022, Finance received your email, in which you confirmed that you sought an internal review on the charges decision on the basis of the following:

I seek an internal review of the FOI 22/85 charges decision on the grounds that fees should not be charged in this case for multiple reasons, including (but not limited to) the overwhelming applicability of section 4.109 for (at least) the reasons I identified in my previous email and below.

Be aware that I've filed another FoI for the same original content (list of domains) making clear that I don't care what source you acquire the list from (since your original rejection was obsequiously based on confidentiality with 3rd parties). I'm willing to drop this review request and FOI 22/85 if you supply the list (I don't want to waste your time or appear vexatious - I just want the domain list which was (at least for a decade or more) published in full in the past: I have no idea why you're fighting so hard to block this formerly-available information from being made available once again).

I strongly recommend you carefully read my new request and the reasons for wanting access to this information, reasons which I hereby incorporate by reference into this review:

https://www.righttoknow.org.au/request/what_are_all_our_govau_domains

The purpose of this letter is to provide you with notice of my internal review decision under the FOI Act.

Authorised decision-maker

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

Internal Review Decision

Consideration of contention

I have considered your request on its merits. In accordance with section 29 of the FOI Act, I have decided not to waive or reduce the charge of \$164.42.

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

- the content of the documents that would fall within the scope of your request;
- the original charges decision;
- the content of your email requesting internal review of the imposition of the charge;
- the relevant provisions of the FOI Act and the FOI Charges Regulations;
- relevant FOI case law (referenced throughout the original decision); and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (FOI Guidelines).

I acknowledge that one of the principal objects of the FOI Act is to facilitate and promote the disclosure of information held by government. However, the FOI Act does not go so far as to say that access to information should be free of any cost to the applicant.

In considering your application, I have also referenced the FOI Guidelines in Part 4, section 4.3:

An agency or minister has discretion to impose or not impose a charge, or impose a charge that is lower than the applicable charge under Regulation 3 of the Charges Regulations. In exercising that discretion the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects clause of the FOI Act at section 3(4):

... functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

I also considered the following principle at paragraph 4.5 of the Guidelines which is relevant to charges under the FOI Act:

Charges should fairly reflect the work involved in providing access to documents on request

The power to reduce or waive FOI charges is a discretionary one, subject to law and government policy.

Subsection 29(5) of the FOI Act provides:

Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:

- (a) whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and
- (b) 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.

I have considered subsection 29(5) of the FOI Act, the FOI Guidelines, your reasons for the internal review, together with the reasons set out in Finance's Charges decision letter under the headings of 'Calculation of charge amount', 'Financial hardship', 'Public Interest' and 'Improper behaviour' from pages 2 to 4.

In particular, you stated:

I seek an internal review of the FOI 22/85 charges decision on the grounds that fees should not be charged in this case for multiple reasons, including (but not limited to) the overwhelming applicability of section 4.109 for (at least) the reasons I identified in my previous email and below.

My findings of fact and reasons for deciding not to waive or reduce the charge are set out below.

Public Interest

Paragraph 29(5)(b) of the FOI Act requires me to consider 'whether the giving of access to the documents in question is in the general public interest or in the interest of a substantial section of the public'.

The FOI Guidelines at paragraph 4.109 has a non-exhaustive list of factors that may constitute 'public interest' for the purposes of charging under the FOI Act.

I consider that Finance's Charges decision letter, under the heading of 'Public Interest' on page 4 addresses your above statement. That is, the documents relate to the standard contractual provisions in relation to the provision of services for the administration of .au and the .gov.au domain name registry, together with the standard steps required to be undertaken by Finance to consult with third parties.

As such, I do not consider that the documents that you have requested relate to a matter of public debate, or to a policy issue under discussion, or that disclosure would assist the public to comment on, or participate in, the debate or discussion.

Improper behaviour

In your request for internal review email sent on 13 November 2022, you stated:

- 5. Your department has made the advanced decision NOT to release one or more items in my request, including the one you know for certain that I most want to receive (the domain list), and has nevertheless decided to levy a fee knowing full-well in advance that you will not be providing me with access to the document even if/when I pay this fee. Charging for an item that you have no intent to release is fraud.

I have reviewed the charges documents and consider that the estimate of 13.5 hours of work, and the associated charges of \$164.42 is a reasonable estimate of the time required to process your request. I do not consider that the issuing of a charge reveals any improper behaviour of FOI Officers', or any government employee. Finance's employees, in response to receiving your FOI request (FOI 22/85) conducted themselves at all times in accordance with their obligations under the APS Code of Conduct.

I consider that if documents existed that would reveal improper behaviour of government employees, then those documents would be relevant to the public interest considerations for the purposes of charging under the FOI Act, but this is not the case.

Conclusion

Based upon the above, I am therefore satisfied that the charge of \$164.42 should not be waived nor 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 the documents should ultimately be disclosed.

Next steps

Timeframe

We ask that within 60 days of the date of receipt of this notice, you either:

- agree to pay the charge of \$164.42; or
- seek an external review of charges decision by the Australian Information Commissioner (IC), or
- withdraw your request.

Notice must be provided to Finance in writing. If you fail to notify Finance in a manner described above within 60 days of the date on this notice, being on or before **Friday 10 February 2023**, it will be taken that you have withdrawn your request.

The time period for processing your request remains suspended from the date of this notice and resumes on either the day you pay the charges amount or the day on which Finance makes a decision not to impose a charge. However, the actual processing time would also be affected by third party consultation.

Payment of charges

You can agree to pay the charge. If you agree, processing of your request will resume as soon as Finance receives payment.

Payment is \$164.42. Payment entitles you to receive a decision in relation to your request, a schedule (if there are more than 3 documents) which lists the documents relevant to your request, and any documents released.

If you agree to pay the charge please notify the FOI team and they will prepare an invoice for you to complete, sign and return.

Review and appeal rights

You are entitled to request an external review by the Office of the Australian Information Commissioner (OAIC) of my decision. The process for review and your appeal rights are set out at **Attachment D**.

Yours sincerely,

12/12/2022

X 

Signed by: Gabriel, Marcel

Marcel Gabriel
Assistant Secretary
Government Services Branch | Information and Communications Technology Division
Department of Finance
13 December 2022



Australian Government

Department of Finance

Freedom of Information – Your Review Rights

If you disagree with a decision made by the Department of Finance (Finance) or the Minister for Finance (Minister) under the *Freedom of Information Act 1982* (the FOI Act) you can have the decision reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if you have made a contention against the release of the documents that has not been agreed to by Finance or the Minister, or if your application to have your personal information amended was not accepted. There are two ways you can seek a review of our decision: an internal review (IR) by Finance or the Minister, or an external review (ER) by the Australian Information Commissioner (IC).

Internal Review (IR)

If Finance or the Minister (we/our), makes a Freedom of Information (FOI) decision that you disagree with, you can seek a review of the original decision. The review will be carried out by a different decision maker, usually someone at a more senior level.

You must apply for an IR within 30 calendar days of being notified of the decision or charge, unless we agree to extend your time. You should contact us if you wish to seek an extension.

We are required to make an IR decision within 30 calendar days of receiving your application. If we do not make an IR decision within this timeframe, then the original decision stands.

Review by the Australian Information Commissioner (IC)

The Office of the Australian Information Commissioner (OAIC) is an independent office who can undertake an ER of our decision under the FOI Act. The IC can review access refusal decisions, access grant decisions, refusals to extend the period for applying for an IR, and IR decisions.

If you are objecting to a decision to refuse access to a document, impose a charge, or a refusal to amend personal information, you must apply in writing to the IC within 60 calendar days of receiving our decision.

Third parties

If you are a third party objecting to a decision to grant someone else access to your information, you must apply to the IC within 30 calendar days of being notified of our decision to release your information. Further assistance is located [here](#).

Do I have to go through the internal review process?

No. You may apply directly to the OAIC for an ER by the IC.

If I apply for an internal review, do I lose the opportunity to apply for an external review?

No. You have the same ER rights of our IR decision as you do with our original decision. This means you can apply for an ER of the original decision or of the IR decision.

Do I have to pay for an internal review or external review?

No. Both the IR and ER are free.

How do I apply?

Internal review

To apply for an IR of the decision of either Finance or the Minister, you must send your review in writing. We both use the same contact details, and you must send your review request in writing.

In your written correspondence, please include the following:

- a statement that you are seeking a review of our decision;
- attach a copy of the decision you are seeking a review of; and
- state the reasons why you consider the original decision maker made the wrong decision.

Email: foi@finance.gov.au

Post: The FOI Coordinator
Legal and Assurance Branch
Department of Finance
One Canberra Avenue
FORREST ACT 2603

External review (Information Commissioner Review)

For an ER, you must apply to the OAIC in writing. The OAIC ask that you commence a review by completing their online form [here](#).

Your application must include a copy of the notice of our decision that you are objecting to, and your contact details. You should also set out why you are objecting to the decision.

Email: FOIDR@oaic.gov.au

Post: Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

The IC's enquiries phone line is 1300 363 992.

Can I appeal the Information Commissioner's external review decision?

Yes. You can appeal the Information Commissioner's ER decision to the Administrative Appeals Tribunal (AAT).

There is a fee for lodging an AAT application (as at 19 October 2022 it is \$1,011).

Further information is accessible [here](#).

The AAT's number is 1800 228 333.

Complaints

Making a complaint to the Office of the Australian Information Commissioner

You may make a written complaint to the OAIC about actions taken by us in relation to your application.

Further information on lodging a complaint is accessible [here](#).

Investigation by the Commonwealth Ombudsman

The Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be, or has been, investigated by the IC, the Ombudsman will consult with the IC to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate the complaint, then they are to transfer all relevant documents and information to the IC.

The IC can also transfer a complaint to the Ombudsman where appropriate. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. You will be notified in writing if your complaint is transferred.

Complaints to the Ombudsman should be made online [here](#).

The Ombudsman's number is 1300 362 072.