Australian Government
Office of the Australian Information Commissioner

Besser and Department of Infrastructure and Transport
[2011] AICmr 2 (17 March 2011)

Decision and reasons for decision of
Freedom of Information Commissioner, Dr James Popple

Applicant:	**Linton Besser**
Respondent:	**Department of Infrastructure and Transport**
Decision date:	**17 March 2011**
Application number:	**MR11/00001**
Catchwords:	**Freedom of Information — Charges — Whether the giving of access to a document is in the general public interest or in the interest of a substantial section of the public — (CTH) *Freedom of Information Act 1982* s 29(5)(b)**

Contents

Summary

1. I set aside the decision of the Department of Infrastructure and Transport (the **Department**) of 23 November 2010 and substitute my decision, under s 29(4) of the *Freedom of Information Act 1982* (the **FOI Act**), to reduce by 50% the charge in respect of the request for access.

Background

2. On 1 November 2010, Mr Linton Besser applied to the Department for access to (amongst other documents) all internal audit reports undertaken by the Department during a specified period. Mr Besser added that he was seeking material 'which examines cases of fraud, corruption or other serious cases of non-compliance or breaches of protocol, by [Department] employees and its contractors and consultants.' He also requested that 'any processing costs beyond the preliminary five hours[1] are discounted on the grounds of the public interest'.

3. On 11 November, the Department provided Mr Besser with an estimate of a charge of $2,339.26 in respect of his request. Later that day, Mr Besser replied asking if there were 'a way to narrow the scope of my inquiry to reduce the processing costs'. He also provided reasons why, he contended, the charge should be 'waived or reduced by 50 per cent on the grounds of public interest'. On 12 November, the Department provided Mr Besser with a schedule of internal audit reports that fell within the scope of his request. Later that day, Mr Besser replied asking what the charge would be for giving access to 12 specified reports listed in that schedule. On 23 November, the Department advised Mr Besser that the processing charge for those 12 documents would be $901.06, and that it had decided not to waive or reduce that charge.

4. By email dated 23 November, Mr Besser sought IC review of this decision under s 54N of the FOI Act.

Decision under review

5. The decision under review is the decision of the Department under s 29(4) of the FOI Act on 23 November 2010 not to reduce or not impose the charge in respect of Mr Besser's amended request for 12 documents.

[1] There is no charge for the first five hours of the time spent in making an access decision (*Freedom of Information (Charges) Regulations 1982*, Schedule, Part I, item 5).

The discretion to reduce or not to impose a charge

6. Section 29 of the FOI Act provides for charges to be imposed in respect of FOI requests. Relevantly, that section provides:

> **29 Charges**
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> (1) Where, under the regulations, an agency or Minister decides that an applicant is liable to pay a charge in respect of a request for access to a document, or the provision of access to a document, the agency or Minister must give to the applicant a written notice stating:
>
> (a) that the applicant is liable to pay a charge; and
> (b) the agency's or Minister's preliminary assessment of the amount of the charge, and the basis on which the assessment is made; and
> (c) that the applicant may contend that the charge has been wrongly assessed, or should be reduced or not imposed; and
> …
> (f) that the applicant must, within the period of 30 days, or such further period as the agency or Minister allows, after the notice was given, notify the agency or Minister in writing:
> (i) of the applicant's agreement to pay the charge; or
> (ii) if the applicant contends that the charge has been wrongly assessed, or should be reduced or not imposed, or both — that the applicant so contends, giving the applicant's reasons for so contending; or
> (iii) that the applicant withdraws the request for access to the document concerned; …
>
> (4) 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.
>
> (5) 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.

Mr Besser's contention

7. In his email to the Department on 11 November 2010, Mr Besser argued that it would be in the public interest for the charge to be reduced or not imposed for two reasons:

- the requested documents potentially examine cases of 'fraud or other leakages of taxpayer funds about which the public are otherwise entirely unaware' and disclosure would 'provide the public with the information it needs to form an opinion about how the department is managed'; and

- the documents may 'offer reassurance' to the public that the Department's internal audit function is operating effectively.

The Department's reasons

8. The Department's reasons for deciding not to reduce or not impose the charge were that the disclosure of internal audit reports on aspects of departmental administration would not be of any identifiable public interest because:
   - the disclosure would not add to the information that is already publicly known; and
   - it is not certain that Mr Besser will make the documents 'available to the public or a substantial section of the public to stimulate or inform public debate'.

9. The Department took the view that not to recoup the processing costs in this case would be inconsistent with the policy of the FOI Act that charges can be imposed for processing FOI requests.

The 'general public interest' or the 'interest of a substantial section of the public'

10. Section 29(5)(b) 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'.

11. Importantly, the question is not whether it is in the public interest to waive or reduce the charge — either generally, or to the advantage of the applicant in particular. Nor is the question whether it is in the public interest for a particular applicant to be granted access to the document.[2]

12. Instead, it is necessary to identify the 'general public interest' or the 'substantial section of the public' that would benefit from disclosing the document. It may be that the FOI applicant will benefit from disclosure, but there must also be a benefit flowing more generally to the public or a substantial section of the public.[3]

Whether releasing the document will add to the information already publicly known

13. The Department, in its reasons for deciding not to reduce or not impose the charge, took the view that disclosure of the documents sought by Mr Besser would not be in the public interest because disclosure would not add to the information that is already publicly known.

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[2] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (2010), paragraph 4.51. This public interest test is different to that which applies to the public interest conditional exemptions in Division 3 of Part IV of the FOI Act: see [29]–[30] below.

[3] Guidelines, paragraph 4.52.

14. I asked the Department for clarification of this point. The Department confirmed that none of the documents sought has been made public in its form as an internal audit report. The Department noted that the activities covered by internal audit reports 'are routinely subject to rigorous external scrutiny and public disclosure by the Australian National Audit Office'; senior officers of the ANAO attend meetings of the Department's audit committee and have access to internal audit reports, including those sought by Mr Besser. Therefore, the Department contended, any issues raised in its internal audit process would be taken into consideration by the ANAO in its scrutiny of the Department's activities and 'through this process, become public knowledge'.[4]

15. It will often be the case that the disclosure of information that is already publicly known will not be in the public interest for the purposes of deciding to reduce or to not impose a charge. If information is already publicly known, its disclosure in a different form is unlikely to be a strong public interest consideration. But that disclosure may be in the public interest if, for example, the disclosure shows that that information was known by an agency or a minister at a particular time. Or the disclosure may provide an authority or imprimatur for the publicly known information simply because it is contained in a government document. Either of these examples is possible in relation to audit documents, like those sought by Mr Besser.

16. In any event, I do not agree with the Department that the information contained in an internal audit report can be said to have become public knowledge simply because its contents are known to the ANAO when the ANAO prepares a publicly available audit report on the same topic. I think that the disclosure of the documents sought by Mr Besser would add to information that is already publicly known.

Whether the document will be published

17. The Department, in its reasons for deciding not to reduce or not impose the charge, also took the view that, to do so, it 'must be satisfied that the documents, if released, would come to the attention of the public or a significant section of the public.' The Department was concerned that 'there is no certainty that [Mr Besser] will make the documents available to the public or a substantial section of the public to stimulate or inform public debate'.

[4] Letter from Department to Office of the Australian Information Commissioner, 11 March 2011.

18. In applying s 29(5)(b), an important policy change that was implemented by amendments to the FOI Act in 2010 should also be taken into account. From 1 May 2011, agencies will be required, with some exceptions, to publish on a website information about documents that have been disclosed following a request under the FOI Act (s 11C[5]) — the 'disclosure log'. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. As the Guidelines note, the policy of the Act is that documents disclosed in response to individual requests should be made available to the public generally. 'Agencies and ministers should be more inclined than they may have been prior to the changes to decide that disclosure of a document … would be of general or identifiable public interest and that a charge should not be imposed.'[6]

19. In any event, the Act does not require an applicant to demonstrate that they will publish a document, or even that it will otherwise come to the attention of the public. The question is whether giving access to the document, and the consequences of giving that access, are in the public interest.[7]

Other public interest considerations

20. The term 'public interest' cannot be exhaustively defined.[8]

21. As noted above, Mr Besser is a journalist. But that does not lead to a presumption that the public interest test is satisfied.[9] The Guidelines give examples of circumstances in which there may be a public interest for the purposes of s 29(5)(b), including that the document sought 'is to be used by a journalist in preparing a story for publication that is likely to be of general public interest.'[10] Mr Besser says, in his application for IC review, that he has previously prepared articles on the basis of information he has obtained under the FOI Act, and that these articles have been published by his employer. It seems likely that, if the documents are disclosed, Mr Besser will use them in preparing a story for publication. But, as discussed above, the Act does not require an applicant to demonstrate that they will publish a document for the public interest test to be satisfied.

22. Another relevant consideration is that the media organisation that employs Mr Besser may derive commercial benefit from publication of a story based on the documents sought. But this alone is not a basis for declining to reduce or waive a charge.[11]

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5 Section 11C will be inserted in the FOI Act by the *Freedom of Information Amendment (Reform) Act 2010* (Schedule 15, item 15) on 1 May 2011.

6 Guidelines, paragraph 4.54.

7 Encel and Secretary, Department of Broadband Communications and the Digital Economy [2008] AATA 72 at [90]. Guidelines, paragraph 4.53.

8 Deloitte Touch Tomatsu v Australian Securities Commission (1995) 54 FCR 562 at 579. Guidelines, paragraph 4.55.

9 Guidelines, paragraph 4.53.

10 Guidelines, paragraph 4.55.

11 Guidelines, paragraph 4.53.

23. Mr Besser's contention is that it is in the public interest to disclose these audit documents because their disclosure

- will provide the public with the information about how the Department is managed; and
- may reassure the public that the Department's internal audit function is operating effectively.

24. While it is to be hoped that the Department's internal audit function is operating effectively, I do not think that giving access to these documents to reassure the public that that function is operating effectively is a strong public interest consideration. More important is what these documents might reveal about the Department's compliance with its obligations, including those imposed by the *Financial Management and Accountability Act 1997* (the **FMA Act**) such as the requirement to manage its affairs in a way that promotes the efficient, effective, economical and ethical use of Commonwealth resources.[12]

25. 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 will ordinarily require consideration both of the content of the documents and the context of their release.[13] I have not examined the 12 documents in question,[14] but the schedule of documents reveals that a number of them are reports of audits of the Department's internal operations (eg 'Review of Corporate Credit Cards' and 'Review of Cash Withdrawals from Corporate Credit Cards') and its external operations (eg 'Airport Curfew Dispensation', 'Review of Better Regions' and 'Review of Nation Building — Economic Stimulus Plan programs'). These go beyond Mr Besser's first point (information about how the Department is managed) and have the potential to reveal important information about whether the Department is using Commonwealth resources consistently with its obligations under the FMA Act. I think that the release of these documents would be in the general public interest for the purposes of s 29(5)(b) of the FOI Act.

Other matters that may be taken into account

26. Section 29(5) makes it clear that s 29(4) gives a general discretion to reduce or not impose a charge, which goes beyond the two matters listed: financial hardship and public interest.[15] Given my conclusion about the public interest considerations, there is no need to exercise that general discretion.

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12 FMA Act, s 44.

13 Guidelines, paragraph 4.52.

14 Under s 55(2)(d) of the FOI Act, the Information Commissioner may 'obtain any information from any person, and make any inquiries, that he or she considers appropriate' for the purposes of an IC review.

15 Guidelines, paragraph 4.57 gives examples of circumstances in which it may be thought appropriate to exercise that discretion.

Reducing or not imposing a charge

27. The discretion in s 29(4) is to reduce or not to impose a charge. As the Guidelines explain, a reduction in the charge payable may adequately address an applicant's claim that payment of the charge would cause financial hardship. 'On the other hand, if an agency or minister accepts that disclosure of a document would be in the general public interest, it may be harder to explain why a charge has been reduced instead of waived in full.'[16]

28. In this case, I think it is more appropriate to reduce the charge by 50% rather than to not impose a charge. This balances the public interest issues, discussed above, with the policy of the FOI Act that charges can be imposed for processing FOI requests.

The public interest test for conditional exemptions

29. The Department has not yet made — and is not required to have made — a decision whether to give access to the documents that Mr Besser has requested. If Mr Besser agrees to pay the reduced charge, then the Department will have to make that decision. In doing so, the Department may conclude that one or more of the public interest conditional exemptions in Division 3 of Part IV of the FOI Act apply. In that event, the Department will need to apply the public interest test in s 11B. That test is different from the public interest test for the purposes of deciding to reduce or to not impose a charge,[17] which has been considered in this review.

30. The fact that giving access to documents is in the general public interest for the purposes of reducing or not imposing a charge (under s 29(4)) does not mean that giving access to those same — conditionally exempt — documents cannot be, on balance, contrary to the public interest (under s 11A(5)).

Decision

31. Under s 55K of the FOI Act, I set aside the Department's decision of 23 November 2010 and decide, in substitution for that decision, to reduce the charge in respect of Mr Besser's request for access by 50% under s 29(4).

Dr James Popple
Freedom of Information Commissioner

17 March 2011

[16] Guidelines, paragraph 4.48.
[17] Guidelines, paragraph 4.51.

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is $777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.