



Briggs and Department of Broadband, Communications and the Digital Economy (No. 2) **[2012] AICmr 18 (25 June 2012)**

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

Applicant:	Jamie Briggs MP
Respondent:	Department of Broadband, Communications and the Digital Economy
Decision date:	25 June 2012
Application number:	MR11/00323
Catchwords:	Freedom of Information — Charges — Whether agency should exercise discretion to reduce or not impose charge — (CTH) <i>Freedom of Information Act 1982 s 29(5)(b)</i>

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Summary

1. I affirm the decision of the Department of Broadband, Communications and the Digital Economy (the **Department**) of 29 July 2011 to reduce the charge applicable under s 29 of the *Freedom of Information Act 1982* (the **FOI Act**) by 50%.

Background

2. On 17 May 2011, Mr Jamie Briggs MP, the federal member for Mayo, applied to the Department for access to the following documents:
 - all reports, publications, documents and consultancies undertaken by Kordia Pty Ltd (**Kordia**) for the Department on the digital dividend and establishment of any assistance programs, including the Digital Switchover Household Assistance Scheme (the **Scheme**), and
 - all documents relating to the decision to provide people with a set-top box rather than a television under the Scheme.

According to the Department's website, '[t]he digital dividend describes the radiofrequency spectrum that will become available when the switch off of analog television signals is completed by 31 December 2013'.¹ Kordia is an 'independent engineering consultancy firm' commissioned by the Department 'to identify issues and options for releasing spectrum after analog television is switched off in Australia'.² The Scheme is a program that provides assistance to older Australians, veterans and people with disabilities, or their carers to convert to digital television.³

3. In his FOI request, Mr Briggs also asked that any charge be waived under s 29(4) of the FOI Act on public interest grounds. On 20 June 2011, the Department advised Mr Briggs that it had identified 102 documents relevant to his request, and provided him with a preliminary assessment of a charge of \$3586.64. The Department sought further information from Mr Briggs in support of his request that the charge be waived. Mr Briggs provided that further information on 23 June 2011.
4. On 26 July 2011, Mr Briggs narrowed the scope of his request to:
 - documents prepared by and/or received from Kordia, and
 - documents that contain references to discussion, consideration, evaluation, etc of any option of providing a television rather than a set-top box under the Scheme.
5. On 29 July 2011, the Department advised that it had found six documents within the scope of his revised request. All six documents are technical reports prepared by Kordia for the Department.⁴

¹ See www.dbcde.gov.au/consultation_and_submissions/digital_dividend/.

² Department of Broadband, Communications and the Digital Economy, *Digital Dividend Green Paper*, 2010, 12. See www.dbcde.gov.au/consultation_and_submissions/digital_dividend/digital_dividend_green_paper_html.

³ See www.digitalready.gov.au/government-assistance/household-assistance-scheme.aspx.

⁴ Email from Department to Office of the Australian Information Commissioner, 1 December 2011. No documents were found relating to the decision to choose set-top boxes over televisions under the Scheme.

6. On the same day, the Department provided Mr Briggs with a revised assessment of a charge of \$1056.73. The Department also advised Mr Briggs that it had decided to reduce the charge by 50%, to \$528.37. This, the Department said, balanced the public interest in the release of the documents and the work required in processing Mr Briggs's request.
7. On 5 August 2011, Mr Briggs sought IC review of this decision under s 54L of the FOI Act.
8. Mr Briggs has not contended that the charge has been wrongly assessed, and there is no reason to doubt the accuracy of the Department's estimate. Rather, he has challenged the Department's decision not to exercise, at his request, the discretion conferred on it by s 29(4) of the FOI Act to not impose a charge at all.

Decision under review

9. The decision under review is the Department's decision on 29 July 2011 to reduce the charge payable by 50% to \$528.37.

The discretion to reduce or not to impose a charge

10. Section 29 of the FOI Act provides for charges to be imposed in respect of FOI requests and the process by which they are assessed, notified and adjusted. Under s 29(1)(b), a preliminary assessment of the amount of the charge is made and the basis of the assessment is outlined by the agency. The applicant may then contend that the charge should be reduced or not imposed (s 29(1)(f)(ii)). The agency must decide whether to reduce or not impose the charge (s 29(4)) and notify the applicant of its decision within 30 days (s 29(6)).
11. 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.
12. In deciding whether to exercise the broad discretion in s 29(4), a decision maker may consider any relevant matter.⁵ 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.

⁵ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [4.45].

Would payment cause financial hardship to the applicant?

13. Mr Briggs has not contended that payment of the charge would cause him financial hardship. Accordingly, I will not consider this issue further.

Is giving access to the document in the public interest?

14. Section 29(5)(b) requires me 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’. 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. Part 4 of the Guidelines explains the factors to take into account when considering the public interest in charges decisions. I have also discussed this issue in previous IC review decisions.⁶
15. There is no presumption that the public interest test is satisfied by reason only that Mr Briggs is a member of Parliament.⁷ However, a member of Parliament may more easily make a public interest argument, because they may make use of a document obtained under the FOI Act in parliamentary or public debate on an issue of public interest or general interest in their electorate.⁸ The fact that Mr Briggs is a member of Parliament, and would be in a position to make use of documents on the digital dividend and related assistance programs in parliamentary or public debate, is a factor in favour of reducing or waiving the charge.
16. Mr Briggs argued that the release of the documents he sought would be in the public interest, and referred to debate on the digital dividend in the Parliament and in the media. The Department agreed, on the basis that there ‘is likely to be a general public interest arising from the release of the documents in so far as it would assist the public understanding of some technical aspects of the digital dividend and more generally of the [Scheme], which has indeed been a matter of public scrutiny and debate’.
17. The Scheme is a substantial program both in terms of its cost and its impact on a large number of individual Australians.⁹ I find that the giving of access to the documents requested by Mr Briggs is in the general public interest for the purposes of s 29(5)(b) of the FOI Act.

⁶ See, for example, *Besser and Department of Infrastructure and Transport* [2011] AICmr 2; *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8; *Besser and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 13; *Fletcher and Department of Broadband, Communications and the Digital Economy (No. 3)* [2012] AICmr 15; *Briggs and Department of the Treasury (No. 2)* [2012] AICmr 17.

⁷ *Guidelines*, [4.53].

⁸ *Guidelines*, [4.55]. See also *Fletcher and Department of Broadband, Communications and the Digital Economy (No. 3)* [2012] AICmr 15, [12], [21]–[22].

⁹ *Briggs and Department of the Treasury* [2012] AICmr 5, [13], [16]. See also *Briggs and Department of Broadband, Communications and the Digital Economy* [2012] AICmr 6, [7]–[9].

Exercising the discretion

18. As the Guidelines explain, it is open to an agency or minister to impose a charge even though a public interest purpose for disclosure has been established.¹⁰ Once a decision maker has decided that giving access to documents would be in the general public interest, it is still open to them to decide that the full charge should apply.
19. Despite there only being six documents within the scope of Mr Briggs's request, the Department explained that a significant amount of work remained to be done in processing the request due to the complex and technical nature of the documents. In particular, eight affected third parties would need to be consulted.
20. 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.¹¹ I have not examined the documents in question in this IC review. However, given their nature, I accept that processing this FOI request will require the Department to undertake significant consultations with affected third parties.
21. I believe that it is appropriate to reduce the charge applicable in this case by 50%—as the Department did. This balances the public interest issues with the policy of the FOI Act that charges can be imposed for processing FOI requests.

Decision

22. Under s 55K of the FOI Act, I affirm the Department's decision of 29 July 2011 to reduce the charge by 50% to \$528.37.

James Popple
Freedom of Information Commissioner

25 June 2012

¹⁰ *Guidelines*, [4.47].

¹¹ *Guidelines*, [4.52].

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.