



‘M’ and Department of Agriculture, Fisheries and Forestry [2013] AICmr 24 (13 March 2013)

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

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| Applicant: | ‘M’ |
| Respondent: | Department of Agriculture, Fisheries and Forestry |
| Decision date: | 13 March 2013 |
| Application number: | MR11/00182 |
| Catchwords: | Freedom of information — Charges — Whether charge has been wrongly assessed — Whether agency should exercise discretion to reduce or not impose charge — (CTH) <i>Freedom of Information Act 1982</i> ss 29(5)(a), 29(5)(b) |

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Summary

1. I set aside the decision of the Department of Agriculture, Fisheries and Forestry (the **Department**) of 22 June 2011 and substitute my decision, under s 29 of the *Freedom of Information Act 1982* (the **FOI Act**), that the amount of the charge is \$202.95 and that the charge should be reduced by 50%.

Background

2. On 13 March 2011, the applicant applied to the Department for access to:
Details of the daily weather and mortality figures for the extended Voyage 93 of the livestock vessel MV Cormo Express (now MV Merino Express).
The information required is for the entire voyage, from 5 August to 30 October 2003:
 - The daily shipboard climatic details—temperature, humidity, wind speed, and wind direction (bridge records and any other data if taken).
 - The daily shipboard mortality, by deck and in total.
3. On 8 April 2011, the Department provided the applicant with a preliminary assessment of a charge of \$262.95. On 12 April 2011, the applicant wrote to the Department objecting to the imposition of the charge.
4. On 12 May 2011, the Department advised the applicant that it had decided not to waive or reduce the charge. On 20 May 2011, the applicant applied for internal review of that decision. On 22 June 2011, the Department affirmed the amount of the charge and its decision not to reduce or waive the charge.
5. On 6 July 2011, the applicant sought Information Commissioner (IC) review of this decision under s 54L of the FOI Act.

Decision under review

6. The decision under review is the Department's decision on 22 June 2011 that the applicable charge is \$262.95, and that that charge should not be reduced or waived.

Can the Department apply a charge?

7. In his IC review application, the applicant notes that he requested internal review of the Department's decision on 20 May 2011 but the Department did not make its decision until 22 June 2011: 33 days later. Section 54C(3) of the FOI Act requires an agency to make an internal review decision within 30 days after the day that it received the request for internal review. (If it does not, s 54D provides that the agency is taken to have affirmed the original decision.) Because the Department did not make a decision within 30 days, the applicant says reg 5 of the *Freedom of Information (Charges) Regulations 1982* (the **Regulations**) applies and there can be no charge for his request.

8. Regulation 5(2) provides:
- (2) There is no charge if:
 - (a) an applicant has not been notified of a decision on the request within the period mentioned in paragraph 15(5)(b) of the FOI Act; and
 - (b) the period has not been extended under subsection 15(6) or (8), section 15AA or subsection 15AB(2) of the FOI Act.
9. Paragraph 15(5)(b) of the FOI Act requires an agency to notify an applicant of 'a decision on the request', 'as soon as practicable but in any case not later than the end of the period of 30 days after the day on which the request is received'.¹
10. The applicant submitted that the words 'decision on the request' in reg 5(2) should be taken to include any decision not made within the statutory timeframes prescribed in the FOI Act.² I do not agree. Regulation 5(2) applies to 'a decision on the request within the period mentioned in paragraph 15(5)(b)'. 'Request' is defined in s 4(1) of the FOI Act to mean an application for access to documents under s 15(1). The Department's decision of 22 June 2011 was not a decision on an application for access to documents under s 15(1); it was a decision on internal review (under s 54C) of a decision to impose a charge (under s 29). Regulation 5(2) does not apply.

Findings

11. Regulation 5 does not prevent the Department from applying a charge in respect of the applicant's FOI request.

Assessment of the amount of the charge

12. 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 has been wrongly assessed, or 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 must notify the applicant of its decision within 30 days (s 29(6)).

¹ The 30-day period referred to in s 15(5)(b) can be extended under ss 15(6), 15(8), 15AA, 15AB(2), 15AC(5), 24AB(8) and 31(2).

² Letter from the applicant to the Office of the Australian Information Commissioner dated 23 December 2011.

13. 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. The Guidelines explain that the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects clause of the FOI Act (s 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.³

14. The Guidelines go on to explain that:

It is important that an estimate of charge is realistic and as accurate as possible. An agency or minister should be mindful that an applicant may think an estimate is set unreasonably high so as to hinder the applicant from pursuing their FOI request.⁴

15. The Department identified one document within the scope of the applicant's request: an 11-page spreadsheet containing the data he requested. The \$262.95 charge was calculated by the Department as follows:

| Description and rate | Estimate | Total |
|---|------------|-----------------|
| Search and retrieval (\$15 per hour) | 16 hours | \$240.00 |
| Decision making (\$0 for first 5 hours; \$20 subsequently) | 6.09 hours | \$21.85 |
| Printing (10 cents per page) | 11 pages | \$1.10 |
| Total | | \$262.95 |

16. In submissions to the Office of the Australian Information Commissioner (OAIC), the applicant challenged the Department's calculation of the charge. He argued that it should not take 16 hours to locate one 11-page document. He said the Department had already published some of the information requested and so it should not take long to find the remainder. He also argued that, if the information he is seeking is stored electronically, finding it should not be so time-consuming. He indicated that he would be happy for the information to be provided to him in electronic form, and speculated that creating an 11-page document was the 'key to the high cost'.
17. The Department says the information sought by the applicant is not stored electronically; it is stored on two paper files. To locate those two files, the Department searched its electronic database using the parameters 'Cormo',

³ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [4.2].

⁴ *Guidelines*, [4.24].

'MV Cormo', 'MV Cormo Express', the exporter's name and variations of the exporter's name.

18. The Department reports to the Parliament every six months on mortality levels for live animal shipments. Since 2005, these reports have been published on the Department's website. These reports contain information relating to the load port, discharge port, species loaded and unloaded, and mortality numbers. They do not contain the specific information requested by the applicant: for example, mortality numbers, temperature and humidity by deck.
19. The Department advises that it receives a daily report from accredited veterinarians with mortality numbers, temperature and humidity by deck for livestock voyages, and that this information is taken into account when preparing mortality investigations. Reports on mortality investigations have been made available to the public since 2006. However, the Department says that the specific information sought by the applicant has not previously been provided to the public or to researchers.
20. The Department says that, to give the applicant the information in the documents he has requested at the lowest possible cost, it decided to compile a spreadsheet from the data on its paper files. The alternative was to copy the documents in the two files, then edit irrelevant and exempt material by hand. This, the Department says, would be more time-consuming for the Department and, consequently, more costly for the applicant. I accept that the Department has adopted a method of processing the applicant's request at the lowest reasonable cost.
21. In response to the applicant's claims, the Department provided the OAIC with a detailed breakdown of how the 16 hours of search and retrieval time was calculated, which can be summarised as follows:

| Description | Time |
|---|-----------------|
| Searching database and reviewing files | 2.75 hours |
| Creation of spreadsheet and entry of data | 8.75 hours |
| Internal discussion on findings | 4.5 hours |
| Total | 16 hours |

22. I am surprised by the amount of time it took the Department to find the two files. This may reflect inadequate naming or description of files on the Department's database, which may have required manual perusal of files. As the Guidelines explain, an estimate of a charge 'should be based on an

assumption that the agency or minister maintains a high quality record system that enables easy identification and location of documents'.⁵

Search and retrieval time is to be calculated on the basis that a document will be found in the place indicated in the agency or minister's filing system (reg 2(2)(a)) or, if no such indication is given, in the place that reasonably should have been indicated in the filing system (reg 2(2)(b)). In summary, applicants cannot be disadvantaged by poor or inefficient record keeping by agencies or ministers. Time wasted by an officer in searching for a document that is not where it ought to be, or that is not listed in the official filing system, cannot be charged to an applicant.⁶

23. The Department has provided the OAIC with a 'Time Control Sheet' which records the work performed on the applicant's FOI request. This includes the name of the person who performed the work and the time taken with respect to each task. The Time Control Sheet indicates it took 8 hours and 41 minutes to create a spreadsheet, enter data from the files onto the spreadsheet, and check data against the information on the files. I accept that the Department spent 8.75 hours creating and entering data from the physical files on to the spreadsheet.
24. The Department says, and the Time Control Sheet shows, that processing the applicant's FOI request involved 4.5 hours of internal discussion. But, as the Guidelines explain:

... the time of other officers whom the decision maker consults in the course of making a decision would not ordinarily fall within [the charge for decision making], as the authorised decision maker is expected to have the necessary skill and understanding to decide access issues.⁷
25. The Time Control Sheet indicates that two named officers each spent 120 minutes in 'meetings, discuss findings, review'. The Department advises that both of these officers attended a meeting to discuss the request at 10.30 am on 21 March 2011, in addition to attending other informal team meetings. The meeting of 21 March has been separately recorded on the Time Control Sheet. The Department says neither of the two named officers was a decision maker on the request; one was the Director of the Live Animal Exports team and the other was a policy officer involved with processing the request. The Department says that the decision maker was an officer in the Senior Executive Service and that it would be unreasonable and inefficient to expect either the decision maker, or the FOI officer who does not have line area experience, to be solely responsible for the search, retrieval and editing required to process this FOI application.

⁵ *Guidelines*, [4.24].

⁶ *Guidelines*, [4.31].

⁷ *Guidelines*, [4.33].

26. I accept that it is not necessary that senior staff be directly involved in searching databases, retrieving information and editing spreadsheets. However, I do not consider it reasonable for the Department to include in its calculation of charges, the costs of three people who attended the same meeting on 21 March 2011 to discuss the request. I also do not consider it reasonable for the Department to include, in its calculation of the charge, the time taken by the two named officers (who were not decision makers) to meet, discuss and review the findings. I consider that the time taken to process the request should be reduced by four hours, or \$60.
27. The applicant argues it is not necessary for the Department to consult with a third party because the information he has asked for has already been made public. As noted above,⁸ some, but not all, of the information sought by the applicant is publically available. The applicant has requested information relating to the business affairs of a third party, which is not in the public domain. The Department was required, under s 27 of the FOI Act, to consult with that third party.
28. The Department states consultation with the affected third party took two hours. This involved contact by both phone and email to advise that a request had been filed and to identify to the third party the documents falling within scope of the request. Because the third party objected to release of the information, formal consultation under s 27 of the FOI Act was initiated. Because the applicant's request was filed shortly after the FOI Act was substantially amended in November 2010, the Department engaged lawyers to draft a letter for use when consulting with affected third parties.

Findings

29. I find that the total time used by the Department to calculate the charge should be reduced by four hours (or \$60) and that the amount of the charge is \$202.95.
30. In all other respects, I find the Department's estimate of the charge to be realistic and accurate, and to represent the lowest reasonable cost required by the FOI Act.

⁸ See [18]–[19] above.

The discretion to reduce or not to impose a charge

31. 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.

32. In deciding whether to exercise the broad discretion in s 29(4), a decision maker may consider any relevant matter.⁹ 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 to the applicant?

33. The applicant submits that the charge should be waived or reduced on the basis that payment would cause him financial hardship (s 29(5)(a)). The Guidelines provide:

Whether payment of a charge would cause 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. For example, the applicant may rely upon (and provide evidence of) receipt of a pension or income support payment; or provide evidence of income, debts or assets. However, an agency should be cautious about conducting an intrusive inquiry into an applicant's personal financial circumstances. Agencies need to have regard to the policy of the Privacy Act, which is to minimise the collection of personal information to what is required for administrative decision making.¹⁰

34. When considering whether to waive a debt due to the Commonwealth the Department of Finance and Deregulation provides the following definition of financial hardship (in the context of deciding whether to waive a debt):

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.¹¹

35. The applicant says that he had no income in 2011–12. In support of his claim that paying the charge will cause him financial hardship, the applicant provided a Notice of Assessment issued by the Australian Taxation Office indicating that his taxable income for the year ended 30 June 2011 was \$0. The Notice of

⁹ *Guidelines*, [4.45].

¹⁰ *Guidelines*, [4.49]–[4.50].

¹¹ See www.finance.gov.au/financial-framework/discretionary-compensation/debt-waiver.html.

Assessment also gives the applicant's 'primary production average details' for the previous five years: his taxable income has been low for all five years.

36. The Notice of Assessment is evidence of the applicant's income. But in order to decide whether payment of the charge would cause the applicant financial hardship, I also need some evidence of the applicant's assets and his debts or liabilities. It is possible for a person with considerable means to have little or no taxable income. Evidence of a person's entitlement to a means-assessed social security payment would be indicative of financial hardship. (The applicant says he does not have a pension or health care card.) Other relevant considerations might be whether a person has the right and the capacity to work, or is imprisoned.
37. In the absence of any such information in relation to the applicant, and mindful of the need to minimise the collection of his personal information, the OAIC invited him to provide some general information about his assets and debts/liabilities in the form of a statutory declaration. The applicant declined.

Findings

38. I am not satisfied that the payment of the charge, or part of it, would cause financial hardship to the applicant.

Is giving access to the document in the public interest?

39. 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'.¹² 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.¹³
40. 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.¹⁴ The question is

¹² The applicant says that the Department erred in referring to s 29(5) instead of s 11A(5). The public interest test in s 11A(5) (expanded upon by s 11B) applies to the public interest conditional exemptions in Division 3 of Part IV of the FOI Act. That test is different from the public interest test for the purposes of deciding to reduce or to not impose a charge under s 29(5)(b). See *Guidelines*, [4.51]; *Besser and Department of Infrastructure and Transport* [2011] AICmr 2, [29]–[30].

¹³ 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; *McBeth and Australian Agency for International Development* [2012] AICmr 24.

¹⁴ *Guidelines*, [4.51].

whether there is a benefit from the release of the documents flowing more generally to the public or a substantial section of the public.¹⁵

41. The applicant says that there has been constant public interest in the live export of animals since the trade commenced in the 1970s. He says that voyage 93 of the MV Cormo Express resulted in high levels of shipboard mortality, and that deaths on livestock vessels continue to be a matter of intense public debate.
42. The Department says that public interest in the 2003 voyage of the MV Cormo Express has diminished. The Department also says that, because of regulatory reforms introduced after that voyage, release of the information sought by the applicant will not substantially inform discussion, debate, or policy change in the current environment.¹⁶
43. I agree with the applicant that there is a high level of public interest and debate about live animal exports in Australia; the Department's regular publication of information about live exports demonstrates this. However, there is a lower level of public interest in, and debate about, the MV Cormo Express's 2003 voyage.

Findings

44. I find that the giving of access to the documents requested by the applicant is in the general public interest for the purposes of s 29(5)(b) of the FOI Act.

Exercising the discretion

45. 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.¹⁷ 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.
46. 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.¹⁸ I have not examined the documents in question in this IC review. However, given their nature, I think that there is a limited public interest in the release of those documents. Significantly, the release of the information sought by the applicant that is not already in the public domain

¹⁵ *Guidelines*, [4.52].

¹⁶ The Department advises that, as a result of the Keniry Livestock Export Review, a number of significant regulatory changes were implemented to improve animal welfare standards, including amendments to the *Export Control (Animals) Order 2004* and the implementation of an Australian livestock export code, which became the *Australian Standards for the Export of Livestock* in 2006.

¹⁷ *Guidelines*, [4.47].

¹⁸ *Guidelines*, [4.52].

(mortality numbers, temperature and humidity by deck) will not greatly inform public debate about live animal exports.

47. I believe that it is appropriate to reduce the charge applicable in this case by 50%. This balances the public interest issues with the policy of the FOI Act that charges can be imposed for processing FOI requests.

Decision

48. Under s 55K of the FOI Act, I set aside the Department's decision of 22 June 2011 and decide, in substitution for that decision, that the amount of the charge is \$202.95 and that the charge should be reduced by 50% to \$101.48.

James Popple
Acting Australian Information Commissioner

13 March 2013

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 \$816, 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.