



FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

15 July 2022

Right to Know

By email: [Redacted]

Dear [Redacted]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 2 July 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

A preliminary assessment has been undertaken of your Freedom of Information (**FOI**) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (**Charges Regulations**):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"> <li>• In examining the document; or</li> <li>• In consultation with any person or body; or</li> <li>• In making a copy with deletions; or</li> <li>• In notifying any interim or final decision on the request.</li> </ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>Searches conducted by staff of FOI team and staff of Human Resources team including searching inboxes, shared drives and electronic document &amp; records system.</li> </ul>	45 minutes	\$15.00 x 0.75 = \$11.25
Decision-making	<ul style="list-style-type: none"> <li>Examination of documents retrieved</li> <li>Deciding to grant or refuse access to documents requested</li> <li>Preparing reasons for decision</li> <li>Making a copy of document with any necessary deletions</li> </ul>	4 hours	\$20.00 x 0 = \$0.00 (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$11.25</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under section 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with section 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under section 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under section 29(1)(f), you must notify the Court in writing within thirty (30) days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with section 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within thirty (30) days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

19 July 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I refer to the letter from the Federal Court of Australia (**Court**) dated 15 July 2022 and your email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) received on 16 July 2022 at 12:45pm.

As advised in the letter dated 15 July 2022, a preliminary assessment was undertaken of your Freedom of Information (**FOI**) request and the Court determined that you are liable to pay the charge of \$11.25. I note in your email you advise that you agree to pay the estimated charge.

Please find attached the invoice for the amount payable.

In order to assist you with your request, I can advise one (1) document has been identified as falling within the scope of your request and is publicly available (see [Disclosure log \(under the Freedom of Information Act\) \(fedcourt.gov.au\)](#), reference PA2925-06/40, National Judicial Registrar – EL 2). Given that the document identified as falling within the scope of your request is already publicly available, should you wish to avoid the charge for processing your FOI request, please advise in writing whether you would like to withdraw your request.

As already advised, please note that under section 31(2) of the FOI Act, the processing period for your FOI request has temporarily ceased from the day you received the notice of charge, being 15 July 2022, and will not recommence until you pay the charge (in the circumstances set out in either sections 31(2)(a) or 31(2)(b) of the FOI Act).

Yours sincerely,

FOI Officer





FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY

LEVEL 16  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

28 July 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I refer to the letter from the Federal Court of Australia (**Court**) dated 15 July 2022 whereby your Freedom of Information (**FOI**) request was acknowledged and you were advised that, based on the Court's preliminary assessment of your request, it was determined that, at that stage, you were not liable to pay a charge.

This letter is to advise you that due to further consideration of your request and further searches undertaken, the Court has determined that you are liable to pay a charge and is notifying you of that charge as required by the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (**Charges Regulations**):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

<b>Item</b>	<b>Description</b>	<b>Estimated hours</b>	<b>Estimated charge</b>
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches conducted by staff of FOI team and staff of Human Resources team including searching inboxes, shared drives and electronic document &amp; records system.</li> </ul>	1.5 hours	\$15.00 x 1.5 = \$22.50
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> <li>• Making a copy of document with any necessary deletions</li> </ul>	7 hours	\$20.00 x 2 = \$40.00 (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$66.50</b>
<b>DEPOSIT PAYABLE</b>			<b>\$20.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

In accordance with the FOI Act and Charges Regulations, the Court requires you to pay a deposit before any further work on your FOI request is undertaken. As outlined in the table above, the deposit payable for your FOI request is \$20.00. This accords with s 12(2) of the Charges Regulations which requires that a deposit must not exceed \$20.00 when the preliminary assessment of the charge is more than \$25.00 but less than \$100.00.

An invoice for the deposit is enclosed with this letter and includes details as to how payment can be made. As noted above, the Court will not undertake any further work on your FOI request until the deposit is paid. Once the deposit is paid, work on your FOI request will recommence and the statutory processing period will re-continue from the date of payment.

Please note that the deposit is not refundable, unless you contest the charge and the Court decides not to impose any charge in relation to your FOI request OR the Court fails to make a decision on your FOI request within the applicable statutory processing period.

#### *Right to contest charge*

Under section 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with section 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.



In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under section 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

#### *Your obligations*

Under section 29(1)(f), you must notify the Court in writing within thirty (30) days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with section 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within thirty (30) days, your FOI request will be taken to have been withdrawn.

In circumstances where you pay the applicable deposit for your FOI request and the Court makes a decision on your FOI request, please note that, in accordance with s 11A(1) of the FOI Act and s 11(1) of the Charges Regulations, you are not entitled to access any documents to which the Court has granted you access until all applicable charges have been paid.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

30 August 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
2 July 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 31 July 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 2 July 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 28 July 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 31 July 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given “*genuine consideration*” to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 31 July 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- you state that while the Court’s estimated search and retrieval time of one and a half (1½) hours may be accurate, you consider it is “*not appropriate*” for the Court to charge you for this time,
- you consider that the Court’s estimated decision making time is “*without an explanation*” and for that reason “*simply capricious*”, and

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

- you suggest: “... *By implication, there is a public interest, which affects the entire Australian community, in knowing whether the law as to merit based selection in the Australian Public Service has been contravened*”.

### **Authorised decision maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

I have decided, pursuant to section 29(4) of the FOI Act, to reduce the time taken to search for the documents you have requested from one and a half (1½) hours to one (1) hour, thereby reducing the charge imposed on you such that the total estimated charge be revised from \$66.50 to \$55.00. I make these findings in accordance with the “*lowest reasonable cost*’ objective” in subsection 3(4) of the FOI Act,<sup>2</sup> and am satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

Pursuant to section 29 of the FOI Act, I find that you are liable to pay the revised charge estimated in the enclosed letter dated 30 August 2022 and that you are also liable to pay the deposit of \$20.00 set out in that letter. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 2 July 2022;
- the acknowledgement letter from the Court dated 15 July 2022;
- the charges letter from the Court dated 28 July 2022;
- your email dated 31 July 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines; ‘*J*’ and *Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

email of 31 July 2022. I have also given consideration to whether disclosure of the documents would advance the objects of the FOI Act.<sup>5</sup>

***Section 29(5)(a) – Financial hardship***

Your email dated 31 July 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances that would justify the charge being reduced or not imposed.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in “*the general public interest*” or in “*the interests of a substantial section of the public*”.<sup>6</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should “*identify or specify the ‘general public interest’ or the ‘substantial section of the public’ that will benefit from its disclosure (s 29(1)(f)(ii)).*”<sup>7</sup> To determine this, I have considered both the “*content of the documents*” requested “*and the context in which their public release would occur.*”<sup>8</sup>

I note that in your email dated 31 July 2022 you state:

*It is in the public interest to access the requested documents.*

*Take the vacancy notification for example. The entire Australian community has a right to apply for an SES Band 1 District Registrar role and if there was no vacancy notification published, then the entire Australian Community was denied the right to apply for that job and to be considered on their merits (please refer to Part 4, Subdivision B of the Australian Public Service Commissioner’s Directions 2022 (Cth) or Part 3, Subdivision B of the Australian Public Service Commissioner’s Directions 2016 (Cth)). By implication, there is a public interest, which affects the entire Australian community, in knowing whether the law as to merit based selection in the Australian Public Service has been contravened, in as much as a vacancy in the Federal Court has not been notified to the Australian community and has been filled without giving all members of the Australian community an opportunity to apply and be considered for that role on their merits.*

The FOI Act does not define what constitutes in the “*general public interest*” or “*in the interests of a substantial section of the public*”.<sup>9</sup> The concept of “*public interest*” is thought of as “*a concept of wide import that cannot be exhaustively defined.*”<sup>10</sup> It is recommended that an agency should direct “*its attention to the advancement or the interest or welfare of the public*” which is dependent “*on each particular set of circumstances.*”<sup>11</sup> It is also considered

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Section 29(5)(b) of the FOI Act.

<sup>7</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>10</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019]

AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29], citing the FOI Guidelines.

<sup>11</sup> *Ibid.*

that “*the public interest is not a static concept confined and defined by strict reference points.*”<sup>12</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases “*in the general public interest*” and “*in the interests of a substantial section of the public*”. The “*question is whether giving access to the document, and the consequences of giving that access, are in the public interest.*”<sup>13</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request, it would appear you are seeking document/s that relate to a “*SES Band 1 District Registrar role*” that was referenced in an earlier FOI decision made by the Court and dated 22 June 2022. That earlier decision, which is available on the “Right to Know” website<sup>14</sup>, made clear as follows:

*In relation to the information provided to you in response to your FOI request, I note that those persons acting in SES roles have also been included in the written compilation of information provided. This is because each of those persons were temporarily assigned duties in an SES position for a period of three months or more, and are required to be reported by agencies as part of their SES cap. [footnote omitted]*

The documents you have requested relate to temporary acting arrangements and, therefore, in my view, there is very little public interest in determining whether “*a vacancy in the Federal Court has not been notified to the Australian community*” when there was no requirement to advertise a vacancy in the circumstances.<sup>15</sup>

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where “... *the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public*”.<sup>16</sup> Given the misconceptions with your request, I consider that your request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act.

Another important factor is that some of the document/s may contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>17</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

<sup>14</sup> [FOI Response Stephanie 22 June 2022.pdf \(righttoknow.org.au\)](https://www.righttoknow.org.au/foi-response/stephanie-22-june-2022.pdf).

<sup>15</sup> See <https://www.apsc.gov.au/working-aps/aps-employees-and-managers/movement/assignment-duties-within-aps-agency#:~:text=A%20decision%20to%20assign%20duties.required%20to%20perform%20the%20duties>.

<sup>16</sup> See paragraph 4.99 of the FOI Guidelines: “*For example, see Tennant and Australian Broadcasting Corporation* [2014] AATA 452.”

<sup>17</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

Further, I do not consider that the document/s you requested could be “*reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.*”<sup>18</sup> As outlined above, there was no requirement to advertise a vacancy and therefore, no issue that would require “*public discussion or analysis*”.<sup>19</sup>

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of “*public interest*” in respect of contesting a charge. Again, the FOI Guidelines point to the fact that “*the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.*”

Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 31 July 2022, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- “*The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*”
- “*The document will add to the public record on an important and recurring aspect of agency decision making.*” [footnotes omitted]

I do not consider that the documents you have requested would “*better inform the public*” about the decision making process with respect to the recruitment exercises within the Court. That is because the documents do not relate to such recruitment processes, and no findings have been made about “*problems or flaws*”<sup>20</sup> in any such decision making process. There is also nothing to suggest that any “*important and recurring aspect of agency decision making*” will be identified.<sup>21</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s and if necessary any adverse effect of the release of that document/s and the applicability of conditional exemptions under the FOI Act.

However, without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request “*are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.*”<sup>22</sup>

For all of the above reasons, I do not consider that there should be a reduction or waiver of the charges imposed on your FOI request on the basis that giving access to the document/s in question is in the general public interest or in the interest of a substantial section of the public.

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<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.

<sup>19</sup> Paragraph 4.110 of the FOI Guidelines.

<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>21</sup> Ibid.

<sup>22</sup> Paragraph 4.99 of the FOI Guidelines.

### *Other considerations*

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>23</sup> These matters include any specific contentions you have made and whether disclosure of the documents would advance the objects of the FOI Act.<sup>24</sup>

On this basis, I have given consideration to the specific contentions made in your email of 31 July 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the documents would advance the objects of the FOI Act.

#### *Charge for search and retrieval time*

In the letter dated 28 July 2022, it was estimated that one and a half (1½) hours was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request has fourteen (14) discrete paragraphs. Each paragraph must be thoroughly considered when conducting searches for the document/s. Varying search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

The Court has an obligation to take “*all reasonable steps*” to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.*<sup>25</sup>

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office.*<sup>26</sup> *At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*

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<sup>23</sup> Paragraph 4.96 of the FOI Guidelines, ‘*J* and Department of Industry, Innovation, Science, Research and Tertiary Education [2012] AICmr 16 (14 June 2012) at [9].

<sup>24</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

<sup>25</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>26</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: ‘Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes’.



- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>27</sup>

In accordance with its obligations under the FOI Act and as is set above, the Court undertook extensive searches in response to paragraphs (a) to (n) of your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of each of the fourteen (14) paragraphs of your request are found. As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

In your email of 31 July 2022, you acknowledge that the estimation of one and a half (1½) hours to search for the documents you have requested “*may be the case*”, however, you claim that “*it is not appropriate to charge me for that time*”. Your email then goes on to make allegations about the Court’s record keeping including where you consider certain Court records should be kept.

The Court maintains “*high quality*”<sup>28</sup> and “*well-organised*”<sup>29</sup> records that are checked thoroughly upon the making of FOI requests. While you, as the applicant, may assume you know the location of the document/s you requested, the Court is committed to its obligation to take “*all reasonable*”<sup>30</sup> and “*demonstrable*”<sup>31</sup> steps to find the document/s the subject of an FOI request.

Notwithstanding my reasons above, having regard to the objects of the FOI Act, and in particular the “*lowest reasonable cost*” objective (subsection 3(4) of the FOI Act), I have decided to reduce the charges imposed on you by reducing the time taken to search for the documents you have requested from one and a half (1½) hours to one (1) hour. This reduces the charges associated with that aspect of your request from \$22.50 (being \$15.00 x 1.5 hours) to \$15.00 (being \$15.00 x 1 hour).

The above reduction should go some way to allaying your concerns that you have been charged for the time it took to search for documents that were not “*readily identifiable*” by the Court. This is despite thorough searches having to be conducted for each of the fourteen (14) paragraphs of your request.

I consider that one (1) hour for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

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<sup>27</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>28</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>29</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>30</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>31</sup> Paragraph 3.86 of the FOI Guidelines.

I note your comments in your email dated 31 July 2022 about the salary of Court employees and time spent preparing the letter and invoice. While I am not sure how your comments relate to the estimated decision making time in relation to your FOI request, I am confident that any of the Court's FOI Officers are "*skilled and efficient*" and have the "*appropriate knowledge of the FOI Act and the scope of the exemption provisions*".<sup>32</sup>

Therefore, I am satisfied that any of the Court's FOI Officer's would spend the estimated time of seven (7) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the documents returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released documents (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

I note that your request sought that the decision maker "*address each of (a) – (m) discretely in your FOI decision letter so that the FOI decision is clearly articulated.*" Given that there were in fact fourteen (14) paragraphs to your FOI request, that being paragraphs (a) to (n), a thorough consideration and address of each paragraph would require, at a minimum, the estimated decision making time.

In the email of 31 July 2022 you comment that: "*You have also not noted that any consultations will be required, which I find particularly interesting because I have requested copies of the records of decision and reasons for decision.*" The original charges notice issued to you on 28 July 2022 accounted for time taken in "*Deciding to grant or refuse access to documents requested*". A necessary part of this includes any consultations with third parties as required under the FOI Act. On a preliminary consideration of the document/s, it is estimated that consultation would be required with at least three (3) individuals.

While it may not have been expressly stated in the letter dated 28 July 2022, that does not preclude the FOI decision maker undertaking such consultation. Pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to consult rests in the both legislative basis and guidance from the Office of the Australian Information Commissioner (OAIC).

I appreciate that you, as the applicant, may feel that the "*cost of calculating and collecting the charge appears to exceed the cost to the agency of processing the request.*" However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of decision making charges has been informed by "*previous experience dealing with FOI requests of similar nature*".<sup>33</sup>

Furthermore, I am confident that the Court has correctly applied the guiding principle of the "*lowest reasonable cost*" objective<sup>34</sup> with respect to the charges that have been imposed on you for decision making. I am also satisfied that the charge does "*fairly reflect the work involved in providing access to the documents*"<sup>35</sup> the subject of your FOI request, was "*as fair*

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<sup>32</sup> Paragraph 4.34 of the FOI Guidelines.

<sup>33</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>34</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>35</sup> Paragraph 4.6 of the FOI Guidelines.

*and accurate as possible*", and has not "*set an unreasonably high estimate which may hinder or deter*"<sup>36</sup> you as the applicant.

It is important to note that in the letter dated 28 July 2022, you were advised that the estimated charges provided in the table were an estimate only. And that following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested.

#### *Exceptions to imposition of charges*

Your email dated 31 July 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.45 of the FOI Guidelines. On this basis, I conclude that none of the exceptions apply and you fall within the circumstances that provide for the imposition of charges on your FOI request.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

#### *Information Commissioner review*

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

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<sup>36</sup> Paragraph 4.68 of the FOI Guidelines.

## Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,

*B Henderson*

B Henderson  
FOI Officer



**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

30 August 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I refer to the decision of the Federal Court of Australia (Court) dated 30 August 2022 to reduce the charge imposed in respect to your freedom of information (FOI) request.

This letter is to advise you of the reduced charge the Court has determined that you are liable to pay and is notifying you of that charge as required by the *Freedom of Information Act 1982* (Cth) (FOI Act).

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, and following your email to the Court of 31 July 2022 contesting the original charge imposed on you, and the decision made by the Court on that request dated 30 August 2022, a revised estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches conducted by staff of FOI team and staff of Human Resources team including searching inboxes, shared drives and electronic document &amp; records system.</li> </ul>	1 hour	\$15.00 x 1 = \$15.00
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> <li>• Making a copy of document with any necessary deletions</li> </ul>	7 hours	\$20.00 x 2 = \$40.00 (no charge for first 5 hours)
<b>TOTAL REVISED ESTIMATED CHARGE</b>			<b>\$55.00</b>
<b>DEPOSIT PAYABLE</b>			<b>\$20.00</b>

Please be aware that the revised estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

*Deposit*

In accordance with the FOI Act and Charges Regulations, the Court requires you to pay a deposit before any further work on your FOI request is undertaken. As outlined in the table above, the deposit payable for your FOI request is \$20.00. This accords with s 12(2) of the Charges Regulations which requires that a deposit must not exceed \$20.00 when the preliminary assessment of the charge is more than \$25.00 but less than \$100.00.

An invoice for the deposit is enclosed with this letter and includes details as to how payment can be made. As noted above, the Court will not undertake any further work on your FOI request until the deposit is paid. Once the deposit is paid, work on your FOI request will recommence and the statutory processing period will re-continue from the date of payment.

Please note that the deposit is not refundable, unless: you seek a review of the charge and the Court decides to reduce the charge to an amount lower than the deposit paid or not impose any charge; the Court fails to make a decision on your FOI request within the applicable statutory processing period; or a final charge is set that is lower than the amount already paid as a deposit.

*Right to contest charge*

As advised in the decision accompanying this revised charges letter, if you believe the charge has been wrongly assessed, or should be reduced or not imposed, you may apply for internal review of the charges decision or review by the Information Commissioner. Please refer to the charges decision for further information on your review rights.

*Your response*

Please respond in writing within sixty (60) days of receiving this revised notice of charge by:

- paying the deposit specified within this notice; or
- advising that you seek review of the charges decision; or
- withdrawing your FOI request.

If the Court does not receive a response to this revised notice of charge in writing in the manner specified above within sixty (60) days, your FOI request will be taken to have been withdrawn.

In circumstances where you pay the applicable deposit for your FOI request and the Court makes a decision on your FOI request, please note that, in accordance with s 11A(1) of the FOI Act and s 11(1) of the Charges Regulations, you are not entitled to access any documents to which the Court has granted you access until all applicable charges have been paid.

Yours sincerely,

FOI Officer







**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

14 October 2022

[REDACTED]  
via Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for an internal review under the *Freedom of Information Act 1982***

I refer to your email of 14 September 2022 sent to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Federal Court of Australia (**Court**) seeking an internal review of a decision made on behalf of the Court on 30 August 2022.

I am authorised under the FOI Act to make a decision on behalf of the Court in relation to your internal review request. In conducting the internal review, I note that s 54C of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) requires me to review the original FOI decision and make a fresh decision on behalf of the Court. I also acknowledge that an internal review is a merit review process and that, as set out in paragraph 9.34 of the FOI Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**), an internal review officer should “*bring a fresh, independent and impartial mind to the review.*”

**Background**

On 2 July 2022, you sent an email to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Court (**FOI request**) seeking access to documents under the FOI Act. Specifically, you requested the following:

*Under the FOI Act I request:*

- a) the vacancy notification for the SES Band 1 District Registrar role published in the Public Service Gazette;*
- b) the position description for the SES Band 1 District Registrar role;*
- c) any and all classification evaluation documentation for the SES Band 1 District Registrar role;*
- d) the record of the analysis leading to the task and job design of the SES Band 1 District Registrar role;*

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- e) the record of the supporting reasons for the classification decision, including reference to the comparisons made with formal standards (e.g. the Australian Public Service Commissioner's work level standards);
  - f) the assessment of the resource impact of the creation or reclassification of the SES Band 1 District Registrar role;
  - g) the evidence that there was a need for the SES Band 1 District Registrar role;
  - h) the job application of the Executive Level, ongoing, full time, APS employee who was selected for promotion to the SES Band 1 District Registrar role;
  - i) the certification that the Australian Public Service Commissioner's representative issued following his or her participation in the selection process for the SES Band 1 District Registrar role;
  - j) any and all correspondence between staff in the Federal Court and the Australian Public Service Commissioner's representative in relation to the selection process for the SES Band 1 District Registrar role;
  - k) to the extent that the Australian Public Service Commissioner personally participated in the selection process for the SES Band 1 District Registrar role, any correspondence sent to the Australian Public Service Commissioner or his staff by staff members in the Federal Court in relation to his participation in the selection process for the SES Band 1 District Registrar role;
  - l) the promotion notice published in the Public Service Gazette following the promotion of the full time, ongoing Executive Level APS employee who was selected for promotion to the SES Band 1 District Registrar role;
  - m) the record of decision (by a selection panel or otherwise) to select a full time, ongoing Executive Level APS employee for promotion to the SES Band 1 District Registrar role; and
  - n) the record of the reasons for decision (by a selection panel or otherwise) to select a full time, ongoing Executive Level APS employee for promotion to the SES Band 1 District Registrar role.

On 28 July 2022, the Court issued a written notice to you, in compliance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request which was estimated by the Court to be \$66.50, based on one and a half (1.5) hours of search and retrieval time and seven (7) hours of decision-making time. In accordance with the FOI Act and *Freedom of Information (Charges) Regulations 2019 (Charges Regulations)*, the Court also notified you that you were liable to pay a deposit of \$20.00 before any further work on your FOI request was undertaken.

In an email to the Court sent on 31 July 2022, you contested the charge estimated by the Court in the written notice to you of 28 July 2022 and set out various reasons as to why you were contesting the charge.

In a decision dated 30 August 2022, the decision-maker reduced the charge notified to you in the Court's written notice of 28 July 2022. Specifically, the decision-maker decided to reduce the estimated search and retrieval time from one and a half (1.5) hours to one (1) hour, thereby reducing the total estimated charge from \$66.50 to \$55.00.

On 14 September 2022, you sent an email to the Court's [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox seeking an internal review of that decision under the FOI Act.

According to paragraph 9.34 of the FOI Guidelines, an internal review officer should "consider all issues raised by the person applying for internal review". In that regard, I note that your internal review request states the following:

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*If the vacancy was not notified, then there can be no document to grant access to. Either the documents within the scope of my request exist or they do not. If the document does not exist, there can be no charge applied for providing a decision to that effect.*

That contention concerns the assertion by the original decision-maker that the documents you requested related to “*temporary acting arrangements*”. I will address that contention in the reasons for my decision set out below. Your internal review request also contains several allegations regarding decision-makers of the Court “*lying about the existence of documents*”. Such allegations are baseless and inappropriate and I will not make any further comment about them in this decision.

### **Summary of internal review decision**

After reviewing the decision made on behalf of the Court 30 August 2022 and considering your FOI request afresh, I am satisfied that the charges estimated in that decision, and set out in the written notice accompanying that decision dated 30 August 2022, are reasonable and appropriate in the circumstances. Accordingly, I have decided, in exercise of my discretion under the FOI Act and Charges Regulations, that you are liable to pay an estimated charge of \$55.00, based on one (1) hour of search and retrieval time and a seven (7) hour estimate of decision-making time. As advised in the written notice from the Court to you dated 30 August 2022, you are also liable to pay a deposit of \$20.00 before any further work on your FOI request is undertaken.

### **Material taken into account**

I have taken the following material into account in making my decision:

- your FOI request of 2 July 2022;
- the written notice of charge issued by the Court on 28 July 2022;
- your email to the Court of 31 July 2022 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 30 August 2022;
- your internal review request dated 14 September 2022;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the Charges Regulations; and
- the FOI Guidelines.

### **Reasons for internal review decision**

#### *Section 29(5) – financial hardship and public interest*

While an agency has a general discretion to decide whether to reduce or waive a charge,<sup>1</sup> s 29(5) of the FOI Act stipulates that a decision-maker must take into account whether payment of the charge “*would cause financial hardship*” to the applicant and whether giving access to the document/s “*is in the general public interest or in the interest of a substantial section of the public*”.

Neither your email contesting the charges or your request for an internal review make any suggestion, or provide any information, as to payment of the charge causing financial hardship

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<sup>1</sup> See paragraph 4.95 of the FOI Guidelines.

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to you. Therefore, in the absence of any evidence indicating that financial hardship would be caused to you, I must conclude that financial hardship is not at issue in the present circumstances.

In relation to whether giving access to the documents requested would be “*in the general public interest or in the interest of a substantial section of the public*”, the original decision-maker considered this question in detail including quoting relevant paragraphs from the FOI Guidelines and case law, which I will not repeat here. As noted by that decision-maker, your email of 31 July 2022 contesting the charges stated that it was “*in the public interest to access the requested documents*”. In this regard, you claimed there was a public interest in knowing whether a merit based selection process occurred or, alternatively, was contravened in relation to the “*SES Band 1 District Registrar*” role that was the subject of your FOI request.

As explained by the original decision-maker, the documents you requested in relation to the “*SES Band 1 District Registrar*” role concern a temporary acting arrangement within the Court. For this reason, I fail to see how granting access to documents concerning a temporary acting arrangement within the Court would be “*in the general public interest or in the interest of a substantial section of the public*” given that such arrangements are not the subject of external merit-based selection processes, which is the basis on which you claim there is a public interest in the release of the documents. Instead, I agree with the original decision-maker that the documents appear to be primarily of interest to you, the applicant, rather than being of broader interest to the general public or a substantial section of the public.

In addition, and having reviewed the relevant search records and documents identified as falling within the scope of your FOI request, I conclude that at least one of the documents captured by your FOI request is confidential and contains personal information relating to certain individuals. This is relevant to my consideration of whether the release of documents would be “*in the general public interest or in the interest of a substantial section of the public*”.

Therefore, given the documents captured by your FOI concern a short-term acting arrangement within the Court and that at least one of the documents captured by your FOI request is confidential and contains personal information, I consider that giving access to the documents would primarily satisfy your own interest/curiosity and would not be “*in the general public interest or in the interest of a substantial section of the public*”. For this reason, I have formed the view that a reduction or waiver of the charges notified to you would not be appropriate on the basis of the public interest test contained in s 29(5) of the FOI Act.

#### *Search and retrieval*

As outlined by the original decision-maker, in addition to considering the matters stipulated in s 29(5) of the FOI Act, when determining contested charges agencies may also consider “*any other relevant matter*” and “*should give genuine consideration to any contention or submission made by the applicant as to why a charge should be reduced or not imposed*”.<sup>2</sup>

In the written notice of charge issued to you by the Court on 28 July 2022, it was estimated that search and retrieval of the documents requested would take one and a half (1.5) hours. In your email contesting the charges dated 31 July 2022, you claimed that it was “*not appropriate to charge me for that time*” and provided your own estimate of time that you assert would have

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<sup>2</sup> Paragraph 4.96 of the FOI Guidelines.

been “reasonable” for the search and retrieval of documents. Having regard to your contentions, as well as the “lowest reasonable cost” objective,<sup>3</sup> the decision-maker who made the original charges decision decided it was appropriate to reduce the time taken for search and retrieval from one and a half hours (1.5) hours to one (1) hour.

Having considered your original FOI request, the records of searches conducted, the contentions made in your email of 31 July 2022, and the charges decision made on behalf of the Court on 30 August 2022, I agree with the original decision-maker that one (1) hour is an appropriate and reasonable amount of time for the search and retrieval of the documents requested and, further, is consistent with the “lowest reasonable cost” principle. As explained by the original decision-maker, paragraph 4.27 of the FOI Guidelines sets out what is encompassed in search and retrieval of documents which, relevantly, includes time spent consulting relevant officers, time spent searching digital or hardcopy files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file. As outlined in detail in the charges decision made on 30 August 2022, agencies are required to take “all reasonable steps”<sup>4</sup> to locate the documents requested.

Your FOI request, extracted earlier in this decision, contains fourteen (14) items, each of which requests a different document or category of documents. In order for the Court to comply with its obligations, it was necessary for each of the fourteen (14) items to be considered separately and for “all reasonable steps” to be taken to search for each of the documents or categories of documents requested. A total of one (1) hour for the search and retrieval of the documents would roughly equate with 4 – 5 minutes being spent on each of the fourteen (14) items listed in your FOI request. This time includes consulting relevant officers, searching digital/hardcopy files, as well as removing/saving relevant documents from files for each of the items. Based on the materials I have reviewed, including the records of searches conducted, I have concluded that one (1) hour of search and retrieval time for the fourteen (14) items listed in your FOI request is reasonable and proportionate. I have come to this conclusion on the basis that the Court maintains a “high quality record system”<sup>5</sup> that is well-organised and “enables easy identification and location of documents”.<sup>6</sup>

As already noted in this decision, the original decision-maker explained that the documents requested by you relate to “temporary acting arrangements”. Based on this statement, you contend in your internal review request that “if the vacancy was not notified, then there can be no document to grant access to”. Similarly, you assert that “there are inconsistencies in the claim that the documents that I seek relate to the temporary acting arrangement for which there would be no documents”. Given that the “SES Band 1 District Registrar” role that is the subject of your FOI request was a temporary acting arrangement for which there was no formal external recruitment process conducted, it is correct there were no documents found with respect to some of the fourteen (14) items contained in your FOI request. For example, given the role was not advertised, there was no vacancy notification found with respect to item (a) of your request.

However, not all of the items listed in your FOI request refer to a vacancy notice or a formal external recruitment process. For example, item (b) of your request seeks a position description for the “SES Band 1 District Registrar” role without any reference to an advertised role or a formal recruitment process and item (g) of your request asks for “evidence that there was a

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<sup>3</sup> S 3(4) of the FOI Act.

<sup>4</sup> See s 24A of the FOI Act.

<sup>5</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>6</sup> Paragraph 4.69 of the FOI Guidelines.

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*need for the SES Band 1 District Registrar role*". Searches for some of the items listed in your FOI request therefore yielded documents, even though the "*SES Band 1 District Registrar*" was a temporary acting arrangement that was not the subject of an external recruitment process.

While it is the decision-maker on your FOI request who will ultimately determine which documents fall within the scope of your FOI request and whether or not access will be granted to those documents, I am satisfied, on the basis of the documents identified from the searches undertaken to date, that it is appropriate to charge you for the search and retrieval of the documents you requested and that the estimated time of one (1) hour is fair and reasonable.

#### *Charge for decision-making*

As explained by the original decision-maker, in accordance with Schedule 1 of the Charges Regulations, the Court can charge for decision-making time after the first five (5) hours. This includes time spent examining documents, consulting other parties, making deletions, preparing reasons for decision and notifying of an interim or final decision.<sup>7</sup>

The written notice of charge issued to you by the Court on 28 July 2022 estimated that seven (7) hours of decision-making time would be required to respond to your FOI request. In the charges decision issued to you on behalf of the Court on 30 August 2022, the decision-maker determined that the estimate of seven (7) hours for decision-making was fair, accurate and correctly applied the "*lowest reasonable cost objective*". In contrast, you contend in your email contesting the charges that the "*7 hour figure is simply capricious*" and that such charges "*cannot reasonably be sustained*".

Having carefully considered all of the relevant material – including your FOI request, the documents identified as falling within the scope of your FOI request, the contentions made in your email of 31 July 2022, the contentions made in your internal review request of 14 September 2022, and the charges decision issued to you on 30 August 2022 – I am satisfied that the estimate of seven (7) hours for decision-making time is appropriate and reasonable. As explained by the original decision-maker, the seven (7) hours of decision-making time that has been estimated includes: examining the documents identified as falling within the scope of your request, consulting with individuals pursuant to s 27A of the FOI Act, considering any applicable exemptions under the FOI Act, drafting the written reasons for decision, and the preparation of any documents to be released (possibly with redactions). Given the fact that your FOI request contains fourteen (14) separate items, as well as the nature of the specific documents identified as falling within the scope of your FOI request, I consider that seven (7) hours is not excessive or unreasonable but, rather, is an accurate and fair estimate of the time required to undertake the work and accords with the "*lowest reasonable cost objective*".

Paragraph 4.34 of the FOI Guidelines stipulates that it is an underlying assumption in calculating decision-making time that "*the officers involved in this process are skilled and efficient*" and have "*appropriate knowledge of the FOI Act and the scope of the exemption provisions*". In that regard, I note that the relevant officers of the Court who handle FOI requests are highly skilled and have ample experience in relation to processing FOI requests, including in relation to the application of exemptions contained within the FOI Act.

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<sup>7</sup> Schedule 1 of the Charges Regulations and paragraph 4.31 of the FOI Guidelines.

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For all of the above reasons, I have determined that one (1) hour of search and retrieval time and seven (7) hours for decision-making time are both fair and reasonable and that you should be charged in accordance with the revised written notice of charges issued to you on 30 August 2022. For the avoidance of any doubt, I also agree with the original decision-maker that there are no exceptions that apply to the imposition of charges in relation to your FOI request.

### **Your review rights**

Within 60 days of my decision, you should either:

- pay the charge or deposit in the manner specified in the revised written notice of charge issued to you on 30 August 2022;
- apply to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.<sup>8</sup>

If the Court does not receive a response within 60 days, your FOI request will be taken to have been withdrawn.<sup>9</sup>

In relation to applying to the Information Commissioner for review of the charge, an application for review must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

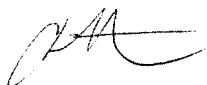
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely



C Hammerton Cole  
Registrar

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<sup>8</sup> FOI Guideline 4.119

<sup>9</sup> FOI Guideline 4.120







**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

12 September 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Charges attributable to the Freedom of Information request dated 2 July 2022**

I refer to your email to the Federal Court of Australia (Court) of 2 July 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

On 15 July 2022, the Court issued an acknowledgement letter. Then due to further consideration of the request and further searches being undertaken, the Court issued a notice of charge letter and invoice on 28 July 2022. On 31 July 2022 you sent an email to the Court requesting a reduction or waiver of the charge associated with the request on the basis that the charge was wrongly assessed. In response to this email, the Court issued you with a decision on 30 August 2022 advising that a charge remained payable but reduced the total amount.

On 14 September 2022 you sent a further email to the Court requesting an internal review of the charges decision dated 30 August 2022. The Court issued the internal review charges decision on 14 October 2022 affirming that you were liable to pay a charge to process the request.

On 26 July 2023, the Court was notified by the Information Commissioner of an external review of the charges decision dated 14 October 2022.

**Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

**Decision**

I have decided, pursuant to subsection 55G(1)(b) of the FOI Act, to relieve you of the liability to pay a charge by waiving the charge as outlined in the internal review charges decision dated 14 October 2022. This means that you do not need to pay any charge.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 2 July 2022;
- the acknowledgement letter dated 15 July 2022;
- the notice of charge letter and invoice dated 28 July 2022;
- your email dated 31 July 2022 contesting the charges for your FOI request;
- the charges decision issued by the Court on 30 August 2022;
- your further email dated 14 September 2022 seeking an internal review of charges decision;
- the internal review charges decision dated 14 October 2022;
- the OAIC notice of external review of the charges decision dated 26 July 2023;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.


### **Charges**

You have not been charged for the processing of your request.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1).

Yours sincerely,



B Henderson  
**FOI Officer**



**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

LEVEL 16  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

15 July 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear Sir/Madam,

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 3 July 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

<b>Item</b>	<b>Description</b>	<b>Estimated hours</b>	<b>Estimated charge</b>
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches conducted by staff of FOI team and staff of Human Resources team including searching inboxes, shared drives and electronic document &amp; records system.</li> </ul>	15 minutes	$\$15.00 \times 0.25 = \$3.75$
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting two individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	6.5 hours	$\$20.00 \times 1.5 = \$30.00$ (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$33.75</b>
<b>DEPOSIT PAYABLE</b>			<b>\$20.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

In accordance with the FOI Act and Charges Regulations, the Court requires you to pay a deposit before any further work on your FOI request is undertaken. As outlined in the table above, the deposit payable for your FOI request is \$20.00. This accords with s 12(2) of the Charges Regulations which requires that a deposit must not exceed \$20.00 when the preliminary assessment of the charge is more than \$25.00 but less than \$100.00.

An invoice for the deposit is enclosed with this letter and includes details as to how payment can be made. As noted above, the Court will not undertake any further work on your FOI request until the deposit is paid. Once the deposit is paid, work on your FOI request will recommence and the statutory processing period will re-continue from the date of payment.

Please note that the deposit is not refundable, unless you contest the charge and the Court decides not to impose any charge in relation to your FOI request OR the Court fails to make a decision on your FOI request within the applicable statutory processing period.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

#### *Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

In circumstances where you pay the applicable deposit for your FOI request and the Court makes a decision on your FOI request, please note that, in accordance with s 11A(1) of the FOI Act and s 11(1) of the Charges Regulations, you are not entitled to access any documents to which the Court has granted you access until all applicable charges have been paid.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

23 August 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
3 July 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 24 July 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 3 July 2022 for access to documents under the *Freedom of Information Act 1982 (Cth)* (**FOI Act**).

As advised in the letter from the Court dated 15 July 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 24 July 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given “*genuine consideration*” to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 24 July 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- the Court’s estimated search and retrieval time of fifteen (15) minutes is excessive, and
- the Court’s estimated decision-making time is unjustifiable, does not “*fairly reflect the work involved*”, and further, should not include consultation with individuals under section 27A of the FOI Act.

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

## Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

## Decision

I am satisfied that pursuant to section 3(4) of the FOI Act, that the Court:

- (a) took into account the “‘lowest reasonable cost’ objective”<sup>2</sup>;
- (b) applied the lowest reasonable cost to you; and
- (c) has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29(8) of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$33.75 as set out in the letter from the Court to you dated 15 July 2022. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 15 July 2022 and that you are also liable to pay the deposit of \$20.00 set out in that letter. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 3 July 2022;
- the acknowledgement and charges letter from the Court dated 15 July 2022;
- your email dated 24 July 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

## Reasons for Decision

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your email of 24 July 2022. I have also given consideration to whether disclosure of the documents would advance the objects of the FOI Act.<sup>5</sup>

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.



In your email dated 24 July 2022 you state: “*This business about imposing charges is a feeble attempt by the Federal Court to unnecessarily delay access to or to discourage an applicant from exercising the right of access conferred by the FOI Act.*” I do not agree with this proposition.

The Court is exercising its lawful discretion<sup>6</sup> to impose charges for FOI requests that meet the relevant conditions for imposing charges as outlined in the Charges Regulations and FOI Guidelines. Your FOI request met those conditions.

***Section 29(5)(a) – Financial hardship***

Your email dated 24 July 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in “*the general public interest*” or in “*the interests of a substantial section of the public*”.<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should “*identify or specify the ‘general public interest’ or the ‘substantial section of the public’ that will benefit from its disclosure (s 29(1)(f)(ii)).*”<sup>8</sup> To determine this, I have considered both the “*content of the documents*” to be released “*and the context in which their public release would occur.*”<sup>9</sup>

I note that your email dated 24 July 2022 does not identify or specify either the “*general public interest*” or the “*substantial section of the public*”<sup>10</sup> that will benefit from disclosure of any document/s. Nor does the email make any specific contentions about disclosure being in the public interest, apart from the brief reference to the allegations published in *The Australian* newspaper and the suggestion that the Court is seeking to obscure the truth.

I am not convinced that there currently exists a demonstrable link between disclosure of any document/s and the advancement of a public interest. I can find nothing in your email dated 24 July 2022 that would “*draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.*”<sup>11</sup> While it is not a requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

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<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

The FOI Act does not define what constitutes in the “*general public interest*” or “*in the interests of a substantial section of the public*”.<sup>13</sup> The concept of “*public interest*” is thought of as “*a concept of wide import that cannot be exhaustively defined.*”<sup>14</sup> It is recommended that an agency should direct “*its attention to the advancement or the interest or welfare of the public*” which is dependent “*on each particular set of circumstances.*”<sup>15</sup> It is also considered that “*the public interest is not a static concept confined and defined by strict reference points.*”<sup>16</sup>

In *Besser and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 13 (20 April 2012) at [12] and [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases “*in the general public interest*” and “*in the interests of a substantial section of the public*”. The “*question is whether giving access to the document, and the consequences of giving that access, are in the public interest.*”<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request, it would appear you are seeking correspondence about the instigation of a current Commonwealth Ombudsman investigation. In circumstances where it has already been confirmed that a Commonwealth Ombudsman investigation has been instigated, I am not convinced that disclosure of confidential correspondence about the commencement of that investigation would be in the general public interest or in the interest of a substantial section of it. Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where “*... the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public*”. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act.

Another important factor is that the document/s may relate to confidential and sensitive investigations. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>18</sup>

I do not consider that the document/s you requested, in the light of a current Commonwealth Ombudsman investigation, could be “*reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.*”<sup>19</sup> In fact, given that the investigation is not yet finalised, I consider that outcome would be not only undesirable but detrimental to the investigation and those involved.

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<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 13 (20 April 2012) at [19].

<sup>18</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>19</sup> Paragraph 4.110 of the FOI Guidelines.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of “*public interest*” in respect of contesting a charge. Again, the FOI Guidelines point to the fact that “*the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.*” Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 24 July 2022, those two (2) potential circumstances are:

- “*The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*”
- “*The document will add to the public record on an important and recurring aspect of agency decision making.*”<sup>20</sup> [footnotes omitted]

I do not consider that the document/s would “*better inform the public*” about the decision making process with respect to the Commonwealth Ombudsman investigation. Further, given the investigation is ongoing, no findings have been made about “*problems or flaws*”.<sup>21</sup> There is also nothing to suggest that any “*important and recurring aspect of agency decision making*” will be identified.<sup>22</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s and if necessary any adverse effect of the release of that document/s and the applicability of conditional exemptions under the FOI Act.

However, without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request “*are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.*”<sup>23</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

### ***Other considerations***

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>24</sup> These matters include any specific contentions you have made and whether disclosure of the documents would advance the objects of the FOI Act.<sup>25</sup>

On this basis, I have given consideration to the specific contentions made in your email of 24 July 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the documents would advance the objects of the FOI Act.

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<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>21</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.99 of the FOI Guidelines.

<sup>24</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>25</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

### *Charge for search and retrieval time*

It was estimated that fifteen (15) minutes was required to search and retrieve the document/s that may fall within the scope of your request.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the estimation of fifteen (15) minutes was entirely reasonable in light of your FOI request. The Court maintains “*high quality*”<sup>26</sup> and “*well-organised*”<sup>27</sup> records that are checked thoroughly upon the making of FOI requests. While you, as the applicant, may consider your request to be “*simple*”, the Court is committed to its obligation to take “*all reasonable*”<sup>28</sup> and “*demonstrable*”<sup>29</sup> steps to find the document/s the subject of an FOI request.

I now turn to the notion of what constitutes reasonable steps. The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.<sup>30</sup>*

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office.<sup>31</sup> At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister’s office who may be able to assist with the location of documents, and*
- *the age of the documents.<sup>32</sup>*

<sup>26</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>27</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>29</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>30</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>31</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: ‘Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes’.

<sup>32</sup> *KE’ and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

I consider the estimation of fifteen (15) minutes was based on a “*common sense interpretation of the terms*” of your request.<sup>33</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

In relation to you questioning the Court’s choice of who is to conduct the searches, I respectfully note that it is for the Court to determine the appropriate person to conduct searches relevant to each FOI request. Court employees are often best placed to identify the custodians of relevant information.

On the basis of the Court’s obligation to take “*all reasonable*”<sup>34</sup> and “*demonstrable*”<sup>35</sup> steps to find the document/s, and despite the contentions made in your email of 24 July 2022, I have decided that fifteen (15) minutes for search and retrieval of documents captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I note your comments in your email dated 24 July 2022 about the salary of Court employees and time spent preparing the letter. While I am not sure how your comments relate to the estimated decision making time in relation to your FOI request, I am confident that any of the Court’s FOI Officers are “*skilled and efficient*” and have the “*appropriate knowledge of the FOI Act and the scope of the exemption provisions*”.<sup>36</sup>

Therefore, I am satisfied that any of the Court’s FOI Officer’s would spend the estimated time of six and a half (6 ½) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the documents returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released documents (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

In terms of the requirement to consult and the impact this would have on the decision making time, that is a matter entirely for the decision maker. The Court is entitled to include the time spent “*consulting with any person or body*”<sup>37</sup> in the charge for decision making time. I consider the inclusion of consultation in the charges is wholly appropriate.

In the email dated 24 July 2022, you enquire as to the Court’s need to consult with two (2) individuals. Pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. Therefore the “*need*” rests in the both

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<sup>33</sup> Paragraph 3.89 of the FOI Guidelines.

<sup>34</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>35</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>36</sup> Paragraph 4.34 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.31 of the FOI Guidelines.

legislative basis and guidance from the Office of the Australian Information Commissioner (OAIC).

I appreciate that you, as the applicant, do not consider the *“estimated charges fairly reflect the work involved in providing access to the document(s) requested”*. However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by *“previous experience dealing with FOI requests of similar nature”*<sup>38</sup>. Furthermore, I am confident that the Court has correctly applied the guiding principle of the *“‘lowest reasonable cost’ objective”*.<sup>39</sup>

I am satisfied that the charge *“fairly reflects the work involved in providing access to the documents”*<sup>40</sup> the subject of your FOI request.

It is important to note that in the letter dated 15 July 2022, you were advised that the estimated charges provided in the table were an estimate only. And that following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the estimated charge was *“as fair and accurate as possible”* and was not *“set an unreasonably high estimate which may hinder or deter”*<sup>41</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 24 July 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.45 of the FOI Guidelines. On this basis, I conclude that none of the exceptions apply and you fall within the circumstances that provide for the imposition of charges on your FOI request.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

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<sup>38</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>39</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>40</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>41</sup> Paragraph 4.68 of the FOI Guidelines.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



**B Henderson  
FOI Officer**







**FEDERAL COURT OF AUSTRALIA  
REGISTRY**

COMMONWEALTH LAW COURTS  
3 ANGAS STREET  
ADELAIDE SA 5000

GPO BOX 1350  
ADELAIDE SA 5001

23 September 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for an internal review under the Freedom of Information Act**

I refer to your email correspondence of 24 August 2022 (6:37PM) seeking an internal review of the decision made on 23 August 2022.

**Authorised decision-maker**

I am authorised to make a decision on behalf of the Federal Court of Australia (**Court**) in relation to your internal review request. In conducting the internal review, I acknowledge that an internal review is a merit review process and that I am required to bring a fresh, independent and impartial mind to the review.

**Material taken into Account**

In making my decision on internal review, I have considered the following material:

- your FOI request received on 3 July 2022 (5:29PM) (**FOI request**);
- the charges letter to you dated 15 July 2022 (**charges letter**);
- your email dated 24 July 2022 (7:00PM) contesting the charges and the manner the charges were assessed (**contest letter**);
- the decision letter to you dated 23 August 2022;
- your request for internal review dated 24 August 2022 (6:37PM) (**review request**);
- the documents identified as falling within the scope of your request;
- the records of the searches conducted by Court staff;
- the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and relevant case law;
- the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**); and

- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**).

### **Decision on Internal Review**

Your review request disputes the proposed charges for the reasons set out in the contest letter. The original decision maker summarised these reasons as:

- the Court's estimated search and retrieval time of fifteen (15) minutes is excessive; and
- the Court's estimated decision-making time is unjustifiable, does not "*fairly reflect the work involved*", and further, should not include consultation with individuals under section 27A of the FOI Act.

You have also disputed the charges on the basis that the proposed charges are contrary to the objects of the FOI Act.

I am satisfied that the estimate of 15 minutes for the search and retrieval time is appropriate and not excessive. However, as the Court was able to identify and retrieve the document requested through your FOI request easily and at minimal cost, I am satisfied that there should be no charge for search and retrieval time in these circumstances.

I am satisfied that the Court's estimated decision-making time is justifiable and fairly reflects the work involved. It is not inappropriate for this time to include consultation with individuals under s 27A of the FOI Act.

I am not satisfied that payment of the charge would cause financial hardship to you. I am also not satisfied that giving you access to the document requested is in the general public interest or in the interest of a substantial section of the public. Finally, I am not satisfied that any issue raised in the contest letter and review request (including in relation to the objects of the FOI Act) would lead me to decide that there should be a reduced charge or no charge imposed.

I therefore determine that you are liable to pay the charge estimated in the letter dated 15 July 2022 in relation to the decision-making time. This charge is \$30.00. You are also liable to pay the deposit of \$20.00 set out in that letter.

### **Reasons**

In providing these reasons, I note that the decision letter dated 23 August 2022 includes the text of sections of the FOI Act and FOI Guidelines. I do not propose to repeat the text in this internal review.

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#### *Charge for search or retrieval time*

I am satisfied that 15 minutes is not an unreasonable amount of time for the decision maker to consider the request, consult the relevant officers to determine if the document exists and for

those persons to search the relevant file or database to determine if the document exists.<sup>1</sup> As set out in the charges letter, the applicable charge for search and retrieval is \$3.75 (\$15.00 per hour x 0.25).

The contest letter asserts that where the cost of calculating and collecting a charge might exceed the cost to the agency of processing the request, it is appropriate not to impose a charge.<sup>2</sup> If the total cost charged to you was \$3.75, the cost of calculation and collection may well exceed the cost to the Court of processing the request. However, \$3.75 is just one component of the overall applicable charge set out in the charges letter. I am therefore not satisfied that the cost of calculating and collecting the charge exceeds the cost of processing the request.

However, I am satisfied that the Court was able to identify and retrieve the document the subject of the FOI request easily and at minimal cost.<sup>3</sup> I am therefore satisfied that there should be no charge for the search and retrieval of the document in these circumstances.

#### *Charge for decision-making time*

The Court may charge for the time spent by the decision maker in deciding whether to grant, refuse or defer access to the document sought through the FOI request, or to grant access to a copy of the document with deletions, including the time spent:

- examining the document;
- consulting with any person or body;
- making a copy with deletion; and
- notifying any interim or final decision on the request.<sup>4</sup>

The charges letter advises that an estimate of the time required to make a decision in relation to your FOI request is 6.5 hours. The charge is therefore estimated to be \$30.00 (\$20.00 for each hour after the first 5 hours).<sup>5</sup>

You have disputed the charge on the basis that:

- it is unjustified;
- the estimated charge does not fairly reflect the work involved in providing access to the document(s) requested; and
- in determining whether to charge a person, the objects of the FOI Act have not been taken into account.

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<sup>1</sup> FOI Guideline 4.27

<sup>2</sup> FOI Guideline 4.114

<sup>3</sup> FOI Guideline 4.114

<sup>4</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4

<sup>5</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4

You also assert that the imposition of the charge is an attempt by the Court to unnecessarily delay access, or to discourage an applicant from exercising the right of access, conferred by the FOI Act.

Neither the contest letter nor the review request contain any information or evidence as to whether payment of the charge will cause you financial hardship or whether giving access to the document is in the general public interest or in the interest of a substantial section of the public (see s 29(5) of the FOI Act).

### *Considerations*

I am satisfied that the decision maker has given genuine consideration to the assertions made in the contest letter as to why the charge should be reduced or not imposed.<sup>6</sup> The review request “presses again” these assertions. I agree with the reasons for decision contained in the letter dated 23 August 2022 and adopt them here. I also emphasise the following:

I am satisfied that the charge is justified and fairly reflects the work involved in providing access to documents.<sup>7</sup> The charge estimate was prepared by Court staff with extensive experience and expertise in the FOI jurisdiction. I consider several of the remarks made in the contest letter and review request inappropriate.<sup>8</sup> In my view, those remarks demonstrate a lack of understanding of the skill, nuance, time and consideration involved in responding to FOI requests made to the Court.

The contest letter makes assertions that the charge has been used to unnecessarily delay access, or to discourage an applicant from exercising the right of access, conferred by the FOI Act. No evidence has been provided to support these assertions and I am satisfied that they are not substantiated. The Court is entitled under the FOI Act to impose charges for FOI requests in accordance with the FOI Act, FOI Charges Regulations and FOI Guidelines. It has exercised its discretion accordingly.

The decision maker has also considered whether disclosure of the document sought would advance the objects of the FOI Act. I note that this includes promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government’s activities.<sup>9</sup> I am of the view that disclosure of the document sought would not advance these objects. The document sought advises of the commencement of a confidential investigation by the Commonwealth Ombudsman. The fact that this investigation has

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<sup>6</sup> FOI Guideline 4.96

<sup>7</sup> FOI Guideline 4.6

<sup>8</sup> Such remarks include the statement that an officer of the Court “simply made up the requirement for lawful consultation and was forced into the embarrassing position of confessing to have lied about the need for consultation”; that “[t]here is no way that it would take more than 5 hours for a competent and reasonably efficient public servant to process the FOI Request. Without more, any claim to the contrary is not only laughable but pitiable”; that the estimate of timing “sounds more like an Easter Egg hunt after a boozy Autumn picnic than a professional search for cognate documents.”

<sup>9</sup> See s 3 of the FOI Act and FOI Guideline 4.97

commenced is public knowledge,<sup>10</sup> and the document does not add to the public record.<sup>11</sup> The investigation by the Ombudsman remains on foot, is confidential and is an independent and impartial process. In these circumstances, it is difficult to see how disclosure of the document would advance the objects of the FOI Act.

#### *Section 29(5) of the FOI Act*

Appropriately, the decision maker has considered both of the following factors:

- whether payment of the charge would cause you financial hardship; and
- whether giving access to the document without charge or at a reduced charge, would be in the general public interest or the interests of a substantial section of the public.

The decision maker determined that the charge would not cause you financial hardship as you did not provide any information or evidence on this point. The review request does not address this point either. I have therefore reached the same conclusion as the original decision maker.

The decision maker also determined that it is appropriate to impose an FOI charge because the document is not primarily of interest to the general public or a substantial section of the public. The contest letter did not address this point, and neither did the review request. I agree with the view of the decision maker and the reasons given in the letter dated 23 August 2022, and adopt them here.

#### **Your review rights**

Within 60 days of my decision, you should either:

- pay the charge or deposit in the manner specified in the charges letter;
- apply to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.<sup>12</sup>

If the Court does not receive a response within 60 days, your FOI request will be taken to have been withdrawn.<sup>13</sup>

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to [Information Commissioner review - Home \(oaic.gov.au\)](https://www.oaic.gov.au/information-commissioner-review-home)

#### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website,

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<sup>10</sup> See for example, the article in The Australian newspaper “Spotlight Shines Back on Watchdog” dated 29 March 2022.

<sup>11</sup> FOI Guideline 4.99

<sup>12</sup> FOI Guideline 4.119

<sup>13</sup> FOI Guideline 4.120

including a link to the online complaints form which the OAIC recommends using for complaints. Go to [Make an FOI complaint - Home \(oaic.gov.au\)](http://oaic.gov.au)

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nicola', with a long horizontal flourish extending to the right.

**Nicola Colbran**  
**National Judicial Registrar &**  
**District Registrar**



**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

7 September 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Charges attributable to the Freedom of Information request dated 3 July 2022**

I refer to your email to the Federal Court of Australia (Court) of 3 July 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

On 15 July 2022, the Court issued an acknowledgement and notice of charge letter. On 24 July 2022 you sent an email to the Court requesting a reduction or waiver of the charge associated with the request on the basis that the charge was wrongly assessed. In response to this email, the Court issued you with a decision on 23 August 2022 advising that the charge remained payable.

On 24 August 2022 you sent a further email to the Court requesting an internal review of the charges decision dated 23 August 2022. The Court issued the internal review charges decision on 23 September 2022 affirming that you were liable to pay a charge to process the request but reduced the total amount.

On 26 July 2023, the Court was notified by the Information Commissioner of an external review of the charges decision dated 23 September 2022.

**Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

**Decision**

I have decided, pursuant to subsection 55G(1)(b) of the FOI Act, to relieve you of the liability to pay a charge by waiving the charge as outlined in the internal review charges decision dated 23 September 2022. This means that you do not need to pay any charge.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 3 July 2022;
- the acknowledgement and charges letter from the Court dated 15 July 2022;
- your email dated 24 July 2022 contesting the charges for your FOI request;
- the internal review charges decision dated 23 September 2022;
- the OAIC external review of the charges decision dated 26 July 2023;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Charges**

You have not been charged for the processing of your request.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: [https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1).

Yours sincerely,



**B Henderson**  
**FOI Officer**





Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>Searches conducted by staff of the Human Resources team including searching inboxes, shared drives and electronic document &amp; records system.</li> </ul>	20 mins	$\$15.00 \times 0.3333 = \$5.00$
Decision-making	<ul style="list-style-type: none"> <li>Examination of documents retrieved</li> <li>Deciding to grant or refuse access to documents requested</li> <li>Preparing reasons for decision</li> <li>Making any copies of documents with deletions</li> </ul>	6.5 hours	$\$20.00 \times 1.5 = \$30.00$ (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$35.00</b>
<b>DEPOSIT PAYABLE</b>			<b>\$20.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

In accordance with the FOI Act and Charges Regulations, the Court requires you to pay a deposit before any further work on your FOI request is undertaken. As outlined in the table above, the deposit payable for your FOI request is \$20.00. This accords with s 12(2) of the Charges Regulations which requires that a deposit must not exceed \$20.00 when the preliminary assessment of the charge is more than \$25.00 but less than \$100.00.

An invoice for the deposit is enclosed with this letter and includes details as to how payment can be made. As noted above, the Court will not undertake any further work on your FOI request until the deposit is paid. Once the deposit is paid, work on your FOI request will recommence and the statutory processing period will re-continue from the date of payment.

Please note that the deposit is not refundable, unless you contest the charge and the Court decides not to impose any charge in relation to your FOI request OR the Court fails to make a decision on your FOI request within the applicable statutory processing period.

#### *Right to contest charge*

Under section 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with section 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under section 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

#### *Your obligations*

Under section 29(1)(f), you must notify the Court in writing within thirty (30) days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with section 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within thirty (30) days, your FOI request will be taken to have been withdrawn.

In circumstances where you pay the applicable deposit for your FOI request and the Court makes a decision on your FOI request, please note that, in accordance with s 11A(1) of the FOI Act and s 11(1) of the Charges Regulations, you are not entitled to access any documents to which the Court has granted you access until all applicable charges have been paid.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

13 September 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request under the Freedom of Information Act**

I refer to your email to the Federal Court of Australia (**Court**) of 24 July 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Your request is too lengthy to reproduce in this decision, particularly given the printed version is three (3) pages in length. However, I have carefully read and considered your request, including the very specific, narrow and targeted parameters that you include.

I also refer to the letter from the Court dated 8 August 2022 advising that it had determined you were liable to pay a charge for the processing of your FOI request, and your email to the Court of 14 August 2022 contesting the estimated charge.

**Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

**Decision**

I have decided, pursuant to subsection 24A(1) of the FOI Act, to refuse your request for access to documents as I am satisfied that all reasonable steps have been taken to find the documents you have requested, but the documents cannot be found or do not exist.

I have also decided, pursuant to section 29 of the FOI Act, that the charge as set out in the letter from the Court to you dated 8 August 2022 should not be imposed. Pursuant to section 29 of the FOI Act, I find that you are not liable to pay either the deposit or the charge estimated in the letter dated 8 August 2022.

I have taken the following into account in making my decision:

- the terms of your request;

- the acknowledgement and charges letter from the Court dated 8 August 2022;
- your email dated 14 August 2022 contesting the charges for your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the *Freedom of Information (Charges) Regulations 2019 (Charges Regulations)*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

## **Reasons for Decision**

Subsection 24A(1) of the FOI Act provides:

- (1) *An agency or Minister may refuse a request for access to a document if:*
- (a) *all reasonable steps have been taken to find the document; and*
  - (b) *the agency or Minister is satisfied that the document:*
    - (i) *is in the agency's or Minister's possession but cannot be found; or*
    - (ii) *does not exist.*

Extensive searches were undertaken by senior staff in the Court's People and Culture team, to identify any documents falling within the scope of your request. These searches included discussions with employees of the Court, searches of the human resources and recruitment inboxes, and searches of the Court's electronic document, records management and information systems.

As a result of the searches undertaken, no documents could be found that fell within the scope of your request. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.

As mentioned above, in your request you outlined, in very particular terms, what you did and did not want to receive by way of documents. Further, your email dated 14 August 2022 again highlighted the limitations on what should and should not be included within the scope of your FOI request. It is on this basis (that is, the very narrow and specific terms of your request and your subsequent email dated 14 August 2022), that there were no documents found that fell within the strict parameters of your request, and why I have decided a charge should not be imposed.

Having regard to the above, I am satisfied that all reasonable steps have been taken to find any documents within the ambit of your request, and that the documents cannot be found or do not exist. As there are no documents to provide you, I must refuse access to the documents requested under subsection 24A(1) of the FOI Act.

## **Charges**

On the basis of my decision outlined above, to refuse your request for access to documents pursuant to subsection 24A(1) of the FOI Act, I have decided to exercise my discretion under the FOI Act and Charges Regulations and not impose a charge for the processing of your FOI request. For this reason, this decision is issued to you without the imposition of a charge.

## **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

### *Information Commissioner review*

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

## **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



**B Henderson  
FOI Officer**







**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

19 September 2022

[REDACTED]

Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 3 September 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches conducted by staff of FOI team and staff of Human Resources team including searching inboxes and electronic document &amp; records system.</li> </ul>	30 minutes	\$15.00 x 0.5 = \$7.50
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting numerous individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	5.5 hours	\$20.00 x 0.5 = \$10.00 (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$17.50</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

19 October 2022

[REDACTED]

Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
3 September 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 19 September 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 3 September 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 19 September 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 19 September 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given "*genuine consideration*" to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 19 September 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- the Court's estimated search and retrieval time of thirty (30) minutes is "*inappropriate*", and

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

- the Court’s estimated decision-making time is “*simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act.*”

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the “*lowest reasonable cost’ objective*”<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29 of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$17.50 as set out in the letter from the Court to you dated 19 September 2022. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 19 September 2022. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 3 September 2022;
- the acknowledgement and charges letter from the Court dated 19 September 2022;
- your email dated 19 September 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

email of 19 September 2022. I have also given consideration to whether disclosure of the documents would advance the objects of the FOI Act.<sup>5</sup>

In your email dated 19 September 2022 you state:

*"I have seen an external disclosure made under the Public Interest Disclosure Act 2013, which included Kate McMullan's report issued under the Public Interest Disclosure Act 2013. Don't try to lie your way through this. I was lied to about the existence of documents and the need to pay for those documents by the FOI Officer. I called this liar's bluff. B Henderson conceded as much:*

*[https://www.righttoknow.org.au/request/documents\\_relating\\_to\\_the\\_select\\_8#incoming-27675](https://www.righttoknow.org.au/request/documents_relating_to_the_select_8#incoming-27675)."*

I do not agree with your unsubstantiated allegation that a FOI Officer of the Court lied to you in relation to a different FOI request you recently submitted. There is no evidence to support this statement. Further, I disagree that any concession was made in my decision in relation to that FOI request. Rather, the Court is responding appropriately to all communication between itself and FOI applicants, based on the scope and specific terms used in relation to each FOI request.

With respect to charging for FOI requests, I note that, in accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 3 September 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

#### ***Section 29(5)(a) – Financial hardship***

Your email dated 19 September 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

#### ***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in "*the general public interest*" or in "*the interests of a substantial section of the public*".<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should "*identify or specify the 'general public interest' or the 'substantial section of the public' that will benefit from its disclosure (s 29(1)(f)(ii))*".<sup>8</sup> To determine this, I have considered both the "*content of the documents*" to be released "*and the context in which their public release would occur*".<sup>9</sup>

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<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

I note that your email dated 19 September 2022 does not identify or specify either the “*general public interest*” or the “*substantial section of the public*”<sup>10</sup> that will benefit from disclosure of any document/s. Nor does the email make any specific contentions about disclosure being in the public interest. Rather, your email contends that there are no documents that fall within the scope of your FOI request. This may explain why you do not make any direct claims that disclosure of documents captured by your FOI request would be in the “*general public interest*” or in the interest of a “*substantial section of the public*”.

In such circumstances, and in the absence of you identifying the “*general public interest*” or “*substantial section of the public*” that would benefit from disclosure, I am not convinced that there currently exists a demonstrable link between disclosure of any document/s and the advancement of a public interest. I can find nothing in your email dated 19 September 2022 that would “*draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.*”<sup>11</sup> While it is not a requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

The FOI Act does not define what constitutes disclosure being in the “*general public interest*” or “*in the interests of a substantial section of the public*”.<sup>13</sup> The concept of “*public interest*” is thought of as “*a concept of wide import that cannot be exhaustively defined.*”<sup>14</sup> It is recommended that an agency should direct “*its attention to the advancement or the interest or welfare of the public*” which is dependent “*on each particular set of circumstances.*”<sup>15</sup> It is also considered that “*the public interest is not a static concept confined and defined by strict reference points.*”<sup>16</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases “*in the general public interest*” and “*in the interests of a substantial section of the public*”. The “*question is whether giving access to the document, and the consequences of giving that access, are in the public interest.*”<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request dated 3 September 2022, it would appear you are seeking documents concerning the appointment of a specifically-named individual to an Executive Level 2 National Judicial Registrar role. Your FOI request also references a public interest disclosure (PID), an Australian Public Service Commission (APSC) investigation and a Commonwealth Ombudsman investigation. Your FOI request appears to link the appointment

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<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].



of that named individual to the PID, the APSC investigation and the Commonwealth Ombudsman investigation. Without making any comment on that link, I am not convinced that disclosure of the document/s requested would be in the general public interest or in the interest of a substantial section of it.

I do not consider that the document/s you requested could be “*reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.*”<sup>18</sup> In fact, given your suggestion of a link between the document/s you have requested and a Commonwealth Ombudsman investigation that is not yet finalised, I consider that outcome would be not only undesirable but may be detrimental and prejudicial to any investigation and those involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where “... *the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public*”. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act.

Another important factor is that some of the document/s you have requested are likely to contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>19</sup>

In this regard, documents containing personal information are less likely to be “*of general public interest or of interest to a substantial section of the public*” and, furthermore, the release of such confidential and/or sensitive information may impede and prejudice the Commonwealth Ombudsman investigation currently on foot if, indeed, it is linked to that investigation as you have suggested.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of “*public interest*” in respect of contesting a charge. Again, the FOI Guidelines point to the fact that “*the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.*” Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 19 September 2022, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- “*The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*”
- “*The document will add to the public record on an important and recurring aspect of agency decision making.*”<sup>20</sup> [footnotes omitted]

I do not consider that the document/s would “*better inform the public*” about the decision making process with respect to recruitment exercises within the Court, or any previous or current investigations. Further, no findings have been made to date about “*problems or*

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<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.

<sup>19</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

*flaws*”<sup>21</sup> in the decision making process relating to the recruitment/appointment of the individual named in your FOI request. There is also nothing to suggest that any “*important and recurring aspect of agency decision making*” will be identified.<sup>22</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in section 11A(5) of the FOI Act.

However, without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request “*are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.*”<sup>23</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

### ***Other considerations***

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account, in addition to financial hardship and the public interest.<sup>24</sup> These matters include any specific contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>25</sup>

On this basis, I have given consideration to the specific contentions made in your email of 19 September 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

### ***Charge for search and retrieval time***

In the letter from the Court dated 19 September 2022, it was estimated that thirty (30) minutes was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request has four (4) discrete paragraphs. Each paragraph must be thoroughly considered when conducting searches for the document/s. Varying search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*

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<sup>21</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.99 of the FOI Guidelines.

<sup>24</sup> Paragraph 4.96 of the FOI Guidelines, ‘*J*’ and Department of Industry, Innovation, Science, Research and Tertiary Education [2012] AICmr 16 (14 June 2012) at [9].

<sup>25</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the estimation of thirty (30) minutes was entirely reasonable in light of your FOI request. The Court maintains “*high quality*”<sup>26</sup> and “*well-organised*”<sup>27</sup> records that are checked thoroughly upon the making of FOI requests. I appreciate that you, as the applicant, may consider your request to be “*very specific*” and that any document/s “*would reasonably be expected to be located in a single location*”, that being an “*APS employee file or something similar*”. However, the Court is committed to its obligation to take “*all reasonable*”<sup>28</sup> and “*demonstrable*”<sup>29</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

The Court has an obligation to take “*all reasonable steps*” to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.*<sup>30</sup>

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office.*<sup>31</sup> *At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister’s office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>32</sup>

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to paragraphs (a) to (d) of your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of each of the four (4) paragraphs of your request are found.

I consider the estimation of thirty (30) minutes was based on a “*common sense interpretation of the terms*” of your request.<sup>33</sup> As a matter of practice, until reasonable searches are conducted

<sup>26</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>27</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>29</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>30</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>31</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: ‘Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes’.

<sup>32</sup> *KE’ and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>33</sup> Paragraph 3.89 of the FOI Guidelines.

by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

On the basis of the Court's obligation to take "*all reasonable*"<sup>34</sup> and "*demonstrable*"<sup>35</sup> steps to find the document/s, and despite the contentions made in your email of 19 September 2022, I have decided that thirty (30) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I note your comments in your email dated 19 September 2022 about the salary of Court employees and time spent preparing the letter. While I am not sure how your comments relate to the estimated decision making time in relation to your FOI request, I am confident that any of the Court's FOI Officers are "*skilled and efficient*" and have the "*appropriate knowledge of the FOI Act and the scope of the exemption provisions*".<sup>36</sup>

Therefore, I am satisfied that any of the Court's FOI Officers would spend the estimated time of five and a half (5½) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the documents returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released documents (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the charge "*fairly reflects the work involved in providing access to the documents*"<sup>37</sup> the subject of your FOI request.

I note that you, as the applicant, consider the charge for decision making "*is simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act.*" However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by "*previous experience dealing with FOI requests of similar nature*".<sup>38</sup> Furthermore, I am confident that the Court has correctly applied the guiding principle of the "*lowest reasonable cost' objective*".<sup>39</sup>

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<sup>34</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>35</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>36</sup> Paragraph 4.34 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>38</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>39</sup> Paragraph 4.3 of the FOI Guidelines.

It is important to note that in the letter from the Court dated 19 September 2022, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the estimated charge was “*as fair and accurate as possible*” and was not “*set an unreasonably high estimate which may hinder or deter*”<sup>40</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 19 September 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>41</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

#### *Information Commissioner review*

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

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<sup>40</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>41</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

## Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,

*B Henderson*

B Henderson  
FOI Officer



**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

18 November 2022

[REDACTED]  
via Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for an internal review under the *Freedom of Information Act 1982***

I refer to your email of 19 October 2022 sent to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Federal Court of Australia (**Court**) seeking an internal review of a decision regarding charges made on behalf of the Court on 19 October 2022.

I am authorised under the FOI Act to make a decision on behalf of the Court in relation to your internal review request. In conducting the internal review, I note that s 54C of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) requires me to review the original FOI decision and make a fresh decision on behalf of the Court. I also acknowledge that an internal review is a merit review process and that, as set out in paragraph 9.34 of the FOI Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**), an internal review officer should “bring a fresh, independent and impartial mind to the review.”

**Background**

On 3 September 2022, you sent an email to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Court (**FOI request**) seeking access to documents under the FOI Act. Specifically, you requested the following:

*Under the FOI Act I request:*

a) the vacancy notification published in the Public Service Gazette for the Executive Level 2 National Judicial Registrar vacancy that Claire Gitsham applied for;

b) the vacancy notification published in the Public Service Gazette for the Executive Level 2 National Judicial Registrar vacancy that Claire Gitsham was selected to fill in the course of a merit based selection process for that Executive Level 2 National Judicial Registrar role;

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*c) the record of decision (by a selection panel or otherwise) to select Claire Gitsham to fill the Executive Level 2 National Judicial Registrar vacancy, which was made in the course a merit based selection process for the Executive Level 2 National Judicial Registrar role that Claire Gitsham was selected to fill; and*

*d) the record of the reasons for decision (by a selection panel or otherwise) to select Claire Gitsham to fill the Executive Level 2 National Judicial Registrar vacancy, which was made in the course a merit based selection process for the Executive Level 2 National Judicial Registrar role that Claire Gitsham was selected to fill.*

On 19 September 2022, the Court issued a written notice to you, in accordance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request which was estimated by the Court to be \$17.50, based on thirty (30) minutes of search and retrieval time and five and a half (5.5) hours of decision-making time.

In an email to the Court sent on 19 September 2022, you contested the charge estimated by the Court in the written notice to you dated 19 September 2022 and set out various reasons as to why you were contesting the charge.

In a decision dated 19 October 2022, the decision-maker affirmed the total estimated charge of \$17.50 notified to you in the letter dated 19 September 2022, on the basis the charge was appropriate and correctly applied the “*lowest reasonable cost*” objective.<sup>1</sup>

On 19 October 2022, you sent an email to the Court’s [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox seeking an internal review of that decision under the FOI Act.

According to paragraph 9.34 of the FOI Guidelines, an internal review officer should “*consider all issues raised by the person applying for internal review*”. In relation to your internal review request, I note that you make several derogatory and inappropriate remarks within that request including, for example, asserting that the original decision-maker is “*lying*”. Your request also contains offensive language which I will not repeat here. I ask that you refrain from using such language and making such remarks in future correspondence with the Court.

Your internal review request makes clear that you press the reasons contained in your original email of 19 September 2022 in which you contested the charges. In addition, your internal review request re-hashes the claims contained in your email of 19 September 2022 that there are no documents that fall within the scope of your FOI request. Arguably, the fact that you continue to pursue an FOI request seeking documents that you believe do not exist constitutes an abuse of process under the FOI Act. Nevertheless, I will address this issue in the reasons for my decision set out below.

### **Summary of internal review decision**

After reviewing the decision made on behalf of the Court 19 October 2022 and considering your FOI request afresh, I have decided to exercise my discretion under the FOI Act and *Freedom of Information (Charges) Regulations 2019 (FOI Charges Regulations)* to reduce the estimated charge for search retrieval time from \$7.50 to \$3.75, on the basis of an estimated search and retrieval time of fifteen (15) minutes.

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<sup>1</sup> Paragraph 4.3 of the FOI Guidelines.



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In relation to the estimated decision-making charge of \$10.00 set out in the Court's letter to you dated 19 September 2022, which is based on five and a half (5.5) hours of decision-making time, I have decided to affirm that charge, as I am satisfied that the charge is reasonable and appropriate in the circumstances and accords with the "*lowest reasonable cost*" objective.

Accordingly, I have decided that you are liable to pay an estimated charge of \$13.75, based on fifteen (15) minutes of search and retrieval time and five and a half (5.5) hours of decision-making time. A revised written notice of charge accompanies this letter.

#### **Material taken into account**

I have taken the following material into account in making my decision:

- your FOI request of 3 September 2022;
- the written notice of charge issued by the Court on 19 September 2022;
- your email to the Court of 19 September 2022 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 19 October 2022;
- your internal review request dated 19 October 2022;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the Charges Regulations; and
- the FOI Guidelines.

#### **Reasons for internal review decision**

##### *Section 29(5)(a) – financial hardship*

While an agency has a general discretion to decide the question of whether a charge should be reduced or waived,<sup>2</sup> s 29(5) of the FOI Act stipulates that, in making that decision, a decision-maker must consider whether payment of the charge "*would cause financial hardship*" to the applicant and whether giving access to the document/s "*is in the general public interest or in the interest of a substantial section of the public*".

Neither your email contesting the charges or your request for an internal review make any suggestion, or provide any information, regarding whether payment of the charge would cause financial hardship to you. For this reason, in the absence of any evidence indicating that financial hardship would be caused to you, I conclude that financial hardship is not at issue in the present circumstances.

##### *Section 29(5)(b) – public interest*

In relation to whether giving access to the documents requested would be "*in the general public interest or in the interest of a substantial section of the public*", the original decision-maker considered this question in detail including quoting relevant paragraphs from the FOI Guidelines and case law, which I will not repeat here. As noted by the original decision-maker, the FOI Guidelines stipulate that an applicant should identify or specify the "*general public interest*" or the "*substantial section of the public*" that will benefit from disclosure of the

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<sup>2</sup> See paragraph 4.95 of the FOI Guidelines.

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documents requested.<sup>3</sup> In that regard, neither your email of 19 September 2022 contesting the charges or your email of 19 October 2022 requesting an internal review make any explicit contention regarding disclosure of the documents being “*in the general public interest or in the interest of a substantial section of the public*”; nor do your emails identify or specify the “*general public interest*” or the “*substantial section of the public*” that will benefit from disclosure. As the primary contention in your emails appears to be that there are no documents falling within the scope of your FOI request, as the original decision-maker pointed out, this may explain why you do not address the public interest test in your request for a review.

Given that you do not make any claim about disclosure of the documents being “*in the general public interest or in the interest of a substantial section of the public*”, I can only consider the public interest test in light of my own conclusions about the nature of your FOI request and the nature of the documents identified as falling within the scope of your FOI request. In this regard, I note that your FOI request seeks specific documents regarding the recruitment of a named individual into a National Judicial Registrar role at the Court. While your FOI request of 3 September 2022 makes reference to a public interest disclosure investigation conducted by the Australian Public Service Commission (APSC), as well as to a subsequent Commonwealth Ombudsman investigation, I note that there have not to date been any adverse findings concerning the recruitment of the named individual made by the APSC, Commonwealth Ombudsman or otherwise.

In such circumstances, I cannot see how granting access to documents concerning the recruitment of that named individual would be “*in the general public interest or in the interest of a substantial section of the public*”. Rather, I agree with the original decision-maker that the documents sought appear to be primarily of interest to you, the applicant, rather than being of broader interest to the general public or a substantial section of the public. I also agree with the original decision-maker that disclosure of the documents requested would not “*better inform the public*” about the Court’s decision-making concerning recruitment and would not “*add to the public record on an important and recurring aspect of agency decision making*”.<sup>4</sup>

Moreover, if, as you have suggested, there is a link between the recruitment of the named individual and the Commonwealth Ombudsman investigation that is presently on foot, the release of any documents concerning that individual’s recruitment may impede and/or prejudice that current Commonwealth Ombudsman investigation.

In addition, and having reviewed the documents identified as falling within the scope of your FOI request, at least one of the documents contains highly confidential and personal information concerning several individuals. As noted by the original decision-maker, documents containing personal information are less likely to be “*of general public interest or of interest to a substantial section of the public*” and, further, the release of such personal and confidential information may impede and/or prejudice the present Commonwealth Ombudsman investigation if, as you have suggested, there is a linkage.

Therefore, for all of the reasons discussed above, I conclude that providing access to the documents requested would primarily satisfy your own interest and curiosity and would not be “*in the general public interest or in the interest of a substantial section of the public*”. Consequently, I have formed the view that a reduction or waiver of the charges notified to you

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<sup>3</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>4</sup> See paragraph 4.109 of the FOI Guidelines.

would not be appropriate on the basis of the public interest test contained in s 29(5) of the FOI Act.

### *Search and retrieval*

In addition to considering the matters stipulated in s 29(5) of the FOI Act, when determining contested charges agencies may also consider “*any other relevant matter*” and “*should give genuine consideration to any contention or submission made by the applicant as to why a charge should be reduced or not imposed*”.<sup>5</sup>

In the written notice of charge issued to you by the Court on 19 September 2022, the charge was estimated on the basis that search and retrieval of the documents requested would take thirty (30) minutes. In your email contesting the charges dated 19 September 2022, you asserted that it “*should not take 30 minutes to find documents that are plainly similar in their nature*” and concern the recruitment of one named individual. Instead, you claim that “*six minutes would be more than adequate time*”. You also state that “*cost of calculating and collecting the charge exceeds the reasonable cost to the agency of searching for the documents*” and that the search and retrieval charge is, therefore, inappropriate.

As explained by the original decision-maker, paragraph 4.27 of the FOI Guidelines sets out what is encompassed in search and retrieval of documents which, relevantly, includes time spent consulting relevant officers, time spent searching digital or hardcopy files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file. As outlined in detail in the charges decision made on 19 October 2022, agencies are required to take “*all reasonable steps*”<sup>6</sup> to locate the documents requested which, at a minimum, involves taking comprehensive steps to locate the documents requested, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister’s office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>7</sup>

Your FOI request, extracted earlier in this decision, contains four (4) very specific items, each of which required separate searches to be undertaken in order to ensure that the searches matched the criteria of each item. As outlined above, the Court is required to and, indeed, did undertake “*all reasonable steps*” to locate each of the documents requested. These steps included consulting relevant officers, searching digital files, as well as removing/saving relevant documents from files for each of the items. Based on the materials I have reviewed, including the records of searches conducted, I have concluded that, although thirty (30) minutes of search and retrieval time is not unreasonable, fifteen (15) minutes would be a more reasonable and proportionate amount of search and retrieval time and is more consistent with

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<sup>5</sup> Paragraph 4.96 of the FOI Guidelines.

<sup>6</sup> See s 24A of the FOI Act.

<sup>7</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

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the “*lowest reasonable cost*” objective given the nature of the documents requested and their location. I note that the Court maintains a “*high quality record system*”<sup>8</sup> that is well-organised and “*enables easy identification and location of documents*”.<sup>9</sup>

In relation to your claim that there are no documents that fall within the scope of your FOI request, the searches undertaken have specifically identified documents that fall within the scope of your request. Although it will ultimately be a matter for the decision-maker on your FOI request to determine whether the documents identified by those searches fall within the scope of your request (and whether access will be granted to those documents), I am satisfied, having reviewed the documents, that on their face the documents fall within the scope of your FOI request. For this reason, the contentions you have made concerning the non-existence of documents do not, in my view, affect the estimate or assessment of charges.

Having considered all of the relevant material, I am, therefore, satisfied, that it is appropriate to charge you for the search and retrieval of the documents requested, but that the search and retrieval time should be reduced from thirty (30) minutes to fifteen (15) minutes, which amounts to a charge of \$3.75.

#### *Charge for decision-making*

As explained by the original decision-maker, in accordance with Schedule 1 of the Charges Regulations, the Court can charge for decision-making time after the first five (5) hours. This includes time spent examining documents, consulting other parties, making deletions, preparing reasons for decision and notifying of an interim or final decision.<sup>10</sup>

The written notice of charge issued to you by the Court and dated 19 September 2022 estimated that five and a half (5.5) hours of decision-making time would be required to respond to your FOI request. In the charges decision issued to you on behalf of the Court on 19 October 2022, the decision-maker determined that the estimate of five and a half (5.5) hours for decision-making was fair, accurate and correctly applied the “*lowest reasonable cost objective*”. In your email contesting the charges dated 19 September 2022, you claim that “*the estimate of 5.5 hours is simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act*”.

As stated earlier, having reviewed the specific documents that have been identified as falling within the scope of your FOI request, I am satisfied that, on their face, those documents fall within the scope of your FOI request. As explained by the original decision-maker, the estimated five and a half (5.5) hours of decision-making time includes the following tasks: examining the documents identified as falling within the scope of your request, consulting with individuals pursuant to s 27A of the FOI Act, considering any applicable exemptions under the FOI Act, drafting the written reasons for decision, and the preparation of any documents to be released (possibly with redactions). Given the nature of the specific documents identified as falling within the scope of your FOI request, I consider that five and a half (5.5) hours of decision-making time is not excessive or unreasonable but, rather, is an accurate and fair estimate of the time required to undertake the work and accords with the “*lowest reasonable cost*” objective.

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<sup>8</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>10</sup> Schedule 1 of the Charges Regulations and paragraph 4.31 of the FOI Guidelines.

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Paragraph 4.34 of the FOI Guidelines stipulates that it is an underlying assumption in calculating decision-making time that “*the officers involved in this process are skilled and efficient*” and have “*appropriate knowledge of the FOI Act and the scope of the exemption provisions*”. In that regard, I note that the relevant officers of the Court who handle FOI requests are highly skilled and have ample experience in relation to processing FOI requests, including in relation to the application of exemptions contained within the FOI Act.

For the avoidance of doubt, I also agree with the original decision-maker that there are no exceptions that apply to the imposition of charges in relation to your FOI request.

For the reasons outlined above, I therefore conclude that the estimate of five and a half (5.5) hours of decision-making time is fair and reasonable, but that the estimated search and retrieval time should be reduced from thirty (30) minutes to fifteen (15) minutes. In light of this reduction, a revised written notice of charge has been prepared for you and accompanies this letter. I note that the total charge estimated in that letter and payable by you is \$13.75.

### **Your review rights**

Within 60 days of my decision, you should either:

- pay the charge in the manner specified in the revised written notice of charge accompanying this letter and dated 18 November 2022;
- apply to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.<sup>11</sup>

If the Court does not receive a response within 60 days, your FOI request will be taken to have been withdrawn.<sup>12</sup>

In relation to applying to the Information Commissioner for review of the charge, an application for review must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to

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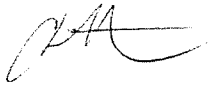
<sup>11</sup> FOI Guideline 4.119

<sup>12</sup> FOI Guideline 4.120

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the online complaints form which the OAIC recommends using for complaints, at:  
<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely

A handwritten signature in black ink, appearing to be 'C Hammerton Cole', written in a cursive style.

C Hammerton Cole  
Registrar



## Decision not to continue to undertake an IC review under s 54W(a) of the *Freedom of Information Act 1982*

IC review applicant	[REDACTED]
Respondent	Federal Court of Australia
Decision date	30 June 2023
OAIC reference number	[REDACTED]
Agency reference number	N/A

### Decision

1. I refer to the application made by [REDACTED] (the applicant) for Information Commissioner review (IC review) of an internal review decision made by the Federal Court of Australia (the respondent) on 18 November 2022 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(a) of the FOI Act.
3. The Office of the Australian Information Commissioner (OAIC) cannot contact the IC review applicant after making reasonable attempts. As a delegate of the Information Commissioner, I have decided not to undertake a review of this IC review under s 54W(a)(iii) of the FOI Act. My reasons follow.

### Background

4. The key procedural steps in this IC review are set out at **Attachment A**.

### Discretion not to undertake an IC review

5. Under s 54W(a)(iii) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner cannot contact the IC review applicant after making reasonable attempts.

6. The Commissioner's procedure direction for applicants also requires that an applicant or their nominated representative must advise the OAI if there are any changes to their contact details as soon as it is possible to do so. The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).
7. On the basis of the information presently before the Information Commissioner, I am satisfied that the review should be finalised under s 54W(a)(iii) of the FOI Act.
8. In deciding whether to exercise the discretion not to undertake a review, I have considered:
  - On 18 November 2022, the respondent made an internal review decision to reduce the estimated charge from \$17.50 in the original decision of 19 September 2022, to \$13.75.
  - On 19 November 2022, the applicant applied for IC review of the respondent's original decision.
  - In March 2023, the OAI was notified that the Right to Know (RTK) platform had disabled a number of RTK user accounts being used by FOI applicants who had made access requests to the respondent [and some other agencies] requesting similar subject matter, and that any associated IC review would also likely be impacted.
  - In light of this advice, on 3 May 2023 and 22 May 2023 the OAI attempted to write to the applicant using the RTK email address provided in their application, and requested they confirm their current contact details.
  - In our correspondence of 22 May 2023, the OAI notified the applicant that in the absence of a response by 5 June 2023, that the applicant's IC review would be finalised by a delegate of the Information Commissioner under s 54W(a)(iii) of the FOI Act. The OAI has not received a response from the applicant to date.
  - The applicant has not provided a phone number or any other contact method by which the OAI could attempt to contact the applicant.



9. In light of the above, it does not appear that reviewing this matter will promote the objects of the FOI Act, particularly noting that the applicant would be unable to participate in the IC review.
10. As a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review of the respondent's decision under s 54W(a)(iii) of the FOI Act.
11. I confirm that this IC review is now closed. Your review rights are set out below.
12. If either party would like to discuss this matter, please contact us by email at FOIDR@oaic.gov.au. In all correspondence, please quote [REDACTED]

Yours sincerely



**Tania Strathearn**  
Acting Director  
Freedom of information Branch

30 June 2023

# ATTACHMENT A

## Key procedural steps

Date	Events
03/09/2022	<p>FOI request made to the respondent for access to:</p> <p><i>Under the FOI Act I request:</i></p> <ul style="list-style-type: none"> <li>a) <i>The vacancy notification published in the Public Service Gazette for the Executive Level 2 National Judicial Registrar vacancy that Claire Gitsham applied for;</i></li> <li>b) <i>The vacancy notification published in the Public Service Gazette for the Executive Level 2 National Judicial Registrar vacancy that Claire Gitsham was selected to fill in the course of a merit based selection process for that Executive Level 2 National Judicial Registrar role;</i></li> <li>c) <i>The record of decision (by a selection panel or otherwise) to select Claire Gitsham to fill the Executive Level 2 National Judicial Registrar vacancy, which was made in the course of a merit based selection process for the Executive Level 2 National Judicial Registrar role that Claire Gitsham was selected to fill; and</i></li> <li>d) <i>The record of the reasons for decision (by a selection panel or otherwise) to select Claire Gitsham to fill the Executive Level 2 National Judicial Registrar vacancy, which was made in the course of a merit based selection process for the Executive Level 2 National Judicial Registrar role that Claire Gitsham was selected to fill.</i></li> </ul>
19/09/2022	<p>The respondent made a decision that the applicant was liable to pay a charge for the processing of the FOI request estimated by the Court to be \$17.50, based on thirty (30) minutes of search and retrieval time.</p>
19/10/2022	<p>The respondent received a request for an internal review.</p>
18/11/2022	<p>The respondent made an internal review decision reducing the charge payable to \$13.75.</p>
19/11/2022	<p>IC review application received by the OAIC.</p>
01/08/2022	<p>The respondent made an internal review decision to reduce the estimated charge for search retrieval time from \$7.50 to \$3.75 based on fifteen (15) minutes of search and retrieval time and affirmed the estimated decision-making charge of \$10.00 in the original decision of 19 September 2022.</p>

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03/05/2023 The OAIC asked the applicant to confirm their current or preferable contact email address. This email was undeliverable.

22/05/2023 The OAIC again asked the applicant to confirm their current or preferable contact email address. The OAIC also advised the applicant that their IC review may be finalised under s 54W(a)(iii) if no response was received by the specified date.

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## Review rights

### Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

### Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

### Accessing your information

If you would like access to the information that we hold about you, please contact [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au). More information is available on the **Access our information**<sup>1</sup> page on our website.

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<sup>1</sup> [www.oaic.gov.au/about-us/access-our-information/](http://www.oaic.gov.au/about-us/access-our-information/).







**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

28 September 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 14 September 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982 (Cth) (FOI Act)*.

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019 (Charges Regulations)*:

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>Searches conducted by staff of the Human Resources team including searching inboxes and electronic document &amp; records system.</li> </ul>	30 minutes	\$15.00 x 0.5 = \$7.50
Decision-making	<ul style="list-style-type: none"> <li>Examination of documents retrieved</li> <li>Consulting individuals in relation to personal information</li> <li>Deciding to grant or refuse access to documents requested</li> <li>Preparing reasons for decision</li> </ul>	5.5 hours	\$20.00 x 0.5 = \$10.00 (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$17.50</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.



In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

28 October 2022

█  
Right to Know

By email: █

Dear █

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
14 September 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 28 September 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 14 September 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 28 September 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 28 September 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given “*genuine consideration*” to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 28 September 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- the Court’s estimated search and retrieval time of thirty (30) minutes is “*inappropriate*”, and

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

- the Court’s estimated decision-making time is “*simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act.*”

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the “*lowest reasonable cost’ objective*”<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29 of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$17.50 as set out in the letter from the Court to you dated 28 September 2022. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 28 September 2022. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 14 September 2022;
- the acknowledgement and charges letter from the Court dated 28 September 2022;
- your email dated 28 September 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

email of 28 September 2022. I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.<sup>5</sup>

In your email dated 28 September 2022 you state:

*"I have seen an external disclosure made under the Public Interest Disclosure Act 2013, which included Kate McMullan's report issued under the Public Interest Disclosure Act 2013. Don't try to lie your way through this. I was lied to about the existence of documents and the need to pay for those documents by the FOI Officer. I called this liar's bluff. B Henderson conceded as much:*



I do not agree with your unsubstantiated allegation that a FOI Officer of the Court lied to you in relation to a different FOI request you recently submitted. There is no evidence to support this statement. Further, I disagree that any concession was made in my decision in relation to that FOI request. Rather, the Court is responding appropriately to all communication between itself and FOI applicants, based on the scope and specific terms used in relation to each FOI request.

With respect to charging for FOI requests, I note that, in accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 14 September 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

***Section 29(5)(a) – Financial hardship***

Your email dated 28 September 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in "*the general public interest*" or in "*the interests of a substantial section of the public*".<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should "*identify or specify the 'general public interest' or the 'substantial section of the public' that will benefit from its disclosure (s 29(1)(f)(ii)).*"<sup>8</sup> To determine this, I have considered both the "*content of the documents*" to be released "*and the context in which their public release would occur.*"<sup>9</sup>

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<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

I note that your email dated 28 September 2022 does not identify or specify either the “*general public interest*” or the “*substantial section of the public*”<sup>10</sup> that will benefit from disclosure of any document/s. Nor does the email make any specific contentions about disclosure being in the public interest. Rather, your email contends that there are no documents that fall within the scope of your FOI request. This may explain why you do not make any direct claims that disclosure of document/s captured by your FOI request would be in the “*general public interest*” or in the interest of a “*substantial section of the public*”.

In such circumstances, and in the absence of you identifying the “*general public interest*” or “*substantial section of the public*” that would benefit from disclosure, I am not convinced that there currently exists a demonstrable link between disclosure of any document/s and the advancement of a public interest. I can find nothing in your email dated 28 September 2022 that would “*draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.*”<sup>11</sup> While it is not a requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

The FOI Act does not define what constitutes disclosure being in the “*general public interest*” or “*in the interests of a substantial section of the public*”.<sup>13</sup> The concept of “*public interest*” is thought of as “*a concept of wide import that cannot be exhaustively defined.*”<sup>14</sup> It is recommended that an agency should direct “*its attention to the advancement or the interest or welfare of the public*” which is dependent “*on each particular set of circumstances.*”<sup>15</sup> It is also considered that “*the public interest is not a static concept confined and defined by strict reference points.*”<sup>16</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases “*in the general public interest*” and “*in the interests of a substantial section of the public*”. The “*question is whether giving access to the document, and the consequences of giving that access, are in the public interest.*”<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request dated 14 September 2022, it would appear you are seeking documents concerning the appointment of a specifically-named individual to an Executive Level 2 National Judicial Registrar role. Your FOI request also references a public interest disclosure (PID), an Australian Public Service Commission (APSC) investigation and a Commonwealth Ombudsman investigation. Your FOI request appears to link the appointment

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<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

of that named individual to the PID, the APSC investigation and the Commonwealth Ombudsman investigation. Without making any comment on that link, I am not convinced that disclosure of the document/s requested would be in the general public interest or in the interest of a substantial section of it.

I do not consider that the document/s you requested could be “*reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.*”<sup>18</sup> In fact, given your suggestion of a link between the documents you have requested and a Commonwealth Ombudsman investigation that is not yet finalised, I consider that outcome would be not only undesirable but may be detrimental and prejudicial to any investigation and those involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where “... *the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public*”. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act.

Another important factor is that some of the document/s you have requested are likely to contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>19</sup>

In this regard, documents containing personal information are less likely to be “*of general public interest or of interest to a substantial section of the public*” and, furthermore, the release of such confidential and/or sensitive information may impede and prejudice the Commonwealth Ombudsman investigation currently on foot if, indeed, it is linked to that investigation as you have suggested.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of “*public interest*” in respect of contesting a charge. Again, the FOI Guidelines point to the fact that “*the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.*” Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 28 September 2022, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- “*The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*”
- “*The document will add to the public record on an important and recurring aspect of agency decision making.*”<sup>20</sup> [footnotes omitted]

I do not consider that the document/s would “*better inform the public*” about the decision making process with respect to recruitment exercises within the Court, or any previous or current investigations. Further, no findings have been made to date about “*problems or*

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<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.

<sup>19</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

*flaws*”<sup>21</sup> in the decision making process relating to the recruitment/appointment of the individual named in your FOI request. There is also nothing to suggest that any “*important and recurring aspect of agency decision making*” will be identified.<sup>22</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in s 11A(5) of the FOI Act.

However, without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request “*are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.*”<sup>23</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

### ***Other considerations***

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>24</sup> These matters include any specific contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>25</sup>

On this basis, I have given consideration to the specific contentions made in your email of 28 September 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

### ***Charge for search and retrieval time***

In the letter from the Court dated 28 September 2022, it was estimated that thirty (30) minutes was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request has four (4) discrete paragraphs. Each paragraph must be thoroughly considered when conducting searches for the document/s. Varying search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

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<sup>21</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.99 of the FOI Guidelines.

<sup>24</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>25</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.



I consider the estimation of thirty (30) minutes was entirely reasonable in light of your FOI request. The Court maintains “*high quality*”<sup>26</sup> and “*well-organised*”<sup>27</sup> records that are checked thoroughly upon the making of FOI requests. I appreciate that you, as the applicant, may consider your request to be “*very specific*” and that any document/s “*would reasonably be expected to be located in a single location*”, that being an “*APS employee file or something similar*”. However, the Court is committed to its obligation to take “*all reasonable*”<sup>28</sup> and “*demonstrable*”<sup>29</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

The Court has an obligation to take “*all reasonable steps*” to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.*<sup>30</sup>

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office.*<sup>31</sup> *At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister’s office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>32</sup>

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to paragraphs (a) to (d) of your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of each of the four (4) paragraphs of your request are found.

I consider the estimation of thirty (30) minutes was based on a “*common sense interpretation of the terms*” of your request.<sup>33</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

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<sup>26</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>27</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>29</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>30</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>31</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: ‘Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes’.

<sup>32</sup> *KE’ and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>33</sup> Paragraph 3.89 of the FOI Guidelines.

On the basis of the Court's obligation to take "*all reasonable*"<sup>34</sup> and "*demonstrable*"<sup>35</sup> steps to find the document/s, and despite the contentions made in your email of 28 September 2022, I have decided that thirty (30) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I note your comments in your email dated 28 September 2022 about the salary of Court employees and time spent preparing the letter. While I am not sure how your comments relate to the estimated decision making time in relation to your FOI request, I am confident that any of the Court's FOI Officers are "*skilled and efficient*" and have the "*appropriate knowledge of the FOI Act and the scope of the exemption provisions*".<sup>36</sup>

Therefore, I am satisfied that any of the Court's FOI Officers would spend the estimated time of five and a half (5½) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the document/s returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released document/s (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the charge "*fairly reflects the work involved in providing access to the documents*"<sup>37</sup> the subject of your FOI request.

I note that you, as the applicant, consider the charge for decision making "*is simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act.*" However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by "*previous experience dealing with FOI requests of similar nature*"<sup>38</sup>. Furthermore, I am confident that the Court has correctly applied the guiding principle of the "*'lowest reasonable cost' objective*".<sup>39</sup>

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<sup>34</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>35</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>36</sup> Paragraph 4.34 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>38</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>39</sup> Paragraph 4.3 of the FOI Guidelines.

It is important to note that in the letter from the Court dated 28 September 2022, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the estimated charge was “*as fair and accurate as possible*” and was not “*set an unreasonably high estimate which may hinder or deter*”<sup>40</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 28 September 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>41</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

#### *Information Commissioner review*

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

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<sup>40</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>41</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

## Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,

*B Henderson*

B Henderson  
**FOI Officer**



**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

28 November 2022

[REDACTED]  
via Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for an internal review under the *Freedom of Information Act 1982***

I refer to your email of 28 October 2022 sent to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Federal Court of Australia (Court) seeking an internal review of a decision regarding charges made on behalf of the Court on 28 October 2022.

I am authorised under the FOI Act to make a decision on behalf of the Court in relation to your internal review request. In conducting the internal review, I note that s 54C of the *Freedom of Information Act 1982* (Cth) (FOI Act) requires me to review the original FOI decision and make a fresh decision on behalf of the Court. I also acknowledge that an internal review is a merit review process and that, as set out in paragraph 9.34 of the FOI Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines), an internal review officer should “bring a fresh, independent and impartial mind to the review.”

**Background**

On 14 September 2022, you sent an email to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Court (FOI request) seeking access to documents under the FOI Act. Specifically, you requested the following:

*Under the FOI Act, I request access to:*

- a) the vacancy notification published in the Public Service Gazette for the Executive Level 2 National Judicial Registrar vacancy that Matthew Benter applied for;*
- b) the vacancy notification published in the Public Service Gazette for the Executive Level 2 National Judicial Registrar vacancy that Matthew Benter was selected to fill in the course of a merit based selection process for that Executive Level 2 National Judicial Registrar role;*
- c) the record of decision (by a selection panel or otherwise) to select Matthew Benter to fill the Executive Level 2 National Judicial Registrar vacancy, which was made in the course a*

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*merit based selection process for the Executive Level 2 National Judicial Registrar role that Matthew Benter was selected to fill; and*

*d) the record of the reasons for decision (by a selection panel or otherwise) to select Matthew Benter to fill the Executive Level 2 National Judicial Registrar vacancy, which was made in the course a merit based selection process for the Executive Level 2 National Judicial Registrar role that Matthew Benter was selected to fill.*

On 28 September 2022, the Court issued a written notice to you, in accordance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request which was estimated by the Court to be \$17.50, based on thirty (30) minutes of search and retrieval time and five and a half (5.5) hours of decision-making time.

In an email to the Court sent on 28 September 2022, you contested the charge estimated by the Court in the written notice to you dated 28 September 2022 and set out various reasons as to why you were contesting the charge.

In a decision dated 28 October 2022, the decision-maker affirmed the total estimated charge of \$17.50 notified to you in the letter dated 28 September 2022, on the basis the charge was appropriate and correctly applied the “*lowest reasonable cost*” objective.<sup>1</sup>

On 28 October 2022, you sent an email to the Court’s [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox seeking an internal review of that decision under the FOI Act.

According to paragraph 9.34 of the FOI Guidelines, an internal review officer should “*consider all issues raised by the person applying for internal review*”. In relation to your internal review request, I note that you make several derogatory and inappropriate remarks within that request including, for example, asserting that the original decision-maker is “*lying*”. Your request also contains offensive language which I will not repeat here. I ask that you refrain from using such language and making such remarks in future correspondence with the Court.

Your internal review request makes clear that you press the reasons contained in your original email of 28 September 2022 in which you contested the charges. In addition, your internal review request re-hashes the claims contained in your email of 28 September 2022 that there are no documents that fall within the scope of your FOI request. Arguably, the fact that you continue to pursue an FOI request seeking documents that you believe do not exist constitutes an abuse of process under the FOI Act. Nevertheless, I will address this issue in the reasons for my decision set out below.

### **Summary of internal review decision**

After reviewing the decision made on behalf of the Court 28 October 2022 and considering your FOI request afresh, I have decided to exercise my discretion under the FOI Act and *Freedom of Information (Charges) Regulations 2019 (FOI Charges Regulations)* to reduce the estimated charge for search retrieval time from \$7.50 to \$3.75, on the basis of an estimated search and retrieval time of fifteen (15) minutes.

In relation to the estimated decision-making charge of \$10.00 set out in the Court’s letter to you dated 28 September 2022, which is based on five and a half (5.5) hours of decision-making

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<sup>1</sup> Paragraph 4.3 of the FOI Guidelines.

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time, I have decided to affirm that charge, as I am satisfied that the charge is reasonable and appropriate in the circumstances and accords with the “*lowest reasonable cost*” objective.

Accordingly, I have decided that you are liable to pay an estimated charge of \$13.75, based on fifteen (15) minutes of search and retrieval time and five and a half (5.5) hours of decision-making time. A revised written notice of charge accompanies this letter.

#### **Material taken into account**

I have taken the following material into account in making my decision:

- your FOI request of 14 September 2022;
- the written notice of charge issued by the Court on 28 September 2022;
- your email to the Court of 28 September 2022 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 28 October 2022;
- your internal review request dated 28 October 2022;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the FOI Charges Regulations; and
- the FOI Guidelines.

#### **Reasons for internal review decision**

##### *Section 29(5)(a) – financial hardship*

While an agency has a general discretion to decide the question of whether a charge should be reduced or waived,<sup>2</sup> s 29(5) of the FOI Act stipulates that, in making that decision, a decision-maker must consider whether payment of the charge “*would cause financial hardship*” to the applicant and whether giving access to the document/s “*is in the general public interest or in the interest of a substantial section of the public*”.

Neither your email contesting the charges or your request for an internal review make any suggestion, or provide any information, regarding whether payment of the charge would cause financial hardship to you. For this reason, in the absence of any evidence indicating that financial hardship would be caused to you, I conclude that financial hardship is not at issue in the present circumstances.

##### *Section 29(5)(b) – public interest*

In relation to whether giving access to the documents requested would be “*in the general public interest or in the interest of a substantial section of the public*”, the original decision-maker considered this question in detail including quoting relevant paragraphs from the FOI Guidelines and case law, which I will not repeat here. As noted by the original decision-maker, the FOI Guidelines stipulate that an applicant should identify or specify the “*general public interest*” or the “*substantial section of the public*” that will benefit from disclosure of the documents requested.<sup>3</sup> In that regard, neither your email of 28 September 2022 contesting the charges or your email of 28 October 2022 requesting an internal review make any explicit

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<sup>2</sup> See paragraph 4.95 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.107 of the FOI Guidelines.

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contention regarding disclosure of the documents being “*in the general public interest or in the interest of a substantial section of the public*”; nor do your emails identify or specify the “*general public interest*” or the “*substantial section of the public*” that will benefit from disclosure. As the primary contention in your emails appears to be that there are no documents falling within the scope of your FOI request, as the original decision-maker pointed out, this may explain why you do not address the public interest test in your request for a review.

Given that you do not make any claim about disclosure of the documents being “*in the general public interest or in the interest of a substantial section of the public*”, I can only consider the public interest test in light of my own conclusions about the nature of your FOI request and the nature of the documents identified as falling within the scope of your FOI request. In this regard, I note that your FOI request seeks specific documents regarding the recruitment of a named individual into a National Judicial Registrar role at the Court. While your FOI request of 14 September 2022 makes reference to a public interest disclosure investigation conducted by the Australian Public Service Commission (APSC), as well as to a subsequent Commonwealth Ombudsman investigation, I note that there have not to date been any adverse findings concerning the recruitment of the named individual made by the APSC, Commonwealth Ombudsman or otherwise.

In such circumstances, I cannot see how granting access to documents concerning the recruitment of that named individual would be “*in the general public interest or in the interest of a substantial section of the public*”. Rather, I agree with the original decision-maker that the documents sought appear to be primarily of interest to you, the applicant, rather than being of broader interest to the general public or a substantial section of the public. I also agree with the original decision-maker that disclosure of the documents requested would not “*better inform the public*” about the Court’s decision-making concerning recruitment and would not “*add to the public record on an important and recurring aspect of agency decision making*”.<sup>4</sup>

Moreover, if, as you have suggested, there is a link between the recruitment of the named individual and the Commonwealth Ombudsman investigation that is presently on foot, the release of any documents concerning that individual’s recruitment may impede and/or prejudice that current Commonwealth Ombudsman investigation.

In addition, and having reviewed the documents identified as falling within the scope of your FOI request, at least one of the documents contains highly confidential and personal information concerning several individuals. As noted by the original decision-maker, documents containing personal information are less likely to be “*of general public interest or of interest to a substantial section of the public*” and, further, the release of such personal and confidential information may impede and/or prejudice the present Commonwealth Ombudsman investigation if, as you have suggested, there is a linkage.

Therefore, for all of the reasons discussed above, I conclude that providing access to the documents requested would primarily satisfy your own interest and curiosity and would not be “*in the general public interest or in the interest of a substantial section of the public*”. Consequently, I have formed the view that a reduction or waiver of the charges notified to you would not be appropriate on the basis of the public interest test contained in s 29(5) of the FOI Act.

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<sup>4</sup> See paragraph 4.109 of the FOI Guidelines.



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*Search and retrieval*

In addition to considering the matters stipulated in s 29(5) of the FOI Act, when determining contested charges agencies may also consider “*any other relevant matter*” and “*should give genuine consideration to any contention or submission made by the applicant as to why a charge should be reduced or not imposed*”.<sup>5</sup>

In the written notice of charge issued to you by the Court on 28 September 2022, the charge was estimated on the basis that search and retrieval of the documents requested would take thirty (30) minutes. In your email contesting the charges dated 28 September 2022, you asserted that it “*should not take 30 minutes to find documents that are plainly similar in their nature*” and concern the recruitment of one named individual. Instead, you claim that “*six minutes would be more than adequate time*”. You also state that “*cost of calculating and collecting the charge exceeds the reasonable cost to the agency of searching for the documents*” and that the search and retrieval charge is, therefore, inappropriate.

As explained by the original decision-maker, paragraph 4.27 of the FOI Guidelines sets out what is encompassed in search and retrieval of documents which, relevantly, includes time spent consulting relevant officers, time spent searching digital or hardcopy files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file. As outlined in detail in the charges decision made on 28 October 2022, agencies are required to take “*all reasonable steps*”<sup>6</sup> to locate the documents requested which, at a minimum, involves taking comprehensive steps to locate the documents requested, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister’s office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>7</sup>

Your FOI request, extracted earlier in this decision, contains four (4) very specific items, each of which required separate searches to be undertaken in order to ensure that the searches matched the criteria of each item. As outlined above, the Court is required to and, indeed, did undertake “*all reasonable steps*” to locate each of the documents requested. These steps included consulting relevant officers, searching digital files, as well as removing/saving relevant documents from files for each of the items. Based on the materials I have reviewed, including the records of searches conducted, I have concluded that, although thirty (30) minutes of search and retrieval time is not unreasonable, fifteen (15) minutes would be a more reasonable and proportionate amount of search and retrieval time and is more consistent with the “*lowest reasonable cost*” objective given the nature of the documents requested and their

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<sup>5</sup> Paragraph 4.96 of the FOI Guidelines.

<sup>6</sup> See s 24A of the FOI Act.

<sup>7</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

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location. I note that the Court maintains a “*high quality record system*”<sup>8</sup> that is well-organised and “*enables easy identification and location of documents*”.<sup>9</sup>

In relation to your claim that there are no documents that fall within the scope of your FOI request, the searches undertaken have specifically identified documents that fall within the scope of your request. Although it will ultimately be a matter for the decision-maker on your FOI request to determine whether the documents identified by those searches fall within the scope of your request (and whether access will be granted to those documents), I am satisfied, having reviewed the documents, that on their face the documents fall within the scope of your FOI request. For this reason, the contentions you have made concerning the non-existence of documents do not, in my view, affect the estimate or assessment of charges.

Having considered all of the relevant material, I am, therefore, satisfied, that it is appropriate to charge you for the search and retrieval of the documents requested, but that the search and retrieval time should be reduced from thirty (30) minutes to fifteen (15) minutes, which amounts to a charge of \$3.75.

#### *Charge for decision-making*

As explained by the original decision-maker, in accordance with Schedule 1 of the FOI Charges Regulations, the Court can charge for decision-making time after the first five (5) hours. This includes time spent examining documents, consulting other parties, making deletions, preparing reasons for decision and notifying of an interim or final decision.<sup>10</sup>

The written notice of charge issued to you by the Court and dated 28 September 2022 estimated that five and a half (5.5) hours of decision-making time would be required to respond to your FOI request. In the charges decision issued to you on behalf of the Court on 28 October 2022, the decision-maker determined that the estimate of five and a half (5.5) hours for decision-making was fair, accurate and correctly applied the “*lowest reasonable cost objective*”. In your email contesting the charges dated 28 September 2022, you claim that “*the estimate of 5.5 hours is simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act*”.

As stated earlier, having reviewed the specific documents that have been identified as falling within the scope of your FOI request, I am satisfied that, on their face, those documents fall within the scope of your FOI request. As explained by the original decision-maker, the estimated five and a half (5.5) hours of decision-making time includes the following tasks: examining the documents identified as falling within the scope of your request, consulting with individuals pursuant to s 27A of the FOI Act, considering any applicable exemptions under the FOI Act, drafting the written reasons for decision, and the preparation of any documents to be released (possibly with redactions). Given the nature of the specific documents identified as falling within the scope of your FOI request, I consider that five and a half (5.5) hours of decision-making time is not excessive or unreasonable but, rather, is an accurate and fair estimate of the time required to undertake the work and accords with the “*lowest reasonable cost*” objective.

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<sup>8</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>10</sup> Schedule 1 of the Charges Regulations and paragraph 4.31 of the FOI Guidelines.

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Paragraph 4.34 of the FOI Guidelines stipulates that it is an underlying assumption in calculating decision-making time that “*the officers involved in this process are skilled and efficient*” and have “*appropriate knowledge of the FOI Act and the scope of the exemption provisions*”. In that regard, I note that the relevant officers of the Court who handle FOI requests are highly skilled and have ample experience in relation to processing FOI requests, including in relation to the application of exemptions contained within the FOI Act.

For the avoidance of doubt, I also agree with the original decision-maker that there are no exceptions that apply to the imposition of charges in relation to your FOI request.

For the reasons outlined above, I therefore conclude that the estimate of five and a half (5.5) hours of decision-making time is fair and reasonable, but that the estimated search and retrieval time should be reduced from thirty (30) minutes to fifteen (15) minutes. In light of this reduction, a revised written notice of charge has been prepared for you and accompanies this letter. I note that the total charge estimated in that letter and payable by you is \$13.75.

### **Your review rights**

Within 60 days of my decision, you should either:

- pay the charge in the manner specified in the revised written notice of charge accompanying this letter and dated 28 November 2022;
- apply to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.<sup>11</sup>

If the Court does not receive a response within 60 days, your FOI request will be taken to have been withdrawn.<sup>12</sup>

In relation to applying to the Information Commissioner for review of the charge, an application for review must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to

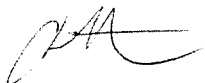
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<sup>11</sup> FOI Guideline 4.119

<sup>12</sup> FOI Guideline 4.120

the online complaints form which the OAIC recommends using for complaints, at:  
<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely

A handwritten signature in black ink, appearing to be 'C Hammerton Cole', written in a cursive style.

C Hammerton Cole  
Registrar



FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

28 November 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I refer to the decision issued on behalf of the Federal Court of Australia (**Court**) dated 18 November 2022 to reduce the charge imposed in respect to your freedom of information (**FOI**) request.

This letter is to advise you of the reduced charge the Court has determined that you are liable to pay and is notifying you of that charge as required by the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (**Charges Regulations**):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, and in accordance with the internal review decision made on behalf of the Court dated 18 November 2022, a revised estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>Searches conducted by staff of FOI team and staff of Human Resources team including searching inboxes, shared drives and electronic document &amp; records system.</li> </ul>	15 minutes	\$15.00 x 0.25 = \$3.75
Decision-making	<ul style="list-style-type: none"> <li>Examination of documents retrieved</li> <li>Deciding to grant or refuse access to documents requested</li> <li>Preparing reasons for decision</li> <li>Making a copy of document with any necessary deletions</li> </ul>	5.5 hours	\$20.00 x 0.5 = \$10.00 (no charge for first 5 hours)
<b>TOTAL REVISED ESTIMATED CHARGE</b>			<b>\$13.75</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the revised estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend on the relevant tasks in relation to documents you have requested.

*Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

*Right to contest charge*

As advised in the decision accompanying this revised charges letter, if you believe the charge has been wrongly assessed, or should be reduced or not imposed, you may apply for review by the Information Commissioner (IC). Please refer to the charges decision for further information on your review rights.

*Your response*

As advised in the decision accompanying this letter, we ask that you respond in writing within sixty (60) days of receiving this revised notice of charge by:

- paying the charge specified within this notice; or
- advising that you have sought IC review of the charges decision; or
- withdrawing your FOI request.

If the Court does not receive a response to this revised notice of charge in writing in the manner specified above within sixty (60) days, your FOI request will be taken to have been withdrawn.

Please be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer







Australian Government

Office of the Australian Information Commissioner

## Decision not to continue to undertake an IC review under s 54W(a) of the *Freedom of Information Act 1982*

IC review applicant	[REDACTED]
Respondent	Federal Court of Australia
Decision date	30 June 2023
OAIC reference number	[REDACTED]
Agency reference number	N/A

### Decision

1. I refer to the application made by [REDACTED] (the applicant) for Information Commissioner review (IC review) of a decision made by the Federal Court of Australia (the respondent) on 28 October 2022 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(a) of the FOI Act.
3. The Office of the Australian Information Commissioner (OAIC) cannot contact the IC review applicant after making reasonable attempts. As a delegate of the Information Commissioner, I have decided not to undertake a review of this IC review under s 54W(a)(iii) of the FOI Act. My reasons follow.

### Background

4. The key procedural steps in this IC review are set out at **Attachment A**.

### Discretion not to undertake an IC review

5. Under s 54W(a)(iii) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner cannot contact the IC review applicant after making reasonable attempts.

6. On the basis of the information presently before the Information Commissioner, I am satisfied that the review should be finalised under s 54W(a)(iii) of the FOI Act.
7. In deciding whether to exercise the discretion not to undertake a review, I have considered:
  - On 28 October 2022, the respondent made a decision that the lowest reasonable cost to the applicant was applied and the charge did not exceed the cost of processing the applicant's FOI request.
  - On 10 December 2022, the applicant applied for IC review of the respondent's original decision.
  - In March 2023, the OAIC was notified that the Right to Know (RTK) platform had disabled a number of RTK user accounts being used by FOI applicants who had made access requests to the respondent [and some other agencies] requesting similar subject matter, and that any associated IC review would also likely be impacted.
  - In light of this advice, on 3 May 2023 and 22 May 2023 the OAIC attempted to write to the applicant using the RTK email address provided in their application, and requested they confirm their current contact details.
  - In our correspondence of 22 May 2023, the OAIC notified the applicant that in the absence of a response by 5 June 2023, that the applicant's IC review would be finalised by a delegate of the Information Commissioner under s 54W(a)(iii) of the FOI Act. The OAIC has not received a response from the applicant to date.
  - The applicant has not provided a phone number or any other contact method by which the OAIC could attempt to contact the applicant.
8. In light of the above, it does not appear that reviewing this matter will promote the objects of the FOI Act, particularly noting that the applicant would be unable to participate in the IC review.
9. As a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review of the respondent's decision under s 54W(a)(iii) of the FOI Act.
10. I confirm that this IC review is now closed. Your review rights are set out below.

11. If either party would like to discuss this matter, please contact us by email at FOIDR@oaic.gov.au. In all correspondence, please quote [REDACTED]

Yours sincerely



**Tania Strathearn**  
Acting Director  
Freedom of information Branch

30 June 2023

# ATTACHMENT A

## Key procedural steps

Date	Events
03/09/2022	FOI request made to the respondent to reduce or not impose the charges: <ul style="list-style-type: none"> <li>• <i>The Court's estimated search and retrieval time of thirty (30) minutes is "inappropriate", and</i></li> <li>• <i>The Court's estimated decision-making time is "simply incorrect because whatever documents you claim to be looking at do not objectively fall within the scope of the documents I have requested under the FOI Act.,</i></li> </ul>
28/09/2022	Respondent notifies applicant of charges involved in processing of request
28/09/2022	Applicant contests imposition of charges
19/09/2022	Respondent affirms decision to impose charge of \$17.50
10/12/2022	IC review application received by the OAIC.
03/05/2023	The OAIC asked the applicant to confirm their current or preferable contact email address.
22/05/2023	The OAIC again asked the applicant to confirm their current or preferable contact email address. The OAIC also advised the applicant that their IC review may be finalised under s 54W(a)(iii) if no response was received by the specified date.

## Review rights

### Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

### Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

### Accessing your information

If you would like access to the information that we hold about you, please contact [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au). More information is available on the **Access our information**<sup>1</sup> page on our website.

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<sup>1</sup> [www.oaic.gov.au/about-us/access-our-information/](http://www.oaic.gov.au/about-us/access-our-information/).





FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

11 November 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 28 October 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>Searches conducted by staff of the People and Culture team of the electronic document &amp; records system.</li> </ul>	20 minutes	\$15.00 x 0.3 = \$4.50
Decision-making	<ul style="list-style-type: none"> <li>Examination of documents retrieved</li> <li>Consulting individuals in relation to personal information</li> <li>Deciding to grant or refuse access to documents requested</li> <li>Preparing reasons for decision</li> </ul>	6 hours	\$20.00 x 1 = \$20.00 (no charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$24.50</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.



In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

13 December 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
28 October 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 13 November 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 28 October 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 11 November 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 13 November 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given ‘genuine consideration’ to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 13 November 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- the Court’s estimated search and retrieval time of twenty (20) minutes is ‘inappropriate’;
- the Court’s estimated decision-making time is ‘unjustified’; and

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

- there is 'a broad public interest' in disclosure.

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the "lowest reasonable cost" objective<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29 of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$24.50 as set out in the letter from the Court to you dated 11 November 2022. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 11 November 2022. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 28 October 2022;
- the acknowledgement and charges letter from the Court dated 11 November 2022;
- your email dated 13 November 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J'' and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

email of 13 November 2022. I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.<sup>5</sup>

In accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 28 October 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

***Section 29(5)(a) – Financial hardship***

Your email dated 13 November 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in ‘the general public interest’ or in ‘the interests of a substantial section of the public’.<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should ‘identify or specify the “general public interest” or the “substantial section of the public” that will benefit from its disclosure (s 29(1)(f)(ii)).’<sup>8</sup> To determine this, I have considered both the ‘content of the documents’ to be released ‘and the context in which their public release would occur.’<sup>9</sup>

I note that in your email dated 13 November 2022 you suggest there is:

*a broad public interest in determining if Linda Potter, the wife of Wayne Potter, the CEO of Sydney Ferries, the Agency from which Darrin Moy came to the Federal Court of Australia under dubious circumstances, was given a jammy job, without the job being notified to the Australian community, with a salary package above the normal pay band. If the allegations are true, then Linda Potter would be the beneficiary of someone's patronage in the Australian Public Service. Patronage in the Australian Public Service is against the law. The Australian community deserves to know if members of the management of the Federal Court have broken the law and have handed out “jobs to mates”.*

While I make no comment on the contentions made in your above statement, I accept that there is a public interest in the integrity of public sector recruitment processes. However, that is different from specific personnel records that contain a large amount of personal information about third parties. I do not accept that disclosure, given the nature of these type of document/s, is in the ‘general public interest’ or such that would benefit a ‘substantial section of the public’.

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<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

I am not convinced that there is a sufficiently strong demonstrable link between disclosure of these particular document/s and the advancement of a public interest.

The FOI Act does not define what constitutes disclosure being in the 'general public interest' or 'in the interests of a substantial section of the public'.<sup>10</sup> The concept of 'public interest' is thought of as 'a concept of wide import that cannot be exhaustively defined.'<sup>11</sup> It is recommended that an agency should direct 'its attention to the advancement or the interest or welfare of the public' which is dependent "on each particular set of circumstances.'<sup>12</sup> It is also considered that 'the public interest is not a static concept confined and defined by strict reference points.'<sup>13</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases 'in the general public interest' and 'in the interests of a substantial section of the public'. The 'question is whether giving access to the document, and the consequences of giving that access, are in the public interest.'<sup>14</sup> I have carefully considered this point and at present I do not consider providing access to document/s of the kind you requested could be of benefit to the public, or a substantial section of it. Rather, it is likely to compromise the individual right to privacy as well as undermine the general public's confidence in the ability of the Court to respect the privacy and confidentiality of those who trust their personal information to it.

On the face of your FOI request dated 28 October 2022, it would appear you are seeking documents concerning the appointment of a specifically-named individual to an Assistant Director, Human Resources role. I do not consider that the document/s you requested could be 'reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.'<sup>15</sup> The types of documents you requested are related to an individual rather than a recruitment process. Further, given the types of personnel records you have requested, I consider that any 'public discussion or analysis' of any individual's personnel records would be not only undesirable but may be detrimental and prejudicial to the individual involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where '... the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public'. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act. That is, both your FOI request dated 28 October 2022 and your email dated 13 November 2022 include personal points of view and then target a specifically named individual.

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<sup>10</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>11</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>13</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>14</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

<sup>15</sup> Paragraph 4.110 of the FOI Guidelines.

Another important factor is that the document/s you have requested are likely to contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>16</sup>

In this regard, documents containing personal information are less likely to be ‘of general public interest or of interest to a substantial section of the public’. At this preliminary stage, I fail to see how the release of such confidential and/or sensitive information could be in the ‘general public interest’ or such that would benefit a ‘substantial section of the public’.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of ‘public interest’ in respect of contesting a charge. Again, the FOI Guidelines point to the fact that ‘the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.’ Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 13 November 2022, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- *The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*
- *The document will add to the public record on an important and recurring aspect of agency decision making.*<sup>17</sup> [footnotes omitted]

I do not consider that these document/s would ‘better inform the public’ about the decision making process with respect to recruitment exercises within the Court. I draw this conclusion primarily based on the nature of the document/s requested (that is, personnel documents). Further, there is nothing to suggest that any ‘important and recurring aspect of agency decision making’ will be identified.<sup>18</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in section 11A(5) of the FOI Act.

Without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request ‘are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.’<sup>19</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

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<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>18</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>19</sup> Paragraph 4.99 of the FOI Guidelines.

### *Other considerations*

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>20</sup> These matters include any specific contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>21</sup>

On this basis, I have given consideration to the specific contentions made in your email of 13 November 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

### *Charge for search and retrieval time*

In the letter from the Court dated 11 November 2022, it was estimated that twenty (20) minutes was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request has two (2) discrete paragraphs. Each paragraph must be thoroughly considered when conducting searches for the document/s. Various search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the estimation of twenty (20) minutes was entirely reasonable in light of your FOI request. The Court maintains 'high quality'<sup>22</sup> and 'well-organised'<sup>23</sup> records that are checked thoroughly upon the making of FOI requests. I appreciate that you, as the applicant, may consider your request to be 'very specific' and that 'all of the documents requested would reasonably be expected to be located in a single location', that being the 'APS employee file.' However, the Court is committed to its obligation to take 'all reasonable'<sup>24</sup> and 'demonstrable'<sup>25</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

The Court has an obligation to take 'all reasonable steps' to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by*

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<sup>20</sup> Paragraph 4.96 of the FOI Guidelines, *J" and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>21</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>24</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>25</sup> Paragraph 3.86 of the FOI Guidelines.



*reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.*<sup>26</sup>

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.*<sup>27</sup> *At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>28</sup>

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to paragraphs (a) and (b) of your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of each of the two (2) paragraphs of your request are found.

I consider the estimation of twenty (20) minutes was based on a 'common sense interpretation of the terms' of your request.<sup>29</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

On the basis of the Court's obligation to take 'all reasonable'<sup>30</sup> and 'demonstrable'<sup>31</sup> steps to find the document/s, and despite the contentions made in your email of 13 November 2022, I have decided that twenty (20) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I am satisfied that any of the Court's FOI Officers would spend the estimated time of six (6) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the document/s returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released document/s (with or without redactions).

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<sup>26</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>27</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

<sup>28</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>29</sup> Paragraph 3.89 of the FOI Guidelines.

<sup>30</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>31</sup> Paragraph 3.86 of the FOI Guidelines.

I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the charge 'fairly reflects the work involved in providing access to the documents'<sup>32</sup> the subject of your FOI request.

I note that you, as the applicant, consider the charge for decision making 'is unjustified'. However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by 'previous experience dealing with FOI requests of similar nature'<sup>33</sup>. Furthermore, I am confident that the Court has correctly applied the guiding principle of the "lowest reasonable cost" objective'.<sup>34</sup>

It is important to note that in the letter from the Court dated 11 November 2022, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the estimated charge was 'as fair and accurate as possible' and was not "set an unreasonably high estimate which may hinder or deter"<sup>35</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 13 November 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>36</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

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<sup>32</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>33</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>34</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>35</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>36</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



**B Henderson  
FOI Officer**





## Decision not to continue to undertake an IC review under s 54W(a) of the *Freedom of Information Act 1982*

IC review applicant	[REDACTED]
Respondent	Federal Court of Australia
Decision date	19 June 2023
OAIC reference number	[REDACTED]
Agency reference number	N/A

### Decision

1. I refer to the application made by [REDACTED] (the applicant) for Information Commissioner review (IC review) of a deemed charges decision made by the Federal Court of Australia (the respondent) on 12 December 2022 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(a) of the FOI Act.
3. The Office of the Australian Information Commissioner (OAIC) cannot contact the IC review applicant after making reasonable attempts. As a delegate of the Information Commissioner, I have decided not to undertake a review of this IC review under s 54W(a)(iii) of the FOI Act. My reasons follow.

### Background

4. The key procedural steps in this IC review are set out at **Attachment A**.

### Discretion not to undertake an IC review

5. Under s 54W(a)(iii) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner cannot contact the IC review applicant after making reasonable attempts.
6. As outlined in the Commissioner's IC review procedure direction for applicants:

An applicant or nominated representative must advise the OAIC if there are any changes to their contact details as soon as it is possible to do so. The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).<sup>1</sup>

7. On the basis of the information presently before the Information Commissioner, I am satisfied that the review should be finalised under s 54W(a)(iii) of the FOI Act.
8. In deciding whether to exercise the discretion not to undertake a review, I have considered:
  - On 11 November 2022, the respondent made a preliminary assessment and determined the applicant is liable to pay a charge applicable to the applicant's FOI request.
  - On 12 November 2022, the applicant contested the proposed charge.
  - On 12 December 2022, the respondent was deemed to have made a decision that the applicant pay the charge set out in the preliminary assessment under s 29(7) of the FOI Act.
  - In March 2023, the OAIC was notified that the Right to Know (RTK) platform had disabled a number of RTK user accounts being used by FOI applicants who had made access requests to the respondent [and some other agencies] requesting similar subject matter, and that any associated IC review would also likely be impacted.
  - In light of this advice, on 3 May 2023 and 22 May 2023 the OAIC attempted to write to the applicant using the RTK email address provided in their application, and requested they confirm their current contact details.
  - In our correspondence of 22 May 2023, the OAIC notified the applicant that in the absence of a response by 5 June 2023, that the applicant's IC review would be finalised by a delegate of the Information Commissioner under s 54W(a)(iii) of the FOI Act. The OAIC has not received a response from the applicant to date.
  - The applicant has not provided a phone number or any other contact method by which the OAIC could attempt to contact the applicant.

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<sup>1</sup> [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#) | OAIC at [1.21].

9. In light of the above, it does not appear that reviewing this matter will promote the objects of the FOI Act, particularly noting that the applicant would be unable to participate in the IC review.
10. As a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review of the respondent's decision under s 54W(a)(iii) of the FOI Act.
11. I confirm that this IC review is now closed. Your review rights are set out below.
12. If either party would like to discuss this matter, please contact us by email at FOIDR@oaic.gov.au. In all correspondence, please quote [REDACTED]

Yours sincerely



**Tania Strathearn**  
Acting Director  
Freedom of information Branch

19 June 2023

# ATTACHMENT A

## Key procedural steps

Date	Events
28/10/2022	FOI request made to the respondent for access to: <ul style="list-style-type: none"><li>a) <i>The written document giving effect to the contract of employment between the Commonwealth and Linda Potter, the wife of Wayne Potter, the general manager at Sydney Ferries; and</i></li><li>b) <i>The independent flexibility arrangement Linda Potter signed.</i></li></ul>
11/11/2022	The respondent made a preliminary assessment and determined the applicant is liable to pay a charge applicable to the FOI request.
11/11/2022	The applicant contested the proposed charge.
26/12/2022	IC review application received by the OAIC.
3/05/2022	The OAIC asked the applicant to confirm their current or preferable contact email address.
22/05/2022	The OAIC again asked the applicant to confirm their current or preferable contact email address. The OAIC also advised the applicant that their IC review may be finalised under s 54W(a)(iii) if no response was received by the specified date.



## Review rights

### Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

### Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

### Accessing your information

If you would like access to the information that we hold about you, please contact [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au). More information is available on the **Access our information**<sup>2</sup> page on our website.

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<sup>2</sup> [www.oaic.gov.au/about-us/access-our-information/](http://www.oaic.gov.au/about-us/access-our-information/).





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

28 November 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 14 November 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982 (Cth) (FOI Act)*.

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019 (Charges Regulations)*:

Item	Applicable charge
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

<b>Item</b>	<b>Description</b>	<b>Estimated hours</b>	<b>Estimated charge</b>
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches of the electronic document &amp; records system conducted by staff of the FOI team and senior staff of the Court.</li> </ul>	15 minutes	\$15.00 x 0.25 = \$3.75
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	5.25 hours	\$20.00 x 0.25 = \$5.00 (No charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$8.75</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

*Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

*Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

30 December 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
14 November 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 30 November 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 14 November 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 28 November 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 30 November 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given 'genuine consideration' to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 30 November 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- the Court's estimated search and retrieval time of fifteen (15) minutes is 'inappropriate'; and
- the Court's estimated decision-making time is 'unjustifiable'.

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

## **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

## **Decision**

I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the “lowest reasonable cost” objective<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29 of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$8.75 as set out in the letter from the Court to you dated 28 November 2022. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 28 November 2022. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 14 November 2022;
- the acknowledgement and charges letter from the Court dated 28 November 2022;
- your email dated 30 November 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

## **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your email of 30 November 2022. I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.<sup>5</sup>

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.



In accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 14 November 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

***Section 29(5)(a) – Financial hardship***

Your email dated 30 November 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in ‘the general public interest’ or in ‘the interests of a substantial section of the public’.<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should ‘identify or specify the “general public interest” or the “substantial section of the public” that will benefit from its disclosure (s 29(1)(f)(ii)).’<sup>8</sup> To determine this, I have considered both the ‘content of the documents’ to be released ‘and the context in which their public release would occur.’<sup>9</sup>

I note that your email dated 30 November 2022 does not identify or specify either the ‘general public interest’ or the ‘substantial section of the public’<sup>10</sup> that will benefit from disclosure of any document/s. Nor does the email make any specific contentions about disclosure being in the public interest.

In such circumstances, and in the absence of you identifying the ‘general public interest’ or ‘substantial section of the public’ that would benefit from disclosure, I am not convinced that there currently exists a demonstrable link between disclosure of any document/s and the advancement of a public interest. I can find nothing in your email dated 30 November 2022 that would ‘draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.’<sup>11</sup> While it is not a requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

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<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

The FOI Act does not define what constitutes disclosure being in the ‘general public interest’ or ‘in the interests of a substantial section of the public’.<sup>13</sup> The concept of ‘public interest’ is thought of as ‘a concept of wide import that cannot be exhaustively defined.’<sup>14</sup> It is recommended that an agency should direct ‘its attention to the advancement or the interest or welfare of the public’ which is dependent “on each particular set of circumstances.”<sup>15</sup> It is also considered that ‘the public interest is not a static concept confined and defined by strict reference points.’<sup>16</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases ‘in the general public interest’ and ‘in the interests of a substantial section of the public’. The ‘question is whether giving access to the document, and the consequences of giving that access, are in the public interest.’<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request dated 30 November 2022, it would appear you are seeking documents concerning specific email communication between senior court employees. I do not consider that the document/s you requested could be ‘reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.’<sup>18</sup> The type of document/s you requested are related to communications between senior court employees about a recruitment process. Further, your FOI request dated 14 November 2022 indicates that you already have possession of the document/s. Given the type of document/s you have requested, and the fact that you appear to have possession of the document/s, I consider that any ‘public discussion or analysis’ of any email communication would be not only undesirable but may be detrimental and prejudicial to the individuals involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where ‘... the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public’. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act. That is, both your FOI request dated 14 November 2022 and your email dated 30 November 2022 includes personal points of view and targets specifically named individuals.

Another important factor is that the document/s you have requested are likely to contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>19</sup>

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<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.

<sup>19</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

In this regard, documents containing personal information are less likely to be ‘of general public interest or of interest to a substantial section of the public’. At this preliminary stage, I fail to see how the release of such confidential and/or sensitive information could be in the ‘general public interest’ or such that would benefit a ‘substantial section of the public’.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of ‘public interest’ in respect of contesting a charge. Again, the FOI Guidelines point to the fact that ‘the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.’ Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 30 November 2022, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- *The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*
- *The document will add to the public record on an important and recurring aspect of agency decision making.*<sup>20</sup> [footnotes omitted]

I do not consider that these document/s would ‘better inform the public’ about the decision making process with respect to recruitment exercises within the Court. I draw this conclusion primarily based on the nature of the document/s requested (that is, email correspondence about a recruitment). Further, there is nothing to suggest that any ‘important and recurring aspect of agency decision making’ will be identified.<sup>21</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in section 11A(5) of the FOI Act.

Without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request ‘are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.’<sup>22</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

### ***Other considerations***

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>23</sup> These matters include any specific

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<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>21</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.99 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.96 of the FOI Guidelines, *J'' and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>24</sup>

On this basis, I have given consideration to the specific contentions made in your email of 30 November 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

*Charge for search and retrieval time*

In the letter from the Court dated 28 November 2022, it was estimated that fifteen (15) minutes was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request was for document/s that you appear to have in your possession. Regardless of the level of specificity of your request, each FOI request must be thoroughly considered when conducting searches for the document/s. Various search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the estimation of fifteen (15) minutes was entirely reasonable in light of your FOI request. The Court maintains 'high quality'<sup>25</sup> and 'well-organised'<sup>26</sup> records that are checked thoroughly upon the making of FOI requests. I appreciate that you, as the applicant, may consider your request to be 'very specific' and that you 'identified the person who sent the email', 'the person to whom the email was sent', and the date, title and classification of the email. However, the Court is committed to its obligation to take 'all reasonable'<sup>27</sup> and 'demonstrable'<sup>28</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

The Court has an obligation to take 'all reasonable steps' to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.<sup>29</sup>*

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business*

<sup>24</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

<sup>25</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>26</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>27</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>29</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

*practices in the agency's operating environment or the minister's office.*<sup>30</sup> At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>31</sup>

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of your request are found.

I consider the estimation of fifteen (15) minutes was based on a 'common sense interpretation of the terms' of your request.<sup>32</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

On the basis of the Court's obligation to take 'all reasonable'<sup>33</sup> and 'demonstrable'<sup>34</sup> steps to find the document/s, and despite the contentions made in your email of 30 November 2022, I have decided that fifteen (15) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I am satisfied that any of the Court's FOI Officers would spend the estimated time of five and a quarter (5¼) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the document/s returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released document/s (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to

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<sup>30</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

<sup>31</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>32</sup> Paragraph 3.89 of the FOI Guidelines.

<sup>33</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>34</sup> Paragraph 3.86 of the FOI Guidelines.

consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the charge 'fairly reflects the work involved in providing access to the documents'<sup>35</sup> the subject of your FOI request.

I note that you, as the applicant, consider the charge for decision making 'is unjustifiable' and 'has been calculated with the cynical motive of erecting artificial hurdles to access by attempting to extract payment for access to a one page document.' However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by 'previous experience dealing with FOI requests of similar nature'<sup>36</sup>. Furthermore, I am confident that the Court has correctly applied the guiding principle of the "lowest reasonable cost" objective'.<sup>37</sup>

It is important to note that in the letter from the Court dated 28 November 2022, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the estimated charge was 'as fair and accurate as possible' and was not 'set an unreasonably high estimate which may hinder or deter'<sup>38</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 30 November 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>39</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

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<sup>35</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>36</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>38</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>39</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

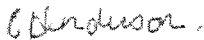
online: <https://forms.business.gov.au/aba/oaic/foi-review/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



**B Henderson  
FOI Officer**







**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

30 January 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for an internal review under the *Freedom of Information Act 1982***

I refer to your email dated 31 December 2022 sent to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Federal Court of Australia (**Court**). In that email you requested an internal review of the decision made on 30 December 2022 that you are liable to pay a charge in respect of your request for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

**Authorised decision-maker**

I am authorised under s 23 of the FOI Act to make decisions on behalf of the Court in relation to your internal review request.

In conducting the internal review, I am required to review the original FOI decision and make a fresh decision on behalf of the Court.<sup>1</sup> I acknowledge that an internal review is a merit review process and that I am required ‘to bring a fresh, independent and impartial mind to the review’.<sup>2</sup>

**Background**

On 14 November 2022, you requested access to documents under the FOI Act. Specifically, you requested the following:

*Under the FOI Act, I request access to the unclassified email that Andrea Jarratt sent to Darrin Moy. [sic] Sia Lagos and David Pringle on 18 April 2018, with the title “Recruitment – Legal”.*

On 28 November 2022, the Court issued a written notice to you, in compliance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request.

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<sup>1</sup> Section 54C of the FOI Act.

<sup>2</sup> See paragraphs 1.28, 4.117 and 9.34 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

That charge was estimated by the Court to be \$8.75, based on fifteen (15) minutes of search and retrieval time, and five and a quarter (5.25) hours of estimated decision-making time.

On 30 November 2022, you sent an email to the Court contesting the charge estimated in the written notice to you of 28 November 2022 and provided reasons as to why the charge should be reduced or not imposed.

On 30 December 2022, the Court made a decision to reject your contentions and to affirm the total estimated charge of \$8.75 as set out in the letter from the Court to you dated 28 November 2022.

On 31 December 2022, you sent an email to the Court seeking an internal review under the FOI Act of the Court's decision dated 30 December 2022 and provided reasons for the internal review.

### **Material taken into account**

I have considered the following material in making my decision on internal review:

- your FOI request of 14 November 2022;
- the written notice of charge issued by the Court on 28 November 2022;
- your email to the Court of 30 November 2022 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 30 December 2022;
- your internal review request dated 31 December 2022;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the *Freedom of Information (Charges) Regulations 2019 (FOI Charges Regulations)*; and
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**).

### **Decision on internal review**

I am satisfied that the charges estimated in the written notice of charge issued by the Court on 28 November 2022 are reasonable and appropriate in the circumstances. Accordingly, I have determined that you are liable to pay the estimated charge of \$8.75. The charge is based on fifteen (15) minutes of search and retrieval time, and five and a quarter (5.25) hours of estimated decision-making time.

In making my decision, I have taken into account the following factors that are required to be considered under s 29(5) of the FOI Act:

- whether payment of the charge, or part of it, would cause financial hardship to you; and
- 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 am also permitted to, and have considered, '*other relevant matters*' in making my decision on the internal review.<sup>3</sup> In particular, I have given '*genuine consideration*' to the specific

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<sup>3</sup> Paragraphs 4.96 and 9.34 of the FOI Guidelines.

contentions you have made as to why the charge should be reduced or not imposed,<sup>4</sup> and have considered whether disclosure of the documents ‘*will advance the objects of the FOI Act*’, even though you have not expressly framed your contention on that basis.<sup>5</sup>

## **Reasons**

The decision issued by the Court regarding the contested charges on 30 December 2022 included extracts from relevant sections of the FOI Act, paragraphs in the FOI Guidelines, and case law. I will not repeat that text in providing my reasons in this internal review.

### ***Financial hardship – s 29(5)(a) of the FOI Act***

Neither your email to the Court of 30 November 2022 contesting the estimated charges, nor your internal review request dated 31 December 2022, make any suggestion nor provide any evidence that payment of the charge, or part of it, would cause you financial hardship. In the absence of any evidence indicating that financial hardship would be caused to you if you paid the charge in part or in full,<sup>6</sup> I have reached the same conclusion as the original decision-maker that financial hardship is not at issue in the present circumstances.

### ***Public interest – s 29(5)(b) of the FOI Act***

The FOI Guidelines provide that an applicant relying on s 29(5)(b) of the FOI Act should identify or specify the ‘*general public interest*’ or the ‘*substantial section of the public*’ that will benefit from disclosure of the documents requested if seeking to have the charge reduced or not imposed (s 29(1)(f)(ii) of the FOI Act).<sup>7</sup>

The original decision-maker considered the public interest test under s 29(5)(b) of the FOI Act in detail and decided to refuse your request for a reduction and/or waiver of the estimated charge on the basis that the imposition of the charge is appropriate. The original decision-maker noted that your email to the Court of 30 November 2022 contesting the estimated charge did not identify or specify the ‘*general public interest*’ or the ‘*substantial section of the public*’ that will benefit from disclosure of the documents requested, nor did your email make any specific contentions about disclosure being in the public interest. Your request for internal review dated 31 December 2022 did not address these points either.

Notwithstanding the above, I have considered whether disclosure of the document requested would advance the objects of the FOI Act, namely, by ‘*promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government’s activities*’.<sup>8</sup> Paragraph 4.109 of the FOI Guidelines illustrates examples in which giving the giving of access may be in the general public interest or in the interest of a substantial section of the public. I agree with the original decision-maker that only two (2) of those examples appear to be relevant to your request, but even then, there is nothing to suggest that disclosure would ‘*better inform the public as to why or how [an agency] decision was made*’, or that an ‘*important and recurring aspect of agency decision*’ will be identified. The document you have requested is an email that was sent between senior Court employees in relation to a

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<sup>4</sup> Paragraph 4.96 of the FOI Guidelines.

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Paragraph 4.103 of the FOI Guidelines.

<sup>7</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>8</sup> Section 3 of the FOI Act; Paragraph 4.97 of the FOI Guidelines.

recruitment process. Some of the information in the document ‘*is already publicly available*’<sup>9</sup> because you yourself have published that information online by including large excerpts of the document in your FOI request and making your request publicly through the Right to Know website.

For these reasons, it is difficult to see that any ‘*public benefit may flow from the release of the documents*’.<sup>10</sup> I have therefore formed the view that a reduction or waiver of the charges notified to you would not be appropriate on the basis of the public interest test contained in s 29(5)(b) of the FOI Act.

### ***Other considerations***

The ‘*other relevant matters*’<sup>11</sup> I have considered in making my decision on internal review include the specific contentions you have made as to why the charge should be reduced or not imposed. In your email to the Court dated 30 November 2022, you contested the estimated charges both with respect to search and retrieval time and decision-making time. In your email to the Court dated 31 December 2022, you contested the estimated charges only with respect to decision-making time. Your email of 31 December 2022 also makes remarks that are inappropriate.<sup>12</sup>

### **Charge for search and retrieval time**

Under the FOI Charges Regulations, the Court may charge for time spent ‘*searching for, or retrieving, the document*’.<sup>13</sup> Paragraph 4.27 of the FOI Guidelines provides that this encompasses time spent consulting relevant officers, searching digital or hardcopy file indexes and files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file.

In conducting searches for documents, s 24A of the FOI Act imposes an obligation on agencies to take ‘*all reasonable steps*’ to locate the documents requested. While the FOI Act is silent on what constitutes ‘*all reasonable steps*’, agencies are generally required to undertake ‘*comprehensive*’ searches in order to fulfil that obligation.<sup>14</sup>

The written notice of charge issued to you by the Court on 28 November 2022 estimated that fifteen (15) minutes was required to search and retrieve any documents that fell within the scope of your request. In the charges decision issued by the Court on 30 December 2022, the decision-maker confirmed that the estimate of fifteen (15) minutes for search and retrieval time was appropriate and reasonable.

You have contested the estimated charge for search and retrieval time on the basis that it is ‘*inappropriate*’. You also provided your own, lower-estimate of time. You asserted that your lower-estimated charge ‘*would be more than adequate*’ given the specific parameters of your

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<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Paragraph 4.107 of the FOI Guidelines, citing *Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [21].

<sup>11</sup> Paragraphs 4.96 and 9.34 of the FOI Guidelines.

<sup>12</sup> Such remarks include: ‘*the Federal Court has a poor track record with its human resources decisions. If it doesn’t involve allegations of the irregular recruitment of handfuls of the Court’s registrars... then it involves sacking people for wanting to return part time from maternity leave...*’.

<sup>13</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 1.

<sup>14</sup> Paragraphs 3.88 and 3.89 of the FOI Guidelines.

request and the requirement that agencies have ‘*sound record keeping*’. You also asserted that the Court’s cost of calculating and collecting the charge for search and retrieval ‘*exceeds the reasonable cost to the agency of searching for the documents*’.

I have considered the terms of your FOI request dated 14 November 2022, the records of searches conducted, the notice of charge issued to you on 28 November 2022, the contentions made in your email dated 30 November 2022, and the charges decision made on behalf of the Court on 30 December 2022. I agree with the original decision-maker that fifteen (15) minutes is a reasonable and appropriate amount of time for the search and retrieval of the documents requested and that the charge is consistent with the ‘*lowest reasonable cost*’ principle.

The Court’s fifteen (15) minute estimate for search and retrieval time accounts for the amount of time to consider your request, consult the relevant officers to determine if the document requested exists, and for those persons to conduct searches of the relevant files and then extract the relevant document. I am satisfied that fifteen (15) minutes for search and retrieval time is not an unreasonable amount of time for the search and retrieval of document the subject of your FOI request having regard to the obligation to take ‘*all reasonable steps*’ to locate the document requested.

#### Charge for decision-making time

Under the FOI Charges Regulations, the Court may charge for time spent ‘*in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including time spent:*

- (a) *in examining the document; or*
- (b) *in consultation with any person or body; or*
- (c) *in making a copy with deletions; or*
- (d) *in notifying any interim or final decision on the request*.<sup>15</sup>

Agencies can only impose these charges for each hour after the first five (5) hours.<sup>16</sup>

The written notice of charge issued by the Court on 28 November 2022 estimated the decision-making time in relation to your request at five and a quarter (5.25) hours. In the charges decision issued by the Court on 30 December 2022, the decision-maker determined that five and a quarter (5.25) hours of decision-making time was appropriate and reasonable, informed by previous experience dealing with FOI requests of similar nature, and that the Court correctly applied the ‘*lowest reasonable cost objective*’ stated in the objects of the FOI Act.<sup>17</sup>

In your email to the Court of 30 November 2022 contesting the estimated charges, you contend that the estimated decision-making time is ‘*unjustifiable*’. The basis for this contention is because you ‘*believe that the estimated time to process the request has been calculated with the cynical motive of erecting artificial hurdles to access by attempting to extract payment for access to a one page document*’. The contention in your email is made by reference to an FOI request, which you claim to have made, for documents relating to one Mrs Potter. However, the documents relating to Mrs Potter were requested under another name on the Right to Know

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<sup>15</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4.

<sup>16</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4; paragraph 4.32 of the FOI Guidelines.

<sup>17</sup> Section 3(4) of the FOI Act; paragraph 4.3 of the FOI Guidelines.

website,<sup>18</sup> and are not the documents the subject of the charges now under review. I have taken your reference to the FOI request relating to Mrs Potter to be an inadvertent error, and have considered the contentions made in your email of 30 November 2022 in light of the FOI request you made to the Court on 14 November 2022. For the avoidance of doubt, your FOI request dated 14 November 2022 was a request for the following documents:

*Under the FOI Act, I request access to the unclassified email that Andrea Jarratt sent to Darrin Moy. [sic] Sia Lagos and David Pringle on 18 April 2018, with the title "Recruitment – Legal".*

In addition to the contentions made in your email to the Court of 30 November 2022 contesting the estimated charges, your internal review request to the Court of 31 December 2022 contends that the reasons given by the original decision-maker ‘*go beyond the scope*’ of your request. You made this contention including because, in your view, consultation ‘*is unlikely to be necessary*’ for documents ‘*on which a staff member’s name appears simply because of the position they hold*’. It is implied in your email that any time accounted for by the Court to consult third parties under s 27A of the FOI Act for the document you have requested should not be included in the estimated decision-making time.

Having regard to all of the material before me, I am satisfied that the estimated five and a quarter (5.25) hours for decision-making time is reasonable and appropriate. In my view, it is clear that the original decision-maker has given ‘*genuine consideration*’ to the contentions you have made as to why the charge should be reduced or not imposed.<sup>19</sup> Your contentions about the Court’s ‘*cynical motive*’ to erect ‘*artificial hurdles*’ to delay or discourage your access to documents are not supported by any evidence. Despite your views that the Court is unlawfully imposing a charge to delay or discourage your access to documents, the Court is entitled to impose charges for FOI requests under the FOI Act, FOI Charges Regulations and FOI Guidelines.

With respect to your particular contention that consultation time should not be factored into the estimated decision-making time because of the ‘*staff member’s name[s]*’ contained in the document, I note that the document you have requested also contains other personal information of staff, in particular, a direct work email address. In circumstances where your FOI request has been made publicly through the Right to Know website, such that any disclosure to you of personal information in the document would also be disclosure to the world at large, I consider that the public servant whose direct work email address appears in the document might reasonably wish to make contentions against disclosure. I therefore agree with the original decision-maker that consultation time should be factored into the estimated decision-making time.

In addition to consultation time, the estimated charge for decision-making time takes into account the decision-maker’s examination of the documents found in response to your FOI request, the application of any exemptions and/or conditional exemptions to the documents, making any copy of the documents with the relevant deletions, and notifying you of the decision on your request. There is skill, nuance, time and consideration involved in completing these tasks in order to adequately respond to FOI requests made to the Court. In calculating the estimate of charges for decision-making time, the Court took into account its previous experience dealing with FOI requests of similar nature. I am satisfied that the estimated five and a quarter (5.25) hours for decision-making time is reasonable and appropriate.

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<sup>18</sup> See the FOI request made to the Court on 28 October 2022 under the name ‘*Christine*’: [https://www.righttoknow.org.au/request/employment\\_documents\\_relating\\_to#incoming-28828](https://www.righttoknow.org.au/request/employment_documents_relating_to#incoming-28828).

<sup>19</sup> Paragraph 4.96 of the FOI Guidelines.

### Exceptions to imposition of charges

Neither your email to the Court of 30 November 2022 contesting the estimated charges, nor your internal review request dated 31 December 2022, identified any of the exceptions outlined in paragraphs 4.42 to 4.50 of the FOI Guidelines.<sup>20</sup> I therefore agree with the original decision-maker that none of these exceptions apply to your FOI request, and conclude that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

For all of the above reasons, I have determined that fifteen (15) minutes of search and retrieval time and five and a quarter (5.25) hours for decision-making time are both reasonable and appropriate in respect of your request for documents under the FOI Act. I have therefore determined that you are liable to pay the charge set out in the written notice of charge issued to you by the Court on 28 November 2022.

### **Your Review Rights**

Within 60 days of my decision, you should either:

- pay the charge or deposit in the manner specified in the revised written notice of charge issued to you on 28 November 2022;
- apply in writing to the Australian Information Commissioner for review of the charge;
- withdraw your FOI request.<sup>21</sup>

If the Court does not receive a response within 60 days, your FOI request will be taken to have been withdrawn.<sup>22</sup>

More information about Information Commissioner review, including the procedure for applying for that review, is available on the Office of the Australian Information Commissioner (OAIC) website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



R Muscat  
**Registrar**

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<sup>20</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

<sup>21</sup> Paragraph 4.119 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.120 of the FOI Guidelines.







**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

29 November 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 15 November 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

<b>Item</b>	<b>Applicable charge</b>
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

<b>Item</b>	<b>Description</b>	<b>Estimated hours</b>	<b>Estimated charge</b>
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches of the electronic document &amp; records system conducted by staff of the FOI team and senior staff of the Court.</li> </ul>	15 minutes	\$15.00 x 0.25 = \$3.75
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	5.25 hours	\$20.00 x 0.25 = \$5.00 (No charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$8.75</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

30 December 2022

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
15 November 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 30 November 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 15 November 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 29 November 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 30 November 2022 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given 'genuine consideration' to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 30 November 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- the Court's estimated search and retrieval time of fifteen (15) minutes is 'inappropriate'; and
- the Court's estimated decision-making time is 'unjustifiable'.

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

## **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

## **Decision**

I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the “lowest reasonable cost” objective<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29 of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$8.75 as set out in the letter from the Court to you dated 29 November 2022. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 29 November 2022. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 15 November 2022;
- the acknowledgement and charges letter from the Court dated 29 November 2022;
- your email dated 30 November 2022 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

## **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your email of 30 November 2022. I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.<sup>5</sup>

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J'' and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

In accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 15 November 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

***Section 29(5)(a) – Financial hardship***

Your email dated 30 November 2022 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in ‘the general public interest’ or in ‘the interests of a substantial section of the public’.<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should ‘identify or specify the “general public interest” or the “substantial section of the public” that will benefit from its disclosure (s 29(1)(f)(ii)).’<sup>8</sup> To determine this, I have considered both the ‘content of the documents’ to be released ‘and the context in which their public release would occur.’<sup>9</sup>

I note that your email dated 30 November 2022 does not identify or specify either the ‘general public interest’ or the ‘substantial section of the public’<sup>10</sup> that will benefit from disclosure of any document/s. Nor does the email make any specific contentions about disclosure being in the public interest.

In such circumstances, and in the absence of you identifying the ‘general public interest’ or ‘substantial section of the public’ that would benefit from disclosure, I am not convinced that there currently exists a demonstrable link between disclosure of any document/s and the advancement of a public interest. I can find nothing in your email dated 30 November 2022 that would ‘draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.’<sup>11</sup> While it is not a requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

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<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

The FOI Act does not define what constitutes disclosure being in the ‘general public interest’ or ‘in the interests of a substantial section of the public’.<sup>13</sup> The concept of ‘public interest’ is thought of as ‘a concept of wide import that cannot be exhaustively defined.’<sup>14</sup> It is recommended that an agency should direct ‘its attention to the advancement or the interest or welfare of the public’ which is dependent ‘on each particular set of circumstances.’<sup>15</sup> It is also considered that ‘the public interest is not a static concept confined and defined by strict reference points.’<sup>16</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases ‘in the general public interest’ and ‘in the interests of a substantial section of the public’. The ‘question is whether giving access to the document, and the consequences of giving that access, are in the public interest.’<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request dated 30 November 2022, it would appear you are seeking documents concerning specific email communication between senior court employees. I do not consider that the document/s you requested could be ‘reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.’<sup>18</sup> The type of document/s you requested are related to communications between senior court employees about a recruitment process. Further, your FOI request dated 15 November 2022 indicates that you already have possession of the document/s. Given the type of document/s you have requested, and the fact that you appear to have possession of the document/s, I consider that any ‘public discussion or analysis’ of any email communication would be not only undesirable but may be detrimental and prejudicial to the individuals involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where ‘... the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public’. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act. That is, both your FOI request dated 15 November 2022 and your email dated 30 November 2022 includes personal points of view and targets specifically named individuals.

Another important factor is that the document/s you have requested are likely to contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>19</sup>

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<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.

<sup>19</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].



In this regard, documents containing personal information are less likely to be ‘of general public interest or of interest to a substantial section of the public’. At this preliminary stage, I fail to see how the release of such confidential and/or sensitive information could be in the ‘general public interest’ or such that would benefit a ‘substantial section of the public’.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of ‘public interest’ in respect of contesting a charge. Again, the FOI Guidelines point to the fact that ‘the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.’ Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 30 November 2022, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- *The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*
- *The document will add to the public record on an important and recurring aspect of agency decision making.*<sup>20</sup> [footnotes omitted]

I do not consider that these document/s would ‘better inform the public’ about the decision making process with respect to recruitment exercises within the Court. I draw this conclusion primarily based on the nature of the document/s requested (that is, email correspondence about a recruitment). Further, there is nothing to suggest that any ‘important and recurring aspect of agency decision making’ will be identified.<sup>21</sup>

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in section 11A(5) of the FOI Act.

Without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request ‘are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.’<sup>22</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

### ***Other considerations***

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>23</sup> These matters include any specific

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<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>21</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.99 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>24</sup>

On this basis, I have given consideration to the specific contentions made in your email of 30 November 2022. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

#### *Charge for search and retrieval time*

In the letter from the Court dated 29 November 2022, it was estimated that fifteen (15) minutes was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request was for document/s that you appear to have in your possession. Regardless of the level of specificity of your request, each FOI request must be thoroughly considered when conducting searches for the document/s. Various search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the estimation of fifteen (15) minutes was entirely reasonable in light of your FOI request. The Court maintains ‘high quality’<sup>25</sup> and ‘well-organised’<sup>26</sup> records that are checked thoroughly upon the making of FOI requests. I appreciate that you, as the applicant, may consider your request to be ‘very specific’ and that you ‘identified the person who sent the email’, ‘the person to whom the email was sent’, and the date, title and classification of the email. However, the Court is committed to its obligation to take ‘all reasonable’<sup>27</sup> and ‘demonstrable’<sup>28</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

The Court has an obligation to take ‘all reasonable steps’ to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.<sup>29</sup>*

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business*

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<sup>24</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

<sup>25</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>26</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>27</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.86 of the FOI Guidelines.

<sup>29</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

*practices in the agency's operating environment or the minister's office.<sup>30</sup> At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.<sup>31</sup>*

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of your request are found.

I consider the estimation of fifteen (15) minutes was based on a 'common sense interpretation of the terms' of your request.<sup>32</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

On the basis of the Court's obligation to take 'all reasonable'<sup>33</sup> and 'demonstrable'<sup>34</sup> steps to find the document/s, and despite the contentions made in your email of 30 November 2022, I have decided that fifteen (15) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I am satisfied that any of the Court's FOI Officers would spend the estimated time of five and a quarter (5¼) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the document/s returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released document/s (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document/s that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to

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<sup>30</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

<sup>31</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>32</sup> Paragraph 3.89 of the FOI Guidelines.

<sup>33</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>34</sup> Paragraph 3.86 of the FOI Guidelines.

consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the charge 'fairly reflects the work involved in providing access to the documents'<sup>35</sup> the subject of your FOI request.

I note that you, as the applicant, consider the charge for decision making 'is unjustifiable' and 'nothing more than an attempt to erect artificial hurdles for access to documents that constitute a national resource.' However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by 'previous experience dealing with FOI requests of similar nature'<sup>36</sup>. Furthermore, I am confident that the Court has correctly applied the guiding principle of the "lowest reasonable cost" objective'.<sup>37</sup>

It is important to note that in the letter from the Court dated 29 November 2022, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the estimated charge was 'as fair and accurate as possible' and was not 'set an unreasonably high estimate which may hinder or deter'<sup>38</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 30 November 2022 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>39</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

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<sup>35</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>36</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>38</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>39</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:


online: <https://forms.business.gov.au/aba/oaic/foi-review/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the OAIC website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson  
**FOI Officer**





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

LEVEL 17  
LAW COURTS BUILDING  
QUEENS SQUARE  
SYDNEY NSW 2000

30 January 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for an internal review under the *Freedom of Information Act 1982***

I refer to your email dated 31 December 2022 sent to the [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au) mailbox of the Federal Court of Australia (**Court**). In that email you requested an internal review of the decision made on 30 December 2022 that you are liable to pay a charge in respect of your request for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

**Authorised decision-maker**

I am authorised under s 23 of the FOI Act to make decisions on behalf of the Court in relation to your internal review request.

In conducting the internal review, I am required to review the original FOI decision and make a fresh decision on behalf of the Court.<sup>1</sup> I acknowledge that an internal review is a merit review process and that I am required ‘to bring a fresh, independent and impartial mind to the review’.<sup>2</sup>

**Background**

On 15 November 2022, you requested access to documents under the FOI Act. Specifically, you requested the following:

- a) the unclassified email that Darrin Moy sent to Matt Asquith, among others, on 18 April 2018 [titled “FW: Recruitment – Legal”]; and
- b) the document attached to Darrin Moy’s email with the file name “Recruitment Legal – sent to Darrin Moy 18 April 2018.docx”.

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<sup>1</sup> Section 54C of the FOI Act.

<sup>2</sup> See paragraphs 1.28, 4.117 and 9.34 of the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act.

On 29 November 2022, the Court issued a written notice to you, in compliance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request. That charge was estimated by the Court to be \$8.75, based on fifteen (15) minutes of search and retrieval time, and five and a quarter (5.25) hours of estimated decision-making time.

On 30 November 2022, you sent an email to the Court contesting the charge estimated in the written notice to you of 29 November 2022 and provided reasons as to why the charge should be reduced or not imposed.

On 30 December 2022, the Court made a decision to reject your contentions and to affirm the total estimated charge of \$8.75 as set out in the letter from the Court to you dated 29 November 2022.

On 31 December 2022, you sent an email to the Court seeking an internal review under the FOI Act of the Court's decision dated 30 December 2022. I note that your email requesting internal review was not accompanied by any reasons for the review.

### **Material taken into account**

I have considered the following material in making my decision on internal review:

- your FOI request of 15 November 2022;
- the written notice of charge issued by the Court on 29 November 2022;
- your email to the Court of 30 November 2022 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 30 December 2022;
- your internal review request dated 31 December 2022;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the *Freedom of Information (Charges) Regulations 2019 (FOI Charges Regulations)*;
- and
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**).

### **Decision on internal review**

I am satisfied that the charges estimated in the written notice of charge issued by the Court on 29 November 2022 are reasonable and appropriate in the circumstances. Accordingly, I have determined that you are liable to pay the estimated charge of \$8.75. The charge is based on fifteen (15) minutes of search and retrieval time, and five and a quarter (5.25) hours of estimated decision-making time.

In making my decision, I have taken into account the following factors that are required to be considered under s 29(5) of the FOI Act:

- whether payment of the charge, or part of it, would cause financial hardship to you; and
- 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 am also permitted to, and have considered, ‘*other relevant matters*’ in making my decision on the internal review.<sup>3</sup> In particular, I have given ‘*genuine consideration*’ to the specific contentions you have made as to why the charge should be reduced or not imposed,<sup>4</sup> and have considered whether disclosure of the documents ‘*will advance the objects of the FOI Act*’, even though you have not expressly framed your contention on that basis.<sup>5</sup>

## Reasons

The decision issued by the Court regarding the contested charges on 30 December 2022 included extracts from relevant sections of the FOI Act, paragraphs in the FOI Guidelines, and case law. I will not repeat that text in providing my reasons in this internal review.

### *Financial hardship – s 29(5)(a) of the FOI Act*

Neither your email to the Court of 30 November 2022 contesting the estimated charges, nor your internal review request dated 31 December 2022, make any suggestion nor provide any evidence that payment of the charge, or part of it, would cause you financial hardship. In the absence of any evidence indicating that financial hardship would be caused to you if you paid the charge in part or in full,<sup>6</sup> I have reached the same conclusion as the original decision-maker that financial hardship is not at issue in the present circumstances.

### *Public interest – s 29(5)(b) of the FOI Act*

The FOI Guidelines provide that an applicant relying on s 29(5)(b) of the FOI Act should identify or specify the ‘*general public interest*’ or the ‘*substantial section of the public*’ that will benefit from disclosure of the documents requested if seeking to have the charge reduced or not imposed (s 29(1)(f)(ii) of the FOI Act).<sup>7</sup>

The original decision-maker considered the public interest test under s 29(5)(b) of the FOI Act in detail and decided to refuse your request for a reduction and/or waiver of the estimated charge on the basis that the imposition of the charge is appropriate. The original decision-maker noted that your email to the Court of 30 November 2022 contesting the estimated charge did not identify or specify the ‘*general public interest*’ or the ‘*substantial section of the public*’ that will benefit from disclosure of the documents requested, nor did your email make any specific contentions about disclosure being in the public interest. Your request for internal review dated 31 December 2022 did not address these points either.

Notwithstanding the above, I have considered whether disclosure of the documents requested would advance the objects of the FOI Act, namely, by ‘*promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government’s activities*’.<sup>8</sup> Paragraph 4.109 of the FOI Guidelines illustrates examples in which giving the giving of access may be in the general public interest or in the interest of a substantial section of the public. I agree with the original decision-maker that only two (2) of those examples appear to be relevant to your request, but even then, there is nothing to suggest that disclosure would ‘*better inform the public as to why or how [an agency] decision was made*’, or that an

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<sup>3</sup> Paragraphs 4.96 and 9.34 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines.

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Paragraph 4.103 of the FOI Guidelines.

<sup>7</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>8</sup> Section 3 of the FOI Act; Paragraph 4.97 of the FOI Guidelines.

*'important and recurring aspect of agency decision'* will be identified. The documents you have requested are an email that was sent between senior Court employees in relation to a recruitment process and the attachment to that email. Some of the information in the documents *'is already publicly available'*,<sup>9</sup> either because that recruitment information was published in the Public Service Gazette around that time, or because you yourself have published that information online by including large excerpts of one of the documents in your FOI request and making your request publicly through the Right to Know website.

For these reasons, it is difficult to see that any *'public benefit may flow from the release of the documents'*.<sup>10</sup> I have therefore formed the view that a reduction or waiver of the charges notified to you would not be appropriate on the basis of the public interest test contained in s 29(5)(b) of the FOI Act.

### ***Other considerations***

The *'other relevant matters'*<sup>11</sup> I have considered in making my decision on internal review include the specific contentions you have made as to why the charge should be reduced or not imposed. Those specific contentions were set out in your email to the Court dated 30 November 2022, when you contested the estimated charges both with respect to search and retrieval time and decision-making time.

### **Charge for search and retrieval time**

Under the FOI Charges Regulations, the Court may charge for time spent *'searching for, or retrieving, the document'*.<sup>12</sup> Paragraph 4.27 of the FOI Guidelines provides that this encompasses time spent consulting relevant officers, searching digital or hardcopy file indexes and files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file.

In conducting searches for documents, s 24A of the FOI Act imposes an obligation on agencies to take *'all reasonable steps'* to locate the documents requested. While the FOI Act is silent on what constitutes *'all reasonable steps'*, agencies are generally required to undertake *'comprehensive'* searches in order to fulfil that obligation.<sup>13</sup>

The written notice of charge issued to you by the Court on 29 November 2022 estimated that fifteen (15) minutes was required to search and retrieve any documents that fell within the scope of your request. In the charges decision issued by the Court on 30 December 2022, the decision-maker confirmed that the estimate of fifteen (15) minutes for search and retrieval time was appropriate and reasonable.

You have contested the estimated charge for search and retrieval time on the basis that it is *'inappropriate'*. You also provided your own, lower-estimate of time. You asserted that your lower-estimated charge *'would be more than adequate'* given the specific parameters of your request and the requirement that agencies have *'sound record keeping'*. You also asserted that

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<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Paragraph 4.107 of the FOI Guidelines, citing *Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [21].

<sup>11</sup> Paragraphs 4.96 and 9.34 of the FOI Guidelines.

<sup>12</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 1.

<sup>13</sup> Paragraphs 3.88 and 3.89 of the FOI Guidelines.

the Court's cost of calculating and collecting the charge for search and retrieval '*exceeds the reasonable cost to the agency of searching for the documents*'.

I have considered the terms of your FOI request dated 15 November 2022, the records of searches conducted, the notice of charge issued to you on 28 November 2022, the contentions made in your email dated 30 November 2022, and the charges decision made on behalf of the Court on 30 December 2022. I agree with the original decision-maker that fifteen (15) minutes is a reasonable and appropriate amount of time for the search and retrieval of the documents requested and that the charge is consistent with the '*lowest reasonable cost*' principle.

The Court's fifteen (15) minute estimate for search and retrieval time accounts for the amount of time to consider your request, consult the relevant officers to determine if the documents requested exist, and for those persons to conduct searches of the relevant files using key words from your FOI request, and then extract the relevant documents. I am satisfied that fifteen (15) minutes for search and retrieval time is not an unreasonable amount of time for the search and retrieval of documents the subject of your FOI request having regard to the obligation to take '*all reasonable steps*' to locate the documents requested.

#### Charge for decision-making time

Under the FOI Charges Regulations, the Court may charge for time spent '*in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including time spent*':

- (a) *in examining the document; or*
- (b) *in consultation with any person or body; or*
- (c) *in making a copy with deletions; or*
- (d) *in notifying any interim or final decision on the request*'.<sup>14</sup>

Agencies can only impose these charges for each hour after the first five (5) hours.<sup>15</sup>

The written notice of charge issued by the Court on 29 November 2022 estimated the decision-making time in relation to your request at five and a quarter (5.25) hours. In the charges decision issued by the Court on 30 December 2022, the decision-maker determined that five and a quarter (5.25) hours of decision-making time was appropriate and reasonable, informed by previous experience dealing with FOI requests of similar nature, and that the Court correctly applied the '*lowest reasonable cost objective*' stated in the objects of the FOI Act.<sup>16</sup>

In your email to the Court of 30 November 2022 contesting the estimated charges, you contend that the estimated decision-making time is '*unjustifiable*'. The basis for this contention is because you '*believe that the estimated time to process the request has been calculated with the cynical motive of extracting payment for access to a couple of documents*', and that the charges are '*nothing more than an attempt to erect artificial hurdles for access to documents that constitute a national resource*'.

Having regard to all of the material before me, I am satisfied that the estimated five and a quarter (5.25) hours for decision-making time is reasonable and appropriate. In my view, it is clear that the original decision-maker has given '*genuine consideration*' to the contentions you

<sup>14</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4.

<sup>15</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4; paragraph 4.32 of the FOI Guidelines.

<sup>16</sup> Section 3(4) of the FOI Act; paragraph 4.3 of the FOI Guidelines.

have made as to why the charge should be reduced or not imposed.<sup>17</sup> Your contentions about the Court's 'cynical motive' to erect 'artificial hurdles' to delay or discourage your access to documents are not supported by any evidence. Despite your views that the Court is unlawfully imposing a charge to delay or discourage your access to documents, the Court is entitled to impose charges for FOI requests under the FOI Act, FOI Charges Regulations and FOI Guidelines.

While I generally agree with the reasons given by the original decision-maker that five and a quarter (5.25) hours for decision-making time should be imposed with respect to your FOI request, the original decision-maker factored into that estimated decision-making time consultation under s 27A of the FOI Act. Since the charges decision was issued to you on 30 December 2022, it has become apparent, from the results of the searches undertaken for the documents you have requested, that the nature of any personal information of third parties in the documents may not give rise to the requirement to consult under s 27A of the FOI Act. I have therefore not accounted for consultation time in the estimate of time to make a decision on your FOI request. Notwithstanding this, I have decided not to reduce or waive the charge imposed for decision-making time because I am of the view that five and a quarter (5.25) hours for decision-making time is still reasonable and appropriate to impose.

The estimated charge for decision-making time takes into account a number of other factors in the handling of your FOI request, including the decision-maker's examination of the document found, the application of any exemptions and/or conditional exemptions to that document, making any copy of the document with the relevant deletions, and notifying you of the decision on your request. There is skill, nuance, time and consideration involved in completing these tasks in order to adequately respond to FOI requests made to the Court. In calculating the estimate of charges for decision-making time on your request, the Court took into account its previous experience dealing with FOI requests of similar nature. I am satisfied that, even removing any time required to consult under s 27A of the FOI Act, the estimated five and a quarter (5.25) hours for decision-making time is reasonable and appropriate.

#### Exceptions to imposition of charges

Neither your email to the Court of 30 November 2022 contesting the estimated charges, nor your internal review request dated 31 December 2022, identified any of the exceptions outlined in paragraphs 4.42 to 4.50 of the FOI Guidelines.<sup>18</sup> I therefore agree with the original decision-maker that none of these exceptions apply to your FOI request, and conclude that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

For all of the above reasons, I have determined that fifteen (15) minutes of search and retrieval time and five and a quarter (5.25) hours for decision-making time are both reasonable and appropriate in respect of your request for documents under the FOI Act. I have therefore determined that you are liable to pay the charge set out in the written notice of charge issued to you by the Court on 29 November 2022.

#### **Your Review Rights**

Within 60 days of my decision, you should either:

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<sup>17</sup> Paragraph 4.96 of the FOI Guidelines.

<sup>18</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

- pay the charge or deposit in the manner specified in the revised written notice of charge issued to you on 29 November 2022;
- apply in writing to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.<sup>19</sup>

If the Court does not receive a response within 60 days, your FOI request will be taken to have been withdrawn.<sup>20</sup>

More information about Information Commissioner review, including the procedure for applying for that review, is available on the Office of the Australian Information Commissioner (OAIC) website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



R Muscat  
**Registrar**

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<sup>19</sup> Paragraph 4.119 of the FOI Guidelines.

<sup>20</sup> Paragraph 4.120 of the FOI Guidelines.






**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

19 December 2022



By email: 

Dear 

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 4 December 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

<b>Item</b>	<b>Applicable charge</b>
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

<b>Item</b>	<b>Description</b>	<b>Estimated hours</b>	<b>Estimated charge</b>
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches of the electronic document &amp; records system conducted by staff of the FOI team and senior staff of the Court.</li> </ul>	3 hours	\$15.00 x 3 = \$45.00
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	7 hours	\$20.00 x 2 = \$40.00 (No charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$85.00</b>
<b>DEPOSIT PAYABLE</b>			<b>\$20.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

*Deposit*

In accordance with the FOI Act and Charges Regulations, the Court requires you to pay a deposit before any further work on your FOI request is undertaken. As outlined in the table above, the deposit payable for your FOI request is \$20.00. This accords with s 12(2) of the Charges Regulations which requires that a deposit must not exceed \$20.00 when the preliminary assessment of the charge is more than \$25.00 but less than \$100.00.

An invoice for the deposit is enclosed with this letter and includes details as to how payment can be made. As noted above, the Court will not undertake any further work on your FOI request until the deposit is paid. Once the deposit is paid, work on your FOI request will recommence and the statutory processing period will re-continue from the date of payment.

Please note that the deposit is not refundable, unless you contest the charge and the Court decides not to impose any charge in relation to your FOI request OR the Court fails to make a decision on your FOI request within the applicable statutory processing period.

*Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.



In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

#### *Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

18 January 2023

[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
4 December 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 19 December 2022 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 4 December 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 19 December 2022, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 19 December 2022 suggests that you are contesting the charge and seeking a waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given 'genuine consideration' to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

In your email dated 19 December 2022 you state:

*The imposition of charge in this case is unreasonable.*

*From the documents in NSD790/22 you will see that the Court have waived filing fees because that will cause the applicant [REDACTED] financial hardship. He is unemployed and sustains his living on the disability support pension of his partner [REDACTED]*

*I seek waiver of the \$85 charge on the grounds of financial*

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

*hardship.*

*This aside, the registry cannot simply impose charges to derail [REDACTED] FOI application - the access to which will show abuse of power by registry staff.*

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

I am satisfied that, pursuant to section 29(5) of the FOI Act, the Court had taken into account the “lowest reasonable cost” objective<sup>2</sup> and applied the lowest reasonable cost to you. I am also satisfied that the Court had not imposed a charge that exceeded the cost of processing your FOI request.<sup>3</sup>

Notwithstanding the above, I have decided, pursuant to section 29 of the FOI Act, to waive the total estimated charge of \$85.00 as set out in the letter from the Court to you dated 19 December 2022. I make this finding pursuant to section 29(5)(a) of the FOI Act, on the basis that the payment of the charge, or part of it, would cause financial hardship to a person on whose behalf the application was made.

### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### ***Internal review***

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

#### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review/>

email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

post: GPO Box 2999, Canberra ACT 2601

<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson  
**FOI Officer**





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

2 January 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 19 December 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

<b>Item</b>	<b>Applicable charge</b>
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches of the electronic document &amp; records system conducted by staff of the FOI team and senior staff of the Court.</li> </ul>	30 minutes	\$15.00 x 0.5 = \$7.50
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	5.5 hours	\$20.00 x 0.5 = \$10.00 (No charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$17.50</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

By way of assistance, please note that while conducting the searches, it has come to the Court's attention that it appears that the document requested can already be found on the Federal Court of Australia's disclosure at the following link: <https://www.fedcourt.gov.au/disclosurelog> (refer PA2925-06/13). If this document satisfies your request and you wish to withdraw the request, please notify the Court in writing within 30 days of the date of this letter.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:



- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

#### *Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

2 February 2023

Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
19 December 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 3 January 2023 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 19 December 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 2 January 2023, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 3 January 2023 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given 'genuine consideration' to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 3 January 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- you question the Court's estimated search and retrieval time of thirty (30) minutes; and
- you state that the Court's estimated decision-making time is not justified.

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

After consideration of your email dated 3 January 2023 and your FOI request afresh, I have decided to exercise my discretion under the FOI Act and the FOI Charges Regulations and reduce the estimated charge for search retrieval time from \$7.50 to \$3.75, on the basis of an estimated search and retrieval time of fifteen (15) minutes. I have also decided to reduce the estimated charge for decision-making time from \$10.00 to \$5.00, which is based on five and a quarter (5¼) hours of decision-making time.

Based on this revision, I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the “lowest reasonable cost” objective<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

Accordingly, I have decided that you are liable to pay an estimated charge of \$8.75, based on fifteen (15) minutes of search and retrieval time and five and a quarter (5¼) hours of decision-making time. A revised written notice of charge and invoice accompanies this letter. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 19 December 2022;
- the acknowledgement and charges letter from the Court dated 2 January 2023;
- your email dated 3 January 2023 contesting the charges for your FOI request;
- the nature of the documents sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you; and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your email of 3 January 2023. I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.<sup>5</sup>

In accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 19 December 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

#### ***Section 29(5)(a) – Financial hardship***

Your email dated 3 January 2023 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

#### ***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document/s that fall within the scope of your FOI request would be in ‘the general public interest’ or in ‘the interests of a substantial section of the public’.<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should ‘identify or specify the “general public interest” or the “substantial section of the public” that will benefit from its disclosure (s 29(1)(f)(ii)).’<sup>8</sup> To determine this, I have considered both the ‘content of the documents’ to be released ‘and the context in which their public release would occur.’<sup>9</sup>

I note that your email dated 3 January 2023 does not identify or specify either the ‘general public interest’ or the ‘substantial section of the public’<sup>10</sup> that will benefit from disclosure of any document/s. Nor does the email make any specific contentions about disclosure being in the public interest.

In such circumstances, and in the absence of you identifying the ‘general public interest’ or ‘substantial section of the public’ that would benefit from disclosure, I am not convinced that there currently exists a demonstrable link between disclosure of any document/s and the advancement of a public interest. I can find nothing in your email dated 3 January 2023 that would ‘draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.’<sup>11</sup> While it is not a

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<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

The FOI Act does not define what constitutes disclosure being in the ‘general public interest’ or ‘in the interests of a substantial section of the public’.<sup>13</sup> The concept of ‘public interest’ is thought of as ‘a concept of wide import that cannot be exhaustively defined.’<sup>14</sup> It is recommended that an agency should direct ‘its attention to the advancement or the interest or welfare of the public’ which is dependent ‘on each particular set of circumstances.’<sup>15</sup> It is also considered that ‘the public interest is not a static concept confined and defined by strict reference points.’<sup>16</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases ‘in the general public interest’ and ‘in the interests of a substantial section of the public’. The ‘question is whether giving access to the document, and the consequences of giving that access, are in the public interest.’<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document/s that falls within the scope of your request.

On the face of your FOI request dated 19 December 2022, it would appear you are seeking a recruitment related document concerning a specifically named employee. I do not consider that the document/s you requested could be ‘reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.’<sup>18</sup> The type of document/s you requested is related to the employment of a National Judicial Registrar following a recruitment process. Given the type of document/s you have requested, and your additional commentary in your email dated 3 January 2023 discussing information ‘in an email sent to the registrars of the Court on 2 November 2018’, I consider that any ‘public discussion or analysis’ of any recruitment documentation would be not only undesirable but may be detrimental and prejudicial to the individuals involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where ‘... the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public’. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act. In particular, your email dated 3 January 2023 includes personal points of view and conclusions, and, along with your FOI request of 19 December 2022, targets specifically named individuals.

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<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.

Another important factor is that the document/s you have requested are likely to contain confidential and sensitive information, including personal information. The very nature and circumstance of the existence of any document/s that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>19</sup> In this regard, documents containing personal information are less likely to be ‘of general public interest or of interest to a substantial section of the public’.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of ‘public interest’ in respect of contesting a charge. Again, the FOI Guidelines point to the fact that ‘the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.’ Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 3 January 2023, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- *The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*
- *The document will add to the public record on an important and recurring aspect of agency decision making.*<sup>20</sup> [footnotes omitted]

I do not consider that the document would ‘better inform the public’ about the decision making process with respect to recruitment exercises within the Court. I draw this conclusion primarily based on the nature of the document requested (that is, a recruitment related document concerning a specifically named employee). Further, as indicated in the letter from the Court dated 2 January 2023, the document is already on the public record.<sup>21</sup> There is also nothing to suggest that any ‘important and recurring aspect of agency decision making’ will be identified.<sup>22</sup> Moreover, paragraph 4.99 of the FOI Guidelines provides that ‘an agency may decide it is appropriate to impose an FOI charge where ... the information in the documents has already been published by an agency and the documents do not add to the public record’.

Therefore, at this stage I have decided that the disclosure of any document/s that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in section 11A(5) of the FOI Act.

Without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request ‘are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.’<sup>23</sup> I consider the imposition of a reduced charge is appropriate and refuse your request for a waiver of the estimated charges.

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<sup>19</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>21</sup> Federal Court of Australia’s disclosure at the following link: <https://www.fedcourt.gov.au/disclosurelog> (refer PA2925-06/13).

<sup>22</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>23</sup> Paragraph 4.99 of the FOI Guidelines.

### *Other considerations*

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>24</sup> These matters include any specific contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>25</sup>

On this basis, I have given consideration to the specific contentions made in your email of 3 January 2023. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

### *Charge for search and retrieval time*

In the letter from the Court dated 3 January 2023, it was estimated that thirty (30) minutes was required to search and retrieve the document that may fall within the scope of your request. During the search process, an entry on the Federal Court's disclosure log was identified as a potential source of the document/s you requested. Each FOI request must be thoroughly considered when conducting searches for document/s that may fall within the scope of a request. Various search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the revised estimation of fifteen (15) minutes is entirely reasonable in light of your FOI request. The Court maintains 'high quality'<sup>26</sup> and 'well-organised'<sup>27</sup> records that are checked thoroughly upon the making of FOI requests. The Court is committed to its obligation to take 'all reasonable'<sup>28</sup> and 'demonstrable'<sup>29</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

The Court has an obligation to take 'all reasonable steps' to find documents that have been requested under the FOI Act (see section 24A). The FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by*

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<sup>24</sup> Paragraph 4.96 of the FOI Guidelines, *J' and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>25</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

<sup>26</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>27</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>29</sup> Paragraph 3.86 of the FOI Guidelines.



*reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.*<sup>30</sup>

3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.<sup>31</sup> At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents*
- *the current and past file management systems and the practice of destruction or removal of documents*
- *the record management systems in place*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.*<sup>32</sup>

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of your request are found.

I consider the revised estimation of fifteen (15) minutes is based on a 'common sense interpretation of the terms' of your request.<sup>33</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

On the basis of the Court's obligation to take 'all reasonable'<sup>34</sup> and 'demonstrable'<sup>35</sup> steps to find the document/s, I have decided that fifteen (15) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

I am satisfied that any of the Court's FOI Officers would spend the revised estimated time of five and a quarter (5¼) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the document/s returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released document/s (with or without redactions). I consider this time to be both reasonable and fair

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<sup>30</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>31</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

<sup>32</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>33</sup> Paragraph 3.89 of the FOI Guidelines.

<sup>34</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>35</sup> Paragraph 3.86 of the FOI Guidelines.

considering the terms of your request and the type of document that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document/s requested contain personal information. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the revised charge 'fairly reflects the work involved in providing access to the documents'<sup>36</sup> the subject of your FOI request.

I note that you, as the applicant, consider any charge for decision making is not justified. However, the employees of the Court who are considering your request have considerable experience in this area. The revised estimation of charges has been informed by 'previous experience dealing with FOI requests of similar nature'.<sup>37</sup> Furthermore, I am confident that the Court has correctly applied the guiding principle of the "lowest reasonable cost" objective'.<sup>38</sup>

It is important to note that in the letter from the Court dated 3 January 2023, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to document/s you requested. I consider that the revised estimated charge is 'as fair and accurate as possible' and is not 'set an unreasonably high estimate which may hinder or deter'<sup>39</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 2 January 2023 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>40</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

#### **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

#### *Internal review*

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

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<sup>36</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>38</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>39</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>40</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: [Information Commissioner Review Application form \(business.gov.au\)](https://www.business.gov.au/foi-reviews)  
email: [foi@oaic.gov.au](mailto:foi@oaic.gov.au)  
post: Director of FOI Dispute Resolution, GPO Box 5218, Sydney NSW 2001

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (OAIC) website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson  
**FOI Officer**





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

2 February 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I refer to the decision issued on behalf of the Federal Court of Australia (**Court**) dated 2 February 2023 to reduce the charge imposed in respect to your freedom of information (**FOI**) request.

This letter is to advise you of the reduced charge the Court has determined that you are liable to pay and is notifying you of that charge as required by the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (**Charges Regulations**):

<b>Item</b>	<b>Applicable charge</b>
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, and in accordance with the charges review decision made on behalf of the Court dated 2 February 2023, a revised estimate of your charge is set out in the following table:

<b>Item</b>	<b>Description</b>	<b>Estimated hours</b>	<b>Estimated charge</b>
Search and retrieval	<ul style="list-style-type: none"> <li>• Searches of the electronic document &amp; records system conducted by staff of the FOI team and senior staff of the Court.</li> </ul>	15 minutes	\$15.00 x 0.25 = \$3.75
Decision-making	<ul style="list-style-type: none"> <li>• Examination of documents retrieved</li> <li>• Consulting individuals in relation to personal information</li> <li>• Deciding to grant or refuse access to documents requested</li> <li>• Preparing reasons for decision</li> </ul>	5.25 hours	\$20.00 x 0.25 = \$5.00 (No charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$8.75</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer







On 2 January 2023, the Court issued a written notice to you, in compliance with s 29 of the FOI Act, advising that you were liable to pay a charge for the processing of your FOI request. That charge was estimated by the Court to be \$17.50, based on thirty (30) minutes of search and retrieval time, and five and a half (5.5) hours of estimated decision-making time.

On 3 January 2023, you sent an email to the Court contesting the charge estimated in the written notice to you of 2 January 2023 and provided reasons as to why the charge should be reduced or not imposed.

On 2 February 2023, the Court made a decision to reduce the total estimated charge for the processing of your FOI request from \$17.50 to \$8.75, based on a reduced fifteen (15) minutes of search and retrieval time, and a reduced five and a quarter (5.25) hours of decision-making time. Accompanying that decision was a revised written notice to you, and an invoice, setting out these reduced charges.

On 3 February 2023, you sent an email to the Court seeking an internal review under the FOI Act of the Court's decision dated 2 February 2023 and provided reasons for the internal review.

### **Material taken into account**

I have considered the following material in making my decision on internal review:

- your FOI request of 19 December 2022;
- the written notice of charge issued by the Court on 2 January 2023;
- your email to the Court of 3 January 2023 contesting the estimated charges;
- the decision issued by the Court regarding the contested charges on 2 February 2023;
- the revised written notice of charge and invoice issued on 2 February 2023;
- your internal review request of 3 February 2023;
- the records of searches conducted by staff of the Court;
- the documents identified as falling within the scope of your FOI request;
- the FOI Act and relevant case law;
- the *Freedom of Information (Charges) Regulations 2019 (FOI Charges Regulations)*; and
- the guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (**FOI Guidelines**).

### **Decision on internal review**

I have decided to exercise my discretion to further reduce the charge imposed on the processing of your FOI request from \$8.75 to \$3.75. The revised written notice of charge issued by the Court on 2 February 2023 was based on an estimated fifteen (15) minutes of search and retrieval time and five and a quarter (5.25) hours for decision-making time. The adjusted charge is based on fifteen (15) minutes of search and retrieval time and no charge for estimated decision-making time.

In making my decision, I have taken into account the following factors that are required to be considered under s 29(5) of the FOI Act:

- whether payment of the charge, or part of it, would cause financial hardship to you; and

- 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 am also permitted to, and have considered, ‘*other relevant matters*’ in making my decision on the internal review.<sup>3</sup> In particular, I have given ‘*genuine consideration*’ to the specific contentions you have made as to why the charge should be reduced or not imposed,<sup>4</sup> and have considered whether disclosure of the documents ‘*will advance the objects of the FOI Act*’, even though you have not expressly framed your contention on that basis.<sup>5</sup>

## **Reasons**

The decision issued by the Court regarding the contested charges on 2 February 2023 included extracts from relevant sections of the FOI Act, paragraphs in the FOI Guidelines, and case law. I will not repeat that text in providing my reasons in this internal review.

### ***Financial hardship – s 29(5)(a) of the FOI Act***

Neither your email to the Court of 3 January 2023 contesting the estimated charges, nor your internal review request dated 3 February 2023, make any suggestion nor provide any evidence that payment of the charge, or part of it, would cause you financial hardship. In the absence of any evidence indicating that financial hardship would be caused to you if you paid the charge in part or in full,<sup>6</sup> I have reached the same conclusion as the original decision-maker that financial hardship is not at issue in the present circumstances.

### ***Public interest – s 29(5)(b) of the FOI Act***

The FOI Guidelines provide that an applicant relying on s 29(5)(b) of the FOI Act should identify or specify the ‘*general public interest*’ or the ‘*substantial section of the public*’ that will benefit from disclosure of the documents requested if seeking to have the charge reduced or not imposed (s 29(1)(f)(ii) of the FOI Act).<sup>7</sup>

The original decision-maker considered that the estimated charge should not be reduced and/or waived on the basis of the public interest test under s 29(5)(b) of the FOI Act. The original decision-maker noted that your email to the Court of 3 January 2023 contesting the estimated charge did not identify or specify the ‘*general public interest*’ or the ‘*substantial section of the public*’ that will benefit from disclosure of the documents requested, nor did your email make any specific contentions about disclosure being in the public interest. Your request for internal review dated 3 February 2023 did not address these points either.

Notwithstanding the above, I have considered whether disclosure of the document requested would advance the objects of the FOI Act, namely, by ‘*promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government’s activities*’.<sup>8</sup> Paragraph 4.109 of the FOI Guidelines illustrates examples in which the giving of access may be in the general public interest or in the interest of a substantial section of the public. I agree with the original decision-maker that only two (2) of those examples appear to

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<sup>3</sup> Paragraphs 4.96 and 9.34 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines.

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

<sup>6</sup> Paragraph 4.103 of the FOI Guidelines.

<sup>7</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>8</sup> Section 3 of the FOI Act; Paragraph 4.97 of the FOI Guidelines.

be relevant to your request, but even then, there is nothing to suggest that disclosure would *'better inform the public as to why or how [an agency] decision was made'*, or that an *'important and recurring aspect of agency decision'* will be identified.

In your FOI request dated 19 December 2022, you requested the Commissioner's representative certification of the recruitment process for a particular Senior Executive Service Band 1 vacancy at the Court. In your internal review request dated 3 February 2023, you clarified that you *'have no interest in the person's signature'* in the document requested and that the Court is *'welcome to redact'* that signature before provision of the document.

As explained by the original decision-maker, the document you have requested is already on the Court's FOI disclosure log. That document is already on the disclosure log in redacted form, with the signature of a public servant redacted. In other words, there is no information in the document you have requested that is not *'already publicly available'*<sup>9</sup> such that disclosure will *'add to the public record'*.<sup>10</sup>

For these reasons, it is difficult to see that any *'public benefit may flow from the release of the documents'*.<sup>11</sup> I have therefore formed the view that a reduction or waiver of the charges notified to you would not be appropriate on the basis of the public interest test contained in s 29(5)(b) of the FOI Act.

#### ***Other considerations***

The *'other relevant matters'*<sup>12</sup> I have considered in making my decision on internal review include the specific contentions you have made as to why the charge should be reduced or not imposed. In your emails dated 3 January 2023 and 3 February 2023, you contend that the document you have requested is not publicly available. You make this contention despite the Court indicating to you where the redacted document appears on the FOI disclosure log, and otherwise providing you with an opportunity *'to obtain free access'* to that document outside the FOI Act.<sup>13</sup>

Your emails dated 3 January 2023 and 3 February 2023 contend, in the alternative, that even if the document requested is on the Court's disclosure log, that there should not be a charge for a document that is publicly available. You also contend that the Court has *'cooked up'* the charge to unnecessarily delay or discourage you from exercising your right of access to the document.

Despite your views, the Court is entitled to charge for the processing of your FOI request under the FOI Act, FOI Charges Regulations and FOI Guidelines. You were advised in the original written notice of charge issued to you on 2 January 2023 that you are welcome to withdraw your request should you wish to access the document on the Court's disclosure log outside of the FOI Act, and that course of action is still available to you. The fact that you do not agree that the document you have requested is publicly available is not, in my view, sufficiently compelling so as to justify a waiver of the charge for the processing your FOI request.

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<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Paragraph 4.99 of the FOI Guidelines.

<sup>11</sup> Paragraph 4.107 of the FOI Guidelines, citing *Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [21].

<sup>12</sup> Paragraphs 4.96 and 9.34 of the FOI Guidelines.

<sup>13</sup> Paragraph 4.6 of the FOI Guidelines.

I note that you make a number of remarks in your request for internal review dated 3 February 2023 that I consider inappropriate.<sup>14</sup> Those remarks are not supported by any evidence, and I consider that they demonstrate a lack of understanding of the skill, nuance, time and consideration involved for FOI officers to sufficiently respond to FOI requests made to the Court.

Your emails dated 3 January 2023 and 3 February 2023 also make contentions with respect to both the Court's search and retrieval time and estimated decision-making time in processing your FOI request. I address those specific contentions in the sections below.

#### Charge for search and retrieval time

Under the FOI Charges Regulations, the Court may charge for time spent '*searching for, or retrieving, the document*'.<sup>15</sup> Paragraph 4.27 of the FOI Guidelines provides that this encompasses time spent consulting relevant officers, searching digital or hardcopy file indexes and files to locate documents, as well as physically locating digital or hardcopies of documents and removing them from the file.

In conducting searches for documents, s 24A of the FOI Act imposes an obligation on agencies to take '*all reasonable steps*' to locate the documents requested. While the FOI Act is silent on what constitutes '*all reasonable steps*', agencies are generally required to undertake '*comprehensive*' searches in order to fulfil that obligation.<sup>16</sup>

The original written notice of charge issued to you by the Court on 2 January 2023 estimated that thirty (30) minutes was required to search and retrieve any documents that fell within the scope of your request. In the charges decision issued by the Court on 2 February 2023, the decision-maker reduced that estimate and considered that fifteen (15) minutes for search and retrieval time was appropriate and reasonable. A revised written notice of charge and invoice was issued to you accordingly.

In your request for internal review dated 3 February 2023, you contested the estimated charge for search and retrieval time on the basis that you contend it should not '*take 15 minutes to find a single certification document relating to the recruitment of an identified National Judicial Registrar*'. You also query '*why are you searching for a document that an FOI official says is already published on the Federal Court of Australia's FOI disclosure log?*'

The Court's revised fifteen (15) minute estimate for search and retrieval time accounts for the amount of time to consider your request, consult the relevant officers to determine if the document requested exists, and for those persons to conduct searches of the relevant files and

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<sup>14</sup> Such remarks include: '*You have merely regurgitated swathes of the FOI Guidelines while shirking the specific grounds of contention I set out in my email of 3 January 2023*'; '*the reasons you have provided in your revised charge decision are insane. I really do not think you know what you are doing*'; '*I cannot think of a farcical example having been cooked up to unnecessarily delay access or to discourage an applicant from exercising the right of access conferred by the FOI Act than your revised charge decision*'; '*There is no way that the revised charge decision is a transparent decision. It's an abuse of process...*'; '*Clearly, you have paid no heed to the objects of the FOI Act because if you had, you would realise just how deranged your insistence on my paying a fee for a document your colleague claims is publicly accessible is*'; '*Mindlessly droning... doesn't detract from the fact that your insistence on my paying a fee for a document your colleague claims is publicly accessible is deranged.*'

<sup>15</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 1.

<sup>16</sup> Paragraphs 3.88 and 3.89 of the FOI Guidelines.

then extract the relevant document. I am satisfied that fifteen (15) minutes for search and retrieval time is not an unreasonable amount of time for the search and retrieval of document the subject of your FOI request having regard to the obligation to take ‘*all reasonable steps*’ to locate the document requested.

Having regard to all of the material before me, I agree with the original decision-maker that fifteen (15) minutes is a reasonable and appropriate amount of time to impose for the search and retrieval of the document you have requested. I consider that the charge is consistent with the ‘*lowest reasonable cost*’ principle. There is no evidence before me to suggest that if this charge was imposed you would not proceed with your FOI request.

#### Charge for decision-making time

Under the FOI Charges Regulations, the Court may charge for time spent ‘*in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including time spent:*

- (a) *in examining the document; or*
- (b) *in consultation with any person or body; or*
- (c) *in making a copy with deletions; or*
- (d) *in notifying any interim or final decision on the request’.*<sup>17</sup>

Agencies can only impose these charges for each hour after the first five (5) hours.<sup>18</sup>

The original written notice of charge issued by the Court on 2 January 2023 estimated the decision-making time in relation to your request at five and a half (5.5) hours. In the charges decision issued by the Court on 2 February 2023, the decision-maker exercised their discretion to reduce the estimated charge on the basis that five and a quarter (5.25) hours of decision-making time is justifiable and fairly reflects the work involved. The original decision-maker informed their decision by previous experience dealing with FOI requests of similar nature, and considered that the Court correctly applied the ‘*lowest reasonable cost objective*’ stated in the objects of the FOI Act.<sup>19</sup> It is clear to me, having read the decision issued to you on 2 February 2023, that the original decision-maker gave ‘*genuine consideration*’ to the contentions you made as to why the charge for decision-making should be reduced or not imposed.<sup>20</sup>

In your request for internal review dated 3 February 2023, you explain that the Court is ‘*welcome to redact*’ the public servant’s signature on the Commissioner’s Representative Certificate you have requested. I note that you had not previously indicated this to the Court, either in your FOI request dated 19 December 2022 nor your email contesting the charges dated 3 January 2023. Having regard to the revised terms of your request – that you only seek a redacted copy of the document requested – I am of the view that personal consultation under s 27A of the FOI Act should no longer be factored into the Court’s decision-making time. Apart from the public servant’s signature which you have agreed to redact, I agree that there is no other personal information in the document that requires personal consultation under s 27A of the FOI Act. There is therefore no reason to include in the Court’s estimated decision-making

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<sup>17</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4.

<sup>18</sup> FOI Charges Regulations, Schedule 1, Part 1, Item 4; paragraph 4.32 of the FOI Guidelines.

<sup>19</sup> Section 3(4) of the FOI Act; paragraph 4.3 of the FOI Guidelines.

<sup>20</sup> Paragraph 4.96 of the FOI Guidelines.

time any time spent applying to the document the personal privacy conditional exemption under s 47F of the FOI Act.

Overall, I consider that the revised terms of your FOI request ‘*requires less work to process*’ your request,<sup>21</sup> such that it is appropriate to reduce the charge imposed on you for estimated decision-making time. I have decided to reduce the revised estimate of five and a quarter (5.25) hours of decision-making time to under five (5) hours. As agencies can only impose charges for decision-making time for each hour after the first five (5) hours, there is therefore no charge for decision-making time in respect of your FOI request.

#### Exceptions to imposition of charges

Neither your email to the Court of 3 January 2022 contesting the estimated charges, nor your internal review request dated 3 February 2022, identified any of the exceptions outlined in paragraphs 4.42 to 4.50 of the FOI Guidelines.<sup>22</sup> I therefore agree with the original decision-maker that none of these exceptions apply to your FOI request, and conclude that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

For all of the above reasons, I have determined that the imposition of a charge for fifteen (15) minutes of search and retrieval time is reasonable and appropriate in respect of your request for documents under the FOI Act. I have therefore determined that you are liable to pay the charge set out in the further revised written notice of charge and invoice that accompany this letter.

#### **Your Review Rights**

Within 60 days of my decision, you should either:

- pay the charge or deposit in the manner specified in the revised written notice of charge issued to you on 6 March 2023; or
- apply in writing to the Australian Information Commissioner for review of the charge; or
- withdraw your FOI request.<sup>23</sup>

If the Court does not receive a response within 60 days from the date of this letter, your FOI request will be taken to have been withdrawn.<sup>24</sup>

More information about Information Commissioner review, including the procedure for applying for that review, is available on the Office of the Australian Information Commissioner (OAIC) website at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

#### **Complaints**

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<sup>21</sup> Paragraph 4.115 of the FOI Guidelines, citing *Rita Lahoud and Department of Education and Training* [2016] AICmr 5 [32]-[33].

<sup>22</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

<sup>23</sup> Paragraph 4.119 of the FOI Guidelines.

<sup>24</sup> Paragraph 4.120 of the FOI Guidelines.

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'R Muscat', written over a horizontal line.

R Muscat  
**Registrar**





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

11 January 2023

[REDACTED]  
Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Request for access to documents under the *Freedom of Information Act 1982***

I acknowledge receipt of your request, dated 28 December 2022 and communicated by email to [External.FOI@fedcourt.gov.au](mailto:External.FOI@fedcourt.gov.au), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act).

A preliminary assessment has been undertaken of your Freedom of Information (FOI) request and the Court has determined that you are liable to pay a charge.

The charges applicable to your request are set at the following rates by the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations):

<b>Item</b>	<b>Applicable charge</b>
Search and retrieval: time spent in searching for or retrieving the document requested	\$15.00 per hour
Decision-making: time spent in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of document with deletions, including time spent: <ul style="list-style-type: none"><li>• In examining the document; or</li><li>• In consultation with any person or body; or</li><li>• In making a copy with deletions; or</li><li>• In notifying any interim or final decision on the request.</li></ul>	\$20.00 for each hour after the first 5 hours

On the basis of the applicable charges outlined above, an estimate of your charge is set out in the following table:

Item	Description	Estimated hours	Estimated charge
Search and retrieval	<ul style="list-style-type: none"> <li>Searches of the electronic document &amp; records system conducted by staff of the FOI team and senior staff of the Court.</li> </ul>	15 minutes	\$15.00 x 0.25 = \$3.75
Decision-making	<ul style="list-style-type: none"> <li>Examination of document/s retrieved</li> <li>Consulting individuals in relation to personal information</li> <li>Deciding to grant or refuse access to document/s requested</li> <li>Preparing reasons for decision</li> </ul>	5.5 hours	\$20.00 x 0.5 = \$10.00 (No charge for first 5 hours)
<b>TOTAL ESTIMATED CHARGE</b>			<b>\$13.75</b>
<b>DEPOSIT PAYABLE</b>			<b>\$0.00</b>

Please be aware that the estimated charges provided in the table above are an estimate only. Following the processing of your FOI request, the actual charge may be higher as it is not possible to know the precise amount of time that staff of the Court will spend searching for and retrieving documents and/or making a decision in relation to documents you have requested.

#### *Deposit*

Subsection 12(2) of the Charges Regulations only allows a deposit to be charged in circumstances where the agency's preliminary assessment of the charge exceeds \$25.00. Having regard to the total estimated charge for processing your FOI request, and in accordance with the FOI Act and Charges Regulations, the Court does not require you to pay a deposit.

#### *Right to contest charge*

Under s 29(1)(f) of the FOI Act, you may make an application to contest the charge if you believe it has been wrongly assessed, or should be reduced or not imposed. In accordance with s 29(f), your application contesting the charge must:

- Be made in writing;
- Be made to the Court within 30 days of receiving the notice of charge; and
- Provide reasons for contending that the charge has been wrongly assessed, or should be reduced or not imposed.

In considering whether or not to reduce, or not impose, the charge, the Court must take into account the following factors under s 29(5) of the FOI Act:

- Whether payment of the charge would cause financial hardship to you; and
- Whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

However, the Court can also take other matters into account, apart from financial hardship and the public interest.

In relation to any claim you make that the imposition of the charge will cause financial hardship to you, you should consider providing evidence regarding the financial hardship. This will better enable the Court to assess whether the charge will cause financial hardship to you.

*Your obligations*

Under s 29(1)(f) of the FOI Act, you must notify the Court in writing within 30 days of receiving this notice of charge that you:

- agree to pay the charge; or
- wish to contest the charge; or
- withdraw your FOI request.

In accordance with s 29(1)(g) of the FOI Act, if you fail to respond to this notice of charge in writing within 30 days, your FOI request will be taken to have been withdrawn.

You should also be aware that, under s 31(2) of the FOI Act, the processing period for your FOI request will temporarily cease on the day you receive this notice of charge and will not recommence until the earliest of the following occurs: you pay the charge (in the circumstances set out in either ss 31(2)(a) or 31(2)(b)) OR following a review under the FOI Act, a decision is made by the Court not to impose a charge.

Yours sincerely,

FOI Officer





**FEDERAL COURT OF AUSTRALIA  
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS  
119 NORTH QUAY  
BRISBANE QLD 4000

6 March 2023

[REDACTED]

Right to Know

By email: [REDACTED]

Dear [REDACTED]

**Contest of the charges attributable to the Freedom of Information (FOI) request dated  
28 December 2022**

I refer to your email to the Federal Court of Australia (**Court**) of 4 February 2023 contesting the charge estimated by the Court for the processing of your FOI request made to the Court on 28 December 2022 for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

As advised in the letter from the Court dated 11 January 2023, the Court exercised its discretion under the FOI Act and determined that you were liable to pay a charge for the processing of your FOI request. The estimated charge was set out in that letter and was assessed in accordance with the rates prescribed by the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**).

Your email to the Court of 4 February 2023 states that you are contesting the charge and suggests that you are seeking a reduction and/or waiver of the charge. As recommended by the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**), I have given 'genuine consideration' to the contentions and submissions you have made as to why the charge should be reduced or not imposed.<sup>1</sup>

While the contents of your email of 4 February 2022 are too lengthy to reproduce in this decision, your reasons as to why the charge should be reduced or not imposed can be summarised as follows:

- you question the Court's estimated search and retrieval time of fifteen (15) minutes; and

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<sup>1</sup> Paragraph 4.96 of the FOI Guidelines.

- you question the Court’s estimated decision-making time of five and a half (5½) hours.

### **Authorised decision-maker**

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

### **Decision**

I am satisfied that, pursuant to section 3(4) of the FOI Act, the Court has taken into account the “lowest reasonable cost” objective<sup>2</sup> and has applied the lowest reasonable cost to you. I am also satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.<sup>3</sup>

I have decided, pursuant to section 29 of the FOI Act, to reject your contentions and to affirm the total estimated charge of \$13.75 as set out in the letter from the Court to you dated 11 January 2023. Pursuant to section 29 of the FOI Act, I find that you are liable to pay the charge estimated in the letter dated 11 January 2023. The reasons for my decision are set out below.

I have taken the following into account in making my decision:

- the terms of your FOI request dated 28 December 2022;
- the acknowledgement and charges letter from the Court dated 11 January 2023;
- your email dated 4 February 2023 contesting the charges for your FOI request;
- the nature of the document sought in your FOI request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the FOI Charges Regulations; and
- the FOI Guidelines.

### **Reasons for Decision**

In considering whether or not to reduce, or not impose, the charge, I must take into account the following factors under section 29(5) of the FOI Act:

- whether payment of the charge would cause financial hardship to you, and
- whether giving access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

I am also able to take other matters into account in addition to financial hardship and the public interest.<sup>4</sup> On this basis, I have given consideration to the specific contentions made in your email of 4 February 2023. I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.<sup>5</sup>

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<sup>2</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>3</sup> Paragraph 4.4 of the FOI Guidelines.

<sup>4</sup> Paragraph 4.96 of the FOI Guidelines, *J” and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>5</sup> Paragraph 4.97 of the FOI Guidelines.

In accordance with the FOI Act and FOI Charges Regulations, agencies have a discretion to impose a charge, not impose a charge, or impose a charge that is lower than the applicable charge. In relation to the charge estimated by the Court for the processing of your FOI request made on 28 December 2022, which you are now contesting, the Court is exercising its lawful discretion<sup>6</sup> to impose a charge in relation to that FOI request while ensuring it meets the relevant conditions for imposing charges as outlined in the FOI Charges Regulations and FOI Guidelines.

***Section 29(5)(a) – Financial hardship***

Your email dated 4 February 2023 makes no reference to whether payment of the charge would cause financial hardship to you. Accordingly, and in the absence of any kind of evidence that financial hardship would be caused to you as a result of the charge being imposed, I conclude that no issues of financial hardship arise in the present circumstances.

***Section 29(5)(b) – Public interest***

I have also considered whether the disclosure of any document that falls within the scope of your FOI request would be in ‘the general public interest’ or in ‘the interests of a substantial section of the public’.<sup>7</sup>

The FOI Guidelines note that, with respect to the public interest test contained in section 29(5)(b) of the FOI Act, an applicant should ‘identify or specify the “general public interest” or the “substantial section of the public” that will benefit from its disclosure (s 29(1)(f)(ii)).’<sup>8</sup> This may require consideration of both the ‘content of the documents’ to be released ‘and the context in which their public release would occur.’<sup>9</sup>

I note that your email dated 4 February 2023 does not identify or specify either the ‘general public interest’ or the ‘substantial section of the public’<sup>10</sup> that will benefit from disclosure of any document. Nor does the email make any specific contentions about disclosure being in the public interest.

In such circumstances, and in the absence of you identifying the ‘general public interest’ or ‘substantial section of the public’ that would benefit from disclosure, I am not convinced that there currently exists a demonstrable link between disclosure of any document and the advancement of a public interest. I can find nothing in your email dated 4 February 2023 that would ‘draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.’<sup>11</sup> While it is not a requirement that you draw such a link, it goes some way in you, as the applicant, demonstrating public interest.<sup>12</sup>

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<sup>6</sup> Section 29(4) of the FOI Act.

<sup>7</sup> Section 29(5)(b) of the FOI Act.

<sup>8</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>9</sup> Paragraph 4.107 of the FOI Guidelines.

<sup>10</sup> Section 29(5)(b) of the FOI Act.

<sup>11</sup> Paragraph 4.108 of the FOI Guidelines.

<sup>12</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

The FOI Act does not define what constitutes disclosure being in the ‘general public interest’ or ‘in the interests of a substantial section of the public’.<sup>13</sup> The concept of ‘public interest’ is thought of as ‘a concept of wide import that cannot be exhaustively defined.’<sup>14</sup> It is recommended that an agency should direct ‘its attention to the advancement or the interest or welfare of the public’ which is dependent ‘on each particular set of circumstances.’<sup>15</sup> It is also considered that ‘the public interest is not a static concept confined and defined by strict reference points.’<sup>16</sup>

In *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19], Information Commissioner Popple succinctly outlined the relevant question in relation to the phrases ‘in the general public interest’ and ‘in the interests of a substantial section of the public’. The ‘question is whether giving access to the document, and the consequences of giving that access, are in the public interest.’<sup>17</sup> I have carefully considered this point and at present I cannot identify the benefit the public, or a substantial section of it, would derive from disclosure of any such document that falls within the scope of your request.

On the face of your FOI request dated 28 December 2022, it would appear you are seeking a specific document attached to confidential email communication between senior court employees. I do not consider that the document you requested could be ‘reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.’<sup>18</sup> The type of document you requested is related to communications between senior court employees about a recruitment process. Further, your FOI request dated 28 December 2022 and your email dated 4 February 2023 indicates that you already have possession of the document. For example, your email dated 4 February 2023 makes reference to your ‘laser like precision’ with respect to identifying the document. Given the type of document you have requested, I consider that any ‘public discussion or analysis’ of any email communication would be not only undesirable but may be detrimental and prejudicial to the individuals involved.

Paragraph 4.99 of the FOI Guidelines outlines that an agency may decide the imposition of a charge is appropriate where ‘... the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public’. Your FOI request seems to have an individualistic purpose, rather than the broader focus that is required to satisfy being in the public interest pursuant to section 29(5)(b) of the FOI Act. That is, both your FOI request dated 28 December 2022 and your email dated 4 February 2023 targets specifically named individuals and is quite focused on a particular piece of correspondence to which you already seem to have in your possession.

Another important factor is that the document you have requested is likely to contain confidential and sensitive information, including personal information. The very nature and

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<sup>13</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AAT 584 (11 August 2015) Senior Member Walsh at [15].

<sup>14</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) per Australian Information Commissioner Falk at [29].

<sup>15</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>16</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>17</sup> *Besser and Department of Infrastructure and Transport* [2011] AICmr 13 (17 March 2011) at [19] as citing *Encel and Secretary, Department of Broadband, Communications and the Digital Economy* [2008] AATA 72 (25 January 2008) at [90].

<sup>18</sup> Paragraph 4.110 of the FOI Guidelines.



circumstance of the existence of any document that falls within the scope of your FOI request must inform my decision as to its level (potential or otherwise) of public interest.<sup>19</sup>

In this regard, documents containing personal information are less likely to be ‘of general public interest or of interest to a substantial section of the public’. At this preliminary stage, I fail to see how the release of such confidential and/or sensitive information could be in the ‘general public interest’ or such that would benefit a ‘substantial section of the public’.

Paragraph 4.109 of the FOI Guidelines provides an elaboration on the notion of ‘public interest’ in respect of contesting a charge. Again, the FOI Guidelines point to the fact that ‘the advancement of the interests or welfare of the public ... will depend on each particular set of circumstances.’ Paragraph 4.109 of the FOI Guidelines identifies seven (7) circumstances which may be indicative of public interest. From those seven (7), I consider only two (2) to be relevant to your request. From the information in your email dated 4 February 2023, those two (2) potential circumstances set out in paragraph 4.109 of the FOI Guidelines are:

- *The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.*
- *The document will add to the public record on an important and recurring aspect of agency decision making.*<sup>20</sup> [footnotes omitted]

I do not consider that these document/s would ‘better inform the public’ about the decision making process with respect to recruitment exercises within the Court. I draw this conclusion primarily based on the nature of the document requested (that is, an attachment to confidential email correspondence about a recruitment process). Further, there is nothing to suggest that any ‘important and recurring aspect of agency decision making’ will be identified.<sup>21</sup>

Therefore, at this stage I have decided that the disclosure of any document that may fall within the scope of your request would not necessarily be in the general public interest or in the interest of a substantial section of the public. Of course, the decision maker of the FOI request will undertake a thorough assessment of any document/s falling within the scope of your FOI request and, if necessary, consider the applicability of conditional exemptions under the FOI Act, including the application of the public interest test contained in section 11A(5) of the FOI Act.

Without the benefit of the decision making process in relation to your request, my conclusion at this point in time is that the document/s the subject of your FOI request ‘are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public.’<sup>22</sup> I consider the imposition of a charge is appropriate and refuse your request for a reduction and/or waiver of the estimated charges.

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<sup>19</sup> *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 (29 April 2019) at [29].

<sup>20</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>21</sup> Paragraph 4.109 of the FOI Guidelines.

<sup>22</sup> Paragraph 4.99 of the FOI Guidelines.

### *Other considerations*

As outlined earlier in this decision, in determining whether the charge has been wrongly assessed or should be reduced or not imposed, I am permitted to take other matters into account in addition to financial hardship and the public interest.<sup>23</sup> These matters include any specific contentions you have made and whether disclosure of the document/s would advance the objects of the FOI Act.<sup>24</sup>

On this basis, I have given consideration to the specific contentions made in your email of 4 February 2023. As recommended by paragraph 4.97 of the FOI Guidelines, I have also given consideration to whether disclosure of the document/s would advance the objects of the FOI Act.

### *Charge for search and retrieval time*

In the letter from the Court dated 11 January 2023, it was estimated that fifteen (15) minutes was required to search and retrieve the document/s that may fall within the scope of your request. Your FOI request was for a document that you appear to have in your possession. Regardless of the level of specificity of your request, each FOI request must be thoroughly considered when conducting searches for the document/s. Various search terms and parameters are used for each of those paragraphs to ensure all document/s falling within the scope of your request are captured.

Paragraph 4.27 of the FOI Guidelines provides that an agency may charge for time spent:

- *consulting relevant officers to determine if a document exists*
- *searching a digital database or hardcopy file index for the location of a document*
- *searching a digital or hardcopy file to locate a document*
- *physically locating a digital or hardcopy document and removing it from a file.*

I consider the estimation of fifteen (15) minutes was entirely reasonable in light of your FOI request. The Court maintains 'high quality'<sup>25</sup> and 'well-organised'<sup>26</sup> records that are checked thoroughly upon the making of FOI requests. I appreciate that you, as the applicant, may consider your request 'identified the documents ... with laser like precision', and that you noted 'a) the person from whom the email was sent; b) to the people it was sent; c) on the date that it was sent; d) the title of the email; e) the contents of the email; and f) the attachments to that email.'

While such information may be of assistance, the Court is committed to its obligation to take 'all reasonable'<sup>27</sup> and 'demonstrable'<sup>28</sup> steps to find the document/s the subject of an FOI request. Further, Court employees are best placed to know the appropriate locations to search for document/s.

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<sup>23</sup> Paragraph 4.96 of the FOI Guidelines, *J" and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 16 (14 June 2012) at [9].

<sup>24</sup> Paragraphs 4.96 & 4.97 of the FOI Guidelines.

<sup>25</sup> Paragraph 4.28 of the FOI Guidelines.

<sup>26</sup> Paragraph 4.69 of the FOI Guidelines.

<sup>27</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>28</sup> Paragraph 3.86 of the FOI Guidelines.

With respect to the Court's obligation to take 'all reasonable steps' to find documents that have been requested under the FOI Act (see section 24A), the FOI Guidelines note at paragraphs 3.88 and 3.89 that:

*3.88 The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.<sup>29</sup>*

*3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.<sup>30</sup> At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:*

- the subject matter of the documents*
- the current and past file management systems and the practice of destruction or removal of documents*
- the record management systems in place*
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- the age of the documents.<sup>31</sup>*

In accordance with its obligations under the FOI Act and as is set out above, the Court undertook comprehensive searches in response to your request. This was necessary to ensure that all of the document/s that are in the possession of the Court and which meet the terms of your request are found.

I consider the estimation of fifteen (15) minutes was based on a 'common sense interpretation of the terms' of your request.<sup>32</sup> As a matter of practice, until reasonable searches are conducted by the Court, no decision can be made as to whether a document/s exists and/or falls within the scope of the request.

On the basis of the Court's obligation to take 'all reasonable'<sup>33</sup> and 'demonstrable'<sup>34</sup> steps to find the document/s, and despite the contentions made in your email of 4 February 2023, I have decided that fifteen (15) minutes for search and retrieval of document/s captured by your FOI request is reasonable in the circumstances and not excessive.

#### *Charge for decision making time*

As outlined in paragraphs 4.21 and 4.22 of the FOI Guidelines, it is permissible for the Court to charge for decision making time spent by the decision maker after the first five (5) hours.

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<sup>29</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

<sup>30</sup> *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

<sup>31</sup> *KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

<sup>32</sup> Paragraph 3.89 of the FOI Guidelines.

<sup>33</sup> Paragraph 3.85 of the FOI Guidelines.

<sup>34</sup> Paragraph 3.86 of the FOI Guidelines.

I am satisfied that any of the Court's FOI Officers would spend the estimated time of five and a half (5½) hours undertaking the decision making exercise. The estimated time includes: consideration of the FOI request with respect to the document/s returned from relevant searches; consultation with affected third parties; analysis of any applicable exemptions (conditional or otherwise); decision writing time; and preparation of any released document/s (with or without redactions). I consider this time to be both reasonable and fair considering the terms of your request and the type of document that may fall within the scope of your request.

It is important to note that pursuant to section 27A(1)(a) of the FOI Act, the need to consult is based on the fact that the document requested contains personal information. While the basis for your contesting the charge for decision making time is that there is no need for personal consultation under s.27A of the FOI Act, this is ultimately a question for the decision maker. At this stage, I consider it likely that consultation will be required. Further, paragraph 6.163 of the FOI Guidelines outlines that agencies should generally start from the position that a third party might reasonably wish to make a contention. The requirement to consult rests in both the FOI Act and guidance from the Office of the Australian Information Commissioner (OAIC).

In summary, I am satisfied that the charge 'fairly reflects the work involved in providing access to the documents'<sup>35</sup> the subject of your FOI request.

I note that you, as the applicant, may have a different view as to whether the charge for the decision making time is appropriate. However, the employees of the Court who are considering your request have considerable experience in this area. The estimation of charges has been informed by 'previous experience dealing with FOI requests of similar nature'<sup>36</sup>. Furthermore, I am confident that the Court has correctly applied the guiding principle of the "lowest reasonable cost" objective'.<sup>37</sup>

It is important to note that in the letter from the Court dated 11 January 2023, you were advised that the estimated charges provided in the table were an estimate only and that following the processing of your FOI request, the actual charge may be higher, as it is not possible to know the precise amount of time that staff of the Court would spend searching for and retrieving documents and/or making a decision in relation to the document you requested. I consider that the estimated charge was 'as fair and accurate as possible' and was not 'set an unreasonably high estimate which may hinder or deter'<sup>38</sup> you as the applicant.

#### *Exceptions to imposition of charges*

Your email dated 4 February 2023 does not identify any of the exceptions outlined in paragraphs 4.42 to 4.50<sup>39</sup> of the FOI Guidelines. On this basis, I conclude that none of these exceptions apply to your FOI request and that your FOI request falls within the circumstances in which the Court may exercise its discretion to impose a charge.

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<sup>35</sup> Paragraph 4.6 of the FOI Guidelines.

<sup>36</sup> Paragraph 4.70 of the FOI Guidelines.

<sup>37</sup> Paragraph 4.3 of the FOI Guidelines.

<sup>38</sup> Paragraph 4.68 of the FOI Guidelines.

<sup>39</sup> See also section 7 of the *Freedom of Information (Charges) Regulations 2019*.

## **Your Review Rights**

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

### ***Internal review***

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible, please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

### ***Information Commissioner review***

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: [Information Commissioner Review Application form \(business.gov.au\)](https://www.business.gov.au/foi-review-application-form)

email: [foi@oaic.gov.au](mailto:foi@oaic.gov.au)

post: Director of FOI Dispute Resolution, GPO Box 5218, Sydney NSW 2001

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner (**OAIC**) website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

## **Complaints**

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson  
**FOI Officer**

