

- 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,² and am satisfied that the Court has not imposed a charge that exceeds the cost of processing your FOI request.³

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.⁴ On this basis, I have given consideration to the specific contentions made in your

² Paragraph 4.3 of the FOI Guidelines.

³ Paragraph 4.4 of the FOI Guidelines.

⁴ 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.⁵

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*”.⁶

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)).*”⁷ To determine this, I have considered both the “*content of the documents*” requested “*and the context in which their public release would occur.*”⁸

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*”.⁹ The concept of “*public interest*” is thought of as “*a concept of wide import that cannot be exhaustively defined.*”¹⁰ 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.*”¹¹ It is also considered

⁵ Paragraph 4.97 of the FOI Guidelines.

⁶ Section 29(5)(b) of the FOI Act.

⁷ Paragraph 4.107 of the FOI Guidelines.

⁸ Paragraph 4.107 of the FOI Guidelines.

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

¹⁰ *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.

¹¹ *Ibid.*

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

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.*”¹³ 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” website¹⁴, 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.¹⁵

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*”.¹⁶ 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.¹⁷

¹² Ibid.

¹³ *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].

¹⁴ [REDACTED]

¹⁵ 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>.

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

¹⁷ *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.*”¹⁸ As outlined above, there was no requirement to advertise a vacancy and therefore, no issue that would require “*public discussion or analysis*”.¹⁹

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*”²⁰ 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.²¹

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.*”²²

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.

¹⁸ Paragraph 4.110 of the FOI Guidelines.

¹⁹ Paragraph 4.110 of the FOI Guidelines.

²⁰ Paragraph 4.109 of the FOI Guidelines.

²¹ Ibid.

²² 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.²³ These matters include any specific contentions you have made and whether disclosure of the documents would advance the objects of the FOI Act.²⁴

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.²⁵

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.²⁶ At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents*

²³ 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].

²⁴ Paragraphs 4.96 & 4.97 of the FOI Guidelines.

²⁵ *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.

²⁶ *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.*²⁷

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*”²⁸ and “*well-organised*”²⁹ 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*”³⁰ and “*demonstrable*”³¹ 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.

²⁷ *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.

²⁸ Paragraph 4.28 of the FOI Guidelines.

²⁹ Paragraph 4.69 of the FOI Guidelines.

³⁰ Paragraph 3.85 of the FOI Guidelines.

³¹ 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*".³²

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*".³³

Furthermore, I am confident that the Court has correctly applied the guiding principle of the "*lowest reasonable cost*" objective³⁴ 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*"³⁵ the subject of your FOI request, was "*as fair*

³² Paragraph 4.34 of the FOI Guidelines.

³³ Paragraph 4.70 of the FOI Guidelines.

³⁴ Paragraph 4.3 of the FOI Guidelines.

³⁵ Paragraph 4.6 of the FOI Guidelines.

and accurate as possible”, and has not “set an unreasonably high estimate which may hinder or deter”³⁶ 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

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/>.

³⁶ 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,

A handwritten signature in blue ink that reads "B Henderson".

B Henderson
FOI Officer