



**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;*

- 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:

*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.

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.

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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:

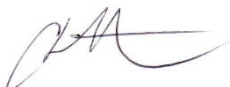
online: <https://forms.business.gov.au/aba/oaic/foi-review/>  
email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
post: GPO Box 2999, Canberra ACT 2601  
in person: Level 3, 175 Pitt Street, Sydney NSW

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