Australian Government

Office of the Australian Information Commissioner

Review of charges under the *Freedom of Information Act 1982*

Report to the Attorney-General

February 2012

Prof. John McMillan
Australian Information Commissioner

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ISBN 978-1-877079-95-5

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Foreword

The capacity of an agency or minister to impose an access charge under the *Freedom of Information Act 1982* is always at the centre of debate about the operation of the Act.

FOI requests can impose a substantial administrative burden on agencies and divert resources from other functions. Access charges are a way of controlling and managing demand for documents and defraying some of the cost of FOI to government.

On the other hand, FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act. The objective of the Act to make government open and engaged with the public will be hampered if it is too expensive or cumbersome for people to make FOI requests.

Balancing those competing interests has always been important, yet difficult. Major reforms to the FOI charges framework were introduced in 2010 to strike a new balance between public access and the administrative demands on government. The Australian Government, recognising the evolving significance of this issue, foreshadowed at the time that I would be asked to commence a review of the FOI charges framework within a year of the reforms commencing on 1 November 2010.

This report concludes that further change to FOI legislation is needed. A new charges framework could enable the FOI Act to work better in providing public access to government information without impairing the other responsibilities of agencies and ministers.

The reform proposals in this report arose from a valuable consultation exercise conducted by the Office of the Australian Information Commissioner with Australian Government agencies, advisory committees, members of the public and community organisations. I thank them for their valuable assistance to my office in this review.

The prevailing theme in all consultation for this report was that the FOI Act is a vital statute that must be supported by government and made to work in an optimal manner. My recommendations for reform are framed in that spirit. I commend them to the Australian Government for close consideration.

Prof. John McMillan
Australian Information Commissioner

10 February 2012

About this review

The terms of reference for this review were issued by the Minister for Privacy and Freedom of Information, the Hon Brendan O'Connor MP, on 7 October 2011. At the time the Office of the Australian Information Commissioner (OAIC) was in the portfolio of the Department of the Prime Minister and Cabinet. The OAIC was transferred to the portfolio of the Attorney-General's Department in late October 2011.

TERMS OF REFERENCE FOR REVIEW OF CHARGES UNDER THE *Freedom of Information Act 1982*

Review by the Australian Information Commissioner

I, Brendan O'Connor, Minister for Privacy and Freedom of Information, request the Australian Information Commissioner to review the charges regime under the *Freedom of Information Act 1982* (FOI Act), including considering the following matters:

i. the role of fees and charges in FOI
ii. the impact on applicants and agencies of the current charging regime
iii. options for change to the fees and charges regime;
iv. whether the decision to impose charges, or the nature or level of charges imposed, should vary according to the nature of the request or the applicant; and
v. any other related matter.

The review should be undertaken in consultation with users of FOI and other stakeholders, Australian Government agencies and the Information Advisory Committee (when appointed). The review should have regard to

a) the objects of the FOI Act
b) the costs to agencies in processing FOI request
c) practices in other Australian and international jurisdictions.

The report should be provided by 31 January 2012.

[Authority: section 8(f) of the *Australian Information Commissioner Act 2010*]

Discussion paper

I commenced this review by releasing a discussion paper on 31 October 2011 on the OAIC website at www.oaic.gov.au.[1] The discussion paper outlined the scope of the review, the background and elements of the charging framework, the estimated costs incurred by agencies in processing FOI requests contrasted with fees and charges collected, and provided an overview of charging practices in other Australian and international

[1] Suggestions and comments as to the matters that should be raised in the discussion paper were invited via the OAIC blog: www.oaic.govspace.gov.au. See my blog post on 13 October 2011: *Review of charges under the Freedom of Information Act 1982*. No suggestions or comments were received.

jurisdictions.[2] The discussion paper included a list of questions concerning the role of charges under the FOI Act (see Appendix A of this report). Submissions on the discussion paper were requested by 21 November 2011. The discussion paper was widely advertised, including through the use of the OAIC's Twitter account,[3] govdex community[4] and OAICnet mailing list.[5]

The OAIC received a total of 23 submissions from agencies and applicants. Submissions as published are listed in Appendix B. Late submissions were accepted until the end of December 2011.

Consultation

I conducted consultation sessions during November and December 2011 with the public, Australian Government agencies, the Information Advisory Committee (IAC)[6] and the Administrative Review Council (ARC).[7] Details of the consultation sessions are listed at Appendix C.

2 An addendum to the discussion paper was issued on 4 November 2011 to amend Part 5: Charging practices of other jurisdictions. The amendment clarified the charging principles that apply in the United Kingdom. Where the estimated cost of responding to a request for information does not exceed the appropriate limit (£600 for central government bodies and £450 for other authorities), an agency cannot charge for costs incurred in locating, retrieving and extracting information. In such cases, an agency can *only* charge for the costs of informing the applicant whether it holds the information (including photocopying and postage costs). The addendum is available at www.oaic.gov.au/publications/papers/FOI_Charges_Review_DP_2011_addendum.html.

3 See www.twitter.com/oaicgov.

4 See www.govdex.gov.au. Govdex supports collaboration across government. It is a secure, private web-based space that helps government agencies to manage projects, and share documents and information.

5 OAICnet provides news from the OAIC about its activities, publications and other relevant information. To subscribe, visit www.oaic.gov.au/news/subscribe.html.

6 The terms of reference required that the IAC be consulted in this review. The role of the IAC is to assist and advise the Information Commissioner in matters relating to the performance of information functions: s 27 of the *Australian Information Commissioner Act 2010*.

7 The ARC is an independent statutory body established under the *Administrative Appeals Tribunal Act 1975* (AAT Act) to inquire into, and report to the Attorney-General on, the operation of the administrative law system. Section 49(1)(ca) of the AAT Act provides that the Australian Information Commissioner is a member of the ARC.

Executive summary and recommendations

Background to this inquiry

The *Freedom of Information Act 1982* (FOI Act), upon commencement in 1982, authorised agencies and ministers[8] to impose charges for providing access to documents. The type and scale of charges were set out in the *Freedom of Information (Charges) Regulations 1982* (Charges Regulations). In deciding on a charge an agency is to observe the stated objective of the FOI Act to facilitate public access to government information promptly and at the lowest reasonable cost (s 3(4)).

Changes have been made only four times to the charges provisions. The first change occurred in 1985 when an FOI application fee was introduced. Next, in 1986 a charge for decision making was introduced, and the current scale of charges was set. The third change was in 1991, when a cap was imposed on the charge that could be levied for a request for personal information. The most recent changes in 2010 were part of an extensive reform of the FOI Act, and were of two kinds:

- application fees were removed from FOI access requests, applications for internal review, and requests to amend or annotate personal records
- FOI charges were removed from access requests for personal information, for the first five hours of decision making time for other requests, and where an agency fails to notify a decision on a request within the prescribed processing period.

At the time of introducing these recent substantial reforms into the Parliament, the Government foreshadowed that it would ask the Australian Information Commissioner to review the charges regime within a year of the 2010 reforms commencing. This review commenced in October 2011, and involved publication of a discussion paper, consultation with the public and Australian Government agencies and advisory committees, and consideration of written submissions.

Main issues raised in inquiry

Issues that were highlighted by agencies in submissions and during consultations included:

- the suitability of the charges scale, which has not altered since 1986
- the need to simplify the charges framework
- the useful role that charges play in initiating a discussion with applicants about narrowing and refining the scope of broad requests, and the difficulties agencies face in using s 24AB of the FOI Act (the 'practical refusal' mechanism) to achieve the same effect

[8] The remainder of this Executive Summary refers only to agencies, but should be read as including ministers.

- the problem of large and complex applications from specific categories of applicants who use the FOI Act rather than rely upon other means to obtain information (such as law firms that use the FOI Act as a form of discovery, and members of parliament, journalists, researchers and the media)
- the need for further guidance from the OAIC regarding the application of the FOI Act provisions for waiving and reducing charges, particularly in assessing an applicant's claim of financial hardship or that disclosure would be in the public interest.

Applicants and members of the public, by contrast, emphasised the importance of:

- minimising cost barriers to the exercise of the democratic right of access conferred by the FOI Act
- ensuring that charges do not discriminate against economically disadvantaged applicants
- preventing the introduction of a full cost-recovery principle for FOI charging.

Various proposals for reform were made, including:

- simplifying the charges scale by combining some existing charges into a single hourly processing charge
- introducing a graduated charging scale under which the charge increases based on the time an agency spends in processing a request
- prescribing a ceiling on the amount of time an agency is required to spend on processing a request
- charging according to the amount of information released
- charging according to the category of applicant
- imposing an FOI application fee and abolishing all other processing charges.

Guiding principles to underpin a new charges framework

Fees and charges play an important role in the FOI scheme. It is appropriate that applicants can be required in some instances to contribute to the substantial cost to government of meeting individual document requests. Charges also play a role in balancing demand, by focusing attention on the scope of requests and regulating those that are complex or voluminous and burdensome to process.

On the other hand, full cost-recovery would be incompatible with the objects of the FOI Act and would strike unfairly against large sections of the community. This has been accepted during 30 years of the FOI Act, as the reported fees and charges collected by agencies represent only 2.08% of the estimated total cost of administering the FOI Act (1.68% in 2010–11). The FOI reform objective in 2010 was to further reduce the cost to the community of obtaining government information and to promote greater transparency in government.

A balance must be struck, but the current method in the FOI Act and Charges Regulations of striking that balance is inadequate. The charging framework is not easy to administer; charges decisions cause more disagreement between agencies and applicants than seems warranted; in some cases the cost of assessing or collecting a charge is higher than the charge itself; and the scale of charges is outdated and unrealistic.

This report proposes four principles to underpin a new charges framework:

- ***Support of a democratic right:*** Freedom of information supports transparent, accountable and responsive government. A substantial part of the cost should be borne by government.
- ***Lowest reasonable cost:*** No one should be deterred from requesting government information because of costs, particularly personal information that should be provided free of charge. The scale of charges should be directed more at moderating unmanageable requests.
- ***Uncomplicated administration:*** The charges framework should be clear and easy for agencies to administer and applicants to understand. The options open to an applicant to reduce the charges payable should be readily apparent.
- ***Free informal access as a primary avenue:*** The legal right of access to documents is important, but should supplement other measures adopted by agencies to publish information and make it available upon request.

Recommendations for a new charges framework

Recommendations are made in Part 5 of this report to replace the current charges framework in the FOI Act and Charges Regulations with a new framework that can be summarised as follows:

1. ***Administrative access:*** agencies are encouraged to establish administrative access schemes that enable people to request access to information or documents that are open to release under the FOI Act. A scheme should be set out on an agency's website and explain that information will be provided free of charge (except for reasonable reproduction and postage costs).
2. ***FOI application fees:*** to encourage people to use an administrative access scheme prior to using the FOI Act, an agency may in its discretion impose a $50 application fee if a person makes an FOI request without first applying under an administrative access scheme that has been notified on an agency's website. A person who applies under an administrative access scheme and is not satisfied with the outcome or who is not notified of the outcome within 30 days may make an FOI request without paying an application fee. The agency's exercise of the discretion to impose a $50 application fee would not be externally reviewable by the Information Commissioner (IC reviewable), nor subject to waiver on financial hardship or public benefit grounds.
3. ***FOI processing charges:*** no FOI processing charge should be payable for the first five hours of processing time (which includes search, retrieval, decision making, redaction and electronic processing). The charge for processing time that exceeds

five hours but is less than 10 hours should be a flat rate of $50. The charge for each hour of processing after the first 10 hours should be $30 per hour.

4. ***Ceiling on processing time:*** an agency should not be required to process a request that is estimated to take more than 40 hours. The agency must consult with the applicant before making that decision. This ceiling will replace the practical refusal mechanism in ss 24, 24AA and 24AB. An agency decision to impose a 40 hour ceiling would not be IC reviewable, though the agency's 40 hour estimate would be reviewable.
5. ***FOI access charges:*** specific access charges should apply for other activities, such as supervising document inspection ($30 per hour), providing information on electronic storage media (actual cost), postage (actual cost), printing ($0.20 per page) and transcription (actual cost).
6. ***Personal information:*** there should be no processing charge for providing access to documents that contain an applicant's personal information, but personal information requests should be subject to the 40 hour ceiling applying to other requests.
7. ***Waiver:*** the specified grounds on which an applicant can apply for reduction or waiver of an FOI processing or access charge should be financial hardship to the applicant, or that release of the documents would be of special benefit to the public. An agency may waive a charge in full or by 50% or decide not to waive. An agency would also have a discretion not to impose or collect an FOI application fee or processing or access charge; the exercise of that general discretion would not be an IC reviewable decision.
8. ***Reduction for delayed processing:*** where an agency fails to notify a decision on a request within the prescribed statutory period, the FOI charge that is otherwise payable should be reduced by 25% if the delay is seven days or less, 50% if more than seven but up to and including 30 days, or 100% for a delay of more than 30 days.
9. ***Review application fees:*** there should be no application fee for internal review. Nor should there be an application fee for IC review, if an applicant first applies for internal review and is not satisfied with the decision or is not notified of a decision within 30 days. If an applicant applies directly for IC review when internal review was available, a fee of $100 should be payable. The fee should not be subject to waiver.
10. ***Indexation:*** all FOI fees and charges should be adjusted every two years to match any Consumer Price Index change over that period, by rounding the fee or charge to the nearest multiple of $5.

Explanation of the proposed changes

The proposed changes are explained fully in this report. The theme throughout is that applicants and agencies can equally benefit from a new charges framework that is clear, easy to administer and understand, encourages agencies to build an open and responsive culture, and provides a pathway for applicants to frame requests that can be

administered promptly and attract little or no processing charge. There are three primary ways for bringing this change about.

The first is by encouraging agencies to develop, and applicants to use, administrative access schemes before resorting to the formal legal processes of the FOI Act. Administrative schemes can play a key role in meeting the objectives of the FOI Act. They can provide quick and informal information release in a way that can reduce the cost both to applicants and agencies. Importantly, they complement and do not detract from the legally enforceable right of access under the FOI Act. In fact, the discussion that occurs between applicants and agencies at the administrative access stage can assist the smooth operation of the FOI Act and bring about targeted and quicker document release if FOI processes are later used.

The second is by introducing a new scale of FOI charges that is clear and straightforward to administer. The new scale will markedly benefit applicants whose requests can be processed in less than 10 hours. Personal information requests will remain free of processing charges. A new ceiling of 40 hours on processing time would replace the 'practical refusal' mechanism in the FOI Act that makes it difficult to decide when a complex or voluminous request imposes an unreasonable administrative burden upon an agency. This will also provide a clear standard for deciding when consultation should occur between an agency and an applicant about revising and narrowing the scope of a request that appears unmanageably large.

The third is by reinforcing the important role that internal review can play in quickly and effectively resolving a disagreement between an applicant and an agency about a document request. Internal review is generally quicker than IC review and enables an agency to take a fresh look at its original decision. An applicant could still apply directly for IC review but would be required to pay an application fee of $100 (subject to some exceptions). This proposal builds on a changing mood within government since the 2010 reforms to attribute greater importance to internal review and to treat it as a valuable step in resolving access requests.

Part 1: The *Freedom of Information Act 1982* and the existing charges regime

Overview of the FOI Act

The declared objects of the FOI Act are:

- to give the Australian community access to information held by government, by requiring agencies to publish that information and by providing for a right of access to documents
- to promote Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision making and increasing scrutiny, discussion, comment and review of government activities
- to increase recognition that information held by government is to be managed for public purposes and is a national resource
- to ensure that powers and functions in the FOI Act are performed and exercised, as far as possible, so as to facilitate and promote public access to information, promptly and at the lowest reasonable cost.[9]

The FOI Act promotes government accountability and transparency by providing a legal framework for people to request access to government information. This right of access extends to government information about policy making, administrative decision making and government service delivery. The Act also gives people the right to access information that government holds about them, and to request corrections to that information if they consider it to be incorrect, incomplete, misleading or out of date.

The FOI Act commenced operation on 1 December 1982. It applies to all Australian Government agencies, with certain exemptions as set out in s 7. Ministers (including parliamentary secretaries) and their offices are also covered by the FOI Act, although the Act applies only to the 'official documents' of a minister and not those of a personal nature or relating to the minister's activities as a member of a political party or a member of Parliament. Section 3A of the FOI Act states that the Act does not prevent or discourage an agency or minister from releasing documents, including documents that are exempt under the FOI Act, as long as there is no legal restriction on disclosure.

Reform of the FOI Act occurred in 2010 following a 2007 election commitment by the Australian Labor Party. The *Freedom of Information (Reform) Act 2010* and the *Australian Information Commissioner Act 2010* (AIC Act) commenced on 1 November 2010. These Acts introduced major changes to the FOI landscape, including:

[9] The objects of the FOI Act are set out in ss 3 and 3A.

- introducing a presumption of openness and maximum disclosure, based on publication of information and the release of information upon request unless there is an overriding reason not to do so
- requiring the proactive release of an increased range of information through a new Information Publication Scheme (IPS) for Australian Government agencies from 1 May 2011
- establishing the independent statutory positions of the Australian Information Commissioner and Freedom of Information Commissioner (FOI Commissioner)
- removing application fees for FOI requests, internal review of FOI decisions, and requests to amend or annotate personal records
- removing charges for FOI requests for personal information and making the first five hours of decision making time free for all other requests.

These Acts also established the OAIC, an independent statutory agency headed by the Information Commissioner with the support of the FOI Commissioner and the Privacy Commissioner. The former Office of the Privacy Commissioner was integrated into the OAIC. The OAIC combines the functions of information policy and independent oversight of FOI and privacy protection in a single agency to promote open government and advance the development of consistent, workable information policy across Australian Government agencies.

Within the OAIC, the FOI Commissioner is primarily responsible for FOI functions such as day-to-day administration of FOI enquiries and complaints, undertaking merit review of FOI decisions, investigating complaints about FOI administration and monitoring agency compliance with the FOI Act. Agencies must have regard to guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines).[10]

Avenues for accessing information within the FOI framework

Formal requests under the FOI Act

Section 11 of the FOI Act declares that every person has a legal right to obtain access to documents of an agency and official documents of a minister, other than exempt documents. Section 15 sets out the requirements for making an FOI access request, including that the request must be in writing, state that the request is an application for the purposes of the FOI Act, provide adequate information to allow the agency or minister to identify the document, and give details of how notices should be sent to the applicant (s 15(2)). The request can be delivered to an agency or minister in person, by post or electronically (s 15(2A)).

Section 15 also obliges agencies and ministers to assist any person who wishes to make a request or whose request does not meet the above requirements (s 15(3)). Where a person has made a request that should have been directed to another agency or minister,

[10] *Guidelines issued by the Australian Information Comissioner under s 93A of the Freedom of Information Act 1983*, available on the OAIC website at www.oaic.gov.au.

there is an obligation to help the person direct the request to the appropriate agency (s 15(4)).

Agencies and ministers have 14 days after receiving a request to notify the applicant that it has been received (s 15(5)(a)) and 30 days to notify the applicant of a decision on the request (s 15(5)(b)). The 30 day processing period can be extended where consultation with other entities is needed before making a decision on the request (s 15(6), (7)), the applicant agrees to an extension (s 15AA), the request is complex or voluminous and the Information Commissioner approves an extension (s 15AB), or where the time for making a decision has expired without the applicant receiving notice of the decision (s 15AC).

The FOI Act also recognises that access to government information can occur through means other than a formal request for documents:

- an agency can establish procedures for current or former staff to obtain access to personnel records (s 15A)
- information can be published by an agency under the IPS
- agencies and ministers can provide access to information outside the formal FOI Act process (s 3A).

Those avenues are discussed further below.

Agency employee access to personnel records (s 15A)

Section 15A of the FOI Act provides that a current or former employee of an agency must use a procedure established by the agency for providing access to personnel records before using the formal FOI request process. A person who is not satisfied with the outcome or who is not notified of the outcome within 30 days may then make an FOI access request (s 15A(2)).

Section 15A was enacted in 1991,[11] following recommendations made in 1986 by an interdepartmental committee (IDC) review of the costs and workload associated with FOI, and in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs review of the FOI Act.[12] The IDC review examined the costs of FOI and calculated that in 1984–85, about 15% of FOI access requests were for access to personnel records of current or former Commonwealth employees seeking information relating to their employment.[13] The proposed new procedure would bring an estimated saving of $850,000 per year.[14] The Senate Committee review accepted that savings could be made but considered it important to retain the legally enforceable right of access.[15]

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11 See *Freedom of Information Amendment Act 1991*.

12 Senate Standing Committee on Legal and Constitutional Affairs (Senate Committee report, 1987), *Freedom of Information Act 1982: A Report on the Operation and Administration of the Freedom of Information Legislation*.

13 Senate Committee report, 1987, paragraph 3.46.

14 Senate Committee report, 1987, paragraph 3.47.

15 Senate Committee report, 1987, paragraph 3.50.

Some agency websites highlight the existence of administrative access schemes for staff wishing to access their personnel records.[16] The Department of Defence (DoD), for example, has established a scheme that applies to current and former members of the Australian Defence Force and current and former employees of the Department. Staff can request their service and medical records, discharge certificates, recruitment file, psychology records and other kinds of documents. If a request falls outside the scope of the administrative access scheme, staff are advised to make an FOI access request and are provided with links to FOI request forms and general information about FOI.[17]

The Information Publication Scheme

The 2010 FOI reforms established the IPS for Australian Government agencies, commencing on 1 May 2011.[18] The IPS is intended to increase public access to government information and promote a pro-disclosure culture within government by requiring the publication of some categories of government information and encouraging the proactive publication of other information. The IPS requires agencies to publish accurate, up to date and complete information about their:

- structure
- functions
- statutory appointments
- annual reports
- consultation arrangements
- documents to which access is routinely given under the FOI Act
- information routinely provided to Parliament
- operational information, meaning information that assists the agency to exercise its functions or powers in making decisions or recommendations that affect members of the public, including agency rules, guidelines, practices and precedents relating to those decisions and recommendations
- details of the agency's contact officer.[19]

Agencies can also choose to publish other information through their IPS.[20] This includes information that may be of interest or benefit to the public, for example, information that increases public understanding of an agency's decisions, policies or programs.[21]

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16 See, for example, websites of the Australian Federal Police, Commonwealth Scientific and Industrial Research Organisation (CSIRO), Department of Agriculture, Fisheries and Forestry (DAFF) and the Social Security Appeals Tribunal.

17 The scheme is set out on DoD's website at www.defence.gov.au/foi/exservice.htm.

18 See Part 2 of the FOI Act. The IPS requirements do not apply to ministers' offices.

19 See s 8(2) of the FOI Act.

20 See s 8(4) of the FOI Act.

21 See paragraph 13.109 of the FOI Guidelines for factors that should be taken into consideration in deciding what information to publish.

Agencies are not required to publish in their IPS entry information that would be exempt under the FOI Act.[22] However, agencies retain a discretion to release information, including information exempt under the Act, so long as this is not restricted by other legal obligations. Agencies are to be guided by the principle that government held information is declared by the Act to be a national resource, to be made available wherever possible in an accessible and usable fashion.[23]

Agencies can charge for access to information or documents released under the IPS only if the data cannot be made available to download from a website and the agency has incurred specific reproduction or incidental costs in making the data available under the IPS.[24] However, apart from the IPS, it is still open to agencies to make publications and information available for purchase by the public (s 12(1)(c)).

The IPS is complemented by a requirement on agencies and ministers to publish on their websites information that has been released in response to each FOI access request (subject to certain exceptions), known as a 'disclosure log'.[25] Inherent in both the IPS and disclosure log requirements is the principle of facilitating equal public access rather than exclusive individual access to government information.

The IPS and disclosure log requirements may, in time, reduce the number of individual document requests to agencies. More fundamentally, they will increase public availability of government information in line with the objects of the FOI Act.

Access to government information apart from the FOI Act

Section 3A of the Act provides that it does not limit access to or the publication of government information outside the processes set down in the Act.

A common approach by agencies to releasing information outside the FOI access request process is via agency online service portals. The portals facilitate both client access to personal information and agency–client transactions. They allow clients to access and update their personal information without charge and also provide agencies with a low-cost alternative to providing access to personal information via the FOI Act.

The Australian Government is seeking to strengthen its online service delivery capabilities through the Australian Government Online Service Point (AGOSP) Program. AGOSP is a $42.4 million Budget initiative that will enhance the australia.gov.au website to provide people with simple, convenient access to government information, messages and services. The enhancements to australia.gov.au will include a single sign-on service, allowing people to access online services from multiple government agencies through one account, an advanced online forms capability, and a National Government Services Directory, providing a comprehensive list of government services.

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22 See s 8C(1) of the FOI Act.
23 FOI guidelines, paragraph 13.106.
24 FOI guidelines, paragraphs 13.126–13.127.
25 See s 11C of the FOI Act.

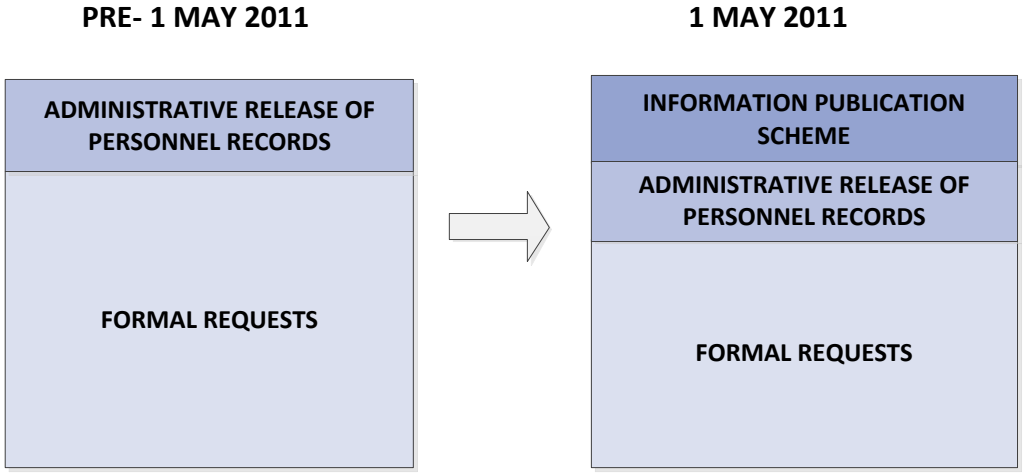
The Department of Human Services (DHS) provides channels for individuals to access personal information held by DHS agencies outside the FOI Act. The website directs individuals wishing to access their personal information to Centrelink's Online Services, Child Support Agency (CSA) Online, and Medicare Services Online. These portals allow individuals to login and access their information, and in some cases to amend information that is incorrect. For example, the CSA Online portal allows users to view and update their personal CSA details, view and print most CSA letters, and access account details, including a history of payments made and received. Medicare's online services portal allows users to lodge a Medicare claim, update bank account details, update personal details (email, phone, address and more), and view both Medicare claims history and 'Care Plan' access history.

The Australian Taxation Office (ATO) also provides access to information via online service portals. The ATO's three portals are the Business Portal, the Tax Agent Portal, and the BAS Agent Portal. These portals enable secure access to and correction of certain information held by the ATO. The ATO's FOI web page also explains when a person may not need to make an FOI request to access information, for example how people can access recent notices of assessment or recent tax returns, as well as taxation rulings, determinations, decision impact statements, and law administration practice statements.

Current FOI landscape

Prior to the 2010 reforms, many documents were released only after an FOI access request or a request for personnel records under s 15A. The IPS provides a third mechanism. This is represented in Figure 1 below.

Figure 1*: The impact of the IPS on the FOI landscape*



Current charging framework applicable to FOI access requests

An agency or minister has a discretion to impose or not impose a charge for access to a document requested under s 15 of the FOI Act. Any charge imposed must not exceed the charges set out in the Charges Regulations. When determining the appropriate charge, the agency or minister must take account of the 'lowest reasonable cost' objective as set out in the objects clause of the FOI Act (s 3(4)).

The FOI Guidelines state that a charge must not be used to discourage an applicant from exercising the right of access conferred by the FOI Act.[26] Charges should fairly reflect the work involved in providing access to documents. Agencies should have sound record keeping practices so that an agency's documents can be readily located and retrieved when an FOI request is received.[27] Applicants are not to be disadvantaged by poor or inefficient record keeping.[28]

The following is an outline of the key features of the current charges regime. A summary of the main legislative provisions is set out at Appendix D**.** For the purpose of this report, an 'application fee' refers to a fee that accompanies an FOI access request or request for review. A 'charge' refers to an amount imposed and collected for processing an FOI access request or providing access in a particular form.

Application fee for FOI access requests

There is no application fee for making an FOI request. In particular, agencies and ministers cannot impose a fee for an application to access a document or amend or annotate personal information.

Scale of charges

The FOI charges that an agency or minister may impose for an initial access decision cover activities such as search and retrieval time, decision making time, retrieval and collation of electronic information, transcription, photocopying, replay, inspection and delivery of documents.

In 1982, the original charges regime incorporated an hourly charge for search and retrieval but no charge for decision making. In part, it was reasoned that as time went by, agencies would need less time for decision making due to increasing familiarity with the legislation and adoption of different attitudes and practices at the time that documents were created.[29] The Senate Committee's 1979 report on the FOI Bill also expressed concern that charges for decision making time would be applied inconsistently and that those agencies that were less disposed to openness would likely spend more time on decision making.[30] In the Committee's view:

> It hardly seems fair or just, in a Bill designed to confer rights of access, that an agency's charges are inversely related to its commitment to the philosophy underlying the Bill.[31]

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26 FOI guidelines, paragraph 4.3.
27 FOI guidelines, paragraph 4.3.
28 FOI guidelines, paragraph 4.31.
29 Senate Standing Committee on Legal and Constitutional Affairs (Senate Committee report, 1979) *Freedom of Information: Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill 197*8, paragraph 11.21.
30 Senate Committee report, 1979, paragraph 11.22.
31 Senate Committee report, 1979, paragraph 11.22.

In 1986, an hourly charge was introduced for agency decision making. The IDC review of the costs and workload associated with FOI in 1986 and the Senate Committee's review of FOI in 1987 were in favour of an hourly decision making charge. The Senate Committee noted that there was little data available on the amount of time that agencies spent on decision making but that it was appropriate that some degree of cost recovery was attempted.[32] However, the Committee recommended a cap on the number of hours that could be charged for decision making time as a means of addressing the risk that applicants end up paying for 'agency inefficiency, obstructionism [and] unjustified caution'.[33] While the hourly charge for decision making time was kept, no upper limit was introduced for requests involving non-personal information.

Figure 2 sets out the current charges. They are not subject to regular indexation and have not increased since November 1986.

Figure 2: *Charges listed in the Schedule to the Charges Regulations*

Activity item	Charge	Schedule
Search and retrieval**:** time spent searching for or retrieving a document	$15.00 per hour	Part I, Item 1
Decision making**:** time spent in deciding to grant or refuse a request, including examining documents, consulting with other parties, and making deletions	First five hours: Nil Subsequent hours: $20 per hour	Part I, Item 5
Electronic production: retrieving and collating information stored on a computer or on like equipment	Actual cost incurred by the agency or minister in producing the copy	Part I, Item 3 Part II, Items 4, 4A, 6
Transcript: preparing a transcript from a sound recording, shorthand or similar medium	$4.40 per page of transcript	Part I, Item 4 Part II, Item 7
Photocopy: a photocopy of a written document	$0.10 per page	Part II, Item 2
Other copies: a copy of a written document other than a photocopy	$4.40 per page	Part II, Item 3
Replay: replaying a sound or film tape	Actual cost incurred in replaying	Part II, Item 5
Inspection: supervision by an agency officer of an applicant's inspection of documents or hearing or viewing an audio or visual recording	$6.25 per half hour (or part thereof)	Part II, Item 1
Delivery**:** posting or delivering a copy of a document at the applicant's request	Actual cost	Part II, Item 8

[32] Senate Committee report, 1987, paragraph 19.30, p 284.
[33] Senate Committee report, 1987, paragraph 19.38, p 286.

Notification and collection of charges

Section 29(1) of the FOI Act provides that an applicant must be given notice in writing when an agency or minister decides that the applicant is liable to pay a charge. The notice must contain certain information, including the applicant's right to contend that the charge is wrongly assessed or should be reduced or waived.

When notifying an applicant of a charge, an agency or minister may require the applicant to pay a deposit (ss 29(1), 29(3), reg 13). The deposit cannot be higher than $20 if the notified charge is between $25 and $100, or 25% of a notified charge that exceeds $100 (reg 12). The agency or minister can defer work on the applicant's request until the deposit is paid or a decision is made to waive the charge following a request from the applicant.[34]

If an applicant is liable to pay a charge, the charge should be paid before the applicant is given access to documents (s 11A(1)(b), reg 11(1)). An exception applies if the charge is for supervising an applicant's personal inspection of documents or hearing or viewing an audio or visual recording (reg 11(2)). Payment of the charge cannot be required in advance of the inspection or viewing, unless the agency or minister has made a decision under reg 9(3) estimating the probable length of the period of inspection or viewing.[35]

Exceptions

There is no charge for an individual seeking access to their personal information. Personal information is defined in s 4(1) of the FOI Act as 'information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'. The information may be private in nature or publicly known. It may be factual, descriptive or an opinion about that individual. The decisive quality is the connection between the information and an individual.[36]

A document that contains an applicant's personal information can fall within this exemption even if the document contains non-personal information. If the personal information forms a small part of a document and an agency or minister can reasonably be expected to expend extra time or resources in providing access to the entire document, it may be appropriate to impose a charge for providing access to the part that does not contain personal information. Before doing so, the agency or minister should consult the applicant about narrowing the scope of the request to that part of the document that contains the applicant's personal information.[37]

There is no charge where a minister or agency fails to meet the prescribed statutory processing period for making an FOI decision. The statutory processing period (30 calendar days) may be extended where a minister or agency needs to consult with an

[34] FOI guidelines, paragraph 4.27.
[35] FOI guidelines, paragraph 4.29.
[36] FOI guidelines, paragraph 4.14.
[37] FOI guidelines, paragraph 4.15.

affected third party, by agreement with the applicant or where the Information Commissioner grants an extension.

As noted in Figure 2, there is no charge for the first five hours of the time spent in making an access decision (Schedule, Part I, Item 5). There is no equivalent free time for the search and retrieval of documents.

Correction, reduction or waiver of charges

An applicant who receives a notice advising that a charge is payable may apply in writing to the agency or minister for the charge to be corrected, reduced or waived (s 29(4)). If an applicant contends that a charge has been wrongly assessed, the central issue to be considered is whether relevant provisions of the FOI Act and the Charges Regulations have been correctly understood and applied.[38] If, on the other hand, an applicant contends that a charge should be reduced or waived, the agency or minister has a general discretion to consider, among other matters:

- whether payment of the charge, or part of it, would cause financial hardship to the applicant or a person on whose behalf the application was made
- whether giving access to the document in question is in the general public interest or in the interest of a substantial section of the public (s 29(5)).[39]

The application should set out the applicant's reasons for contending that the charge has been wrongly assessed or should otherwise be reduced or waived (s 29(1)(f)(ii)).[40]

The agency or minister must provide a written notice of a decision regarding a review of a charge to the applicant within 30 days. If the decision is to deny the applicant's request in whole or in part, the notice of decision must set out the reasons for the decision and the applicant's right to seek internal or Information Commissioner review (IC review) of that decision or to make a complaint to the Information Commissioner and the procedure for doing so (s 29(8)–(10)).[41]

Internal and external review

There is no fee for applying for internal review, review by the Information Commissioner or for making a complaint to the Information Commissioner.

By contrast, a fee is payable under reg 19 of the *Administrative Appeals Tribunal Regulations 1976* (AAT Regulations) for an application to the Administrative Appeals Tribunal (AAT) for review of a decision of the Information Commissioner. The fee, which is increased every two years in line with the Consumer Price Index (CPI), was $777 as at 31 January 2012. The fee can be reduced to $100 in certain circumstances that include an application by a person receiving legal aid or holding a Commonwealth health care or pensioner concession card (reg 19(6)), or payment of the fee being waived by a Registrar,

[38] FOI guidelines, paragraph 4.43.
[39] FOI guidelines, paragraph 4.44.
[40] FOI guidelines, paragraph 4.43.
[41] FOI guidelines, paragraph 4.43.

District Registrar or Deputy District Registrar of the AAT on financial hardship grounds (reg 19(6A)).[42]

No fee is payable if the decision was made under the FOI Act in relation to a document which relates to a decision under Schedule 3 to the AAT Regulations. Decisions listed under Schedule 3 includes decisions about Commonwealth workers' compensation, family assistance and social security payments and veterans' entitlements.

Fees and charges collected under the FOI Act

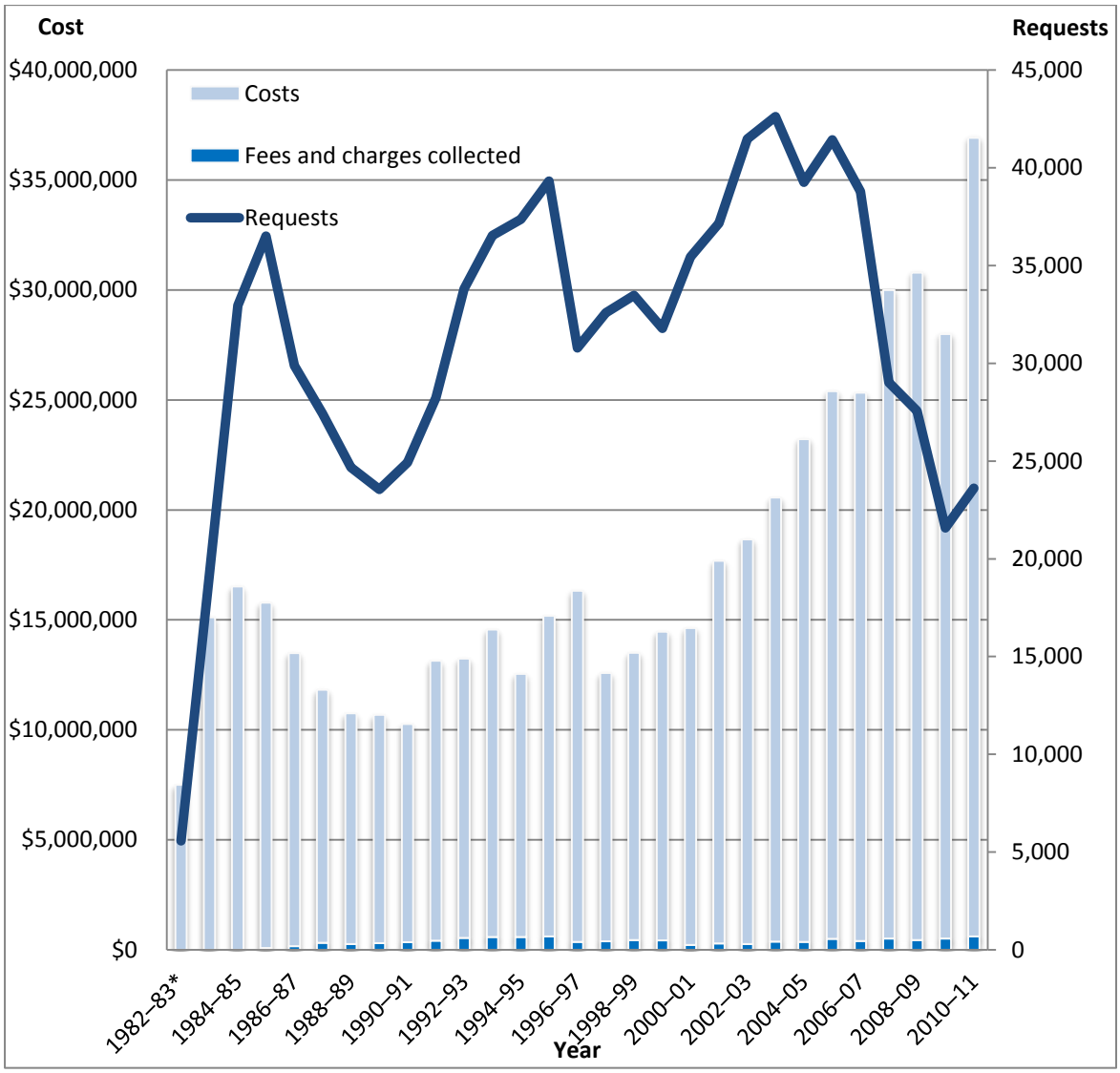
Between the commencement of the FOI Act in 1982 and 30 June 2011, agencies reported a total cost of $498,364,739 to process the 906,639 FOI requests received during this period. The total cost includes staff hours spent on FOI matters and estimates of non-labour costs directly attributable to FOI, such as training and legal costs. However, these figures are an estimate and it is generally understood that agencies rarely keep exact records of hours spent by officers on FOI matters and other non-labour costs incurred.

The total amount of fees and charges collected since the commencement of the FOI Act represent 2.08% of the estimated total cost of administering the FOI Act during the same period. Fees and charges collected in any year have consistently been less than 5% of the total cost of administering the FOI Act, ranging from 0.33 % (1982–83) to 4.91% (1994–95), with the yearly average at 2%. Figure 3 sets out the total costs, requests and fees and charges collected since 1982–83.[43]

[42] Further information is set out on the AAT's website at www.aat.gov.au/FormsAndFees/Fees.htm.

[43] More information about the costs, requests and fees and charges collected under the FOI Act is set out in Part 4 of the discussion paper.

Figure 3: *Total costs, requests and fees and charges collected since 1982–83*



* Seven months of 1982–83 only.

Part 2: The role of fees and charges under the FOI Act

Background

Fees and charges have been a part of FOI in Australia since 1982. During the life of the Act, there have been efforts to find the right balance between principles of cost recovery, 'user-pays', accessibility, citizen rights and government accountability.

Early on, before the full impact of the legislation was known, charges were viewed as a way of managing demand for government documents. In 1979, the Senate Standing Committee on Legal and Constitutional Affairs stated:

> There are practical reasons also why a power to levy charges must exist. If documents could be obtained free of charge, there is a distinct danger that agencies could be beleaguered with requests for most documents that are brought into existence.[44]

Charges provided a means of deterring frivolous and excessively broad FOI requests. The original FOI charges regime established an hourly charge for search and retrieval, along with charges for document inspection and copying. In 1985 and 1986, FOI charges were amended to incorporate, first, an application fee and then an hourly charge for decision making on FOI requests.

On the subject of FOI charges, the second Committee report in 1987 expressed concern that:

> … too much emphasis has been placed upon economic factors (such as cost recovery) at the expense of the admittedly unquantifiable social (and political) benefits derived from the right of access under the Act.[45]

Further, the Committee agreed with the view it expressed in its 1979 report, that charges needed to strike a balance between the 'user-pays' principle (as a deterrent to trivial, overly-broad or poorly framed requests) and ensuring that charges did not limit the range of people able to use the legislation.[46]

The 1987 Senate Committee report recommended capping the number of hours an agency could charge for search and retrieval and decision making time, even though the agency may spend further time processing a request. Placing a cap on chargeable hours would mean that applicants would be less likely to be penalised for an agency's inefficiency or poor record keeping. In addition, applicants would know in advance the maximum possible charge that might be imposed.

Amendments to the Charges Regulations in 1991 partially implemented this recommendation by capping the charge for requests for personal information of the applicant, while leaving the charges for all other requests uncapped.[47]

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[44] Senate Committee report, 1979, paragraph 11.3.
[45] Senate Committee report, 1987, paragraph 19.5.
[46] Senate Committee report, 1987, paragraph 19.7.
[47] *Freedom of Information (Fees and Charges) Regulations (Amendment) 1991*; No 320, see reg 6.

In 1994, the Attorney-General commissioned the Australian Law Reform Commission (ALRC) in partnership with the ARC to review FOI legislation. The ALRC-ARC report stated that charges should be balanced with democratic accountability. The ALRC-ARC noted:

> A strict application of the user-pays principle would almost certainly guarantee that the Act would fail in its objectives. Yet it can be argued that totally free access may place an unreasonable financial and administrative burden on agencies. In the Review's view, applicants should make some contribution to the cost of providing government-held information but that contribution should not be so high that it deters people from seeking information. The fees and charges regime should reflect the fact that the FOI Act is primarily about improving government accountability and the public's participation in decision making processes, not about generating revenue or ensuring cost recovery. [48]

The ALRC-ARC report recommended abolishing charges for processing requests for personal information. Charges (including the application fee) should be retained for other requests, with the application fee being used as credit towards any charges imposed. It also recommended that the application fee for internal review be abolished and that the scale of charges be set by an FOI Commissioner.[49]

Changes in 2010

The 2010 reforms to the FOI Act made significant amendments to the charges regime, some of which implemented recommendations made by the ALRC-ARC. The amendments aimed to reduce the cost of making a request for access under the Act.[50] These included:

- abolishing application fees for requests and internal review
- abolishing charges for requests involving an applicant's own information
- providing the first five hours of decision making time free of charge for requests involving non-personal information
- providing that no charge is required to be paid where an agency or minister fails to notify a decision within a period prescribed in the Act (including a permitted extension period).[51]

Views on the role of fees and charges

As part of this review, the discussion paper invited comments on the role of fees and charges under the FOI Act. Many agencies emphasised the need for a balance between meeting the 'lowest reasonable cost' object of the Act and having applicants contribute

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48 Australian Law Reform Commission and Administrative Review Council (ALRC-ARC report, 1995) Report 77, *Open government: Review of the Freedom of Information Legislation*, paragraph 14.2.

49 ALRC-ARC report, 1995: see recommendations 87–92.

50 Explanatory Statement, *Freedom of Information (Fees and Charges) Amendment Regulations 2010* (No 1), Select Legislative Instrument 2010 No 269.

51 Explanatory Statement, *FOI (Fees and Charges) Amendment Regulations 2010*.

to the sometimes significant cost of processing FOI requests.[52] For example, the Australian Competition and Consumer Commission (ACCC) noted:

> The lowest reasonable cost objective implies that applicants should bear some of the costs associated with making a request. In our view, this approach strikes an appropriate balance between the rights of applicants against the significant costs borne by agencies in processing requests that is ultimately subsidised by the Government.[53]

In a similar vein, the Treasury submitted:

> While it is not reasonable to expect a[n] FOI applicant to bear the full cost of processing a request, we note that the Government is currently facing considerable fiscal constraints. This makes it particularly important that the benefits to the public of disclosure of information are balanced against the costs of providing that information.[54]

Most of the agencies that made submissions accepted that the charges regime should not, and was never intended to, operate as a full cost recovery arrangement, although some suggested that charges needed to be increased to better reflect the actual cost to the agency of providing access. NBN Co pointed out that '[w]hile FOI charges were never meant to be full cost recovery, it is clear that there is a significant imbalance between current charges and costs to agencies'. Other agencies noted that charges had not been updated in line with CPI.[55]

In contrast, both Greenpeace Australia Pacific (Greenpeace) and the Public Interest Advocacy Centre (PIAC) pointed out that charges played only a minor role in recouping agency costs. Greenpeace submitted that:

> Such a recovery rate is so nominal that one must ask whether the benefits of recouping costs through charges and fees is disproportionate to the negative impact they have on access to information that concerns the public.[56]

In addition, PIAC submitted: 'The idea of recovering costs from FOI users is at odds with the idea that FOI legislation is about the fundamental right of individuals to access information'.[57]

PIAC quoted a Queensland Electoral and Administrative Review Commission report, which stated that access to information was a fundamental democratic right:

> FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.[58]

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52 See submissions made by ACCC, Department of Finance and Deregulation (DoFD), Department of Education, Employment and Workplace Relations (DEEWR), Department of Health and Ageing (DoHA), Department of Resources, Energy and Tourism (DRET), the Federal Court of Australia (FCA) and the Treasury.

53 ACCC, Submission No 5, p 2.

54 Treasury, Submission No 7, p 1.

55 DRET, in particular, submitted a recalculated table of charges to reflect inflation since 1986: DRET, Submission No 9, p 5.

56 Greenpeace, Submission No 2, p 1.

57 PIAC, Submission No 4, p 4.

Almost all agencies noted the practical benefit of imposing charges and the way that they encouraged applicants to focus the terms of their requests.[59] As the CSIRO (Commonwealth Scientific and Industrial Research Organisation) pointed out:

> [T]he imposition of charges plays an important practical role in facilitating discussions with the applicant to revise the scope of FOI requests ensuring that the resource burden on agencies is manageable, without issuing a s 24AB(2) notice.[60]

A notice under s 24AB(2) is a notice sent by an agency or minister to notify the applicant of their intention to refuse to process a request on the basis that the work would substantially and unreasonably divert the agency's resources from its other operations or substantially and unreasonably interfere with the performance of the minister's functions.[61] This mechanism was also referred to by Greenpeace:

> Targeted and effective legal frameworks already exist for dealing with the problem of excessively broad requests (see, eg s 24 of the FOI Act). Already departments use s 24 as a mechanism to initiate discussions that attempt to satisfy the information needs of the applicant and reduce the burden on the department through negotiating a more focused FOI request. This is a more precise, democratic and inclusive tool.[62]

Greenpeace further submitted that financial disincentives not only discriminate against economically disadvantaged applicants, but are a very blunt instrument with which to focus FOI applications. PIAC agreed and expressed concern that 'the existing costs in some cases may deter reasonable requests, and not just potentially vexatious requests'.[63]

The Department of Education, Employment and Workplace Relations (DEEWR) and the Federal Court of Australia (FCA) also emphasised the importance of simplicity in any charges framework, with the FCA submitting:

> Adding complexity increases the administrative costs with no return to agencies for actual processing time, is an unnecessary disincentive to potential applicants and increases the risk of dispute.[64]

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58 Electoral and Administrative Review Commission, *Report on Freedom of Information* (1990), p 181, cited in Freedom of Information Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008), www.rti.qld.gov.au/__data/assets/pdf_file/0019/107632/solomon-report.pdf, p 185, cited by PIAC, Submission No 4, p 4.

59 See submissions made by ACCC, DoFD, DEEWR, DRET, CSIRO, Department of Foreign Affairs and Trade (DFAT), DHS, Department of the Prime Minister and Cabinet (DPMC), FCA, NBN Co and Treasury.

60 CSIRO, Submission No 11, p 6.

61 These are referred to as 'practical refusal reasons' and are further discussed in Parts 3 and 5 of this report.

62 Greenpeace, Submission No 2, p 2.

63 PIAC, Submission No 2, p 4.

64 FCA, Submission No 1, p 2.

The role of fees and charges: Guiding principles

Fees and charges play an important role in the FOI scheme. However, the current charging framework does not strike an appropriate balance for agencies and applicants. The framework is not easy to administer; charges decisions cause more disagreement between agencies and applicants than seems warranted; in some cases the cost of assessing or collecting a charge is higher than the charge itself; and the scale of charges is out-dated and no longer realistic.

This report proposes four principles to underpin a new charges framework.

Support of a democratic right

Freedom of information is an essential part of democratic government in Australia. A substantial part of the cost should be borne by government. Providing information to the public upon request supports transparent, accountable and responsive government, and should be treated as a core business function of each government agency. Document requests must nevertheless be regulated by FOI charges, to prevent an unreasonable administrative burden that could detract from other agency responsibilities. The FOI charging framework must strike a balance between providing ready public access to government information and the cost and resource implications of doing so.

Lowest reasonable cost

Public access to government documents should be provided at the lowest reasonable cost to applicants. Every person should have the opportunity to request government information, particularly personal information that should be provided free of charge (subject to limited restrictions). The scale of charges for other requests should not discourage applicants from exercising their legal right to obtain access to government documents. A key purpose of charges should be to moderate unmanageable requests.

Uncomplicated administration

The charges framework should be clear and easy for agencies to administer and for applicants to understand. There should be as few charging categories as practicable. The cost to an agency of assessing a charge should not exceed the amount of the charge imposed. It should also be clear to applicants when a charge can be imposed and the steps available to the applicant to reduce a possible charge. The charging framework should minimise disagreement between applicants and agencies.

Free informal access as a primary avenue

Government agencies should be committed to making information readily available to the public, both generally and upon request. The legal right of access to documents created by the FOI Act is an important democratic right, but the public should not be required to always access that right in order to obtain government information. Agencies should be equipped to deal with requests for information outside the formal FOI request process, and support applicants in obtaining information both through FOI and by other means.

Administrative access schemes provide an appropriate avenue for free and fast information release. Information technology has changed the way government information is created and published, by the introduction of new tools to search, retrieve and collate information, and use of the internet to distribute that information at relatively low cost through government online service portals and the publication of data on websites. These technologies have fundamentally changed the context in which FOI operates in Australia. The 2010 reforms to the FOI Act, including the introduction of the IPS, have further moved FOI towards emphasising the proactive release of government information.

The FOI access request process must remain a vital part of the legal framework for facilitating public access to government information. However, encouraging alternative channels for information access that are, for the most part, free of charge can reduce reliance on formal FOI processes and place greater emphasis on informal information exchange between agencies and the public.

Part 3: Summary of issues and proposals considered

Overview

This Part is divided into the following sections which follow the framework set out in the discussion paper:

- general concerns with the current charges framework
- application fees
- scale of charges
- imposition of charges
- exceptions
- collection of charges
- correction, reduction and waiver
- other issues.

This Part summarises the issues and proposals for reforms of the charges regime as submitted to the OAIC in response to the consultation questions in the discussion paper. The consultation questions are listed at Appendix A. Those that made submissions are listed at Appendix B. Charging practices of other Australian and international jurisdictions are summarised at Appendix E. The views expressed in submissions about the role of fees and charges are discussed in Part 2.

General concerns with the current charges framework

In submissions and during consultation sessions, agencies identified various issues which impacted on their workload. These issues included:

- the need to simplify the charging framework
- the useful role that charges play in initiating a discussion with applicants about narrowing and refining the scope of broad requests, the difficulties agencies face using s 24AB of the FOI Act (the 'practical refusal' mechanism) and in treating multiple requests as a single request under s 24(2)
- the problem of large and complex applications from specific categories of applicants who use the FOI Act rather than relying upon other means to obtain information (such as law firms that use the FOI Act as a form of discovery, and members of parliament, journalists, researchers and the media)
- the need for further guidance from the OAIC regarding the application of the FOI Act provisions for waiving and reducing charges, particularly in assessing an applicant's claim of financial hardship or that disclosure would be in the public interest.

Applicants and members of the public, by contrast, emphasised the importance of:

- minimising cost barriers to the exercise of the democratic right of access conferred by the FOI Act
- ensuring that charges do not discriminate against economically disadvantaged applicants
- preventing the introduction of a full cost recovery principle for FOI charging.

Application fees

Application fees for FOI requests and requests for internal review were abolished in 2010. In this review, agencies were asked whether the abolition of fees had any effect on FOI requests and requests for internal review. Agencies were also asked whether it was appropriate to reimpose application fees for FOI access requests and reviews, and if so, the appropriate level of fee that should be imposed. Applicants, on the other hand, were invited to comment on whether an application fee would deter them from making an FOI access request or from seeking review of an adverse FOI decision.

The discussion on application fees is grouped under the following categories:

- application fees for FOI access requests
- application fees for FOI access requests involving personal information
- application fees for internal review
- application fees for IC review
- application fees for AAT review.

Application fees for FOI access requests

Ten agencies noted an overall increase in FOI requests following the 2010 reforms.[65] Many agencies, including the Department of Agriculture, Fisheries and Forestry (DAFF), DEEWR, DoD, the Department of Foreign Affairs and Trade (DFAT), DHS and the Department of Resources, Energy and Tourism (DRET), noted that it was difficult to determine if the removal of application fees alone had contributed to the higher volume of requests.[66]

The Department of Climate Change and Energy Efficiency (DCCEE), the Department of Health and Ageing (DoHA) and DFAT linked the abolition of application fees to a rise in request splitting, where applicants deliberately lodge multiple FOI requests to capitalise

[65] CSIRO, Submission No 11, p 6; DAFF, Submission No 20, p 2; DCCEE, Submission No 3, response to question 7; DoD, Submission No 13, p 3; DEEWR, Submission No 8, p 5; DoFD, Submission No 6, p 2; DFAT, Submission No 14, p 1; DoHA, Submission No 21, p 2; DPMC, Submission No 15, pp 1–2; and DRET, Submission No 9, p 4.

[66] DAFF, Submission No 20, p 2; DEEWR, Submission No 8, p 5; DoD, Submission No 13, p 3; DFAT, Submission No 14, p 5; DHS, Submission No 18, p 2; and DRET, Submission No 9, p 4.

on free decision making time.[67] This was also mentioned in other agency submissions.[68] One agency at a consultation session described a case where an applicant lodged 440 requests about 10 different subject matters in a single email, along with the instruction that they be considered separately so as to receive the free decision making time for each request.[69] DCCEE also described an applicant who submitted 700 FOI requests in five months.[70]

The Department of Finance and Deregulation (DoFD), DFAT and IP Australia suggested that, since application fees had been abolished, applicants seemed more likely to make a request and then withdraw it after receiving an estimate of applicable charges.[71] Other agencies said that they had not noticed a correlation. For instance, DEEWR suggested that applicants were more likely to enter into negotiations to reduce the scope of a request rather than withdraw it altogether.[72]

Some agencies expressed support for the reinstatement of an application fee. IP Australia submitted that a nominal application fee, reviewed on an annual basis and keeping pace with inflation, would help reduce the number of speculative and unreasonable requests.[73] DoFD noted that without an application fee, applicants are more likely to lodge requests without full consideration of the actual documents being sought or whether the documents are available through other means. It proposed a fee of $30–$40 that should remain stable for a specified period (for example, three to five years) and could be offset against the first hour of charges payable as per the New South Wales (NSW) model.[74]

DoHA proposed that any fee or charge should be significantly higher than the previous $30 fee in order to discourage frivolous applications, offset against the total processing costs.[75] DFAT suggested that a fee of $20–30, indexed to CPI, would be appropriate,[76] while DRET suggested a $50 fee.[77] Ms Megan Carter noted that if application fees were to be imposed, a range of $15–30 would be a reasonable level, and would not deter her from making an application.[78] DFAT also proposed that consideration be given to whether applicants who are not Australian citizens or residents should pay an application fee.[79]

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67 DCCEE, Submission No 3, response to question 7; DoHA, Submission No 21, p 2; and DFAT, Submission No 14, p 3. As noted in Part 1, the current scale of charges provides for the first five hours of decision making to be free of charge for requests involving non-personal information.

68 See DHS, Submission No 18, p 6; and DRET, Submission No 9, p 3.

69 DFAT also referred to this anecdote in their submission: DFAT, Submission No 14, p 13.

70 DCCEE, Submission No 3, response to question 11. DCCEE expressed the view that the applicant did not meet the threshold to make use of the vexatious applicant provisions under the FOI Act (nor, presumably, the provisions for refusing to process complex or voluminous requests).

71 DoFD, Submission No 6, p 2; DFAT, Submission No 14, p 3; IP Australia, Submission No 10, p 4.

72 DEEWR, Submission No 8, p 9.

73 IP Australia, Submission No 10, pp 1–2.

74 DoFD, Submission No 6, p 3. See Appendix E for a summary of the charging practices in NSW.

75 DoHA, Submission No 21, p 5.

76 DFAT, Submission No 14, p 4.

77 DRET, Submission No 9, p 4.

78 Ms Megan Carter, Submission No 16, p 6.

79 DFAT, Submission No 14, p 12.

Some agencies were opposed to the reintroduction of application fees. CSIRO, DEEWR and DHS submitted that application fees are contrary to the objects of the FOI Act.[80] DoD was of the view that the administrative burden of collecting a fee, including collection, acknowledgement, reporting and addressing requests for remission of the fee, would far exceed the fee itself.[81] NBN Co expressed similar concerns about the administrative cost of collecting application fees, while DRET noted that the abolition of application fees has made the administration of FOI requests more efficient, as it removed the administrative processes that were previously required to process relatively small amounts of money.[82]

PIAC suggested that application fees sit uncomfortably with the public right to access government information, and that government should meet this cost in the interests of transparency.[83] Greenpeace, while advocating the elimination of all fees and charges, submitted that it would not oppose the introduction of a flat fee of $35 with no additional charges, as per the Tasmanian model.[84] DEEWR opposed a flat application fee, labelling it as 'inequitable' because it does not consider the varying costs required to process different FOI requests.[85]

The Global Mail described application fees as an 'inherent barrier' to making FOI requests.[86] Greenpeace suggested that fees and charges have a 'clear chilling effect' on FOI applications from not-for-profit organisations.[87] The National Welfare Rights Network (NWRN), which provides information, advice and casework assistance to their clients in the area of social security law, expressed concern that application fees would serve as a deterrent to FOI requests. They also made a similar point to other agencies noted above about the costs involved in administering an application fee compared to the actual fee imposed.[88]

Application fees for FOI access requests involving personal information

Agencies at the consultation sessions agreed that personal information applications should be exempt from FOI charges. One agency suggested that access to personal information should be free as it is entwined with the right under the FOI Act to request access to and amendment and annotation of personal information. Some agencies expressed concern about instances where an applicant, who had obtained all their personal information documents, kept lodging new FOI requests for the same documents.

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80 CSIRO Submission No 11, p 3; DEEWR, Submission No 8, p 4; and DHS, Submission No 18, p 1.
81 DoD, Submission No 13, p 2.
82 NBN Co, Submission No 12, p 2; and DRET, Submission No 9, p 3.
83 PIAC, Submission No 4, p 5.
84 Greenpeace, Submission No 2, p 2. See Appendix E for a summary of the charging practices in Tasmania.
85 DEEWR, Submission No 8, p 4.
86 The Global Mail, Submission No 22, p 1.
87 Greenpeace, Submission No 2, p 1.
88 NWRN, Submission No 17, p 8.

Most submissions proposed that there should be no application fee for personal information requests. Ms Carter noted that while it is not appropriate to have an application fee for such requests, a number of areas associated with access to personal information need to be addressed, including the disproportionate use of the right to access personal information by current and former public servants often engaged in protracted disputes with their agencies.[89]

Application fees for internal review

Most agencies suggested that there should not be an application fee for internal review. DEEWR, DoD, DHS and DRET submitted that an applicant should have the opportunity to seek an internal review of an access refusal or access grant decision free of an application fee.[90] DHS argued that the same policy basis in the objects of the FOI Act for not imposing an FOI application fee (that information held by the Government is a national resource) also applied to internal review application fees.[91] DoD described internal review as 'a means of enhancing accountability within an agency' and suggested that reintroducing application fees could discourage applicants from seeking internal review.[92] PIAC noted that fees for internal review are not applied in other jurisdictions, such as the United Kingdom (UK), Tasmania and the Australian Capital Territory (ACT).[93]

One agency at a consultation session suggested that internal review should be encouraged over IC review as applicants are 'more engaged' at internal review. Other comments from agencies about the value of internal review referred to the relationship between internal and IC review (discussed in the next section).

In contrast, some agencies' submissions supported the reintroduction of application fees for internal review. DFAT supported its reintroduction in recognition of the time and resources required for such a review.[94] IP Australia considered that a fee for internal review helps to ensure that the party seeking the review is focused on what they seek to achieve.[95] DoFD noted concerns that the lack of internal review application fees encourages applicants to lodge applications regardless of the soundness of the original decision.[96] Similarly, CSIRO, citing an example where an applicant requesting internal review responded via email within two minutes of receiving a complex access decision, suggested that a nominal fee ($50 subject to biennial increase) should be charged for internal review, except where the internal review relates to a decision regarding the applicant's personal information.[97] Ms Carter noted that if internal review fees were

89 Ms Megan Carter, Submission No 16, p 2.
90 DEEWR, Submission No 8, p 4; DoD, Submission No 13, p 3; DHS, Submission No 18, p 2; and DRET, Submission No 9, p 3.
91 DHS, Submission No 18, p 2.
92 DoD, Submission No 13, p 3.
93 PIAC, Submission No 4, p 5.
94 DFAT, Submission No 14, p 4.
95 IP Australia, Submission No 10, p 2.
96 DoFD, Submission No 6, p 2.
97 CSIRO, Submission No 11, p 4.

imposed, a reasonable fee of $20 would not deter her from making an application for internal review but a fee of more than $50 probably would.[98]

NBN Co suggested that, instead of an application fee, agencies could be allowed to charge for time required to undertake an internal review, with the first five hours of time provided free.[99]

Application fees for IC review

Agencies generally supported the introduction of an application fee for IC review, with some agencies emphasising the significant costs to agencies in preparing for an IC review. DoD argued that there is currently a discrepancy in the administrative process where there are no application fees for making an application for external review by the Information Commissioner, yet applications for review by the AAT require a $777 application fee.[100]

CSIRO emphasised the resources and timeframes involved in responding to an IC review, and suggested that a nominal fee for IC review would encourage applicants to consider the agency's decision and whether IC review would provide a substantially different outcome.[101] DCCEE submitted that an application fee for IC review would encourage applicants to seek internal review with the agency that made the original decision,[102] while DRET suggested that a nominal fee for an IC review application may have the effect of reducing the backlog of matters currently being handled by the OAIC.[103] The Department of the Prime Minister and Cabinet (DPMC) also discussed the potential correlation between the lack of an application fee for IC review and the number of IC review applications received since the 2010 reforms.[104] Ms Megan Carter submitted that if IC review fees were imposed, they should be set low, for example at $20.[105]

Several agencies raised the possibility of imposing an application fee for IC review where internal review is not sought first. DoD and DRET mentioned this model,[106] with DRET specifically noting that internal review 'is less burdensome on all involved and can produce a quicker outcome for the applicant'.[107] Without making specific reference to application fees for internal and IC review, ACCC suggested that IC review should only be available if an applicant has previously sought internal review, unless an applicant has not received a response to a request for internal review within 30 days.[108]

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98 Ms Megan Carter, Submission No 16, p 6.
99 NBN Co, Submission No 12, p 2.
100 DoD, Submission No 13, p 3. As noted in Part 1, some AAT decisions do not attract an application fee, such as FOI decisions about documents relating to decisions made under legislation listed in Schedule 3 of the AAT Regulations.
101 CSIRO, Submission No 11, p 4.
102 DCCEE, Submission No 3, response to question 3.
103 DRET, Submission No 9, p 4.
104 DPMC, Submission No 15, p 2.
105 Ms Megan Carter, Submission No 16, p 5.
106 DoD, Submission No 13, p 3; and DRET, Submission No 9, pp 3–4.
107 DRET, Submission No 9, p 4.
108 ACCC, Submission No 5, p 4.

Some agencies noted that if application fees were imposed for IC reviews, internal reviews should also carry an application fee. DoFD suggested that introducing a fee for IC review alone 'would likely only transfer the burden from one review mechanism to another without regard to the soundness and merits of the decision'.[109] Similarly, IP Australia suggested that all application fees should be treated in the same manner (that is, there should be an application fee at every level of the request and review process).[110]

Application fees for AAT review

This review did not consider the application fees set by the AAT. No submissions were made regarding the appropriateness of an AAT application fee or the appropriate level of fees.

Scale of charges

The consultation questions specifically asked:

- whether the scale of charges was appropriate, and if not, what level of charges should be imposed
- whether the scale of charges should be subject to increase or be capped
- whether a different approach to charges should be adopted, including whether the charge should vary according to the nature of the applicant or the time taken to process a request, or whether a cap or 'ceiling' should apply to the number of hours taken to process FOI access requests.

General concerns about the current scale

There was general consensus among agencies that the existing scale of charges should be simplified. Submissions suggested that a simplified charging model would be easier for agencies to administer and result in more uniform charging outcomes for applicants. As noted in Part 2, FCA submitted that any changes which increase the complexity of the current scale will increase administrative costs for agencies, discourage potential applicants and increase the risk of disputes between applicants and agencies.[111]

As outlined below, a number of agencies viewed a standard hourly processing charge as a means of simplifying the existing charges regime.

Most agency submissions also expressed concern that the scale of charges was not commensurate with the costs incurred by agencies in processing requests.[112] Treasury

[109] DoFD Submission No 6, p 3.
[110] IP Australia, Submission No 10, p 2.
[111] FCA, Submission No 1, p 2.
[112] See submissions made by DAFF, Submission No 20, p 2; DoFD, Submission No 6, p 1; DFAT, Submission No 14, p 6; DoHA, Submission No 21, p 1; DHS, Submission No 18, p 3; IP Australia, Submission No 10, p 2; and NBN Co, Submission No 12, p 1.

suggested that 'the most important principle is that the applicant should make a non-negligible contribution' to the cost of processing an FOI request.[113]

Submissions from community groups, including Greenpeace and PIAC, noted by contrast that charges were such a small return on agency costs that they should not be levied at all.[114] Both recommended that all fees and charges for FOI requests be abolished. Greenpeace submitted that 'financial disincentives discriminate against economically disadvantaged applicants'.[115]

Charges other than decision making and search and retrieval

Only six submissions referred to the charges for electronic production, transcripts, photocopies and other copies, replay, inspection and delivery. These are summarised below.

Electronic production

No submissions raised concerns with charging electronic production at actual cost.

Transcription

Ms Megan Carter and DoD both recommended that transcription be charged at actual cost.[116] NBN Co suggested that charges for transcription should not be levied per page but according to the time spent transcribing.[117] DHS submitted that: 'The cost of producing a transcript should reflect the commercial cost of having a transcript prepared,' and noted that the current figure did not reflect this.[118]

Photocopies

Ms Megan Carter and DoD recommended that photocopying be increased from the current charge of $0.10 per page to $0.20 per page.[119] DHS also suggested that the $0.10 charge for photocopying may not be high enough and noted that the Federal Magistrates Court charges $0.67 per photocopied page for comparable functions.[120]

Other copies

NBN Co recommended that agencies be able to charge the market rate to produce non-standard copies while DoD suggested other copies be charged at actual cost.[121] No other submissions raised concerns about the current approach to charging for a copy of a written document other than a photocopy.

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113 Treasury, Submission No 7, p 1.
114 Greenpeace, Submission No 2, p 1; and PIAC, Submission No 4, pp 5–6.
115 Greenpeace, Submission No 2, pp 1–2.
116 Ms Megan Carter, Submission No 16, p 6; and DoD, Submission No 13, p 4.
117 NBN Co, Submission No 12, p 3.
118 DHS, Submission No 18, p 3.
119 Ms Megan Carter, Submission No 16, p 6; and DoD, Submission No 13, p 4.
120 DHS, Submission No 18, p 3.
121 DoD, Submission No 13, p 4; and NBN Co, Submission No 12, p 4.

Replay

No submissions raised concerns about the current approach to charging for replay of sound and film recordings.

Inspection

NBN Co and DHS both submitted that the current charge of $6.25 per half hour for inspection of documents was not an appropriate rate and that the charge needed to reflect the cost of having an officer present to supervise inspection.[122] DoD suggested that inspection of documents be charged at $30 per hour.[123]

Delivery

No submissions raised concerns about the current approach to charges for posting or delivering a document to an applicant.

Indexation

Most agency submissions proposed that the scale of charges be increased appropriately and kept up to date.[124] Some submissions suggested that indexing charges to CPI or inflation would be appropriate,[125] while others suggested conducting annual or biennial increases or reviews of charges.[126] Greenpeace submitted that:

> … unless charges and fees are to be increased to the point at which they substantially recoup the administrative costs of the FOI Act – which would effectively destroy access to information for not-for-profit organisations – [indexation] seems to make little sense.[127]

Ms Megan Carter suggested that, to avoid cases where charges are set at unusual amounts because of charges increasing solely at the rate of inflation, they should instead increase periodically to 'round numbers'.[128]

A different approach to charges

Several charging models were proposed during consultations and in submissions. The proposals included:

- simplifying the charging provisions by combining some existing charges into a single hourly processing charge
- introducing a graduated charging scale under which the charge rises to match the increase in time spent by an agency in processing a request

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122 NBN Co, Submission No 12, p 4; and DHS, Submission No 18, p 3.

123 DoD, Submission No 13, p 4.

124 See ACCC, Submission No 5, p 4; DAFF, Submission No 20, pp 2–3; DEEWR, Submission No 8, p 6; DoD, Submission No 13, p 4; DoFD, Submission No 6 p 5; DHS, Submission No 18, p 3; DPMC, Submission No 15, p 3, DRET, Submission No 9, pp 5–6; FCA, Submission No 1, p 2; IP Australia, Submission No 10, pp 2–3; NBN Co, Submission No 12, p 4; and Treasury, Submission No 7, p 1.

125 DAFF, Submission No 20, p 3; DEEWR, Submission No 8, p 6; DoD, Submission No 13, p 4; DoFD, Submission No 6, p 5; DRET, Submission No 9, p 6; and NBN Co, Submission No 12, p 4.

126 DHS, Submission No 18, p 3; FCA, Submission No 1, p 2; and IP Australia, Submission No 10, pp 2–3.

127 Greenpeace, Submission No 2, p 2.

128 Ms Megan Carter, Submission No 16, p 5.

- prescribing a ceiling on the amount of time an agency is required to spend on processing a request
- charging according to the amount of information released by an agency
- charging according to the category of applicant
- imposing an FOI application fee and abolishing all other processing charges.

These options are explored further below.

Charging according to the amount of information released

The ALRC-ARC review of the FOI Act in 1995 recommended that charges be imposed according to the number of pages released. In the ALRC-ARC's view, this approach would avoid penalising applicants for agencies' inefficient information management practices and would potentially encourage agencies to release more documents than was then the case.[129]

PIAC expressed support for this approach, submitting that:

> … it would be easier for an agency to calculate costs on this basis and would ensure that the calculation of costs was more transparent to, and understandable by, applicants. It would also improve the consistency of charging across different government agencies.[130]

A single processing rate

As noted in Part 1, the scale of charges includes separate charges for search and retrieval, decision making, electronic production, transcripts, photocopies, other copies, replays, inspection and delivery. Some submissions suggested that these categories should be streamlined in the interests of greater efficiency.[131]

ACCC, DEEWR, DoFD, DoHA and NBN Co supported the creation of a single processing rate that covers both search/retrieval and decision making activities.[132] NBN Co suggested that a standard flat rate would simplify the administrative burden in calculating the costs involved,[133] while DEEWR proposed that the simplicity of a single flat rate would reduce the time required to process FOI access requests and hence increase agency efficiency.[134]

As to the actual processing rate, NBN Co suggested it should be comparable with that operating in South Australia (SA) at $44 an hour, indexed to inflation.[135] Ms Megan Carter suggested a range of $20–$30 per hour.[136] DoFD and DoHA suggested that an hourly rate

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129 ALRC-ARC report, 1995, paragraphs 14.14 and 14.15.
130 PIAC, Submission No 4, p 6.
131 See ACCC, Submission No 5, p 4; and DAFF, Submission No 20, p 3.
132 ACCC, Submission No 5, p 4; DEEWR, Submission No 8, p 5; DoFD, Submission No 6, p 4; DoHA, Submission No 21, p 5; and NBN Co, Submission No 12, p 4.
133 NBN Co, Submission No 12, p 4.
134 DEEWR, Submission No 8, p 5.
135 NBN Co, Submission No 12, p 4. See Appendix E for a summary of the charging practice in SA.
136 Ms Megan Carter, Submission No 16, p 6.

be set according to a specified Australian Public Service (APS) classification that reflects the 'typical' FOI officer. In DoFD's experience, this should be at about the level of Executive Level 2.[137] DoHA noted that in its experience FOI processing was carried out by officers ranging from APS 6 to Senior Executive Service (SES) Band 1 with decision making usually involving SES officers.[138] While other submissions did not suggest a specific figure, many agencies remarked that, in general, charges needed to be updated to reflect increases in CPI since 1986.

As noted in Appendix E, jurisdictions such as NSW already have a simplified processing model where a single processing charge of $30 per hour applies (s 64 of the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act)). The processing charge covers the total amount of time for dealing efficiently with the application (including considering the application, searching for records, consultation, decision making and any other function exercised in connection with deciding the application), or providing access in response to the application (based on the lowest reasonable estimate of the time needed to provide that access).

Other agencies, while not addressing the issue of a single processing rate, suggested revised figures for search and retrieval and decision making. FCA stated that the $15 per hour charge for search and retrieval was inadequate and noted by way of comparison that similar court processes were charged at $10 per six minutes ($60 per hour).[139] DFAT suggested that search and retrieval be set at $40 per hour and decision making at $60 per hour.[140]

Tiered charging model

The consultation sessions included discussion about whether a tiered charging model based on a single hourly processing rate would be easier to understand and apply than the current charging model. Under a tiered model, the hourly processing charge rate would increase with the length of time taken to process a request. A tiered model discussed in consultation sessions was one in which the first five hours would be free, the next 10 hours would be charged at a single flat rate and the following 10 hours would be charged by the hour.

DoD expressed support for this kind of model in its submission. In particular, DoD suggested a model that would merge search and retrieval into a single charge and retain separate charges for photocopy and inspection, operating along the lines of:

- 0–5 hours free
- 6–15 hours = $30 per hour

137 DoFD, Submission No 6, p 5.

138 DoHA, Submission No 21, pp 3–4. The Australian Public Service Commission's 2010 Australian Public Service Remuneration Survey placed the median salary of an APS 6 officer at $77,824, an Executive Level 1 at $97,275, an Executive Level 2 at $120,840 and an SES Band 1 at $158,277 as of 31 December 2010. A summary of the survey results is available at www.apsc.gov.au/workplacerelations/remunerationsurvey2010.htm.

139 FCA, Submission No 1, p 2.

140 DFAT, Submission No 14, p 7.

- 16–35 hours = $50 per hour
- 35 hours plus = $100 per hour
- Photocopy = 20 cents
- Inspection = $30 per hour
- All other activities = actual cost.[141]

No other submissions addressed the option of a tiered charging model.

Prescribed ceiling

Several agencies, including DFAT, FCA and NBN Co, expressed support for the model used in the UK where an upper limit applies to charges and the time spent on processing requests.[142] Specifically, agencies can refuse to process a request if the estimated costs are above £600 for central government, legislative bodies and the armed forces, or £450 for all other public authorities, while the threshold in Scotland is £600 for all agencies.[143]

IP Australia indicated that if this model was to be adopted using the same prescribed limit as in the UK, approximately half of the FOI requests received by IP Australia would exceed the threshold.[144] DFAT suggested that any ceiling should be based on a combined estimated cost for both search and decision making time, rather than only on the search and retrieval time.[145] Other agencies suggested that a ceiling should be based on measures other than cost, with DoFD suggesting the amount of processing time could be 'a useful and objective threshold'.[146] DCCEE suggested a ceiling based on the number of documents requested.[147]

In contrast, DEEWR suggested that introducing a ceiling on processing time would be contrary to the objects of the FOI Act and that charges should be based on the cost of processing a request rather than being capped at an arbitrary level.[148] DoFD was also against introducing a ceiling, submitting that it was best left open to agencies to determine.[149] In arguing against a ceiling, DoD referred to the practical refusal powers in ss 24–24AB, which allow an agency to refuse to process an FOI request which would substantially and unreasonably divert the agency's resources from its other operations. DoD suggested that this provision allows agencies to enter into discussion with applicants about the scope of their request rather than rejecting it based on a proposed ceiling.[150] Greenpeace argued that the practical refusal powers provide a 'more precise, democratic and inclusive tool' than charges to encourage discussion between agencies, ministers and

141 DoD, Submission No 13, p 4.
142 DFAT, Submission No 14, p 7; FCA, Submission No 1, p 2; and NBN Co, Submission No 12, p 4.
143 Further information about UK charging practices is set out in Appendix E.
144 IP Australia, Submission No 10, p 3.
145 DFAT, Submission No 14, p 7.
146 DoFD, Submission No 6, p 5.
147 DCCEE, Submission No 3, response to question 11.
148 DEEWR, Submission No 8, p 6.
149 DoFD, Submission No 6, p 5.
150 DoD, Submission No 13, p 4.

applicants to narrow requests. This allows applicants to access the information they are seeking while reducing the burden on agencies and ministers of providing access to that information.[151]

However, anecdotally and in submissions, some agencies expressed concern about making use of the practical refusal powers, and more commonly relied on charges to manage the scope of requests. Although s 24(2) allows agencies and ministers to treat multiple requests as a single request for the purposes of s 24, ACCC, DoHA and DRET described difficulties in making use of this provision.[152] DoHA submitted that further guidance is needed about making a practical refusal decision, particularly if the current charging model remains unchanged.[153]

ACCC claimed that the practical refusal provisions do not address the problem of applicants using FOI as a strategic litigation tool.[154] According to ACCC, parties conducting litigation involving the government are more inclined to make FOI requests as FOI is a cheaper means of obtaining documents than standard court procedures such as discovery and subpoena (where the party providing the information is generally reimbursed their actual costs). ACCC submitted that agencies have no effective means of countering such tactics under the FOI Act.

Charges based on categories of applicants

Through the life of the FOI Act, there has been discussion of the relative merits of charging according to the category of applicant making the request. Reviews of the Act carried out by Senate Committees and the ALRC-ARC were against this approach on the grounds of both practicality and principle.

A few agencies expressed the view that differential charging would be suitable for some categories of applicant. DoHA, for example, suggested that applying a single charging model to all applicants, as occurs at present, does not represent an appropriate charging regime. DoHA outlined a possible model that would distinguish between applicants such as journalists, members of parliament, law firms and lobbyists from applicants seeking their own personal information, students, or citizens with a particular interest in a given topic.[155]

DRET expressed support for a model along the lines of the FOI system in the USA, which distinguishes between requests based on categories of commercial use requests,

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151 Greenpeace, Submission No 2, p 2.

152 ACCC, Submission No 5, p 3; DoHA, Submission No 21, p 8; and DRET, Submission No 9, p 3. ACCC, in particular, submitted that 'provisions such as s 24 are of limited utility given the way in which FOI requests can be framed and timed so as to avoid a determination of being a substantial and unreasonable diversion of resources, and the threshold for declaring an applicant vexatious is very high'.

153 DoHA, Submission No 21, p 8.

154 ACCC, Submission No 5, pp 3–4.

155 DoHA, Submission No 21, p 6.

educational use requests, non-commercial scientific use requests, requests from the media and all other requests.[156]

DFAT expressed support for a charging model that would enable better separation of the charges applicable to applications based on profit/career reasons of the applicant from other applications. By 'profit/career', DFAT appeared to be distinguishing between those applicants seeking their own personal information, and other applicants (such as journalists, government representatives, researchers and so on) with profit or career motivations for seeking information. DFAT submitted that generally applicants pursuing profit/career interests should cover much of the cost of their FOI request processing, because 'the benefit of the FOI release which accrues to the Australian community as a whole is significantly less than the benefit accruing to the individual requester'.[157]

DFAT suggested that consideration be given to whether applicants who are not Australian citizens or residents should not be entitled to receive the first five hours of decision-making time free of charge.[158] However, DFAT's submission also suggested that a 'fair' charging model would effectively serve the same purpose as one which distinguished between applicants, as long as waiver provisions remained in place for appropriate circumstances.[159]

In contrast, other agencies did not support a charging model based on categories of applicants. NBN Co submitted that 'it would most likely lead to unnecessary complexity, administrative effort and corresponding costs'.[160] DEEWR and DHS similarly submitted that any attempt to further classify or distinguish classes of people to whom charges should apply would lead to unwarranted levels of complexity and practical difficulty for agencies.[161] DEEWR also pointed out that such an approach would be inconsistent with the objects of the FOI Act, as well as giving rise to issues regarding discrimination.[162] DAFF, while stating that such a model was 'attractive', noted that it would possibly require amendments to the FOI Act to implement because under s 15(2), applicants do not have to identify themselves and under s 11(2)(a) an applicant's right of access is not affected by the reason for which they are seeking access.[163]

Some submissions also discussed the option of setting a special charge where FOI rather than a subpoena or legal discovery process is used to obtain documents that are to be used in litigation. ACCC proposed a model which recovered the actual costs incurred in complying with requests for documents in the course of litigation in the same way that it can for producing documents via subpoena.[164] CSIRO suggested that, when applicants

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156 DRET, Submission No 9, p 6. See also Appendix E for further information about charging practices in the USA.
157 DFAT, Submission No 14, p 4.
158 DFAT, Submission No 14, p 12.
159 DFAT, Submission No 14, pp 1–2, 8.
160 NBN Co, Submission No 12, p 5.
161 DEEWR, Submission No 8, p 7; and DHS, Submission No 18, p 4.
162 DEEWR, Submission No 8, p 7.
163 DAFF, Submission No 20, pp 3–4.
164 ACCC, Submission No 5, p 4.

seek documents through FOI requests rather than legal discovery, the charges imposed should reflect the value of the documents to the applicant.[165]

Reintroducing the application fee and abolishing all other charges

Grennpeace supported the Tasmanian model of fees and charges.[166] In Tasmania, there is no charge for an FOI request for an assessed disclosure under the *Right to Information Act 2009* (Tas) beyond the initial application fee, currently set at $35 (25 fee units). The application fee may be waived if the applicant is impecunious, a member of Parliament acting in connection with his or her official duty, or the applicant is able to show that he or she intends to use the information for a purpose that is of general public interest or benefit. There are no other fees or charges.[167]

While the Tasmanian charging model meets the general objective of 'uncomplicated administration' (see charging principles in part 2), it does not meet the balance between cost and access that must underpin an FOI charging framework. Although a substantial part of the cost of FOI administration should be borne by government, reducing charges to a single application fee would place an unreasonable financial and administrative burden on agencies. This may be more pronounced at the Commonwealth level given the greater number of agencies and thus larger volume of FOI requests that are processed yearly.[168]

Imposition of charges

Effect of notification and imposition of charges

Agencies were asked to set out the circumstances where they imposed charges and the effect that notifying and imposing charges had on FOI requests.

Several agencies provided examples of when they impose charges. DoFD imposes charges for processing most FOI requests (except, as provided for in the Act, requests for access to personal information or where the agency exercises its discretion to release documents outside the FOI Act). Further, DoFD supports individual decision makers using their discretion not to impose charges, particularly if the search and retrieval costs are low and the estimated decision making time is less than or close to five to six hours.[169] DCCEE imposes charges where the quantity of documents sought is considerable. If a small number of documents are easily located, decision makers exercise their discretion and do not impose charges.[170] IP Australia and DRET indicated a similar practice.[171]

In terms of the impact of the notifying and imposing charges, one agency at a consultation session reported noticing a large increase in deemed withdrawals of

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165 CSIRO, Submission No 11, p 8.
166 Greenpeace, Submission No 2, p 2. See also Appendix E.
167 See further discussion about Tasmanian charging practices in Appendix E.
168 See Figure 3: Total costs, requests and fees and charges collected since 1982–83.
169 DoFD, Submission No 6, p 6.
170 DCCEE, Submission No 3, response to question 14.
171 IP Australia, Submission No 10, p 3; and DRET, Submission No 9, p 7.

requests once a charge is notified (where the applicant never responds[172]), particularly in the case of large requests from journalists and members of parliament. IP Australia reported that, since the abolition of the application fee, it has noticed an increase in the number of requests that are withdrawn after a notice of charges is provided. It noted that, previously, applicants would seek an estimate of costs before paying the application fee and thus were less likely to withdraw their request on notification of the charge.[173]

DEEWR, DCCEE and DFAT stated that their experience had been that only a few applicants withdrew their request after being notified of a charge and that the more common outcome was that the agency would consult with the applicant to clarify and refine the applicant's request.[174] CSIRO also commented that notification of the charge often provided an opportunity to work with the applicant to refine their request.[175] DoD stated that few applicants withdrew the request on receiving a charge notice and that this was in part due to DoD liaising with the applicant and clarifying the scope of the request prior to carrying out a preliminary assessment.[176]

DRET stated that it had not been its experience that, on receiving notification of a charge, applicants narrowed the scope of the request and that it was more likely that they would seek waiver on public interest grounds.[177] DHS also submitted that few applicants withdrew a request after being notified of the charge and, as with DRET, it was more likely that the applicant would seek waiver.[178]

The discussion paper also asked applicants about the effect of imposition of charges on them.[179] However none of the submissions from applicants addressed this particular question. As noted previously, Greenpeace did submit more generally that charges were not the appropriate mechanism for impelling applicants to refine or narrow the scope of their requests, and that the FOI Act already provided mechanisms such as the practical refusal powers to enable this to occur.[180]

Charges for requests not finalised within the statutory time limit

The discussion paper also asked in what circumstances charges should be imposed and whether it is appropriate that no charge is payable where the applicant is not notified of a decision on a request within the statutory time limit (including any extension).

Some agencies expressed concerns about their inability to impose a charge where requests are not resolved within the statutory time limit. DoD noted that agencies are

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172 Section 29(1)(g) requires the applicant to accept the charge, contend the charge, or withdraw their FOI access request within 30 days, or the request is deemed to be withdrawn.

173 IP Australia, Submission No 10, p 4.

174 DEEWR, Submission No 8, p 9; DCCEE, Submission No 3, responses to questions 2, 17; and DFAT Submission No 14, p 9.

175 CSIRO, Submission No 11, p 6.

176 DoD, Submission No 13, p 6.

177 DRET, Submission No 9, p 8.

178 DHS, Submission No 18, p 5.

179 See Appendix A, questions 18 and 19.

180 Greenpeace, Submission No 2, p 2.

sometimes restricted by circumstances that are not initially apparent upon receipt of a request when, even with extensions of time, there is inadequate time to deal with some complex issues.[181]

DFAT submitted that it would be appropriate for a proportion of the charge to remain payable when the statutory limit expires, as the current arrangement does not fairly reflect the work done by agencies or the cost to the community.[182] Ms Megan Carter suggested that it seemed unfair that agencies were unable to impose charges in cases where a request was not met within the required time limit because of a lack of resources.[183] DAFF suggested it would be useful if an agency could request an extension from the applicant more than once,[184] while DoFD suggested that if an agency has made every effort to contact the applicant about timeframes for processing the request, then some level of charges should be able to be imposed.[185]

Exceptions

No charge for requests involving an applicant's own personal information

Comments were also invited on whether it was appropriate that requests involving an applicant's own personal information should be free from charges.

Non-governmental organisations were strongly opposed to charges for personal information requests. PIAC submitted that 'it seems particularly unfair' that an individual be charged to access their own information, held by government.[186] NWRN was also opposed to the introduction of such a charge:

> NWRN believes that there are broad public benefits that arise from easy access to personal information kept by large Commonwealth service delivery organisations like Centrelink. Rules that enshrine a legislative requirement that underpins access to an individual's file, where cost is no barrier, assist to sustain an organisation's openness, accountability and fairness. They also help promote a culture that strives to achieve high levels of consistency and quality in decision-making across all levels of its operation.[187]

Similarly, the Central Australian Aboriginal Legal Aid Service (CAALAS) advocated for no charge to be imposed on such requests and endorsed the NWRN submission.[188]

Many agencies also considered that no charge should be imposed for requests involving an applicant's own personal information.[189] However, some agencies at the consultation sessions and in submissions expressed concern that some requests for personal

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181 DoD, Submission No 13, p 5.
182 DFAT, Submission No 14, p 8.
183 Ms Megan Carter, Submission No 16, p 7.
184 DAFF, Submission No 20, p 4. An agency or minister can seek the applicant's agreement to an extension of up to 30 days under s 15AA.
185 DoFD, Submission No 6, p 6.
186 PIAC, Submission No 4, p 7.
187 NWRN, Submission No 17, p 8.
188 CAALAS, Submission No 19, p 2.
189 See ACCC, Submission No 5, p 4; CSIRO, Submission No 11, p 8; DoD, Submission No 13, p 6; DFAT, Submission No 14, p 9; and DHS, Submission No 18, p 5.

information are quite large and/or complex, and may involve consultation with many parties.[190] NBN Co acknowledged that while it holds little personal information:

> It is reasonable to assume that agencies that do hold large amounts of personal information – Centrelink, Veterans' Affairs and other organisations – could be encumbered with unmanageable workloads where there are no practical incentives on the part of personal applicants to make targeted or focussed FOI applications.[191]

NBN Co proposed that if an applicant seeking personal information was required to pay processing fees beyond 20 hours, they could ask for a waiver or reduction if they were in financial hardship.[192] DoFD also said that it would support this model in principle.[193]

Collection of charges

While most agencies indicated they did not face challenges in collecting charges from applicants, some indicated difficulty in undertaking the cost collection and refund process. DCCEE and DRET noted difficulties in collecting charges,[194] while DoFD suggested that difficulties can arise in collecting charges from applicants where a decision has been made to refuse access in part or in full. DoFD also noted that, in practice, a number of applicants pay all charges up front.[195]

Some agencies put forward proposals for new tools or processes to assist in determining and collecting fees and charges. CSIRO suggested that the OAIC could develop a calculator tool, similar to one previously developed by the Australian Government Solicitor, to assist agencies in calculating applicable fees and charges.[196] NBN Co, while recommending that responsibility for determining fees and charges should remain with agencies, recommended that the OAIC consider centralising the cost-recovery or fee collection function across the Australian Government. NBN Co suggested that this would benefit from economies of scale and result in the application of uniform practices across the Commonwealth.[197]

Correction, reduction or waiver

Comments were invited on which categories of applications should not incur charges and which circumstances warranted a reduction or waiver of charges. Agencies were asked if charges should be imposed when an applicant can demonstrate financial hardship, if the agency reduces or waives charges on the basis of public interest and if they experience difficulties in refunding charges.

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190 See DAFF, Submission No 20, p 5; DoFD, Submission No 6, pp 7–8; DRET, Submission No 9, p 8; and IP Australia, Submission No 10, p 4.
191 NBN Co, Submission No 12, p 6.
192 NBN Co, Submission No 12, p 6.
193 DoFD, Submission No 6, p 8.
194 DCCEE, Submission No 3, response to question 21; and DRET, Submission No 9, p 9.
195 DoFD, Submission No 6, p 8.
196 CSIRO, Submission No 11, pp 4–6.
197 NBN Co, Submission No 12, p 2.

Most submissions, including those from agencies proposing increases to FOI fees and charges,[198] expressed support for the continued ability of agencies to waive and reduce charges under the FOI Act. At a consultation session, NWRN said that the abolition of the waiver provision would cause difficulty for non-government organisations. Community and welfare law groups rely on the waiver because their clients would otherwise be unable to pay a charge.

Some agencies outlined their internal processes relating to waiver or a reduction. DAFF said that it may consider waiving charges where the number of documents provided to the applicant is small or contains a large number of edits.[199] IP Australia noted that it generally does not impose charges for documents that are more likely to be considered as being in the public interest, for example policy documents, and as such receives few requests for waiver.[200]

Some agencies requested further guidance from the OAIC about how to apply waiver provisions. DoHA noted that such guidance would be particularly needed if there was an increase in fees and charges, as this could lead to an increase in requests for waiver or reductions.[201]

Waiver of charges: public interest grounds

PIAC submitted that, in its experience, agencies are generally willing to waive charges in cases of financial hardship but rarely on the basis of public interest. PIAC suggested that it may be useful to provide agencies with a non-exhaustive list of factors that might be taken into account in considering the public interest criterion.[202] The matter of defining 'public interest' was also mentioned by DFAT, with suggestions that guidance from the OAIC would assist agencies in applying this waiver more consistently.[203]

At the consultation sessions and in DEEWR's submission, questions were asked about a perceived discrepancy between FOI guidelines and OAIC decisions in deciding whether full or partial waiver should be granted.[204] Agencies including DoD and DEEWR also raised issues about practical difficulties in applying a public interest test, as this requires determining if releasing the documents would be in the public interest before making a decision about whether access to the documents should be provided for the purposes of the request.[205]

198 See DAFF, Submission No 20, p 6; DFAT, Submission No 14, p 11; and DoHA, Submission No 21, p 4.
199 DAFF, Submission No 20, p 4.
200 IP Australia, Submission No 10, p 4.
201 DoHA, Submission No 21, p 7.
202 PIAC, Submission No 4, p 7.
203 DFAT, Submission No 14, pp 10–11.
204 DEEWR, Submission No 8, p 10.
205 DoD, Submission No 13, p 8; and DEEWR, Submission No 8, p 10.

Treasury noted that the fact that a topic is being discussed in the media, or in other forms of public debate, should not be regarded as sufficient to create any presumption that any charges should be waived.[206]

DCCEE and Treasury both noted potential situations where a large amount of material on an issue may have already been released into the public domain before an FOI access request is received. They suggested that the subsequent release of a relatively small number of additional background documents may not add materially to the public debate.[207]

DoFD also suggested revision of the FOI Guidelines, which provide at paragraph 4.54 that:

> …agencies and ministers should be more inclined than they may have been prior to the changes to decide that disclosure of a document – especially a document relating to the policy processes of government – would be of general or identifiable public interest and that a charge should not be imposed.

DoFD said that some applicants were using that paragraph to argue that, since the material would be published in the disclosure log if released to the applicant, charges for the request should be waived on public interest grounds.[208] DoFD argued that the disclosure log requirements should not automatically give rise to waiver on the grounds of public interest but that waiver should be determined on a case by case basis.[209]

Waiver of charges: financial hardship

Agencies in submissions and at consultation sessions requested additional advice about what constitutes financial hardship and what documentary evidence should be required from applicants in these cases.

Some agencies detailed the evidence they currently require for considering waiver in the case of financial hardship. CSIRO said that corporations should provide evidence of charity status, while individuals should provide a fortnightly Centrelink statement or pension card.[210] Other agencies also said that they would accept evidence of assistance from Centrelink or another form of documentary proof that an applicant is experiencing financial hardship.[211] Agencies including DHS and DRET suggested that applicants should only have to produce the bare minimum of information required to assess whether they are experiencing financial hardship.[212]

DEEWR noted that it also considers matters of reasonableness and proportionality when assessing applications for waiver on the basis of financial hardship, including the nature

206 Treasury, Submission No 7, p 1.
207 DCCEE, Submission No 3, response to question 14; and Treasury, Submission No 7, p 1.
208 DoFD, Submission No 6, p 10.
209 DoFD, Submission No 6, p 10.
210 CSIRO, Submission No 11, p 9.
211 See DCCEE, Submission No 3, response to question 24; DoFD, Submission No 6, p 9; and NBN Co, Submission No 12, p 7.
212 DHS, Submission No 18, p 6; and DRET, Submission No 9, p 10.

and extent of any previous FOI requests by the applicant.[213] DoD said that it considers waiving charges for requests from next of kin or family members seeking access to documents of deceased employees.[214]

DFAT proposed that student applicants using the FOI process to assist them with their private research should not necessarily be able to use financial hardship as a ground to obtain a full waiver of charges, as they considered it is not appropriate for the Australian community to bear the full cost of assisting them with their research.[215]

Some agencies, including DAFF and DoHA, also expressed concerns about corporations asking individuals to submit FOI requests on their behalf so that they could claim personal financial hardship.[216]

Agencies also requested more guidance on whether the charge should be reduced or waived if financial hardship was established. As with the public interest waiver, discussion included IC review decisions where charges were reduced rather than waived, and queries as to how the specific amount was decided.

Refunds

Agencies were also asked if they encountered any difficulty in refunding charges. Most of the agency submissions which addressed this question indicated that they did not.[217]

However, Ms Megan Carter suggested that, for some agencies, the cost of processing refunds would often exceed the refund itself.[218] DoD indicated that its internal refund process is complicated and costs up to $375 to process each refund.[219] DFAT noted that it used to have difficulties in refunding charges, but now had a system in place to do so.[220]

Other issues

Two other issues raised in submissions were:

- release of information outside of the FOI Act, and
- consultation with third parties.

A third issue that agencies have raised with the OAIC outside this review is the timeframe that should apply after an applicant has made a contention about a charge and the agency has notified them of its decision on the charge.

These issues are discussed further below.

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213 DEEWR, Submission No 8, p 10.
214 DoD, Submission No 13, p 7.
215 DFAT, Submission No 14, p 11.
216 DAFF, Submission No 20, pp 5–6; and DoHA, Submission No 21, p 7.
217 See DAFF, Submission No 20, p 6; DEEWR, Submission No 8, p 11; DoFD, Submission No 6, p 10; and DHS, Submission No 18, p 6.
218 Ms Megan Carter, Submission No 16, p 8.
219 DoD, Submission No 13, p 8.
220 DFAT, Submission No 14, p 12.

Release of information outside the FOI Act

Some submissions and participants at consultation sessions referred to ways of releasing information outside the FOI Act without the imposition of fees and charges.

Mr Peter Timmins suggested that this review should consider ways to reduce the cost of administering the FOI Act through proactive disclosure of government information.[221] At a consultation session, Mr Timmins said that agencies should be able to release information to applicants without releasing documents, suggesting that people will often be satisfied with receiving only information and that this may prove more efficient than FOI Act processes. DEEWR noted that its *My School* website has provided transparency benefits by providing a range of additional information about schools to the public,[222] suggesting that any discussion of fees and charges under the FOI Act should be considered in the context of increasing the proactive disclosure of government information.[223]

As mentioned previously, DoD also raised the provision under s 15A of the FOI Act for agency employees or former employees to obtain access to their personnel records without making an FOI access request.[224] At a consultation session, some agencies indicated that similar schemes had resulted in closer ties between their internal FOI and human resources areas to allow more proactive release of personnel records.

Consultation with third parties

The Global Mail expressed concern that it is open to agencies to abuse provisions under the FOI Act that require consultation with third parties about documents subject to an access request, particularly in the case of business documents.[225] They argued that 'any document that is more than a few months old should usually be deemed not to fall into [the third party consultation provisions on business documents] as it would no longer affect business interests'.[226] The Global Mail also suggested that the OAIC issue guidance on what might reasonably constitute a personal or business interest that could be affected by release.[227]

Charges timeframes

Agencies have raised with the OAIC, separately from this review, their uncertainty about what timeframe should apply after an applicant has contended a charge and the agency has reviewed the matter and notified their decision.

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221 Mr Peter Timmins, 'Fees and Charges for FOI access', *Open and Shut*, 14 November 2011, http://foi-privacy.blogspot.com/2011/11/fees-and-charges-for-foi-access.html.

222 See www.myschool.edu.au.

223 DEEWR, Submission No 8, p 1.

224 DoD, Submission No 13, p 2.

225 The Global Mail, Submission No 22, pp 1–3.

226 The Global Mail, Submission No 22, p 2.

227 The FOI Guidelines address these matters at paragraphs 6.112–6.186.

Under s 29, an agency or minister must give an applicant a written notice of the charge that they intend to apply. The applicant must within 30 days agree to pay the charge, contest the charge or withdraw their request. If they do not do so, the request is taken to be withdrawn. Where the applicant contests the charge and the agency notifies them of their subsequent decision, the FOI Act does not impose any timeframe in which the applicant must respond, nor is the request deemed to be withdrawn if no action is taken.

Part 4: Administrative release of information

Introduction

A theme that emerged strongly in this review is the significant role that administrative access schemes can play in meeting the objectives of the FOI Act. 'Administrative access' refers to release of government-held information in response to a request, without the need for a formal FOI access request.[228] Such schemes can provide quick and informal information release in a way that can reduce the cost both to applicants and to agencies. In short, they can be an ideal means of addressing the four core charging principles set out in Part 2.

Administrative release of information in support of FOI objectives is not a new idea. The FOI Act has always acknowledged that agencies and ministers can and should make information available without requiring a formal FOI access request. However, beyond that basic acknowledgment the FOI Act has done little to encourage or support the development of administrative access schemes. The limited exception is s 15A, which provides support for agencies to establish schemes for administrative access to personnel records by current or former employees.

A number of reports have urged that more be done to support the development of administrative access. The ALRC-ARC's 1995 review of FOI noted that '[t]here appear to be many instances of agencies regarding requests for information as FOI requests when there is no reason to do so'.[229] The report argued that wherever possible, agencies should release information quickly and informally.[230] The Commonwealth Ombudsman made a similar recommendation in 1999 that '[a]gencies should review procedures for the disclosure of information to encourage, where appropriate, the public disclosure of information without the need for recourse to the FOI Act'.[231] In a later study in 2008 of delays in FOI administration in the Department of Immigration and Citizenship (DIAC), the Ombudsman concluded that far too many requests for information were being handled under FOI rather than by other means.[232]

The OAIC's first annual report on the FOI Act noted that while requests for non-personal information had increased by 48.4% in 2010–11, requests for personal information had risen by only 3.6%. The number had fallen in some agencies that receive a large number of personal information requests (for example, a decrease of 63.2% over two years in

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228 The Office of the Information Commissioner, Queensland, notes in the *Right to Information Guidelines*, 'Administrative release of information' at p 1, that the term 'administrative access' is generally understood to refer to access to information, in full or in part, in certain types of administrative or operational records.

229 ALRC-ARC report, 1995, paragraph 4.18.

230 ALRC-ARC report, 1995, paragraph 4.19.

231 Commonwealth Ombudsman, *Needs to Know: Own motion investigation into the administration of the* Freedom of Information Act 1982 *in Commonwealth agencies*, (1999), p 2.

232 Commonwealth Ombudsman, *Department of Immigration and Citizenship: Timeliness of decision making under the* Freedom of Information Act 1982, Report No 6, (2008), pp 8–9.

Centrelink during 2009–2011).[233] The OAIC attributed this reduction partly at least to agencies providing access outside FOI processes.[234]

It is time to build on those trends and concerns and give more explicit recognition in the FOI Act to the role of administrative access schemes. One way of doing this is to link the implementation of administrative schemes to the charges framework. Briefly, the recommendation explained in more detail in Part 5 is that an FOI applicant will be required to pay an application fee unless they have first made a request under an agency administrative access scheme where one has been established. Agencies will not be required by the FOI Act to establish such schemes, but the Act should support this option and encourage administrative access requests ahead of resort to the statutory procedures in the FOI Act.

This recommendation could bring about a major change in the operation of the FOI Act, marked by greater ease for the public in obtaining government information. This Part provides a broader context for the recommendation by discussing the importance of administrative access schemes and the principles on which they should be based.

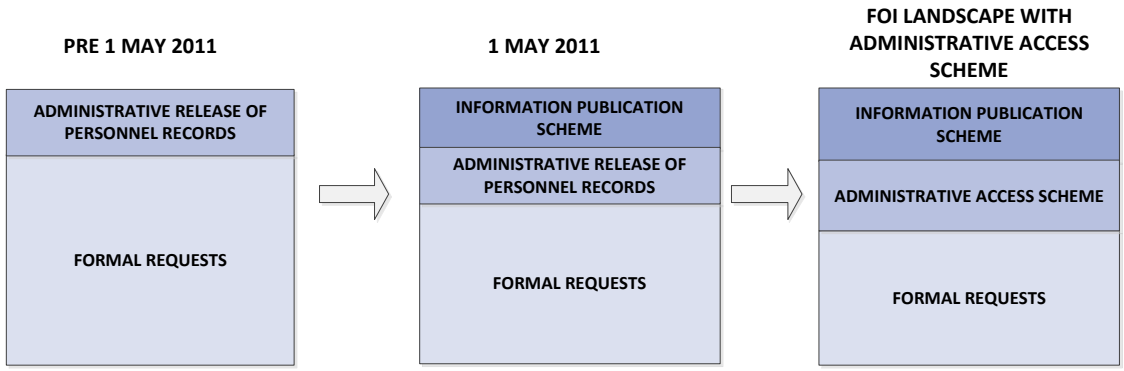
Defining administrative access

Administrative access can be as informal as a person calling or emailing an agency and receiving a response via telephone or email. Many requests to agencies for information or documents are handled by customer client contact centres or public affairs or liaison units. More structured arrangements can be specified in internal agency policies and involve, for example, recording requests, or charging for copying and postage of department publications or documents. Some agencies operate online portals that allow agency clients to log in and access or update information held about them.

The structure and procedures for administrative access are less important than the outcome. The key issue is whether a person is satisfied with the information provided, in whatever form it is provided. If so, the accountability and transparency objectives that underpin a person's individual right to request access to government information have been met. If a person is not satisfied with an agency response under an administrative access scheme, they have enforceable legal rights under the FOI Act. The following diagram (Figure 4) illustrates how greater use of administrative access schemes could shift the balance in handling information access requests.

[233] OAIC, *Freedom of Inforamtion Act 1982: Annual Report 2010–2011*, (2011), p 4.
[234] OAIC, *Freedom of Information Act 1982: Annual Report 2010–11*, (2011), p ix.

***Figure 4**: Impact of administrative access schemes on FOI access requests*



Benefits of administrative access

The move to open government

Administrative access is a natural manifestation of open government. As a more informal means of accessing government information, administrative access reflects the cultural change in government towards increased openness, and greater ease and informality in interactions between individuals and agencies. It also enhances the capability of agencies to comply with the objects of the FOI Act by providing access promptly and at the lowest reasonable cost (s 3(4)).

In recent years, numerous reviews and reforms have supported enhanced transparency in government and unlocking public sector information. In particular, the Government's 2010 *Declaration of Open Government* stated its commitment 'to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology'.[235] Administrative access to government information provides an essential channel for fast and informal information release and advances fundamental principles of open government.

Informality and engagement with the public

The public information culture in government has changed substantially since the FOI Act commenced in 1982. It is now a more routine practice that people request information (rather than documents) from agencies and that agencies provide information and documents without a formal FOI access request. This partly stems from the greater emphasis in government on providing better service delivery to agency clients[236] as well as increased emphasis given to open government.

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235 Australian Government, *Declaration of Open Government*, (2010), www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html.

236 See, for example, www.servicedelivery.govspace.gov.au/reports-test/ and Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*, (2010), www.dpmc.gov.au/publications/aga_reform/aga_reform_blueprint/index.cfm.

The FOI Act should reflect this shift. The legal obligation on agencies to respond to a formal request for documents is still the key principle on which the FOI Act is based, but it should not be seen as the primary means of ensuring public access to government information.

Information technology

An allied change is that the information people seek from government agencies is often stored electronically, and is not necessarily captured in discrete documents. In 1982, most information was stored in paper documents. The FOI Act was accordingly built around a person's right to request access to a particular document that contained the information they sought.

Government agencies now store most information electronically and respond to information requests in more flexible ways. Responses are often provided by collating data from various sources and providing it in a new document, frequently by email. The FOI Act should reflect that in many instances a person is essentially seeking information and the form of access is a secondary consideration. The right to ask for a particular document should not be the primary means of ensuring public access to information. At the least, the FOI scheme should allow discussion to occur between applicants and agencies before requests become formal and the processing period starts to run.

Administrative access as a 'lead-in' to FOI

The FOI Act requires an applicant to 'provide such information concerning the [requested] document as is reasonably necessary' to allow it to be identified (s 15(2)(b)). This can be difficult for an applicant who does not have first-hand knowledge of the documents that an agency holds. An agency can decline to accept a request as valid if it is not sufficiently precise. If, on the other hand, the applicant makes a request that is expressed too broadly, the agency estimate of charges may appear prohibitive.

The period for processing a request can be suspended if an agency advises the applicant that processing the request would involve a substantial and unreasonable diversion of the agency's resources. The processing period will also be suspended if an agency and an applicant do not agree on the charge payable. In practice this means that it can take far longer than the statutory processing period before an agency decides whether access to documents will be granted.

An administrative access scheme that operated as a lead-in to a formal FOI request could establish a productive discussion between applicants and agencies and help to clarify issues before the FOI statutory timeframes commence. The result could be that an FOI request that is made following an unsuccessful administrative access request is more clearly or narrowly framed and can be processed more quickly and inexpensively.

Less formal processes

Another important cultural change in law and government since 1982 is that greater emphasis is now given to resolving disputes by consultation and negotiation rather than by formal legal processes. Claims, complaints, disputes and differences of view should

first be addressed directly and informally between the parties before formal legal procedures commence.

An example is that it is normally expected that a person raise an issue first with an agency before taking it to an external oversight body. Internal review is often required before external review by a tribunal can commence.[237] The civil litigation dispute resolution reforms in 2011 also require a party who institutes civil proceedings in a federal court to file a statement outlining the genuine steps taken by the party to resolve a dispute before commencing proceedings.[238]

The FOI Act could reflect this change by encouraging the use of administrative access opportunities prior to the exercise of the legal rights under the FOI Act. An emphasis on using less formal processes could result in quicker outcomes and better dialogue between agencies and applicants.

Cost benefits of administrative access

An administrative access scheme could also offer cost benefits both to applicants and agencies. For applicants, information or documents provided under an administrative access scheme would normally be provided free of charge, except (in some instances) copying or other electronic production charges. An applicant who proceeds to make an FOI request is likely to be better informed and able to make a request that is clearly framed.

For agencies, there can be greater efficiency in dealing upfront and in a flexible manner with public requests for information and documents. An agency will have less need to assess and collect charges, provide formal statements of reasons under s 26, or deal with complex editing and third party consultation issues in deciding how information can be disclosed. Disclosure of information and documents can be handled more commonly by the customer liaison or public affairs sections of the agency, rather than by the specialist FOI unit which can focus more on complex FOI issues.

For example, DIAC significantly reduced the number of FOI requests it received by handling a greater proportion of requests for personal information outside the FOI process.[239] This change meant that routine requests for personal information could be handled by the appropriate business area of the agency while the FOI team was able to markedly improve FOI processing timeframes as the number of requests received returned to a more manageable quantity.[240]

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[237] The *Australian Administrative Law Policy Guide*, which is intended to assist policy makers to identify administrative law issues in draft legislation or proposals, provides that internal review processes should be implemented in almost all cases – see *Australian Administrative Law Policy Guide 2011*, paragraph 4.2.2 available at www.ag.gov.au/www/agd/agd.nsf/Page/Administrativelaw_Administrativelaw.

[238] See Part 2 of the *Civil Dispute Resolution Act 2011*.

[239] DIAC, *Annual Report 2007–08*, (2008), 'External Scrutiny – Freedom of Information'.

[240] DIAC, *Annual Report 2007–08,* (2008) and *Annual Report 2008–09,* (2009).

Elements of an administrative access scheme

An administrative access scheme must be tailored to the size of an agency, its work, the requests it typically receives for information or documents, and its regular procedures for public contact and access. Australian Government agencies are diverse in nature, function and methods, and this will be reflected in the access procedures they adopt. An agency may, for example, limit an administrative access scheme to only some of its documents (such as personal records), or establish more than one scheme to cater for the different types of records it holds.

It is nevertheless important that members of the public can approach agencies with a conventional understanding of how administrative access will work. The procedures should not differ markedly from one agency to another.

Following is an outline of the main principles on which an agency administrative access scheme should be based. The OAIC will consider providing further guidance on these issues if the FOI Act is amended as proposed in Part 5.

1. The details of an administrative access scheme should be set out on the agency's website.[241] A link to the scheme should be clearly displayed on the agency home page.
2. The scheme should explain the type of requests that the agency will accept under the scheme, and those falling outside the scheme. For example, the scheme may apply to only some of the agency's records (such as personal records or client case files) and a scheme could adopt principles from the FOI Act, excluding requests for material that is available for purchase from the agency, and requests that would impose a substantial and unreasonable administrative burden on the agency.
3. The procedure a person should follow in making a request for information or documents should be set out, including how a request can be made, where it should be sent, the contact details the person should provide, and the proof of identity that may be required for requests for personal information. To the extent practicable, agencies should commit to accepting informal requests for information or documents.
4. Information or documents provided in response to a request under an administrative access scheme should be provided free of charge, except for reasonable copying, reproduction or postage costs.
5. The agency should commit to acknowledging requests promptly upon receipt, and providing a response within 30 days.

[241] The *Guidance for agency websites* (issued under s 93A of the FOI Act on 22 March 2011, and available at www.oaic.gov.au) recommended that an agency's FOI page should include a plain English explanation of documents available from the agency outside the FOI Act. The guidance aims to promote access to government information by ensuring that agency websites assist members of the public to easily locate information published by the agency and to make requests under the FOI Act. It notes that agencies are obliged under s 15(3) of the FOI Act to take reasonable steps to assist any person who wishes to make an FOI request.

6. The form in which access may be granted should be explained. For example, the most suitable form of access may be an email or telephone call to explain an issue, the preparation of a new document that contains the requested information, or provision of a copy of existing documents.
7. The interaction of the scheme with the FOI Act should be set out, as explained in more detail in Part 5. It should be noted that complaints about agency actions under an administrative access scheme do not fall under the FOI Act, but can be taken up directly with the agency or by making a complaint to the Commonwealth Ombudsman.
8. An agency may wish to maintain a record of the requests handled under an administrative access scheme, though it may not be appropriate to record the detailed information that agencies provide for the annual report on the FOI Act.[242] It is possible that many requests received under an administrative access scheme will blend with the enquiries and requests that agencies currently receive from customers, clients and stakeholders. The OAIC does not propose to collect statistics on the operation of administrative access schemes, so the details agencies record would be for their own administrative purposes.
9. Where appropriate, agencies may also choose to publish the information released via their administrative access scheme through their IPS. This would facilitate broader public access to the information rather than exclusive individual access, in line with the requirement that the IPS should include 'information in documents to which the agency routinely gives access in response to requests' under the Act (s 8(2)(g)).

Issues of potential concern

While there are clear benefits of administrative access schemes for both applicants and agencies, there are some countervailing considerations discussed below.

Concerns for applicants

The recommendation in Part 5 for linking the development of administrative access schemes to the FOI charges framework should not be viewed as a retreat from the FOI reforms in which the $30 application fee for FOI requests was removed.

A person could approach an agency directly and ask for information or documents under an administrative access scheme, and no processing charge would apply. If not satisfied with the agency response the person could then make an FOI application without paying an application fee. The FOI request could be lodged 30 days after the administrative application was made, or earlier if the agency gave a quicker response.

The only practical difference between the current and proposed arrangements is that a person could be delayed by up to 30 days to make an FOI request free of an application charge. The expectation, however, is that many applications would not need to proceed to that second stage and would be dealt with adequately at the administrative stage. In

[242] Required by s 30 of the AIC Act.

cases that did proceed through both stages it is, again, to be expected that many requests could be dealt with more quickly than at present, because of the preliminary analysis and discussion that should have occurred between the applicant and the agency at the administrative stage.

The present reality is that many FOI requests are not resolved within 30 days. The processing period can be extended by 30 days to allow for consultations with third parties[243] or for other reasons. In the eight months following 1 November 2010, the OAIC received 1096 requests or notifications from agencies for extension of the statutory processing period.[244] In many other cases that period was suspended while discussion occurred between an applicant and an agency about the scope of a request and the applicable charges.

Over time, it is also to be expected that the development and operation of administrative access schemes will bring about systemic change by aligning agency processes to the open government objectives of the FOI Act. This would make it easier for individuals to obtain information and documents without the need for a formal FOI request.

Concerns for agencies

An administrative access scheme will be more suited to some agencies and to some types of requests than others. For example, a small agency that deals regularly with a known client base may find that it would be unproductive or confusing to create an administrative access scheme to operate alongside the FOI Act. Only 61 out of close to 240 agencies listed in the 2010–11 FOI Annual Report received more than 10 FOI requests that year.

For that reason, I recommend in Part 5 that it be optional for an agency to establish an administrative scheme that an applicant must use before lodging an FOI request that does not attract an application fee. If an agency chooses not to establish such a scheme, there will be no application fee for FOI requests to the agency.

Another agency concern may be a greater cost burden as requests handled under an administrative scheme will not be charged except for incidentals such as copying and postage. The reality, however, is that agencies presently recoup only a small fraction of costs through FOI charges (less than two per cent in 2010–11[245]). The total cost to an agency of administering information and document access requests could be expected to decrease, as less administrative time will be spent on the formal requirements of FOI processing, such as estimating and notifying charges and preparing statements of reasons.

Finally, agencies may be concerned about whether there will be adequate legal protection for agency staff who release information under an administrative access

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243 See s 15(6) and 15(7) of the FOI Act.

244 OAIC, *Annual Report 2010–11*, (2011), p 15. Most of these (834) were notifications of extensions by agreement with the applicant under s 15AA of the FOI Act.

245 See discussion paper, Appendix B, p 39.

scheme. The FOI Act provides protection against civil action (ss 90–91) and criminal prosecution (s 92) for agencies and officers who publish or give access to documents under the Act.

Section 90 provides that no action for defamation, breach of confidence or infringement of copyright lies against the Commonwealth, Norfolk Island, a minister, an agency or an agency officer solely on the ground of having given or authorised access to a document. The main qualification is that the agency or officer must have acted in good faith in the belief that publication or giving access under the Act was required or permitted. Section 92 operates in a similar way to s 90 in providing immunity from criminal prosecution.[246] Section 91 deals specifically with the consultation requirements in ss 26A, 26AA, 27 and 27A of the Act, and provides protection where there was a failure to consult, or a document was shown to a person or organisation in the course of consultation.

There is a strong case for ensuring similar protection to the good faith release of information under an administrative access scheme. It may be that ss 90(1)(c) and 92(1)(c) already provide adequate protection, as they apply to publishing or giving access to a document 'in good faith, in the belief that the publication or access is required or permitted otherwise than under this Act (whether or not under an express legislative power)'. This includes discretionary disclosure outside the FOI Act or disclosure of exempt documents, if made in good faith.[247]

At any rate, this is not a new challenge for agencies. They commonly release information and documents on an administrative basis without apparent difficulty. On occasions agencies direct a person to reframe a request as an FOI request, so that the formal procedures and protections of the FOI Act will definitely apply. This practice could continue with the development of administrative access schemes as proposed in this report.

[246] Note that similar protections do not apply to administrative access schemes in Queensland, although the *Right to Information Act 2009* (Qld) promotes release of information under such schemes.

[247] Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, p 46.

Part 5: A new approach to charges – recommendations for reform

Overview

This Part sets out my recommendations for a new FOI charges framework. Implementing this framework will require amendments to both the FOI Act and the Charges Regulations. This report does not explain those amendments in detail but focuses on describing and explaining a new charges framework. The recommendations and discussion in this Part refer to agencies, but apply also to ministers unless otherwise stated.

The recommendations are based on the four guiding principles stated in Part 2, and would implement those principles in the following way:

- *Support of a democratic right:* Government would continue to bear the substantial cost of administering the FOI Act, in keeping with the Act's fundamental role in supporting Australian democracy. On the other hand, the charges framework would curb disproportionate use of the FOI Act that detracts from the capacity of agencies to discharge their other functions.
- *Lowest reasonable cost:* Personal information would be provided free of charge. Requests for other information would incur either no processing charge or only a moderate charge if suitably framed.
- *Uncomplicated administration:* The new charges framework would be uncomplicated for agencies to administer. It will assist constructive dialogue between applicants and agencies about potential charges and options for minimising them.
- *Free informal access as a primary avenue:* The charges framework will support the development of administrative schemes that make it easier for the public to obtain government information and documents without using the formal FOI request process. This will reinforce other government agency initiatives to build an open and responsive culture, marked by proactive release of information.

The recommendations for reform are grouped as follows:

- greater use of administrative access schemes to facilitate administrative release of information outside the FOI request process (Recommendation 1)
- a new approach to charges, including a sliding scale of charges according to whether a request will take up to five hours, over five and up to 10 hours, or more than 10 hours to process, and a clearer threshold for refusing complex or voluminous requests that place an unreasonable administrative burden on agencies (Recommendations 2–4)
- a simplified approach to reducing and waiving charges (Recommendations 5–6)

- encouraging applicants to seek internal review prior to IC review (Recommendation 7)
- indexation of charges in line with CPI increases (Recommendation 8)
- imposing a statutory limit on the time an applicant has to respond to a decision on charges (Recommendation 9).

Facilitating administrative release of information

Recommendation 1 – Administrative access schemes

1.1 Agencies are encouraged to establish administrative access schemes by which persons may request access to information or documents that are open to release under the FOI Act.

1.2 The details of an administrative access scheme should be set out on an agency's website, and explain:

- how a person may make a request for information or documents that will be provided free of charge (except for reasonable reproduction and postage costs), and
- the interaction of the administrative access scheme with the FOI Act.

1.3 If an agency establishes an administrative access scheme that is notified on its website, a person who makes an FOI request without first seeking the same information under the scheme may be required by the agency to pay an application fee of $50.

1.4 No FOI application fee shall be payable if a person has first applied under an appropriate administrative access scheme. The FOI request may be made either upon receipt of the agency's response to the administrative access request, or after 30 days if no agency response is received.

Section 15A of the FOI Act (giving effect to administrative access schemes that enable current or former agency employees to obtain access to personnel records) will continue unaffected by this recommendation.

General comments

Part 4 describes the growing trend in government to make information and documents available to the public outside the formal FOI request process. This is described as administrative access, and it occurs through both structured and informal processes.

I support this trend, for reasons outlined in Part 4.[248] Administrative access arrangements make it easier for the public to obtain government information promptly and inexpensively. The arrangements help build a culture of openness, civic engagement and community participation in government. They advance the objects of the FOI Act.

[248] See also FOI Guidelines, paragraph 3.2; and OAIC *Agency resource 1: Freedom of Information- Twelve tips for decision makers*, August 2011, available at www.oaic.gov.au.

I propose that this trend be encouraged more strongly by linking it to the FOI charges framework, as recommended in 1.3 and 1.4. The proposal is that an agency may impose an application fee of $50 if an administrative access scheme is notified on an agency's website and a person does not apply under that scheme before making a formal FOI request.

There can be distinct advantages for an applicant in first applying under an administrative scheme. At that stage the formal requirements of the FOI Act requiring that the documents requested be reasonably identified do not apply. There is more flexibility for applicants and agencies to discuss the nature and scope of requests and to resolve them in an agreed manner.

Nor does this arrangement limit or detract from the legally enforceable right of access conferred by the FOI Act. An FOI request can be made 30 days after lodgement of an administrative request, or sooner if an agency has responded or advised a person in an appropriate case (discussed below) to proceed under the FOI Act. The discussion that has already occurred between the applicant and the agency should assist the applicant to make a request that is more precisely framed and can be processed more quickly.

Agencies are not required by this recommendation to establish administrative access schemes. It is equally open to an agency to establish a limited scheme applying only to specific types of documents, such as personal records or client case files. An agency also has a discretion whether to impose a $50 application fee from an applicant who has not used an appropriate administrative scheme before applying under the FOI Act.

Administrative access schemes are an evolving feature of agency practice and community relations. It is important that this evolution continues in the same measured and flexible manner that has occurred to date across government. If agencies choose not to draw the link proposed in this recommendation between administrative access and the FOI charges framework, it is nevertheless important that agencies heed the spirit of the recommendation and take steps to intensify the development of administrative access arrangements that complement the formal access request provisions of the FOI Act.

Explanation of recommendation

A few aspects of Recommendation 1 require specific explanation.

Recommendation 1.2: Part 4 of this report discusses the information that should be set out on an agency's website concerning administrative access arrangements. The nature and style of the statement may vary from one agency to another, but should clearly explain any link between the administrative scheme and the FOI Act charges framework. Further guidance on these issues may later be provided by the OAIC if this recommendation is accepted by government.

Administrative access should be free of charge, although reasonable reproduction and postage costs may be imposed where appropriate. Administrative access will also operate

alongside agency arrangements by which publications are made available for purchase by the public.[249]

Recommendation 1.3: The $50 application fee that will apply where an applicant chooses not to proceed initially under an administrative access scheme should apply to requests for both personal and non-personal information, subject to the exception of s 15A personnel record schemes discussed below. While requests for personal information do not otherwise attract an FOI processing charge, the effectiveness of this recommendation would be undermined if it did not apply to personal information requests. Indeed, administrative access schemes are especially suited to personal information requests.

An agency would have a discretion not to impose an appplication fee that is otherwise payable. This discretion would not be IC reviewable, bearing in mind that it is a moderate fee that an applicant can avoid by first making an administrative request.

Recommendation 1.4: This recommendation allows an applicant who is dissatisfied with the agency's response to an administrative access request to make an FOI request without paying an application fee. The request may be made either upon receipt of the agency's response, or after 30 days if no agency response is received. The applicant would be responsible for establishing at the time of making the FOI request that it was similar in nature to an earlier request made under the administrative scheme notified on an agency's website.

It would be open to an agency upon receiving an administrative access request to direct the applicant to the FOI Act. This may be appropriate, for example, where third party consultation is required, the request is for a substantial number of specified documents, or the agency wishes to bring the request explicitly under the statutory protections in ss 90 and 92 of the FOI Act. The $50 application fee would not apply to these requests.

Recommendation 1.5: Section 15A prevents an employee or ex-employee from making an FOI access request for their personnel records if they have not first sought the information using an administrative scheme the agency has established for this purpose. The person cannot circumvent such a scheme and choose to make an FOI request in the first instance. The FOI request can be made only if the person is not satisfied with the outcome or they are not notified of an outcome within 30 days.

As noted in Part 1, prior to the introduction of s 15A in 1991, two reviews concluded that agency savings would be achieved from such an approach with little disadvantage to applicants. The experience of some agencies supports those conclusions. DoD advised the OAIC that its FOI office received and processed 615 requests for personnel records under its administrative access scheme in the year prior to 1 November 2011. The requests are generally quite straightforward and can be actioned quickly and with minimal clarification with the applicant. Very few staff made FOI requests following dissatisfaction with the outcome or timeframes of the s 15A scheme.

[249] See FOI Act s 12(1)(c).

Schemes established under s 15A appear to work effectively and to streamline document release. I urge more agencies to establish administrative access schemes for employee and ex-employee access to personnel records. Their operation would be preserved by Recommendation 1.5.

A new scale of charges – processing

Recommendation 2 – FOI processing charges

2.1 The FOI processing charges referred to in 2.3 and 2.4 should apply to all processing activities, including search, retrieval, decision making, redaction and electronic processing.

2.2 No processing charge should be payable for the first five hours of processing time.

2.3 The charge for processing time that exceeds five hours but is ten hours or less should be a flat rate charge of $50.

2.4 The charge for each hour of processing time after the first ten hours should be $30 per hour (or part thereof).

2.5 No processing charge should be payable for providing access to a document that contains the applicant's personal information.

General comments

The current scale of charges set in 1986 is both low and inappropriate. It draws an artificial distinction between search and retrieval that is charged at $15 per hour, decision making that is charged at $20 per hour (after the first five hours), and electronic production that is charged at actual cost. Those different rates seem to reflect a view that search and retrieval can be simpler tasks that are undertaken by relatively junior officers, and that manual and electronic retrieval and processing require different skills. However, agencies noted that all stages of FOI processing may be undertaken by the same officers.

Nor does the current scale necessarily benefit applicants, other than that the hourly rates are low and have not increased for more than 25 years. The five free hours applies only to decision making and not search and retrieval. Applicants derive little guidance from the current scale as to the steps or options that are open to them for minimising or reducing charges. Applicants sometimes complain that they are taken aback when they first receive a charges notice from an agency. The separate charging categories can also complicate discussions between agencies and applicants about clarifying or reducing the scope of requests to contain FOI processing costs.

Before explaining below the proposed new and simplified scale of charges, I will note four other proposals that were raised in this review that I have not adopted. One was that charges be determined by the number of documents or the amount of information released. This proposal could fail the test of 'uncomplicated administration' that should underpin a charging framework. Charging by the number of pages could be practically difficult for information that is digitised, for records that are conveyed electronically to an applicant, or that require redaction to remove exempt material.

A second proposal was to charge according to the type of applicant requesting the information. This proposal raises logistical and practical difficulties for agencies in trying to identify and classify applicants. It potentially conflicts with a fundamental FOI principle that an applicant's reasons for making an FOI request should have no bearing on processing the request.

A third proposal was to impose a graduated or sliding scale, under which the hourly processing rate would increase in steps according to the number of hours of processing time. At the heart of that proposal is a concern to restrain requests that are unreasonably large or difficult to manage. I have approached that issue in a different way, by recommending a new charges scale in Recommendation 2 and a 40 hour ceiling on processing time in Recommendation 4.

The fourth proposal was to impose higher charges or other restrictions on FOI applicants who are not Australian citizens or residents. It would be practically difficult to apply such a test. The FOI Act provides that an FOI request can be lodged electronically (s 15(2)(c)), and it is open to a person to appoint a representative to make an FOI request on their behalf or to do so using a pseudonym.[250] It is also a settled feature of Australian FOI practice that the declaration in s 11(1) that 'every person' can make an FOI request has not been limited geographically.

Explanation of recommendation

Recommendation 2.1: This recommendation takes up the point discussed above, that the same processing charge should apply to the various administrative activities that are part of FOI processing. Combining those activities into a single processing rate will simplify the charges framework and make it easier for agencies to administer and respond promptly to applicants.

Recommendation 2.2: This recommendation builds on a principle adopted in the FOI Act in 2010, that no charge applies to the first five hours of decision making time.[251] The recommendation extends that principle to include search, retrieval and electronic processing.

Providing five hours of free processing time enables all members of the public regardless of their financial resources to exercise the right of access to government information conferred by the FOI Act. This also encourages applicants to make requests that are not too broad and can be processed simply and easily by agencies.

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250 FOI Guidelines, paragraph 3.28.

251 See the Explanatory Statement to the *Freedom of Information (Fees and Charges) Regulations (Amendment) 1991*, no. 320. See also Commonwealth, Parliamentary Debates, House of Representatives, 27 October 2010, 1824 (Brendan O'Connor, Minister for Privacy and Freedom of Information) and the Hon Brendan O'Connor MP (Minister for Privacy and Freedom of Information) 2010, 'Fees for Freedom of Information requests to be slashed', media release, Canberra, 27 October, viewed 4 January 2011, www.ema.gov.au/www/ministers/oconnor.nsf/Page/Home.

Recommendation 2.3: A flat rate charge of $50 would apply whether a request took, say, six or nine hours to process. The explanation for this recommendation is that $50 is a moderate charge that would be simple both to administer and understand.

This flat rate charge, together with the recommendation to include search and retrieval within the five free processing hours, would mean a lower charge for applicants in nearly all instances compared to present charging practice. It would be clear to an applicant that the processing charge could be limited to a maximum of $50 if the request was framed with a view to being administered in less than ten hours. An agency would be required to assist an applicant to achieve that result. In any case, an agency may decide not to impose the $50 processing charge due to the cost of administration.[252]

Waiver of charges on financial hardship or public interest grounds may also be less of an issue for agencies where the estimate processing charge is only $50.

Recommendation 2.4: A higher processing charge of $30 per hour beyond the first 10 hours would encourage applicants to frame requests that can be administered in less time. I consider also that $30 per hour (which is higher than the current decision making rate of $20 per hour) is appropriate. A $30 rate is not so high as to discourage genuine requests and is lower than if indexation had applied since 1986. It will also be open to an applicant in an appropriate case to request waiver or reduction of the $30 hourly rate on financial hardship or public interest grounds.

The $30 hourly rate should apply both to a full hour and to part thereof: that is, the same charge will apply for 14.5 as for 15 hours. A more fractional approach can be more complex, particularly at the level of calculating precisely the number of minutes spent by an officer in locating and reading a requested document or information.

Recommendation 2.5: The removal of charges from personal information requests commenced in 1991 when a cap was imposed, and was extended in the 2010 reforms which provided that no processing charge is payable. The rationale was explained in the 1996 joint report by the ALRC and ARC:

> [A]ccess to one's own personal information should generally be free. Citizens should be able, subject to the FOI exemptions, to obtain access to information about them that is held by the government without financial barriers. In addition, it should be noted that there is no provision under the Privacy Act for a record keeper to impose a charge for providing access to personal information.[253]

No disagreement with this principle was raised by any agency or other party during this review of FOI charges. There was general acknowledgement that the cost of handling personal information requests should be borne by government.

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[252] The Department of Finance and Deregulation submission noted at page 10 that it reduced or waived charges if the search and retrieval costs were low and the estimated decision making time is less than or close to 5-6 hours.

[253] ALRC-ARC report, 1995, paragraph 14.8.

The only concern raised by agencies was that some personal information requests are large and complex and can be costly to process. That point is accepted in the later recommendation that the 40 hour limit on an agency's obligation to process an FOI request should apply to all requests, including those for personal information.

A new scale of charges – providing access to a document

Recommendation 3 – FOI access charges

3.1 Supervision of an applicant inspecting documents (or hearing or viewing an audio or visual recording) should be charged at $30 per hour.

3.2 Providing information on electronic storage media (such as a disk or USB drive) should be charged at actual cost.

3.3 Postage costs should be charged at actual cost.

3.4 Printing (including photocopying and other printed copying) should be charged at $0.20 per page.

3.5 Transcription should be charged at actual cost.

General comments

The FOI Charges Regulations specify a combination of charging approaches for providing access, including: by the page (for transcripts and photocopies), by the half hour (for inspection of documents) and at actual cost (for electronic production and other items).

There are two shortcomings in this approach. The first is that some activities which are listed as separate items are in fact carried on as part of general FOI processing or at least should not be treated differently in the charges framework. Electronic production, as discussed above in relation to Recommendation 2.1, should be part of the general processing charge, given that FOI staff are likely either to be directing or undertaking this work. Nor, as discussed below under Recommendation 3.1, is there any apparent reason to differentiate the supervision charge from the charge applying to other processing activities. Recommendation 3.5 on transcription adopts a similar approach.

The second problem with the current specific charges set in 1986 is that some charges may no longer reflect the actual cost to an agency – it may be higher or lower. The better approach is to provide that an agency can impose a charge that reflects the reasonable costs it has incurred. This is the approach adopted in Victoria.[254] Other jurisdictions, such the Northern Territory, South Australia, Queensland, and Western Australia provide that an agency can charge for the actual cost of specified items such as copying media or creating written transcripts, packaging and delivery.

[254] *Freedom of Information (Access Charges) Regulations 2004* (Vic), regulation 6. See Appendix E for a summary of charging practices in other jurisdictions.

Explanation of recommendation

Recommendation 3.1: The ALRC-ARC review of FOI in 1995 recommended that there be no charge to inspect documents.[255] Agency supervision of an inspection was regarded as an incidental function of accountable government rather than an additional cost or service incurred in providing access such as photocopying: 'an officer should be capable of carrying out such supervision while continuing his or her normal work routine in the same room as the applicant'.[256]

I think it more likely that inspection would be carried out at a place away from an officer's desk and work appliances. However, the larger issue of principle is that there is no apparent reason for not combining inspection and replaying an audio or video tape, to be charged at the standard processing rate of $30 per hour. This would be an increase on the current rate for inspection of $6.25 per 30 minutes.

Recommendation 3.2: If an applicant requires information to be provided through recordable media or a portable storage device such as a disk or USB drive, this should be supplied at actual cost. Other electronic processing would, as noted in Recommendation 2.1, be included in the hourly processing charge that also applies to actions that may be undertaken such as search, retrieval and redaction.

Recommendation 3.3: This recommendation maintains the existing rule that postage is charged at actual cost. The Charges Regulations presently refer to postage and delivery. To avoid confusion with other forms of delivery (for example, electronic transmission) I propose that the item be renamed 'postage'.

Recommendation 3.4: The ALRC-ARC review of FOI recommended that the charge for photocopying be based on reasonable cost recovery and should not contain a profit margin.[257] I believe that it would be simpler to specify a rate that applies uniformly across government, which is the approach adopted in most Australian jurisdictions.

The current photocopying rate in the Charges Regulations is $0.10 per page. I propose that it be increased to $0.20 per page in line with most other Australian jurisdictions.[258]

Recommendation 3.5: Transcripts of a sound recording, shorthand or other similar medium are presently charged at $4.40 a page. Advances in information technology (for example, voice recognition software) may make it easier and cheaper to provide transcripts.[259] In line with the approach taken in other recommendations, transcription should be charged according to the time spent by an agency on this activity rather than the number of pages transcribed – that is, at actual cost. However, to ensure that this charge is not unreasonably high, an agency should observe a limit of $30 per hour.

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255 ALRC-ARC report, 1995, paragraph 14.20.
256 ALRC-ARC report, 1995, paragraph 14.20.
257 ALRC-ARC report, 1995, paragraph 14.18.
258 See Appendix E, specifically Queensland, Victoria and Northern Territory. In the ACT, the first 200 photocopied pages are free, thereafter they are charged at $0.30 per page. In South Australia photocopies are $0.15 per page.
259 ALRC-ARC report, 1995, paragraph 14.19.

Managing large and complex requests

Recommendation 4 – FOI processing ceiling

4.1 An agency or minister should have a discretion to refuse to process a request for personal or non-personal information that is estimated to take more than 40 hours to process. While the estimate of time would be an IC reviewable decision, an agency decision not to process a request above the 40 hour ceiling would not be reviewable.

4.2 Before making a decision of that kind the agency or minister must advise the applicant of the estimated processing time and take reasonable steps to assist the applicant to revise the request so that it can be processed in 40 hours or less.

4.3 For the purposes of exercising this discretion, an agency or minister may treat two or more requests as a single request, as provided for in s 24(2) of the FOI Act.

4.4 The practical refusal mechanism in ss 24, 24AA and 24AB of the FOI Act should be repealed.

General comments

It is generally accepted that government agencies should not bear an unlimited obligation to provide access under the FOI Act to all non-exempt information a person requests. To prevent an unmanageable administrative burden, there must be limits on the exercise of the FOI right of access to documents. There are two principal mechanisms in the FOI Act for imposing such a limit – the practical refusal mechanism in ss 24–24AA; and the power to impose charges.

The practical refusal mechanism is the most direct mechanism for controlling complex and voluminous requests. Section 24 provides that an agency or minister may refuse a request if satisfied that 'a practical refusal exists'. This is defined in s 24AA(1) as work which 'would substantially and unreasonably divert the resources of the agency from its other operations'.[260] Before relying on a practical refusal reason to decline to process a request, an agency must follow a consultation process with the applicant so that the applicant has the option of revising the request (s 24AB). This includes providing the applicant with an opportunity to consult with a contact person and providing information that would assist the applicant to revise the request so that the practical refusal reason no longer exists.

In applying the practical refusal mechanism, agencies can also treat multiple requests for the same documents, or documents relating to substantially the same subject matter, as a single request (s 24(2)).

A view expressed by some agencies during this review is that the power to impose charges is in practice the more important mechanism for consulting with applicants about revising and narrowing the scope of voluminous requests. The reason is that the practical refusal criterion – 'substantially and unreasonably divert … resources' from other

[260] The provision is expressed differently as it applies to ministers, viz, 'substantially and unreasonably interfere with the performance of the minister's functions': s 24AA(1)(ii).

operations – is an indeterminate standard that relies on answers to other imprecise questions. What resources of an agency should be taken into account? Is it harder for a large agency to rely on this mechanism because it has more resources, even though it also has more operations, and may receive more FOI requests? What value should be placed on FOI processing compared to other operations in terms of resource allocation? When is a diversion of resources substantial and unreasonable?

A straightforward answer to those questions has not been provided in AAT decisions, other than to suggest that the test is strictly applied and that a high threshold must be crossed to establish that a request would cause a substantial and unreasonable diversion of agency resources.[261]

Some agencies regard the charging power as the more straightforward and practical mechanism to enter discussion with applicants about the scope of requests. The discussion is result-oriented because the applicant will almost invariably be keen to reduce the potential cost. A discussion around charges, based on an hourly estimate of processing time, can assist an applicant to better understand the scope of their request, the resources required to process it, and the options for framing the request in a different manner.

There was, on the other hand, criticism in some submissions (noted in Part 3) of the charges power being used in this way. Section 24AB requires, on its face at least, a more structured consultation process than s 29 on notifying an estimated charge. There is also a danger that a high estimated charge can be a device used by an agency to deter an applicant from proceeding with an FOI request.

Recommendation 4 builds on these points by proposing a new approach to dealing with complex and voluminous requests that is designed to provide greater certainty for agencies and applicants. The proposal is that an agency or minister should not be required to process a request that is estimated to take more than 40 hours of processing time. The maximum charge that an applicant could therefore be required to pay (under the combined proposals in this report) is $950 (plus any costs for providing access), comprising $50 for the first 10 hours, and $30 per hour for the next 30 hours. An applicant could also apply for a waiver of all or part of that amount.

Forty hours is a reasonable period to allocate to processing an individual FOI request, constituting roughly one week of a staff member's time. An agency would be required to assist an applicant to frame a request so that it could be managed within that limit. Consultation with an applicant about the estimate of time and options for narrowing the scope of the request would also be required.

This power would be framed in discretionary terms, so that it would be open to an agency to administer a request that will take longer than 40 hours, and to impose the

[261] For example, *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496; *Re Swiss Aluminium Australia Ltd and Department of Trade* (1986) 10 ALD 96; *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178; and *Re Langer and Telstra Corporation Ltd* (2002) 68 ALD 762.

hourly processing charge of $30 per hour for additional hours. The agency's decision that a request would take more 40 hours to process would be an IC reviewable decision, but not the exercise of the discretion to refuse to process a request beyond the limit of 40 hours.

An advantage of a power framed in this way is that it would introduce greater certainty and predictability into FOI processing. It also balances an applicant's right to be given access at the lowest reasonable cost against an agency's interest in containing the administrative burden of FOI processing.

The idea of a ceiling or limit on processing time is not unique but is adopted in the Scottish and United Kingdom statutes, as explained in Appendix E. I note too that, in a careful analysis of the cases, the NSW Administrative Decisions Tribunal in *Cianfrano v Premier's Department* (2006) NSWADT 137[262] had regard to a period of 40 hours as a reasonable presumptive period for examining whether a request imposed a substantial and unreasonable burden upon an agency.

The proposed 40 hour limit also addresses another agency concern noted in Part 3, that FOI can be an attractive but problematic alternative to discovery in civil litigation. The FOI charges scale can be lower than the rate for reimbursement of costs set by court rules. In effect, an agency providing documents through FOI rather than discovery could be subsidising the litigation, in circumvention of the principles that would otherwise apply. A 40 hour limit would not deprive a party involved in or contemplating litigation from obtaining some relevant documents under FOI, but if extensive discovery was planned the party would have to rely on litigation procedures that are subject to court supervision and cost reimbursement rules.[263]

Explanation of recommendations

Recommendation 4.1: The recommendation applies to all FOI requests, including personal information requests. An applicant could obtain personal information free of charge, but an agency could decline to process a request that would take more than forty hours. If there was a special reason for access beyond that limit, the applicant could raise the issue in a complaint to the Commonwealth Ombudsman or by discussion with an agency under an administrative access scheme.

Recommendation 4.4: The 40 hour limit should replace the practical refusal mechanism in ss 24, 24AA and 24AB. An agency would be expected (after obtaining an applicant's agreement to pay any assessed charge) to process all requests up to the 40 hour processing limit; and beyond that limit would no longer need to rely on the practical refusal mechanism.

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[262] This decision is currently subject to appeal.

[263] See the Access to Justice (Federal Jurisdiction) Amendment Bill 2011, Schedule 1, which proposes amendments to the *Federal Court of Australia Act 1976*, s 43(3). This implements a recommendation in ALRC, *Managing Discovery: Discovery of Documents in Federal Courts*, (2011), Report 115.

The practical refusal mechanism also applies where an agency forms the view under s 15(2(b) that an applicant has not reasonably identified the documents requested (s 24AA(1)(b)). However, I see no reason to retain this aspect of s 24AA. In practice, a request that does not sufficiently identify documents is not accepted by an agency as a valid request, and consultation with the applicant occurs under s 15(3).[264]

Charges estimates and deposits

The proposals in this report do not affect the current mechanism under which an agency must provide an estimate of charges to an applicant, and may require payment of a deposit or $20 or 25% if the total amount exceeds $100. This requirement should remain unchanged.

Reduction and waiver of FOI charges

Recommendation 5: Reduction and waiver

5.1 The specified grounds on which an applicant can apply for reduction or waiver of an FOI processing or access charge (but not an FOI application fee) should be:

- that payment of all or part of the charge would cause financial hardship to the applicant, or
- that release of the documents requested by the applicant would be of special benefit to the public.

5.2 The options open to an agency should be to waive the charges in full, by 50% or not at all. The decision would be an IC reviewable decision.

5.3 An agency should also have a general discretion not to impose or collect an FOI application fee or processing or access charge, whether or not the applicant has requested it to do so. The exercise of that discretion should not be an IC reviewable decision.

General comments

The obligation imposed on agencies by s 29(5) of the FOI Act to consider an applicant's request to reduce or waive a request on the ground of financial hardship or public interest in disclosure is a key element of the charges framework. It provides a direct link to the declaration in the objects clause of the Act that public access to government information should be provided at the lowest reasonable cost.

However, there are two practical difficulties in administering s 29(5) which make this task more time consuming and complex than it should be. The first is that there is no apparent standard for deciding what percentage reduction should apply. It can be hard both to resolve individual cases and distinguish between them by concluding, for example, that a case is suitable for a waiver of 20%, 50%, 65% or some other figure. There can be little certainty that waiver decisions are consistent across government.

[264] FOI Guidelines, paragraphs 3.33–3.42.

Nor has it proved easy in IC review of individual agency decisions to decide whether the correct decision was reached. To be properly satisfied on that issue the Commissioner undertaking the review may need to examine all the documents that have been requested, even though an agency may not yet have reached a decision on their exempt status. The Commissioner may need to go further and receive evidence about the likely impact of disclosure, or the financial resources of the applicant. This will generally be impractical and could require a far greater expenditure of resources than is at issue in the individual case.

The practical reality is that agencies are likely to approach waiver requests with a view to deciding whether a charge should be waived in full, not at all, or by a margin of 25%, 50% or 75%. I considered making a recommendation to that effect, but decided on balance to recommend a 50% or 100% waiver (see Recommendation 5.2). This will be simpler for agencies to administer and discuss with applicants. It is also appropriate in a new charges framework where (as discussed above) the maximum charge payable by an applicant is likely to be $950.

The second practical difficulty in administering s 29(5)(b) is in deciding 'whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public'. The difficulty arises from the fact that the underlying philosophy of the FOI Act since 2010 is that all disclosure is in the public interest. Government information, as the Act declares, 'is a national resource' that 'is to be managed for public purposes' (s 3(3)). Moreover, the introduction of a disclosure log mechanism (s 11C) means that much information released in response to FOI requests is made available to the public generally.

Agencies have drawn attention to this issue and asked for more specific guidance on what is meant by the public interest for the purpose of reducing or waiving charges.[265] However, I do not think that more comprehensive guidance would achieve that purpose. The greater difficulty is that the public interest waiver standard prescribed in s 29(5)(b) is inappropriate in the context of the other changes to the FOI Act that occurred in 2010, particularly the new objects clause (s 3) and the disclosure log mechanism (s 11C).

A more appropriate waiver standard would be that adopted in s 66 of the NSW GIPA Act, namely, whether disclosure would have 'special benefit to the public' (see Recommendation 5.1). Under this standard, the release of a document under the FOI Act and its publication in a disclosure log, though in the public interest, would not necessarily bring 'special' benefit to the public.

This standard is also a more appropriate frame of reference for examining the relationship between documents released through an FOI request and other government information already on the public record. For example, if an agency in developing a policy

[265] For example, DEEWR suggested that more guidance on the public interest provision was needed because of perceived inconsistencies between OAIC guidance, which appears to suggest that charges should be waived in cases where disclosure would be in the public interest, and the OAIC's Besser decision, where charges were reduced by 50% rather than waived altogether: *Besser and Department of Infrastructure and Transport* [2011] AICmr 2 (17 March 2011).

proposal has published an issues paper, submissions and final report, it may be harder to establish that a special public benefit attaches to an FOI request seeking emails between staff at an early stage of the policy development process. That is not to say that those internal communications should not be publicly available under the FOI Act, but rather that an applicant with a special interest in those documents may be required to contribute to the cost to the agency of making them available.

A final aspect to note is Recommendation 5.3, which preserves the existing rule that an agency is not required to impose or collect an FOI charge. In effect, agencies have a general discretion not to impose fees or charges, in addition to their obligation to decide an applicant's request for waiver on financial hardship or public interest grounds. It is appropriate that an agency's decision on a waiver request should be IC reviewable (Recommendation 5.2), but not the exercise of the general discretion as to the imposition of charges. There is no apparent standard for external merits review of discretionary decisions of that kind.

Reduction of charges for decisions outside statutory timeframes

Recommendation 6 – Reduction beyond statutory timeframe

6.1 Where an agency fails to notify a decision on a request within the statutory timeframe (including any authorised extension) the FOI charge that is otherwise payable by the applicant should be reduced:

- by 25%, if the delay is 7 days or less
- by 50%, if the delay is more than 7 days and up to and including 30 days
- by 100%, if the delay is longer than 30 days.

An important change to the FOI Act in 2010 is that no charge is payable if a decision on a request is made outside the statutory timeframe, including authorised extensions. Any deposit paid by an applicant must be refunded (reg 14). The 30 day period for deciding a request can be extended to allow for consultation with a third party (s 15(6),(7)), with the agreement of the applicant (s 15AA), or by the Information Commissioner in relation to complex and voluminous requests (s 15AB).

There was general acceptance in submissions to this review that this was an appropriate and effective mechanism to ensure that FOI decision making in agencies is timely and properly supported. However, there was criticism of the total reduction in charges that applies from the moment a late decision is made. The delay in making a decision may stem from unexpected developments, such as a request being larger or more complex than first assumed, difficulty in resolving the scope of a request with the applicant, or a sudden influx of requests to the agency.

I agree with that criticism and believe it would be more appropriate as proposed in Recommendation 6 to substitute a sliding scale under which the reduction in charge increases with the length of the delay. No charge would be payable when there is a delay of more than 30 days. This provides adequate backing to the statutory timeframes in the Act.

Fees for internal review and IC review

Recommendation 7 – Internal and IC review fees

7.1 No fee should be payable for an application for internal review.

7.2 No fee should be payable for an application for IC review of an internal review decision or a deemed affirmation on internal review.

7.3 An application fee of $100 should be payable for IC review if an applicant who can apply for internal review has not done so first. The fee of $100 should not be subject to reduction or waiver.

7.4 No fee should be payable for an application for IC review of a decision of a minister, the principal officer of an agency, or a deemed decision of an agency to refuse access to a document or to refuse to amend or annotate a personal record. No fee should also apply to an application for IC review by a third party of a decision to grant access to the FOI applicant.

General comments

An FOI applicant who is refused access to a document can apply for internal review of the agency decision[266] and external review.[267] Prior to the 2010 reforms an FOI applicant was required to apply for internal review before applying to the AAT for external review. An internal review fee of $45 was payable.

Now an applicant can apply directly to the Information Commissioner for IC review. Internal review is an optional step. No application fee is payable for either internal review or IC review. If a person seeks AAT review of an IC review decision a fee is payable, currently set at $777.

The main reason given for the change in 2010 was that internal review was portrayed by critics as an extra burden on applicants that would often result in an agency confirming its original decision. By allowing a person to proceed directly to IC review an agency would be encouraged to make the best decision at first instance. The FOI process would be more streamlined and quicker for the public.

There is presently a robust use of both review options. In 2010–11 there were 419 applications for internal review (7.7% more than the previous year) and 176 applications for IC review in the eight months to 30 June 2011.[268] The number of applications for IC review has continued to climb, reaching 425 by 31 December 2011.

The FOI Guidelines encourage applicants to apply first for internal review before IC review. Internal review can be quicker and enable an agency to take a fresh look at its original decision.[269] Internal review provides an important opportunity for applicants and

[266] Unless the decision was made by the principal officer of the agency or a minister.
[267] See FOI Act ss 54, 54L and 57A.
[268] *Freedom of Information Act 1982: Annual Report*, (2011), p 18.
[269] FOI Guidelines, paragraph 9.4.

agencies to discuss their disagreement, by raising questions, clarifying the scope and basis of the primary decision, providing new information, seeing if there is common ground, and exploring options for resolving a disagreement. It is also important in principle that there is an opportunity for an agency at a senior level to give proper consideration to an issue before its decision is reviewed by an external body.

Internal review also receives strong support in other areas of administrative justice. The Access to Justice Taskforce report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System,* recommended that agencies have in place appropriate mechanisms for resolving disputes without recourse to statutory review rights, including internal review and alternative dispute resolution processes.[270] The Taskforce found that such processes were more desirable from an 'access to justice' point of view than formal avenues for complaint and appeal.[271] The Taskforce said that more could be done by agencies to ensure that applicants had a chance to voice their concerns and have an adverse decision explained before the option of external review was chosen. This concern – that cases may not proceed to external review if there was more personal contact with applicants at earlier stages of decision making – was also voiced by the ARC in its 1995 report *Better Decisions*,[272] and in a later ARC report on *Internal Review of Agency Decision Making*.[273]

Those themes are taken up in Recommendation 7, that internal review of FOI decisions should receive stronger encouragement through the charges framework. In summary, no fee should be payable for internal review or for IC review following internal review; but a $100 fee should apply (subject to some exceptions) if a person applies directly for IC review without first seeking internal review.

Recent experience under the FOI Act confirms that internal review can be a valuable step in resolving a disagreement about an access request. In over half the internal review matters resolved in 2010–11 there was a change of decision or concession by the agency. There are early signs that the 2010 reforms have brought about a change in the willingness of agencies to resolve access disputes, including at the internal review stage. Moreover, in internal review an agency can grant access to exempt documents, while the Information Commissioner cannot.[274]

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[270] Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, (2009), www.ag.gov.au/a2j, recommendation 10.1.

[271] Access to Justice Taskforce Report, chapters 7 and 10.

[272] ARC, *Better Decisions: Review of Commonwealth Merits Review Processes*, Report No 39, (1995), paragraph 6.64.

[273] ARC, *Internal Review of Agency Decision Making*, Report No 44, (2000). The ARC pointed to empirical evidence to support the claim that 'if an agency's review officers spoke to the applicant prior to making a decision, there were fewer appeals to external tribunals': at paragraph 5.4. In this report and the Better Decision report the ARC recommended strengthening internal review by encouraging better communication, acknowledging the important role internal review played in ensuring quick and timely resolution of administrative matters: see *Better Decisions* report, recommendation 75; and *Internal Review of Agency Decision Making* report, recommendation 21.

[274] FOI Act s 55L.

It is timely to build on this changing attitude in agencies. Although internal review should conform to administrative law principles that require a different officer to bring a fresh, independent and impartial mind to the review,[275] this does not exclude discussion between the applicant and agency and resolution of the case by agreement rather than a formal decision. A theme of this report is that access requests can often be resolved in this way, or at least that greater encouragement should be given to dialogue between applicants and agencies at all stages of the access process.

The large proportion of matters that have so far been resolved at the IC review stage have not been resolved by the formal decision of a Commissioner but by actions taken by OAIC staff. Between 1 November 2010 and 31 December 2011, 117 IC review applications were resolved but only 11 of those were resolved by a published decision. Some IC review applications were resolved on the basis that the steps required by the FOI Act for a formal IC review application had not been met, but many other cases were resolved as a result either of an agency undertaking a further review of a case[276] or OAIC staff discussing the matter with the applicant and the agency and reaching common ground. In a number of cases the applicant withdrew the IC review application after discussion of the issues and the likely direction the matter may take.

Another reason for encouraging greater use of internal review is that the present arrangements may prove unsustainable in the long term. In the fourteen months to 31 December 2012 the OAIC received 425 applications for IC review, over 300 of which were still unresolved. An application that is not resolved by agreement or withdrawal must be resolved by a decision of one of the three Commissioners (or, most likely, by the FOI Commissioner or the Information Commissioner). This function cannot be delegated to OAIC staff members.[277] It is questionable, bearing in mind the other responsibilities of the Commissioners, whether they will be able to manage this FOI caseload if IC reviews continue to be received at the current rate. In short, at least some applications may be resolved more quickly through internal rather than IC review.

Explanation of recommendation

Recommendation 7.1: This retains the current arrangement, following the 2010 reforms, that there is no fee for internal review. It is also in line with the view of the ARC in its report on *Internal Review of Agency Decision Making*, that internal review be offered free of charge.[278]

The principal reason that internal review should be free of an application fee is that internal review is integral to good decision making under the FOI Act. An applicant should have the opportunity to question the written reasons given by an agency for not granting access in accordance with a request. This will often be the first opportunity an applicant has to put forward a contrary view, or to clarify an issue that could result in the decision

[275] FOI Guidelines, paragraph 9.29.

[276] The FOI Act s 55G provides that an agency can vary a decision that is the subject of IC review by making a fresh decision that is more favourable to the applicant.

[277] AIC Act, s 25(e).

[278] ARC, *Internal Review of Agency Decision Making*, Report No 44, (2000), recommendation 18.

being changed. An applicant should not be required to pay for this opportunity of making a submission and asking an agency to reconsider its earlier decision.

Recommendation 7.2: For essentially the same reasons, it is recommended that (as at present) there be no fee for IC review. The introduction of IC review was a landmark element of the 2010 reforms. The OAIC, through a variety of responsibilities that include IC review of FOI decisions, is intended to play an active role in promoting good FOI decision making. Among the objects of the FOI Act declared in s 3 are to increase public participation in government processes, and increase public scrutiny, discussion, comment and review of government activity. It is a corollary of those objects that a person aggrieved by the decision of an agency or minister should not have to pay a fee for IC review. This is also in line with another declared object of the FOI Act, 'to facilitate and promote public access to information, promptly and *at the lowest reasonable cost*' (s 3(4)).

Many agencies, as noted in Part 3 of this report, agreed with these points. A few submitted that there should be a fee for internal review, and a few more argued for a fee for IC review. A common argument was that these processes impose resource burdens on agencies, and that a review application fee would encourage applicants to take this step seriously and develop sound arguments in support of a review application.

There is force in those arguments, but they can largely be met in other ways. Subsequent to the 2010 reforms agencies and the OAIC have been proactive in opening dialogue with applicants about FOI requests and, where the possibility exists, reducing the scope of requests to a more manageable level. Other recommendations in this report could go some way to striking a balance and reducing the administrative burden on agencies arising from FOI requests.

Recommendation 7.3: A qualification on the previous recommendation is that IC review should be free only if an applicant first applies for internal review if it is available, and waits 30 days for a decision. If an applicant proceeds directly to IC review before receiving a decision or before 30 days has elapsed, an application fee of $100 should apply. The reason for imposing this fee is covered adequately in the earlier discussion, where the point was made that the framework of the Act and the charges principles should provide stronger encouragement and incentive for applicants to take positive steps to resolve matters with agencies before escalating them to external review by an OAIC Commissioner.

In those cases where an applicant does choose to proceed directly to IC review, an application fee of $100 should not pose an impractical burden, nor be difficult to collect. As it is a moderate fee that is payable only if an applicant does not first undertake internal review, it should not be subject to waiver. A waiver provision, especially if the decision was appellable to the AAT, would divert administrative activity into resolving disagreements that are of comparatively limited importance in achieving the objects of the FOI Act.

Recommendation 7.4: Internal review is not available in all cases, and a corresponding qualification is therefore needed on the foregoing principles. Internal review is not available where an access refusal decision or access grant decision was made by a minister (ss 54(1), 54A(1)), was made personally by the principal officer of an agency (ss 54(1), 54A(1)), or where the statutory timeframe was not met (s 54E(b)), or where the decision is a deemed decision of an agency to refuse access to a document (s 15AC) or to refuse to amend or annotate a personal record (s 51DA). The only review option available in those circumstances is to apply for IC review. No fee should be payable to exercise that right.

Prior to the 2010 reforms, third parties wishing to seek review of decisions to grant access to the FOI applicant could proceed directly to the AAT. No fee should be payable to exercise the right of third parties to seek IC review of such decisions without first seeking internal review.

Indexation

Recommendation 8 – Indexation

8.1 All FOI fees and charges should be adjusted every two years to match any change over that period in the Consumer Price Index, by rounding the fee or charge to the nearest multiple of $5.00.

The FOI Act and Charges Regulations do not include an indexation mechanism for adjusting charges from time to time to match changes in the CPI. As a consequence, FOI charges have not increased since 1986, even though the CPI has risen over that period.

The proposal is that FOI fees and charges be reviewed every two years to be adjusted in line with CPI changes (most likely an increase). To retain simplicity in the charges framework a change will occur only if rounding the charge to the nearest multiple of $5 would result in a change.

Other issues

Timeframes for responding to an agency decision

Recommendation 9 – Responding to an agency decision

9.1 An applicant should be required to respond within 30 days after receiving a notice under s 29(8), advising of a decision to reject wholly or partly the applicant's contention that a charge should not be reduced or not imposed. The applicant's response should agree to pay the charge, seek internal review of the agency's decision or withdraw the FOI request.

9.2 If an applicant fails to respond within 30 days (or such further period allowed by an agency) the FOI request should be deemed to be withdrawn.

Separately from this review, agencies have raised concern about the lack of any provision in the Act that requires an applicant to take action within a set timeframe once their contention of charges has been decided under s 29(4) and a notice issued under s 29(8). This can leave an FOI request in abeyance for an extended period. By contrast, an applicant must respond to an initial charges estimate within 30 days, or the request is deemed to be withdrawn (s 29(1)(f),(g)).

Recommendation 9 proposes that a similar approach apply to notices issued under s 29(8) advising of an agency's decision on a contention of charges. If the applicant does not respond within 30 days or such further period allowed by the agency the FOI request is deemed to be withdrawn.

Glossary

AAT	Administrative Appeals Tribunal
AAT Regulations	*Administrative Appeals Tribunal Regulations 1976*
ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
AIC Act	*Australian Information Commissioner Act 2010*
ALRC	Australian Law Reform Commission
APS	Australian Public Service
ARC	Administrative Review Council
CAALAS	Central Australian Aboriginal Legal Aid Service Inc
Charges Regulations	*Freedom of Information (Charges) Regulations 1982*
CSIRO	Commonwealth Scientific and Industrial Research Organisation
CPI	Consumer Price Index
DAFF	Department of Agriculture, Fisheries and Forestry
DCCEE	Department of Climate Change and Energy Efficiency
DoD	Department of Defence
DEEWR	Department of Education, Employment and Workplace Relations
DoFD	Department of Finance and Deregulation
DFAT	Department of Foreign Affairs and Trade
DoHA	Department of Health and Ageing
DHS	Department of Human Services
DIAC	Department of Immigration and Citizenship
DRET	Department of Resources, Energy and Tourism
DPMC	Department of the Prime Minister and Cabinet
FCA	Federal Court of Australia
FOI Act	*Freedom of Information Act 1982*
FOI Commissioner	Freedom of Information Commissioner
GIPA Act	*Government Information (Public Access) Act 2009* (NSW)
IAC	Information Advisory Committee
IC review	Information Commissioner review
IDC	Interdepartmental committee

Information Commissioner	Australian Information Commissioner
IPS	Information Publication Scheme
NSW	New South Wales
NT	Northern Territory
NWRN	National Welfare Rights Network
OAIC	Office of the Australian Information Commissioner
PIAC	Public Interest Advocacy Centre
Qld	Queensland
reg	regulation
s, ss	section(s)
SA	South Australia
SES	Senior Executive Service
Tas	Tasmania
UK	United Kingdom
US	United States
Vic	Victoria
WA	Western Australia

Appendix A: Consultation questions as set out in Part 6 of the Discussion Paper

The role of fees and charges in the FOI Act

General questions

1. What is the role of fees and charges in the FOI Act?
2. Do charges deter reasonable requests for access to information?

Application fees

General questions

3. Is it appropriate that the FOI Act does not impose an application fee for making:
    - an FOI request?
    - an FOI request for personal information?
    - an application for internal review of an access refusal decision?
    - an application for Information Commissioner review of an access refusal or access grant decision?
4. If you support FOI application fees, what level of fee should be imposed? Should it be subject to annual or biennial increase?

For applicants

5. Would application fees for FOI requests deter you from making an application?
6. Would fees for internal review or Information Commissioner review deter you from seeking review of an access refusal or access grant decision?

For agencies

7. What effect has the abolition of application fees had on FOI requests to your agency?
8. What effect has the abolition of fees had on applications for internal review in your agency?

Scale of charges

General questions

9. Is the scale of charges in the FOI Regulations appropriate (as set out in Table 2)? In particular, are the following charges appropriate?
    - search and retrieval: $15.00 per hour
    - decision making: first five hours free and $20.00 per subsequent hour

- electronic production: actual cost incurred in producing the copy
- transcript: $4.40 per page
- photocopy: $0.10 per page
- other copies: $4.40 per page
- replay: actual cost incurred
- inspection: $6.25 per half hour
- delivery: actual cost incurred.

10. If the scale of charges needs to be amended, what level of charges should be imposed? Should they be subject to annual or biennial increase? Should they be capped?

11. Should a different approach be adopted to imposing charges? What form should it take? For example, should the agency's obligation to process a request be capped at a particular level, as in some countries? Or should the scale of a charge vary according to the nature of the applicant or the scale of the charge vary according to the length of time taken to process the request?

Imposition of charges

General questions

12. In what circumstances should charges be imposed?

13. Is it appropriate that no charge is payable where the applicant is not notified of a decision on a request within the statutory time limit (including any extension)?

For agencies

14. In what circumstances does your agency impose charges?

15. What is the maximum charge that your agency has imposed? What is the typical range of charges that your agency has imposed?

16. Where charges are notified, does this result in narrowing the scope of the request?

17. Where charges are imposed, does this result in applicants withdrawing their requests?

For applicants

18. What has been your experience of agency practice in notifying and imposing charges? Do agencies adopt different or inconsistent practices, and if so, is this a concern?

19. Has a charges estimate resulted in you:

- withdrawing your request or
- narrowing your request?

Exceptions

General questions

20. Is it appropriate that requests involving an applicant's own personal information are free from charges?

Collection of charges

For agencies

21. Does your agency face difficulties in collecting charges? What is the cost to your agency of applying and collecting charges?

Correction, reduction or waiver of charges

General questions

22. Are there specific categories of applications that should not incur charges? Should charges be imposed where the applicant can demonstrate financial hardship?

23. In what circumstances should charges be reduced or waived? Does the public interest test for waiver of fees need to be amended?

24. In seeing a reduction or waiver of charges, what evidence of financial hardship should be required?

For agencies

25. Are there specific categories of applications that should not incur charges? Should charges be imposed where the applicant can demonstrate financial hardship?

26. In what circumstances does your agency reduce or waive charges? When does your agency reduce or waive charges on the basis of the public interest?

27. Does your agency experience difficulties in refunding charges?

Other issues

28. Are there any other issues that should be considered that have not been included in this discussion paper?

Appendix B: Submissions

The OAIC received the following submissions in response to the discussion paper:

Sub No	Agency/organisation/individual
1	Federal Court of Australia (FCA)
2	Greenpeace Australia Pacific
3	Department of Climate Change and Energy Efficiency (DCCEE)
4	Public Interest Advocacy Centre (PIAC)
5	Australian Competition and Consumer Commission (ACCC)
6	Department of Finance and Deregulation (DoFD)
7	The Treasury
8	Department of Education, Employment and Workplace Relations (DEEWR)
9	Department of Resources, Energy and Tourism (DRET)
10	IP Australia
11	Commonwealth Scientific and Industrial Research Organisation (CSIRO)
12	NBN Co
13	Department of Defence (DoD)
14	Department of Foreign Affairs and Trade (DFAT)
15	Department of the Prime Minister and Cabinet (DPMC)
16	Ms Megan Carter, Director Information Consultants Pty Ltd
17	National Welfare Rights Network (NWRN)
18	Department of Human Services (DHS)
19	Central Australian Aboriginal Legal Aid Service Inc (CAALAS)
20	Department of Agriculture, Fisheries and Forestry (DAFF)
21	Department of Health and Ageing (DoHA)
22	The Global Mail
23	Confidential

Appendix C: Consultations

The OAIC held the following consultation sessions during November 2011:

For agencies: Monday 21 November 2011: 11.00 am Canberra.
Venue: National Library of Australia, Parkes Place, Parkes.

For public/media: Tuesday 22 November 2011: 9:30 am Canberra.
Venue: National Library of Australia, Parkes Place, Parkes.

For public/media: Thursday 24 November 2011: 2.00 pm Sydney.
Venue: Office of the Australian Information Commissioner, Hearing Room 7, Level 3, 175 Pitt Street, Sydney.

Appendix D: Summary of main legislative provisions for charges

Legislative provision[279]	Operation
Regulation 3	An agency or minister may decide that an applicant is liable to pay a charge at the rate fixed in the Schedule.
Section 29(1)	If an agency or minister decides that an applicant is liable to pay a charge, the applicant must be given a written notice of liability to that effect, including a preliminary assessment of the charge and all the matters set out in s 29(1).
Section 29(2)	If an applicant does not notify the agency or minister as required within 30 days (or such further period allowed by the agency) the FOI request is taken to have been withdrawn.
Section 29(4), (5), (6)	An agency or minister must, within 30 days of receiving an applicant's contention on charges, make a decision whether to correct, reduce or waive a charge. The agency or minister must take into account whether payment of the charge would cause financial hardship, or whether giving access would be in the public interest.
Section 29(7)	Failure by the agency or minister to make a decision within 30 days is taken to be a decision that the amount of the charge is the figure specified in the notice of preliminary assessment.
Section 29(8), (9)	If an agency or minister decides to reject an applicant's request to reduce or waive a charge, the applicant is to be given a written notice of the decision, the reasons for decision, and details of the applicant's right to complain to the Information Commissioner or seek an IC review.
Regulation 5	There is no charge for providing access to an applicant's personal information or for providing access outside the statutory processing period unless the Information Commissioner has extended that period.
Regulation 9	In issuing a notice of a charge under s 29, an agency or minister may estimate the charge (based on the Schedule) if all steps necessary to make a decision on the request have not yet been taken.
Regulation 10	An agency or minister may adjust an estimated charge, after taking all steps necessary to make a decision on a request.
Section 11A Regulation 11	An applicant shall pay the required charge before being given access to a document, except for a charge for an officer to supervise inspection, hearing or viewing of a document.
Regulation 12	An agency or minister may require an applicant to pay a deposit of $20 for an estimated charge of between $20 and $100 or 25% of the estimated charge if greater than $100.
Section 31	If an applicant is notified during the statutory processing period that a charge is payable, that period is extended until the applicant pays the charge or is notified by the agency following a review that no charge is payable.

[279] 'Section' refers to a section of the FOI Act. 'Regulation' refers to a regulation in the Charges Regulations.

Appendix E: Charging practices in other jurisdictions

Appendix E sets out the charging practices of other Australian and international jurisdictions.

Australia

Overview

The charging models adopted by most other Australian jurisdictions are similar to the charging model that existed under the Commonwealth FOI Act prior to the 2010 reforms.

With the exception of the ACT, all Australian jurisdictions impose an application fee to make an FOI request.

With the exception of Tasmania, agencies in all other Australian jurisdictions agencies can impose charges to meet the cost of search, retrieval or production of documents. In the ACT, NT, Queensland, Western Australian (WA) and Victoria, no charges are imposed for requests relating to personal information about the applicant. In NSW, no charges apply to the first 20 hours of a processing request relating to personal information about the applicant. Similarly in SA, no charges apply to the first two hours of processing a request involving the applicant's personal information. Tasmania is unique in that there are no fees or charges beyond the $35 application fee.

All states and territories have, in some form, a discretion to either waive or reduce the charges imposed. With the exception of Tasmania, all states and territories also have internal and/or external review mechanisms available for applicants who wish to seek review of a decision to impose a charge.

Australian Capital Territory

There is no application fee for a request for documents or an application for review of a decision on an application made under the *Freedom of Information Act 1989* (ACT). FOI fees and charges are determined under the Attorney General (Fees) Determination 2011 (ACT).[280]

An agency or a minister may impose a charge of $23 per hour to meet the cost of search and retrieval. The first 10 hours of decision making are free, after which an agency or minister may impose a charge at the rate of $19.20 per hour in deciding whether to grant access, refuse or defer access to a document or to grant access to a document with deletions (including the time spent in examining a document, consulting with any person or body, making a copy with deletions or notifying any interim or final decision on the request). The first 200 pages scanned or copied are free with subsequent pages charged at the rate of $0.30 per page.

[280] The Attorney General (Fees) Determination 2011 (ACT) applies in relation to the current financial year. A new determination is issued at the commencement of each financial year.

A charge cannot be imposed for access to a document about the personal affairs of the applicant or the person on whose behalf the application is made. Giving an Aboriginal person or Torres Strait Islander access to a document for the purpose of assisting that person to re-establish links to a community or family from whom he or she was separated as a result of past policies of an Australian Government is at no cost.

Before an FOI request is processed, the agency or minister may make an estimate of the charges that might reasonably be imposed. An agency or minister may require the applicant to pay a deposit of the estimate.

An applicant may apply in writing to the agency or minister seeking total or partial remission of any charges payable. The agency or minister may take into account whether the payment of any charge would cause or has caused financial hardship, whether the document requested relates to personal information about the applicant, or whether the giving of access is in the general public interest.

Decisions relating to charges are reviewable by the agency or minister.

New South Wales

An applicant can be required to pay a $30 application fee for a request for documents and a $40 fee for application for a review of a decision made under the *Government Information (Public Access) Act 2009* (NSW). FOI fees and charges are set out in the Act.

An agency may impose a processing charge at the rate of $30 per hour for each hour of processing time. The application fee contributes to the first hour of the processing charge. The processing charge covers the total amount of time dealing efficiently with the application (including consideration of the application, searching for records, consultation, decision making and any other function exercised in connection with deciding the application), or providing access in response to the application (based on the lowest reasonable estimate of the time needed to provide that access). If a person applies for their own personal information, the agency cannot impose any processing charge for the first 20 hours.

An agency may require an applicant to make an advance payment of any processing charge up to 50% of the amount the agency estimates to be the total processing charge (ignoring any reduction to which the applicant may be entitled).

If an agency does not decide an access application within time (a deemed refusal), any application fee is to be refunded and no processing charge can be imposed.

An applicant is entitled to a 50% reduction in any processing charge if the agency is satisfied that the applicant is suffering financial hardship. The agency may take into account whether the applicant provides evidence that the applicant is the holder of a Pensioner Card, is a full-time student, or is a non-profit organisation (including a person applying on behalf of a non-profit organisation). Additionally, an agency may reduce the processing charge by 50% if the information is of special benefit to the public generally.

The decision to impose a processing charge is reviewable by the agency. Additionally, an applicant has the right to have the agency's decision reviewed by the Information Commissioner (NSW).

Northern Territory

An applicant must pay a $30 application fee for requests for information made under the *Information Act 2003* (NT). There is no application fee for requests relating to personal information. Fees are set out in the *Information Regulations 2010* (NT).

An agency may charge a processing fee equal to the total cost of the services and materials provided in response to an application. This includes charging $25 per hour or part of an hour for search and retrieval, decision making, supervising examination of information by the applicant, and operating equipment to copy or view media. Black and white A4 photocopies are available at the rate of $0.20 per page. There are no search and retrieval, decision making or supervision costs for access to personal information.

Actual costs may be charged for costs associated with:

- copies of media or written transcripts
- search and retrieval for information in secondary storage
- hiring facilities
- other services to enable an applicant to access the information including packaging material and delivery charges.

An agency may waive or reduce an application fee or processing fee by having regard to the applicant's financial hardship and the objects of the Act. An agency may also not charge an application fee or processing fee if the application is made by a member of the Legislative Assembly, is for access to government information in a report brought into existence by a public sector employee or consultant, or if the report describes an event or situation arising from an investigation, inquiry or observation.

The decision to impose an application or processing fee is reviewable by the agency. Additionally, a person aggrieved by a decision of an agency to charge a fee may make a complaint to the Information Commissioner (NT) about the decision.

Queensland

An applicant can be required to pay a $39 application fee for a request for documents under the *Right to Information Act 2009* (Qld). Fees and charges are set out in the *Right to Information Regulations 2009* (Qld).

The first five hours of processing time (search and retrieval, and decision making) is free. If an agency or minister spends more than five hours processing the application, it may impose a processing charge of $6 per 15 minutes of processing time over five hours. There is no processing charge for access to personal information.

An access cost can be imposed at the rate of the actual cost incurred by the agency or minister to engage another entity to search for and retrieve documents, relocate

documents, create written documents or transcriptions, and otherwise provide access. Black and white A4 photocopies are charged at the rate of $0.20 per page.

An agency or minister may waive or reduce a processing or access charge for an applicant who provides evidence of financial hardship, including if the applicant holds a concession card or is a non-profit organisation. Additionally, an agency or minister may waive a processing charge or access charge if they consider the likely associated costs to the agency or minister would be more than the likely amount of the charge.

A decision to impose a charge is reviewable by the agency. Additionally, an applicant may apply to have the decision reviewed by the Information Commissioner (Qld).

South Australia

An applicant can be required to pay a $29.50 application fee for a request for documents and $29.50 for an application for a review of a decision made under the *Freedom of Information Act 1991* (SA). There is no application fee to access Cabinet documents between 10 and 20 years old. Fees and charges are set out in the *Freedom of Information (Fees and Charges) Regulations 2003*.[281]

An agency may charge $11 per 15 minutes spent by the agency dealing with the application for access. However, the first two hours are free if the application is for personal information. The rate for photocopies is $0.15 per page and written transcripts $6.60 per page. Agencies can recover the actual cost incurred by producing copies of other media. If the cost of dealing with an application is likely to exceed the application fee, an agency may request the applicant to pay an advance deposit.

An agency must waive or remit a fee or charge if the applicant is a concession card holder or the payment of the fee or charge would cause financial hardship to the applicant. An agency may waive, reduce or remit fees in other circumstances.

The decision to impose a fee or charge is reviewable by the agency. Additionally, a person dissatisfied with the decision of an agency on an application for review of a fee or charge may apply to the State Ombudsman or Police Complaints Authority for further review.

A Member of Parliament is entitled to access to documents without charge unless the work generated by the application involves fees and charges totalling more than $1000.

Tasmania

An applicant can be required to pay a $35 application fee (25 fee units[282]) for requests for assessed disclosure of information made under the *Right to Information Act 2009* (Tas).

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281 The current *Freedom of Information (Fees and Charges) Regulations 2003* were issued on 1 July 2011 and have an expiry date of 1 September 2014.

282 The way fee units are set and calculated is set out in the *Fee Units Act 1997* (Tas). The Fee Units Act provides for the automatic indexation of most Tasmanian Government fees in line with movements in the Consumer Price Index for Hobart. For more information see www.tenders.tas.gov.au/domino/dtf/dtf.nsf/v-ecopol/5D8E36BF957730DDCA2578880019C068.

The application fee may be waived if the applicant is 'impecunious', the applicant is a Member of Parliament acting in connection with his or her official duty, or the applicant is able to show that he or she intends to use the information for a purpose that is of general public interest or benefit.

There are no other fees or charges in addition to the application fee.

The Tasmanian Ombudsman can hear appeals under the Right to Information Act against a refusal of an agency to provide access to documents in accordance with a request. This review function does not extend to charges decisions.

Victoria

An applicant can be required to pay a $24.40 application fee (2 fee units[283]) for a request for documents under the *Freedom of Information Act 1982* (Vic). Charges are set out in the *Freedom of Information (Access Charges) Regulations 2004* (Vic).[284]

An agency or minister may impose search and retrieval charges of $20 per hour or part of an hour. A charge may be made for the reasonable costs incurred by an agency or minister in supplying copies of documents, in making arrangements for viewing documents, in providing written transcripts, and in creating written documents from information collated from a computer or other equipment. If an applicant is provided with the opportunity to inspect the document, supervision is charged at rate of $5 per 15 minutes or part thereof. Black and white A4 photocopies are charged at the rate of $0.20 per page. Costs of a suitably qualified health service provider providing an explanation or summary of health information are also specified.

An agency or minister may request a deposit on charges which exceed $25 and discuss with an applicant practical alternatives for altering the request or reducing the anticipated charge.

There is no charge if the request is for access to a document containing information relating to the personal affairs of the applicant and the payment of the charge would cause financial hardship to the applicant.

The decision to impose a charge is reviewable by the agency or minister. Additionally, an applicant can apply to the Victorian Civil and Administrative Tribunal for review of charges imposed.

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283 The way fee units are set and calculated is set out in the *Monetary Units Act 2004* (VIC). The value of one fee unit is currently $12.22. The Victorian Government has a policy of automatically indexing certain fees and fines each year for inflation so that the value of those fees and fines is maintained. For more information see www.dtf.vic.gov.au/CA25713E0002EF43/pages/economic-and-financial-policy-taxation-and-revenue.

284 The *Freedom of Information (Access Charges) Regulations 2004* will sunset 10 years after the day of making on 29 June 2014 (see s 5 of the *Subordinate Legislation Act 1994* (Vic)).

Western Australia

An applicant can be required to pay a $30 application fee for a request for non-personal information under the *Freedom of Information Act 1992* (WA). Fees and charges are set out in the *Freedom of Information Regulations 1993* (WA).

An agency may charge for staff time taken to deal with an application, supervise access, photocopy or transcribe information at the rate of $30 per hour or pro rata for part of an hour. Actual costs incurred by an agency may be charged for special arrangements to hire facilities or equipment, duplicate media, and for delivery, packaging and postage. There is no charge for access to personal information about the applicant.

An access charge must be waived or reduced if payment of the charge would cause financial hardship to the applicant.

The decision to impose a charge or require a deposit is reviewable by the agency. Additionally, an applicant can make a complaint to the Information Commissioner (WA) about an agency's decision to impose a charge or require the payment of a deposit.

Overseas

Overview

Some of the charging models in the overseas jurisdictions surveyed in this paper vary from the Commonwealth FOI Act model. Some jurisdictions require application fees for requests for information (Canada, Ireland and South Africa), while other jurisdictions simply charge for activities such as search and retrieval, reproduction of records and conversions into standard formats.

All jurisdictions have, in some form, the discretion to either waive or reduce the charges imposed. All jurisdictions also have internal and/or external review mechanisms available for applicants who wish to seek review of a decision to impose a charge.

The UK and Scotland are unique in that an agency has the discretion to refuse to process a request if the estimated cost exceeds the prescribed limit (£600 for central government, legislative bodies and the armed forces, or £450 for all other public authorities in the UK and £600 for all in Scotland).

The United States (US) model also differs greatly from the Commonwealth FOI Act model. In the US, the scale of charges is to be prescribed by each agency and the level of charges that may be imposed vary based on which category of 'requesters' the applicant falls under. Commercial use requesters may be charged fees for searching, processing (including reviewing for exemptions) and duplication. Educational institutions, non-commercial scientific institutions, and representatives of the news media are charged only for duplication fees (the first 100 requested pages are provided free of charge), while all other users are only charged for searching and duplication.

Canada

An applicant can be required to pay a $5 application fee for requests for information under the *Access to Information Act 1983* (Canada).[285] Fees and charges are set out in the *Access to Information Regulations (SOR/83-507)* (Canada).[286]

A fee can be charged at the rate of $2.50 per person per quarter hour for every hour in excess of five hours that is spent on search and preparation for non-computerised records. For machine readable records, an agency may requirement payment for the cost of production and programming ($16.50 per minute for the cost of the central processor and all locally attached devices, and $5 per person per quarter hour for time spent).

A fee may be made where applicable for the reproduction of a record (or part thereof), or where the record (or part thereof) is produced in an alternative format. Photocopies of a page measuring no more than 21.5cm by 35.5cm are charged at the rate of $0.20 per page. Rates are provided for microform and magnetic tape duplication as well as braille, large print, audio and computer disk.

An agency may require an applicant to pay a reasonable proportion of calculated fees as a deposit. It is also available to the agency to waive the requirement to pay a fee or to refund a fee paid for a request to access a record.

An applicant can complain to the Information Commissioner (Canada) if they are required to pay an amount that they consider unreasonable.

Cayman Islands

There is no application fee for requests for information under the *Freedom of Information Law 2007* (Cayman Islands). Fees for standard formats are determined by the *Freedom of Information (General) Regulations 2008* (Cayman Islands).

An agency can charge a reasonable fee based on actual costs of searching for, reproducing, preparing and communicating the information in response to an access request. Black and white photocopies in all sizes are charged at the rate of $1.00 per page, and colour at $1.50 per page. Rates are also specified for photographic reproduction, microform duplication, transcripts, expedited service, packaging and delivery, as well as a range of digital file format conversions. Non-standard formats are produced at a price to be determined by the agency, not exceeding the actual material and labour costs incurred.

An applicant may request a waiver of fees and the agency may waive fees if the applicant is of inadequate means or for any other good reason.

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[285] From November 2010, the Office of the Information Commissioner of Canada is waiving the $5 application fee for access requests as part of a pilot project for a 6 month period. This pilot project has been extended into 2011–12. See www.oic-ci.gc.ca/eng/lc-cj-make-request-demande-acces.aspx.

[286] The Access to Information Regulations (SOR83/507) are current to 21 September 2011.

An applicant can seek an internal review of an agency's decision to charge a fee. If an applicant is dissatisfied with an agency's decision regarding fees, they can appeal to the Information Commissioner (Cayman Islands).

Ireland

An applicant must pay a €15 application fee for requests for non-personal information, €75 for reviews of decisions, and €150 for reviews by the Information Commissioner under the *Freedom of Information Act 1987* (Ireland).[287]

Requests for personal information are free. Medical card holders or their dependents are entitled to a reduction in fees of €5 from the application fee for requests, €50 from the fee for reviews of decisions, and €100 from the fee for reviews by the Information Commissioner (Ireland). Fees are determined by the *Freedom of Information Act 1997 (Fees) Regulations 2003* (Ireland).

An agency may charge €20.95 per hour for search and retrieval. Photocopies are charged at the rate of €0.04 per page. Reproduction costs are also specified for digital media and x-rays.[288]

It is at the agency's discretion to reduce or waive a fee or deposit if some of all of the information concerned would be a particular assistance to the understanding of an issue of national importance. An agency can also not charge a fee if the cost of collecting and accounting for the fee, together with any other administrative costs incurred by the agency concerned in relation to the fee, would exceed the amount of the fee.

An applicant may apply for review of a decision to charge a fee or deposit by the agency and by the Information Commissioner.

New Zealand

There is no application fee for requests for information under the *Official Information Act 1982* (New Zealand).[289] Charges are determined by the Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests*, 18 March 2002 (New Zealand).[290]

An agency can charge for staff time of more than one hour for searching, abstracting, collating, copying, transcribing and supervising access for official (non-personal)

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[287] The Principal Act was amended by the *Freedom of Information (Amendment) Act 2003* (Ireland).

[288] See FOI Central Policy Unit, Department of Finance, *CPU Notice No. 11: Charges* at www.finance.gov.ie/viewdoc.asp?DocID=892&CatID=20&StartDate=01+January+1998.

[289] Government information can also be accessed under the *Local Government Official Information and Meetings Act 1987*.

[290] The *Ministry of Justice Charging Guidelines for Official Information Act 1982 Requests*, 18 March 2002 replaced those approved by the State Sector Committee in January 1992 (STA (92) M 1/3) and set out in the Department of Justice memorandum of 26 February 1992. See www.justice.govt.nz/publications/global-publications/m/ministry-of-justice-charging-guidelines-for-official-information-act-1982-requests-18-march-2002/official-information-act.

information. An agency can also charge the applicant the actual cost of off-site retrieval and media reproduction.

Staff time in excess of one hour can be charged at the rate of $38 for the first chargeable half hour (or part thereof) and then $38 for each additional half hour (or part thereof). The first 20 photocopies are free, with additional photocopies charged at the rate of $0.20 per A4 page. An agency may require a deposit where the charge is likely to exceed $76.

An agency can also recover the actual costs involved in producing and supplying information of commercial value. However, the full cost of producing it in the first instance should not be charged to subsequent requesters.

It is at an agency's discretion to reduce or waive charges on the grounds that payment might cause the applicant financial hardship. Other grounds include whether remission or reduction of the charge would facilitate good relations with the public or assist the department or organisation in its work; or would be in the public interest because it is likely to contribute significantly to public understanding of, or effective participation in, the operations or activities of the government, and the disclosure of the information is not primarily in the commercial interest of the requester.

The decision by an agency to impose a charge is a reviewable decision by the Ombudsmen (New Zealand).

Scotland

There is no application fee for requests for information under the *Freedom of Information (Scotland) Act 2002*.[291] Costs and fees are set out in the *Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004*.

An agency can charge for costs incurred in locating, retrieving and providing information. Staff costs can be charged at the maximum rate of £15 per hour per staff member (although rates should reflect the staff member's normal salary). There is a threshold cost of £100 to the authority before a charge can be made, and a ceiling (excessive cost) of £600 beyond which authorities do not have to comply with information requests. Authorities may charge only 10% of the cost to the applicant.

An agency is not permitted to charge for decision making costs (deciding whether a document should be disclosed in full or in part), but the actual process of editing is chargeable.

It is at an agency's discretion to waive costs, including where the costs exceed the maximum threshold of £600.

[291] Government information can also be accessed under the *Environmental Information (Scotland) Regulations 2004* (environmental information) and the *INSPIRE (Scotland) Regulations 2009* (spatial datasets).

An agency's decision to charge costs is a reviewable decision by the Information Commissioner (Scotland).

South Africa

An applicant can be required to pay a R35 application fee for requests for information held by public bodies under the *Promotion of Access to Information Act 2000* (South Africa).[292] There is no application fee for personal information. Fees and charges are set out in the *Promotion of Access to Information Act 2000 Regulations Regarding the Promotion of Access to Information* (South Africa).[293]

An agency may charge R15 per hour or part of an hour, excluding the first hour, to search for and prepare the record for disclosure. Photocopies are charged at the rate of R0.60 per A4 copy and computer print-outs are R0.40 per A4 copy. Charges for transcription, copies of visual images, and production of digital media are also specified.

An agency may request one third of the access fee as a deposit if more than six hours are required to respond to the request. An applicant can apply for an exemption of the payment of a fee.

The decision to impose fees by an agency is a reviewable decision by the agency.

United Kingdom

There is no application fee for requests for information under the *Freedom of Information Act 2000* (United Kingdom).[294] Costs and fees are set out in the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (United Kingdom).

An agency can charge for costs incurred in searching, locating, retrieving and extracting information. Staff costs attributable to time that persons (both staff and external contractors) spend on these activities can be charged at £25 per person per hour regardless of actual cost. If the estimated cost to respond to a request of information exceeds the appropriate limit (£600 for central government, legislative bodies and the armed forces, or £450 for all other public authorities), an agency does not have to process the request. The agency must still confirm or deny whether it holds the information requested unless the cost of this alone would exceed the appropriate limit.

An agency cannot charge for decision making and editing costs.

Where the appropriate limit has not been reached, an agency can only charge reasonable fees to contact the applicant and communicate the information (including reproduction and delivery costs). The cost of staff time to carry out these activities cannot be taken

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[292] The *Promotion of Access to Information Act 2000* allows access to information held by public and private bodies. Only prescribed fees in respect to public bodies are covered in this discussion paper.

[293] The *Promotion of Access to Information Act 2000 Regulations Regarding the Promotion of Access to Information* were gazetted as Regulations 187 on 15 February 2002. Regulations 187 replaced the previous Regulations 223 of 9 March 2001.

[294] Government information can also be accessed under *the Environmental Information Regulations 2004* (environmental information).

into account, although the cost of materials and specialist equipment may be included in these fees.

The decision by an agency to refuse an application on cost grounds (exceeding the appropriate limit) is a reviewable decision by the agency. In addition, applicants can complain to the Information Commissioner (United Kingdom).

United States of America

There are no application fees for requests for information under the *Freedom of Information Act 1966* (United States). The Act provides for the charging of certain fees in some instances and these are regulated by the *Uniform Freedom of Information Act Fee Schedule and Guidelines 1987*.[295] Each agency is required to publish regulations specifying the schedule of fees applicable to processing requests and must ensure its schedule conforms to the guidelines.

The Act provides for three categories of requesters: commercial use requesters; educational institutions, non-commercial scientific institutions, and representatives of the news media; and all other requesters. The first category, commercial use requesters, may be charged fees for searching, processing (including reviewing for exemptions) and duplication. The second category is charged only for duplication fees (the first 100 requested pages are provided free of charge). The third category is only charged for searching and duplication. For non-commercial-use requesters there is no charge for the first two hours of search time and the first 100 pages of duplication (or equivalent).

An applicant can include as part of their request for information a specific statement limiting the amount that they are willing to pay in fees. If no limiting statement is included, an agency can assume that the applicant is willing to pay fees up to $25.

An applicant can ask to have a fee waived where disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the applicant's commercial interest. An applicant's inability to pay fees is not a legal basis for granting a fee waiver.

An agency's decision to impose fees is reviewable by administrative appeal to the agency. Once the administrative appeal process is complete, disputes on FOI matters can be mediated by the Office of Government Information Services, within the National Archives and Records Administration. Finally, an applicant can challenge an agency's decision in a federal court.

[295] The Office of Management and Budget issued the *Uniform Freedom of Information Act Fee Schedule and Guidelines* in 1987. This uniform schedule is not a unitary schedule of fees, but rather recognises that the Act requires each agency's fees to be based upon its direct reasonable operating costs of providing Freedom of Information Act services. Instead the uniform schedule creates categorical limitations on what fees could be charged.