

**Defence Submission – Review of charges under the  
*Freedom of Information Act 1982***

Contents

Background on Application Fees and Charges .....	1
Responses to consultation questions asked by the OAIC .....	2
The role of fees and charges in the FOI Act.....	2
Application fees .....	2
Scale of charges .....	4
Proposed scale of FOI Charges.....	4
Imposition of charges.....	5
Exceptions .....	6
Collection of charges .....	7
Total costs to administer FOI requests by the Department of Defence .....	7
Other issues .....	8

# **Defence Submission – Review of charges under the *Freedom of Information Act 1982***

## ***Background on Application Fees and Charges***

The early rationale behind FOI charges in Australia, during the 1970s, was that members of the public should be required to make a financial contribution for access to documentary information they acquire.<sup>1</sup> There was also a fear that the right of access conferred by the FOI Act could be too expensive to utilise, that fees imposed undermined the right of access and some agencies would not charge some applicants, but would charge others.

The Library Association of Australia and the Australian Advisory Council on Bibliographical Service expressed the view that a system for disclosure of government information was comparable in objectives to the public library system, and both should be publicly subsidised to the same extent.<sup>2</sup> At the time it was noted that the FOI legislation did not call for public subsidy but, noting that if documents could be obtained free of charge, there would be a distinct danger that agencies could be overburdened with requests for most documents that were brought into existence. It was also noted that it would be wrong if the FOI Act required applicants to have '*a need to know*', or that requests had to be genuinely made, but tempered by acknowledgement that individuals should not be able to demand unreasonable amounts of documents.

A move towards a more user-pays approach occurred in 1986 with the introduction of an application fee and a separate charge for decision-making time. The introduction of fees and charges did not, however, lead to anything close to full recovery, nor have users contributed greatly to agency costs to administer requests.

The current challenge, set against the above background, is to balance the public right of access to documents, against the cost for agencies of complying with the FOI legislation.

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<sup>1</sup> Australian Law Reform Commission Report No 77 - Administrative Review Council Report No 40 – Open government: a review of the federal *Freedom of Information Act 1982* – page 180

<sup>2</sup> Submission no. 95, incorporated in Transcript of Evidence, p. 2062 and Submission no. 75, p. 18. – republished on p. 136 Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978.

## ***Responses to consultation questions asked by the OAIC***

The responses and comments below are provided to assist the OAIC in conducting the 'Review of charges under the Freedom of Information Act'.

### ***The role of fees and charges in the FOI Act***

#### ***1. What is the role of fees and charges in the FOI Act?***

**Response:** The role of FOI fees and charges is to seek a contribution from applicants seeking to access government-held information. Prior to the 1 November 2010 amendments to the FOI Act, one of the compliance requirements for a valid request was the requirement to pay an application fee. The FOI application fee was introduced in part so that agencies would not be overburdened with requests. The same reasoning for an application fee also applied to the introduction of charges associated with the administration of FOI requests.

#### ***2. Do charges deter reasonable requests for access to information?***

**Response:** The difficulty in responding to the question is determining what is a 'reasonable request'. Ultimately, the answer depends on who is making the determination, the applicant or the agency. There is currently no financial detriment, under the FOI Act, to any applicant making a request under section 15 of the FOI Act. Individuals or groups who are determined to access documents are not deterred by the current charges levied. Charges do not seem to deter the majority of applicants from making FOI requests to Defence.

### ***Application fees***

#### ***3. Is it appropriate that the FOI Act does not impose an application fee for making:***

##### ***i) an FOI request?***

**Response:** Yes. The experience of Defence is that time spent in administering application fees is not cost effective. The actual costs associated with receipt of the application fee, acknowledgement, reporting and addressing requests for remission of the fee exceeds the collection of the previous \$30 application fee.

##### ***ii) an FOI request for personal information?***

**Response:** Yes. The FOI Act provides, under section 15A, for an employee or former employee of an agency to obtain access to personal records through established agency procedures. The majority of section 15 requests for personal information received from applicants are for documents involving themselves in either a grievance process or investigation by the agency.

iii) *an application for internal review of an access refusal or access grant decision?*

**Response:** Yes. It is Defence's view 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. The *internal review* process allows for both the applicant and the agency to have identified contentions addressed prior to external review. Since 1 November 2010, Defence has received 14 applications for *internal review*. Only two FOI applicants were dissatisfied with the outcome of their applications for *internal review* and subsequently sought external review of their decisions by the Information Commissioner. Defence would support amendment to the FOI Act requiring applicants to seek *internal review* in the first instance, prior to seeking external review.

iv) *an application for Information Commissioner review of an access refusal or access grant decision?*

**Response:** No. Defence recommends that there should be an application fee for external review by the Information Commissioner, particularly where the applicant has chosen not to seek *internal review*. Currently, there is a discrepancy in the administrative process where there are no application fees associated with making an FOI application for *external review* by the Information Commissioner, yet an applicant who applies to have an FOI matter reviewed by the Administrative Appeals Tribunal is required to pay a \$777 application fee.

**4. *If you support FOI application fees, what level of fee should be imposed? Should it be subject to annual or biennial increase?***

**Response:** Defence only supports the introduction of an application fee for external reviews conducted by the OAIC. The suggested application fee for external reviews is \$100. The fee should be subject to an increase in line with Administrative Appeals Tribunal application fee adjustments.

**5. *What effect has the abolition of application fees had on FOI requests to your agency?***

**Response:** Although there is no data to support our view (other than the general increase in requests received after 1 November 2010), the abolition of FOI application fees is seen as a contributing factor to the increase in the number of FOI requests received by Defence. The abolition of application fees has however contributed to administrative savings associated with considerations on whether such fees should be waived, and general savings to the agency in not having to administer the collection and processing of the fee.

**6. *What effect has the abolition of fees had on applications for internal review in your agency?***

**Response:** Refer to the comments in question 5 above. An *internal review* is a means of enhancing accountability within an agency. The re-introduction of an *internal review* application fee may discourage applicants from seeking *internal review* and lead to an increase in external reviews, which can be time-consuming and expensive for both applicants and agencies.

## Scale of charges

### 7. *Is the scale of charges in the FOI Regulations appropriate (as set out in Table 2)? In particular, are the following charges appropriate?*

**Response:** No. Defence recommends that the FOI Charges Regulations need to be simplified with an hourly charge adjusted on a graduated tier structure as set out in **Table 1** below. The suggested increases need to take into account a fair contribution from FOI applicants towards the processing costs associated with the administration of requests. At the very least, charges should be subject to an annual review taking into account annual CPI rates in Australia. As indicated in **Table 1**, it would be more practicable to have the same hourly rate of charges for search, retrieval times and decision making.

### 8. *If the scale of charges needs to be amended, what level of charges should be imposed?*

**Response:** Defence recommends there should be a graduated tiered approach to charges along the lines that the first five hours are free, the next 10 hours at \$30, the following 20 hours at \$50 and the subsequent cost beyond 35 hours at \$100 per hour. *Should they be subject to annual or biennial increase?* **Response:** Yes, refer to response to question 7 above, charges should be subject to an annual review taking into account annual CPI rates in Australia. *Should they be capped?* **Response:** There should not be a cap on charges. The basis for not having a cap on charges is that the FOI Act allows, under section 24, for refusal of an FOI request if an agency is satisfied that the work involved would substantially and unreasonably divert the agency's resources. Defence consults with applicants upon receipt of large requests in accordance with the requirements of section 24AB.

### Proposed Scale of FOI Charges

Proposed Tiered Scale of FOI Charges	
Activity item	Charges
<p><b>Search and retrieval:</b> time spent searching for or retrieving a document.</p> <p><b>Decision making:</b> time spent in deciding to grant or refuse a request, including examining documents, consulting with other parties, and making deletions.</p>	<p>0-5 hours - Nil</p> <p>6-15 hours = \$30 per hour</p> <p>16-35 hours = \$50 per hour</p> <p>35 hours plus = \$100 per hour</p>
<p><b>Electronic production:</b> retrieving and collating information stored on a computer or on like equipment.</p> <p><b>Transcript:</b> preparing a transcript from a sound recording, shorthand or similar medium.</p> <p><b>Delivery:</b> posting or delivering a copy of a document at the applicant's request.</p> <p><b>Replay:</b> replaying a sound or film tape</p> <p><b>Other copies:</b> a copy of a written document other than a photocopy.</p>	Actual cost
<b>Photocopy:</b> a photocopy of a written document.	\$0.20 per page
<b>Inspection:</b> supervision by an agency officer of an applicant's inspection of documents or hearing or viewing an audio or visual recording.	\$30 per hour

**Table 1**

9. ***Should a different approach be adopted to imposing charges?***

**Response:** Yes, refer to comments in response to question 8. above.

***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 length of time taken to process the request?***

**Response:** As indicated above in response to question 7, Defence recommends that there should be the same hourly rate of charges for search, retrieval times and decision making and a graduated tier structure for those charges. Historically the FOI Charges Regulations were based on a predominantly paper-based record keeping system which was administered by clerical assistants, thus incurring a reduced charge in searching for and retrieving documents. Early decision-making authority in Defence was delegated by the Secretary to SES Levels, thus there was justification for decision-making time to be at a higher rate than search and retrieval charges. As we have moved towards an increase in electronic record keeping, the levels of staff conducting searches and retrieving those documents, together with actual decision making, are about the same.

### ***Imposition of charges***

10. ***In what circumstances should charges be imposed?***

**Response:** For all FOI applications, other than for personal information. The introduction of a graduated tiered scale (refer to question 8 above) of charges would not disadvantage any applicant seeking reasonable amounts of documents, while those applicants seeking to commit government to substantial resources in administering large requests would be required to make a reasonable contribution towards the processing costs.

11. ***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)?***

**Response:** No. The issue where there are no charges for a request when the applicant has not been notified of decision with the period mentioned in paragraph 15(5)(b) of the Act should be revoked in the FOI Act. Even when obtaining an extension of time with agreement, under section 15AA, agencies are sometimes restricted by circumstances that are not initially apparent upon receipt of a request when, even with additional time extensions, there is not adequate time to deal with some complex requests. An example in Defence occurred when the record holder indicated that there were three files captured by a request. The initial estimate of documents contained in the three files was approximately 300 pages. It only became apparent, once the request had been accepted, that the three files contained 5000 pages of highly sensitive documents intertwined with legal advice. The current FOI legislation of being unable to charge for requests which are not finalised in 30 days, or within extensions under section 15AA, actually inhibits the most effective use of government resources, by committing agencies to administer requests involving excessive amounts of time at no cost to the applicant.

12. ***In what circumstances does your agency impose charges?***

**Response:** In accordance with section 3 of the FOI Act, each FOI application is considered on its merits, noting there is no requirement for an applicant to provide their identity or reasons for seeking access to documents. Unless the applicant provides information at the time they make a request that release of the document(s) they are seeking is in the public interest, or that payment of any charges would cause them financial hardship, then decisions to impose charges are processed in accordance with section 29 of the FOI Act, FOI Charges Regulations and the guidelines issued by the Australian Information Commissioner. When applicants are informed they are liable to pay charges under the FOI Act they are also provided with their review rights, and the opportunity to reduce the scope of their request. Only after following the above processes is a decision made to impose a charge.

13. ***What is the maximum charge that your agency has imposed?***

**Response:** \$17,620. However the actual charge was \$10,850. *What is the typical range of charges that your agency has imposed?* **Response:** The typical range of charges is between \$100 (and therefore mostly free) and \$1,000.

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

**Response:** Defence works closely with FOI applicants to clarify the scope of their requests prior to obtaining a preliminary assessment and informing the applicant that they are liable to pay if the request proceeds. Normally, applicants either agree to pay the charge or decide not to proceed, with very few charges matters subject to either internal or external review.

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

**Response:** Once charges are imposed, the large majority of applicants proceed with their requests, due in part to Defence liaising with the applicant and clarifying the scope of the request before providing a preliminary assessment.

## ***Exceptions***

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

**Response:** Yes. An applicant should be able to obtain access to their own personal information free of charge. A right of access to personal information enables individuals to find out what information the government holds about them. This provides a means of ensuring that personal information held by government, on which decisions may be based, is correct. The FOI Act gives an individual a right to seek amendment or annotation of a record containing their own personal information. The right to compel amendment of personal records is a necessary adjunct to the right of access.<sup>3</sup> The above notwithstanding, applicants seeking their own personal information should be required to pay any actual costs by the agency for providing access to a document in a different form, other than the form held by the agency. An example would be if an applicant requested that an agency provide to convert a hard copy document to a sound recording.

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<sup>3</sup> Australian Law Reform Commission Report No 77 - Administrative Review Council Report No 40 – Open government: a review of the federal *Freedom of Information Act 1982* – page 155

## Collection of charges

### 17. Does your agency face difficulties in collecting charges?

**Response:** No. The use of electronic transactions has made the collection of fees easier to administer.

#### *What is the cost to your agency of applying and collecting charges?*

**Response:** Refer to **Table 2** below for a comparison of costs to Defence and charges collected over the last five financial years. As noted in **Table 2** the average cost for processing requests has increased significantly over the last five years.

### **Total costs to administer FOI requests by the Department of Defence**

Financial Year	No of Requests	Average Cost of each FOI request \$	Total Cost to Defence \$	Total Charges Collected \$	Total Fees Collected \$
2010-2011	362	*11,993	*3,613,167	18,998	1,260
2009-2010	207	10,385	2,149,702	18,528	3,250
2008-2009	153	10,358	1,584,809	4,505	2,570
2007-2008	175	10,665	1,866,327	8,574	3,120
2006-2007	183	6,714	1,228,616	13,758	3,300

\* Note: Figures are estimates and have not yet published by the Office of the Australian Information Commissioner.

**Table 2**

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

**Response:** Yes. Defence does give sympathetic consideration to waive charges for requests from next-of-kin family members seeking access to documents of a deceased Defence employee. An Australian citizen in receipt of a pension who requires documents to assist them with pension-related entitlements or claims, such as seeking a widow's pension, should not incur a charge.

### 19. 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?

**Response:** Refer to the answer to question 8 above. When an applicant is informed they are liable to pay charges, they are also provided with their rights of review and an opportunity to reduce the scope of their request. In such circumstances, where the applicant reduces the scope of their request, the primary assessment of charges is revised. In accordance with the FOI Charges regulations Defence considers each request for reduction or waiver of charges on its merits.



20. ***Does your agency experience difficulties in refunding charges?***

**Response:** Yes. The internal Defence process is complicated and refunds of small amounts of charges are expensive. The finance area in Defence estimates it costs \$375 to process each charge refund.

***Other issues***

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

**Response: Processing time should commence once a request is deemed valid:** Defence is of the opinion that, once a request is deemed valid, all processing time should be taken into account when determining the actual processing charges. As it stands, there is no provision to take into account the time spent to undertake consultation under section 24AB of the FOI Act. To be able to include consultation time, under section 24AB, would encourage applicants to focus the scope of their request within a reasonable time frame or lose free decision-making time (refer to response to Question 8 above).

**Response: Public interest test for charges should be reviewed:** The FOI Act requires agencies to consider whether the giving of access to a document captured by a request is in the general public interest of a substantial section of the public (paragraph 29(5)(b) of the FOI Act) when deciding whether or not to reduce or not impose a charge. Yet the public interest test for waiver of charges is different from the public interest test in section 11B. It is difficult for the public interest charge considerations to be fully balanced without actually reviewing the documents captured by a request. If an agency does review the documents and decides it is appropriate to waive, or reduce the charges, on public interest grounds then this pre-empts the actual FOI decision and implies that access to the documents must be in the public interest. Consideration needs to be given to removing the public interest test under paragraph 29(5)(b) of the FOI Act.