Australian Information Commissioner’s Report to the Attorney-General on Review of Charges under the Freedom of Information Act 1982 (FOI Act)

Office of the Australian Information Commissioner

Submission by the Administrative Law Committee of the Federal Litigation Section of the Law Council of Australia

11 May 2012
These submissions address Recommendations 1, 2, 4, 6 and 9 of the 10 numbered Recommendations made on pages 6 and 7 of the Australian Information Commissioner’s report to the Attorney-General on *Review of Charges under the Freedom of Information Act 1982*.

**Recommendations 1 and 2**

There is likely to be confusion for members of the public as to what is an informal access scheme and what is a scheme for access under the FOI Act. Like access under the FOI Act, the informal scheme will attract charges for photocopying and postage. The possible confusion is enhanced by use of the expression “Administrative Access Scheme”. Access under the FOI Act is also an administrative access scheme. Any informal scheme operating outside the FOI Act should be described as a “Non-FOI access scheme”, “Voluntary disclosure scheme”, or “Scheme for Access Outside the FOI Act”. For the sake of clarity the latter label is used in this submission.

Applicants for information and documents should not have to identify whether or not those documents are suitable for access outside the FOI Act. In many cases they will not be able to do so. It should be each Agency’s responsibility to make such assessments. Agencies should be encouraged to develop their schemes for access outside the FOI Act proactively. This can be done as part of the FOI process, although it may be that amendments to the legislation can assist in this regard. For example, the FOI Act could provide that when an Agency receives an FOI request, it must assess the request and determine whether it is amenable to a scheme for access outside the FOI Act. The Agency could write back to the FOI applicant offering to process the request outside the FOI legislation. The benefit to the applicant might be that the charges are less or non-existent, and the time taken to process the request is likely to be shorter. However, there may in some cases be restrictions on the use to which the information may be put (unlike FOI access).

An applicant should not be required to assess whether or not an application is suitable for processing as part of a scheme for access outside the FOI Act, and should not be penalised by having to pay a $50 application fee on the ground of his or her failure to invoke the Scheme for Access Outside the FOI Act. Of course if an applicant is aware that he or she can gain access without paying a charge, he or she will invoke that form of access. Failure to do so is most likely to occur out of ignorance, miscommunication because of a mistaken reference to the “FOI Act”, or uncertainty as to whether a document is covered by the Scheme for Access Outside the FOI Act.

Why would an agency proceed to process a request made under the FOI Act when it can simply inform the applicant that it is able to provide the documents without charge under its Scheme for Access Outside the FOI Act? That is what currently occurs. This practice is consistent with s 3A of the Act. It is inconsistent with s.3A (and the note to s.11A(4)) to penalise an applicant who fails to understand the way in which the agency’s two access regimes work. To penalise an applicant for failing to invoke the correct access regime is inconsistent with the object in s.3A. It is a means for raising fees where they should not apply.

The proposal also has the defect of delaying the processing of an FOI request. It rewards an applicant who invokes the Scheme for Access Outside the FOI Act even if the document is not available under that scheme and actually requires a formal FOI request. The purpose of this procedure is unclear. It certainly provides an incentive for all applicants to apply under the Scheme for Access Outside the FOI Act, and hence potentially to have to wait 60 days before any determination is made.
Why should it require 30 days for the agency to ascertain whether a document requested falls within its Scheme for Access Outside the FOI Act? If the question is so complex that reinforces that an applicant should not be penalised for failure to predict which scheme a document falls within.

The procedure will reduce the volume of formal requests under the FOI Act since as time passes many applicants lose heart or believe that there is no further process available to them.

**Recommendations 4 and 6**

This recommendation fundamentally undermines the operation of the FOI Act and Recommendation 4 is also an inappropriate recommendation in a Report about charges: it does not concern charges, rather it is a substantive amendment to the operation of the FOI Act which permits, at the agency’s discretion, the imposition of a ceiling on processing time, and on that basis refusal of access. An applicant will not be in a position to pursue effective review of such an estimate, given that evidence as to document storage and retrieval lies entirely with the agency.

As a total amount of time for processing an FOI request, 40 hours is a low ceiling. A ceiling of 40 hours is probably much less than any period held by the AAT to amount to a substantial and unreasonable diversion of the resources of an agency. Larger and well resourced agencies in particular would not see their resources unreasonably diverted by 40 hours of processing time.

In the AAT case-law the test of substantial and unreasonable diversion of resources is more subtle than simply addition of the processing hours. It takes into account the functions and available officers of the agency. That test should not be replaced.

It should also be kept in mind that where an applicant makes multiple requests (which may include one or more voluminous requests) the provisions for dealing with vexatious FOI applicants under Division 1 of Part VIII of the FOI Act are available.

**Recommendation 9**

An applicant who applies for IC review without first having sought internal review should not be penalised by a higher application fee for internal review. In the absence of an attached internal review decision the Information Commissioner can simply refuse to accept the IC review application for lodgment on the ground of lack of jurisdiction. That is the current position in courts and tribunals.

There is no precedent in other courts or tribunal for an applicant to be penalised financially for failure to invoke an internal review step prior to seeking external review.

A procedure would need to be put in place where the Information Commissioner reports to the agency on the error made by a purported applicant to ensure that the agency raises the internal review fee. This kind of contact between the independent Commissioner and the agency is inappropriate.

The failure to invoke internal review will in all but a minority of cases be a result of ignorance of a person unfamiliar with using the FOI Act. If not, the applicant may well be a vexatious FOI applicant who can be dealt with under Division 1 of Part VIII of the FOI Act.

The only purpose that could be served by the proposal is to discourage challenges to primary decisions.
Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council’s constituent bodies. The Law Council’s constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council’s six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.