



Australian Government
Department of Education and Training

Assistant Director
Office of the Australian Information Commissioner

By email: foidr@oaic.gov.au

Dear [REDACTED]

Thank you for providing an opportunity for the Department of Education and Training (**the department**) to comment on draft revisions to Part 4 of the FOI Guidelines relating to charges.

The department has several observations about the draft which are set out below.

1. Timeframe on payment of balance of a charge

In our view, the insertion of paragraphs 4.87 to 4.89 providing guidance about collecting the remainder of a charge where a deposit has been paid is very helpful. We agree with the view that an FOI request could be on hand indefinitely if the applicant fails to pay the remainder of a charge or cannot be contacted, and also agree with the view at paragraph 4.89 that 30 days for payment of the balance is a reasonable period. In our view this new guidance will help to alleviate potential uncertainty where an applicant does not pay the remainder of a charge.

2. The role of charges

The department has concerns that the manner in which the consultation draft characterises charges is not entirely consistent with the *Freedom of Information Act 1982 (FOI Act)* and *Freedom of Information (Charges) Regulations 2019 (Charges Regulations)*.

The following appears at paragraph 4.1 of the consultation draft (emphasis added):

4.1 An agency or minister may impose a charge for providing access to a document under s 29 of the FOI Act. The charge must be assessed in accordance with the Freedom of Information (Charges) Regulations 2019 (Charges Regulations).

This is an updated version of a statement that already appears in the Guidelines at paragraph 4.1. However, in our view, this is not an entirely accurate reflection of section 29 of the FOI Act which provides (emphasis added): “[...] *Where, under the regulations, an agency or Minister decides that an applicant is liable to pay a charge in respect of a request for access to a document, or the provision of access to a document [...]*”

Accordingly, section 29 does not require that charges only be imposed for providing access to documents. The Charges Regulations further make clear an agency may impose a charge in respect of the time it takes to process a request for access as opposed to only in the context of provision of access (this is also relevant to item 4 below).

The following new text also appears at paragraph 4.19 of the consultation draft at the end of the paragraph:

[...] The overall impact of charges in recovering costs to government is not a relevant consideration to justify the imposition of a charge for an individual request.[6] Further, imposing a charge can deter members of the public seeking access [to] documents and delay access.”

The department is concerned there may be an implication from this new text that decision makers should not charge, which is inconsistent with the FOI Act and Charges Regulations. If imposing a charge in any given case is in accordance with the FOI Act and Charges Regulations (including relevant statutory timeframes), then it is unclear why any perceived “delay” to processing a request caused by the charge would be a relevant consideration when exercising the discretion to impose a charge.

In our view, the revised paragraph 4.19 and Part 4 more generally, comment on the potential adverse consequences of charging, in a manner that does not appropriately reflect the balance which underpins the FOI Act charging regime (and the reasons for the retention of the charging regime in the legislation).

In the context of the above comments, we refer to the review of charges undertaken in 2012 by Prof. John McMillan available on the OAIC website, including the statements quoted below (noting that the reference in the quotes to recovering costs to government is not relevant in individual cases).

“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. [...]”

“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.”

Ultimately, it seems Parliament has accepted the themes captured above and determined that charges should play a role in the FOI scheme. The department is concerned there is a risk that some of the additional commentary in the FOI Guidelines may be seen to be increasingly discouraging agencies from imposing charges, even where doing so is consistent with the FOI charges regime and legislation more broadly. This makes it more difficult for agencies to appropriately navigate their responsibilities and potentially results in a more inconsistent approach to charging across the Commonwealth. We note there are some factors potentially favouring imposition of a charge set out at paragraph 4.93 (and this is helpful) but suggest that it would be worth more prominently reflecting the important role charges do play (justifying their initial inclusion and subsequent retention in the legislation).

3. Charges for document production

The following appears at paragraph 4.34 of the consultation draft (emphasis added):

*“Item 2 of Part 1 of Schedule 1 provides for a charge for the actual cost of using a computer or other equipment (for example, installing a computer program[11]) to produce a document containing information that is otherwise not available in a discrete form in documents of an agency. **This item does not permit an agency to charge for actual staff costs for search or retrieval time, because***

search and retrieval costs are limited to an hourly rate of \$15 per hour under Item 1 of Part 1 of Schedule 1.

It would be useful in this paragraph to include an example or provide some further explanation to make clearer the distinction being drawn between “search and retrieval time” as opposed to “production” time. Our reading of the paragraph is that where an agency spends for example, two hours searching for a document, determines a document does not exist and spends a further two hours producing the document, the two hours of search time should be charged at the rate in Item 1. However, as drafted, paragraph 4.34 could potentially be read as the time spent searching for information to insert into the document while it is in production should be charged at the Item 1 rate.

The department notes that Item 1 of Part 1 of Schedule 1 of the Charges Regulations excludes “a document in relation to which a charge under item 2 of this table applies”. For this reason, the department is of the view that the time spent by an officer in searching for and retrieving information from the department’s electronic records for the purposes of producing a document under section 17 of the FOI Act should be charged a rate not exceeding the actual cost incurred by the agency, rather than \$15 per hour.

The department also notes that it would be difficult for a departmental officer required to produce a document under section 17 of the FOI to separate the time spent searching for and retrieving information from the department’s electronic records and the time spent producing the document, as in practice the processes are inextricably entwined.

4. Refund of a deposit

Section 4.83 of the consultation draft provides (emphasis added):

“Section 10(3)(b) of the Charges Regulations provides that an agency or minister cannot increase a charge for a document if access is refused. Consistent with this provision, and the objects of the FOI Act, it is good administrative practice to refund a deposit paid for access to a document if access is refused.”

The department has some concerns about this proposition. In particular:

- the Charges Regulations at Schedule 1 specifically permit an agency to impose a charge in respect of the time it takes to process a request (e.g. time spent searching for a document, time spent deciding whether to grant, refuse or defer access to a document, including examining the document, consulting with third parties, preparing a copy of a document with deletions, preparing a schedule, and notifying an applicant of a decision etc.). Accordingly, it appears inconsistent with the FOI Act and Charges Regulations to treat a deposit (or payment of a charge in full) as a payment for the actual provision of documents. For the same reason, it appears drawing this inference from 10(3)(b) is not supported by the remainder of the Charges Regulations;
- given the above and, in circumstances where the decision maker is satisfied that the charge is consistent with the FOI Act and Charges Regulations and appropriately reflects the time taken to process a request, it is unclear whether agencies would have a lawful basis on which to refund a charge deposit “as a matter of administrative practice”.

For the reasons discussed above, the department has significant concerns about the inclusion of the sentence in bold above and submits that it should be deleted.

However, in the event that the decision is taken to retain the sentence, the department further notes that in the majority of FOI requests it receives, the applicant pays the charge in full, rather than just a deposit. As such, it is unclear whether this guidance by extension would also be suggesting to agencies that the total charge amount received should be refunded to an applicant where the ultimate decision is to refuse access to the documents. It is also unclear what the expectation would be in circumstances where multiple documents are captured by a request and access refused to only some of the documents (i.e. would this paragraph create an expectation that the applicant should receive a partial refund of the deposit or total amount paid? This would in turn potentially create practical difficulties for how such a partial refund would be calculated).

Thank you again for the opportunity to comment on the revised FOI Guidelines as they relate to charges. We are happy to discuss any of our comments with you if that would assist.

Yours sincerely



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