

Part 4 —

# Charges for providing access

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- 4.1 An agency or minister may impose a charge in respect of a request for access to a document or 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).
- 4.2 The Information Commissioner has published guidance and advice that helps decision makers identify the steps in calculating a charge. The guidance is available at <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/calculating-and-imposing-charges-for-foi-access-requests/>

## Guiding principles

- 4.3 Under s 8 of the Charges Regulations, an agency or minister has a discretion to impose or not impose a charge, or impose a charge that is lower than the applicable charge. In exercising that discretion, the agency or minister should take account of the ‘lowest reasonable cost’ objective stated in the objects of the FOI Act (s 3(4)):
- ... functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.<sup>1</sup>
- 4.4 Agencies and ministers should interpret the ‘lowest reasonable cost’ objective broadly in imposing any charge under the FOI Act. That is, an agency or minister should have regard to the lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole. Where the cost of calculating and collecting a charge might exceed the cost to the agency of processing the request, it may generally be more appropriate not to impose a charge.<sup>2</sup> In assessing the cost of calculating and collecting a charge, agencies should also take into account the likely costs that may be incurred by the agency, as well as other review bodies, if the applicant seeks further review.
- 4.5 Further, an agency or minister should keep in mind that under s 55D(1) of the FOI Act, if an applicant applies for Information Commissioner review (IC review) of a decision to impose a charge, the agency or minister bears the onus, and therefore bears the cost, of establishing that:
- a) its decision in relation to the FOI request is justified, or
  - b) the Information Commissioner should make a decision adverse to the IC review applicant.

Ultimately, the amount of any charge imposed should be:

- determined bearing the objects of the FOI Act in mind
- reasonable, taking into account all relevant factors
- proportionate to the cost of making a decision and providing access, as well as any general public interest supporting release of the requested documents (see s 29(5)(b) of the FOI Act).

<sup>1</sup> An assessment of charges based on the maximum rates outlined in Schedule 1 to the Charges Regulations can be consistent with the ‘lowest reasonable cost’ objective: see *McBeth and Australian Agency for International Development* [2012] AICmr 24 [15].

<sup>2</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [31] and *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information)* [2019] AICmr 15 [46].

- 4.6 The objects of the FOI Act provide the basis for the following principles relevant to charges under the FOI Act:
- A charge must not be used to unnecessarily delay access or to discourage an applicant from exercising the right of access conferred by the FOI Act.
  - A charge should fairly reflect the work involved in providing access to documents.
  - Charges are discretionary and should be justified on a case by case basis.
  - Agencies should encourage administrative access at no charge, where appropriate.
  - Agencies should assist applicants to frame FOI requests (s 15(3) of the FOI Act).
  - Agencies should draw an applicant's attention to opportunities to obtain free access to a document or information outside the FOI Act (s 3A(2)(b)).
  - A decision to impose a charge should be transparent.
- 4.7 An agency should ensure that the notice to an applicant of a charge fully explains and justifies the charge. Implicit in the 'lowest reasonable cost' objective is the requirement for sound record keeping so that an agency's documents can be readily identified and found when an FOI request is received (see [4.29] below).

## Charges framework

### The FOI Act and the Charges Regulations

- 4.8 The FOI Act and Charges Regulations set out the process when an agency or minister decides to impose a charge for processing an FOI request or for providing access to a document to which a request relates.
- 4.9 If an agency or minister decides to impose a charge, the agency or minister must provide the applicant with a written notice outlining the preliminary assessment of the charge and all the matters listed in s 29(1) of the FOI Act (see [4.55] below).<sup>3</sup>
- 4.10 In notifying an applicant of a charge or estimated charge, the agency or minister may require the applicant to pay a deposit (see [4.84] below). Where an applicant receives a notice of preliminary assessment advising that a charge is payable, and does not object to the estimated charge, they may decide to pay a deposit or the full estimated charge. An applicant may also object to the estimated charge *and* pay the deposit or full estimated charge to progress a decision on the FOI request while the charge is disputed (see [4.12] and [4.63]–[4.65] below).<sup>4</sup>
- 4.11 Where the applicant objects to the estimated charge, they may contend that the charge has been wrongly assessed, or should be reduced or not imposed (s 29(1)(f)). The application must:
- be made in writing (s 29(1)(f))
  - be made within 30 days of receiving the notice or such further period as the agency or minister allows (s 29(1)(f))

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<sup>3</sup> For further information about the steps required to estimate and notify a charge, see <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/calculating-and-imposing-charges-for-foi-access-requests/>

<sup>4</sup> *Justin Warren and Department of Human Services (Freedom of information)* [2018] AICmr 16 [35]–[40].

- set out the applicant’s reasons for contending that the charge has been wrongly assessed or should otherwise be reduced or not imposed (s 29(1)(f)(ii)).
- 4.12 An applicant may, in objecting to the estimated charge:
- postpone payment of the deposit or estimated charge until the agency makes a decision on the amount of charge payable, or
  - pay the deposit or the estimated charge pending a decision on reduction or waiver of the estimated charge. This action requires the agency to continue processing the FOI request while considering the application for reduction or waiver of the charge. If the agency or minister decides to reduce or waive the charge, the deposit should be reduced or refunded.
- 4.13 If the applicant does not respond in writing to the agency or minister’s notice of the preliminary assessment of the charge within 30 days, or such other period allowed by the agency or minister, the FOI request is taken to have been withdrawn (s 29(2)).
- 4.14 On receiving the applicant’s reasons for contesting the charge, the agency or minister must, within 30 days, or earlier if practicable (s 29(6)), provide a written notice of decision to the applicant as to whether the charge will be imposed, reduced or waived. In making its decision, the agency or minister must take into account whether payment of the charge will cause financial hardship, or whether giving access without charge or at a reduced charge, will be in the public interest (ss 29(4)–(5)) (see [4.95]–[4.113] below).<sup>5</sup>
- 4.15 Where the agency or minister does not provide its decision to the applicant within 30 days, the agency is taken to have made a decision to impose the charge specified in the notice of preliminary assessment (s 29(7)).
- 4.16 If the decision is to impose or reduce the charge, the notice of the charge decision must also set out the reasons for the decision (s 29(8)) and:
- the applicant’s right to seek internal review or IC review of the decision
  - the applicant’s right to complain to the Information Commissioner
  - the procedure for exercising these rights (s 29(9)).
- 4.17 Where the agency or minister is deemed to have affirmed the preliminary assessment of the charge under s 29(7), or deemed to have affirmed the original decision under s 54D, the agency or minister continues to have an obligation to provide a statement of reasons. This obligation to provide a statement of reasons continues until any IC review of the deemed decision is finalised.
- 4.18 Other relevant provisions in the FOI Act and Charges Regulations concerning the imposition of charges are summarised in Table 1.

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<sup>5</sup> For further information about the steps required to process an application for reduction or waiver of a charge, after an applicant contests a charge, see <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/calculating-and-imposing-charges-for-foi-access-requests/>

**Table 1: Charges – summary of main legislative provisions**

<b>Legislative provision</b>	<b>Operation</b>
Section 6 of the Charges Regulations	Charges for making a decision on a request for access to a document are set out in Part 1 of Schedule 1 of the Charges Regulations.  Charges for providing access to a document are set out in Part 2 of Schedule 2.
Section 7 of the Charges Regulations	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 under ss 15AB of the FOI Act or the applicant has agreed to extend the time under s 15AA (see [4.47]–[4.48] below).
Section 8 of the Charges Regulations	An agency or minister may decide that an applicant is liable to pay a charge in respect of a request for access to a document, or in respect of the provision of access to a document.
Section 9 of the Charges Regulations	In issuing a notice of a charge under s 29 of the FOI Act, an agency or minister may provide an estimate (based on Schedule 1 of the Charges Regulations) if the agency or minister has not taken all steps necessary to make a decision on the request.
Section 10 of the Charges Regulations	After taking all steps necessary to make a decision on a request, an agency or minister: <ul style="list-style-type: none"> <li>• must adjust an estimated charge to a lower amount where the actual amount of the charge is lower than the estimated amount (s 10(2)); or</li> <li>• may adjust an estimated charge to a higher amount (s 10(3)).</li> </ul>
Section 11A of the FOI Act and s 11 of the Charges Regulations	An applicant must pay the required charge before being given access to a document, except if the charge relates to an officer supervising inspection, or in hearing or viewing the document.
Section 12 of the Charges Regulations	An agency or minister may require an applicant to pay a deposit of \$20 for an estimated charge of between \$25 and \$100, or 25 percent of the estimated charge if greater than \$100.
Section 31 of the FOI Act	If an applicant is notified during the statutory processing period that a charge is payable, the processing period is extended until the applicant pays the charge or is notified by the agency following a review that no charge is payable.

## Charges are discretionary

### 4.19 Agencies and ministers have a discretion:

- not to impose a charge for the staff time and resources expended in processing an FOI request (s 8 of the Charges Regulations), independently of an applicant contending that a charge be reduced or waived
- to impose a charge lower than the charge specified in the Charges Regulations (s 8)

- to reduce or waive a charge after an applicant contests a charge (s 29(4)) (see [4.95]–[4.114] below).
- 4.20 Agencies and ministers should be guided by the ‘lowest reasonable cost’ objective in s 3 of the FOI Act in deciding whether a charge specified in the Charges Regulations is warranted; there is no obligation on an agency to charge for access. Agencies and ministers may need to balance a number of factors in reaching decisions concerning access to documents and related charges. The overall impact of charges in recovering costs to government does not, of itself, justify imposing a charge for an individual request.<sup>6</sup> Further, imposing a charge can deter members of the public from seeking access to documents and can delay access.
- 4.21 It is suggested that agencies develop internal guidance to assist staff decide whether it is appropriate to impose a charge in relation to an FOI request. Situations in which it may not be appropriate, include when a request has been outstanding for a long period of time (for example, when the request has been the subject of an IC review).

## Charges that may be imposed

- 4.22 The charges that may be imposed by an agency or minister with respect to a request for access to a document are specified in Schedule 1 of the Charges Regulations. While the decision to impose a charge is discretionary, calculation of the charge must be in accordance with the amounts specified in Schedule 1 of the Charges Regulations. Part 1 of Schedule 1 specifies charges related to making a decision on a request and Part 2 specifies charges for giving access to a document. The charges are listed in Table 2 below.
- 4.23 There is no charge for making:
- a request to an agency or minister for access to a document under Part III of the FOI Act
  - an application for amendment or annotation of a personal record under Part V of the FOI Act
  - an application for internal review of a decision under Part VI of the FOI Act
  - an application for review by the Information Commissioner under Part VII of the FOI Act
  - a complaint to the Information Commissioner under Part VIIB of the FOI Act.
- 4.24 An agency or minister cannot impose a charge:
- for giving access to an individual’s own personal information (s 7(1) of the Charges Regulations)
  - if it fails to make a decision on the request within the statutory processing period – the statutory period includes any extensions of time under ss 15(6), 15(8), 15AA and 15AB, but not s 15AC of the FOI Act (ss 7(2) and (3) of the Charges Regulations); s 12(3)(b) of the Charges Regulations provides that the agency or Minister must refund any deposit paid in these circumstances
  - for making an internal review decision.<sup>7</sup>

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<sup>6</sup> *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131 [30] and *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade* [2018] AICmr 13 [34].

<sup>7</sup> On internal review, an agency or minister can only impose a charge for *providing access* to a document using the charges listed under Part 2 of Schedule 1. This is because s 4(1) the FOI Act defines ‘request’ as a request for access to a document under s 15(1) of the FOI Act. Charges under the Charges Regulations only apply with respect to ‘a request for access to a document’ (s 6). As a result, charges cannot be imposed with respect to an application for internal review under s 54 (or s 54A) of the FOI Act.

This is discussed further at [4.43]–[4.49].

**Table 2: Charges listed in Schedule 1 of the Charges Regulations**

Activity item	Charge	Schedule 1
<b>Search and retrieval:</b> time spent searching for or retrieving a document	\$15 per hour	Part 1, Item 1
<b>Decision making:</b> time spent deciding to grant or refuse a request, including examining documents, consulting other parties, making deletions, or notifying any interim or final decision on the request	First five hours: Nil Subsequent hours: \$20 per hour	Part 1, Item 4
<b>Electronic production:</b> provision of information not available in a discrete form in a document by using a computer or other equipment ordinarily used for retrieving or collating stored information	An amount not exceeding the actual cost incurred in producing a document or copy	Part 1, Item 2 Part 2, Items 4, 5 and 7
<b>Transcript:</b> preparing a transcript from a sound recording, a document written in shorthand or similar codified form	\$4.40 per page of transcript	Part 1, Item 3 Part 2, Item 8
<b>Photocopy:</b> a photocopy of a written document	\$0.10 per page	Part 2, Item 3
<b>Other copies:</b> a copy of a written document other than a photocopy	\$4.40 per page	Part 2, Item 3
<b>Replay:</b> replaying a sound or film tape	An amount not exceeding the actual cost incurred in replaying	Part 2, Item 6
<b>Inspection:</b> supervision by an agency officer of an applicant’s inspection of documents or the hearing or viewing of an audio or visual recording	\$6.25 per half hour (or part thereof)	Part 2, Items 1 and 2
<b>Delivery:</b> posting or delivering a copy of a document at the applicant’s request	Cost of postage or delivery	Part 2, Item 9

## Charge at hourly rate

- 4.25 The Charges Regulations set out an hourly rate that applies regardless of the classification or designation of the officer who undertakes the work (s 94(2)(b) of the FOI Act) for:
- search or retrieval (\$15 per hour)
  - decision making (\$20 per hour).
- 4.26 The Charges Regulations do not specify a method for charging for part of an hour of search or retrieval or decision-making time. If such a charge is to be imposed, it should be calculated on a proportionate basis, for example, 30 minutes work should be charged at 50 percent of the hourly rate.

## Charge for search or retrieval time

- 4.27 An agency or minister can charge for ‘the time spent ... in searching for, or retrieving, the document’ (Charges Regulations, Schedule 1, Part 1, Item 1). This encompasses time spent:
- consulting relevant officers to determine if a document exists
  - searching a digital database or hardcopy file index for the location of a document
  - searching a digital or hardcopy file to locate a document
  - physically locating a digital or hardcopy document and removing it from a file.
- 4.28 An underlying assumption in calculating search or retrieval time is that the agency or minister maintains a high quality record system. Search or retrieval time is to be calculated on the basis that a document will be found in the place indicated in the agency or minister’s filing system (s 5(2)(a) of the Charges Regulations) or, if no such indication is given, in the place that reasonably should have been indicated in the filing system (s 5(2)(b)). The ‘filing system’ of an agency or minister should be taken to include central registries as well as other authorised systems used to record the location of documents.
- 4.29 Time spent by an officer searching for a document that is not where it ought to be, or that is not listed in the official filing system, cannot be charged to an applicant.<sup>8</sup> In summary, applicants cannot be disadvantaged by poor or inefficient record keeping by agencies or ministers.
- 4.30 Decision making time does not include time spent by agency officers, other than the decision maker, discussing and reviewing between themselves the results of search or retrieval activities. It is assumed that the decision maker has the skills and experience needed to make a decision on the request.

## Charge for decision making time

- 4.31 An agency or minister can charge for the time spent by the decision maker:<sup>9</sup>
- ... in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including the time spent:
- a) examining the document
  - b) consulting with any person or body
  - c) making a copy with deletion
  - d) notifying any interim or final decision on the request (Charges Regulations, Schedule 1, Part 1, Item 4(d)).
- 4.32 Item 4 further provides there is no charge for the first five hours of decision-making time.
- 4.33 Other actions not specifically listed in Part 1, Item 4 can also be included in the charge for decision making. Examples include the time spent by an agency preparing a schedule of documents or a recommendation for the authorised decision maker. On the other hand, the time of other officers the decision maker consults in the course of making a decision will not

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<sup>8</sup> *Fingal Head Community Association Inc and Department of Infrastructure and Regional Development* [2014] AICmr 70 [19] and *Ben Butler and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 18 [16].

<sup>9</sup> Charges Regulations, Schedule 1, Part 1, Item 4.

ordinarily fall within that definition, because the authorised decision maker is expected to have the necessary skills and understanding to decide access issues.

- 4.34 An underlying assumption in calculating decision making time is that the officers involved in this process are skilled and efficient. For example, it is assumed that an officer who is deciding whether an exemption applies has appropriate knowledge of the FOI Act and the scope of the exemption provisions.

## Charge for actual costs incurred by agency

- 4.35 An agency or minister can impose a charge that does not exceed the actual cost incurred by the agency or minister in:
- producing a document containing information that is not available in a discrete form in documents of an agency by using a computer or other equipment ordinarily used for retrieving or collating stored information to make a decision on a request (Charges Regulations, Schedule 1, Part 1, Item 2)
  - applying deletions to a document produced using a computer or other equipment in response to a request for information that is not available in a discrete form in a document of the agency or minister (Schedule 1, Part 2, Item 4)
  - producing a computer tape or disk (Schedule 1, Part 2, Item 5)
  - arranging for an applicant to hear a recording or view a stored image (Schedule 1, Part 2, Item 6)
  - producing a copy of a recording, film or videotape (Schedule 1, Part 2, Item 7)
  - posting or delivering a document to an applicant, as requested by the applicant (Schedule 1, Part 2, Item 9).
- 4.36 Item 2 of Part 1 of Schedule 1 provides for a charge for the actual cost of using a computer or other equipment to produce a document containing information that is not available in a discrete form in documents of an agency.<sup>10</sup> This item may include staff costs incurred in writing a computer program to generate the information sought, but does not permit an agency to charge for staff costs for search or retrieval (to ascertain whether the requested information is available in a discrete form in documents of the agency), because search and retrieval costs are limited to an hourly rate of \$15 per hour under Item 1 of Part 1 of Schedule 1.
- 4.37 Digital technology has greatly reduced the cost of producing and copying electronically stored documents, recordings and visual images. This should be reflected in an agency's decision making in relation to considering if or how charges should apply. Agencies and ministers should, as far as practicable, use the latest technology to give applicants access to documents promptly and at the lowest reasonable cost.
- 4.38 An agency or minister must keep a full and accurate record of actual costs incurred to enable the Information Commissioner, when undertaking an IC review, to examine whether a charge is justified.

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<sup>10</sup> For example, installing a computer program that can create a single document containing information from different data sets.

## Charge for access in an alternative form

- 4.39 An applicant who requests access in a particular form is entitled to receive it in that form, unless any of the exceptions in s 20(3) of the FOI Act apply (see Part 3 of these Guidelines). If an alternative form of access is given in accordance with s 20(3), a higher charge cannot be imposed than if access had been given in the form requested by the applicant (s 20(4)).
- 4.40 If access to a document can be provided in two or more forms and an applicant does not specify a particular form of access, the charge imposed cannot be higher than if access was given in the form to which the lowest charge applies.

## Charge for access to exempt document

- 4.41 It is open to an agency or minister, in response to an FOI request, to provide access to a document to which the applicant is not entitled under the FOI Act. For example, an agency can provide access to a document for which an exemption claim can be made (s 3A(2)(b) of the FOI Act). If access is given in response to a request, the Charges Regulations apply as though the applicant was entitled to be given access (s 94(3) of the FOI Act), noting that it is always open to an agency or minister to use their discretion not to impose a charge.

# Exceptions to imposition of charges

## Applicant's personal information

- 4.42 No charge is payable if an applicant is seeking access to a document that contains their own personal information (s 7(1) of the Charges Regulations). The same rule applies under Australian Privacy Principle 12 of the *Privacy Act 1988* (Privacy Act), which requires an entity that holds personal information about an individual to give the individual access to the information on request, and further provides that the entity cannot impose a charge for providing access.<sup>11</sup>
- 4.43 Section 4(1) of the FOI Act says that 'personal information' has the same meaning as in the Privacy Act, which provides in s 6:
- personal information** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
- a) whether the information or opinion is true or not; and
  - b) whether the information or opinion is recorded in a material form or not.
- 4.44 In essence, personal information is information about an identified or identifiable individual. The information may also be publicly known. (See Part 6 of these Guidelines for further discussion of the definition of 'personal information'.)
- 4.45 A document that contains the personal information of an applicant can fall within this exception even if the document also contains non-personal information. An example is given in the decision of *CN and Australian Customs and Border Protection Service*, where the Information Commissioner found that no charge could be imposed in relation to a request

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<sup>11</sup> See Chapter 12 of the Information Commissioner's APP Guidelines at [oaic.gov.au](http://oaic.gov.au)

for CCTV footage that clearly identified the applicant.<sup>12</sup> 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 providing access to the entire document, it may be appropriate for the agency or minister to impose a charge for providing access to the portion of the document that does not contain personal information.<sup>13</sup> 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 only the applicant's personal information.

## Decision not made within statutory time limit

- 4.46 Section 15(5)(b) of the FOI Act provides that an applicant is to be notified of a decision on a request not later than 30 days after the agency or minister received the request. This period can be extended by:
- an agency or minister to facilitate consultation with an affected third party, foreign government or organisation (ss 15(6) and (8))
  - agreement with the applicant (s 15AA), or
  - the Information Commissioner (s 15AB).
- 4.47 If an applicant is not notified of a decision on a request within the statutory time limit (including any extension of time listed above), the agency or minister cannot impose a charge for providing access, even if the applicant was earlier notified that a charge was payable (ss 7(2) and (3) of the Charges Regulations). If the applicant paid a deposit it must be refunded (s 12(3)).
- 4.48 If an agency or minister fails to make a decision within the applicable statutory time limit, resulting in a deemed access refusal decision, the Information Commissioner may grant an extension of time under s 15AC on the agency or minister's application. In these circumstances, the agency or minister must proceed to make an actual decision but cannot impose a charge because the decision is still regarded as out of time for charging purposes (ss 7(2) and (3)).

## Decision making time

- 4.49 There is no charge for the first five hours of time spent making a decision (Charges Regulations, Schedule 1, Part 1, Item 4). There is no equivalent provision for searching or retrieving documents.

## The Goods and Services Tax

- 4.50 The Goods and Services Tax (GST) is not payable on FOI charges. Section 81-10 of *A New Tax System (Goods and Services Tax) Act 1999* provides that GST applies to payments of Australian taxes, fees and charges, *except* those involving a fee or a charge paid to an Australian government agency if the fee or charge relates to 'recording information; copying information; modifying information; allowing access to information; receiving information, processing information and searching for information'.

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<sup>12</sup> [2014] AICmr 87 [12]-[13].

<sup>13</sup> 'CK' and Department of Human Services [2014] AICmr 93.

## Charging procedures

- 4.51 Agencies may develop and publish on their website their own internal procedures for imposing charges, consistent with the FOI Act, the Charges Regulations and these Guidelines. This will assist the public understand the agency's approach to imposing charges, and the supporting evidence the agency requires from applicants who apply for a reduction or waiver of a charge.
- 4.52 Agencies should give applicants an early indication of the likely cost of processing their request and an opportunity to modify or withdraw the request if they wish. The option of providing administrative access to information without payment of a charge can also be discussed with an applicant.<sup>14</sup>
- 4.53 Agencies should assist applicants to identify the specific documents they are seeking to enable them to focus their request on the documents required and minimise potential charges.<sup>15</sup> This approach will also help agencies avoid unnecessarily expending resources searching for and retrieving documents the applicant does not want. Where the information requested is freely available elsewhere (such as on the agency's website or in a publicly released report), agencies should draw the applicant's attention to the location of this information and check whether this satisfies the applicant's request (see [4.6] above).

## Making a decision to impose a charge

### Notifying a charge

- 4.54 Section 29(1) of the FOI Act provides that an applicant must be given a notice in writing when an agency or minister decides the applicant is liable to pay a charge set out in Schedule 1 of the Charges Regulations. The notice must specify:
- a) that the applicant is liable to pay a charge
  - b) the agency or minister's preliminary assessment of the charge and the basis for the calculation
  - c) the applicant's right to contend that the charge has been wrongly assessed or should be reduced or not imposed
  - d) that the agency or minister, in considering any contention, must take into account whether payment of the charge would cause financial hardship to the applicant or the person on whose behalf the application was made, and whether giving access to the document would be in the public interest
  - e) the amount of any deposit payable by the applicant (see also s 12(1) of the Charges Regulations)
  - f) the applicant's obligation to notify in writing within 30 days that they:

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<sup>14</sup> *Australian Pain Management Association and Department of Health* [2014] AICmr 49 [35]. See also the discussion of administrative access in Part 3 of these Guidelines.

<sup>15</sup> This is reflected in s 3(4) of the FOI Act, which provides that the functions and powers given under the FOI Act are to be performed or exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

- i) agree to pay the charge
  - ii) dispute the charge, including seeking waiver or reduction, or
  - iii) withdraw the FOI request
- g) that the FOI request will be taken to have been withdrawn if the applicant fails to respond within 30 days (or such further period as the agency or Minister allows).
- 4.55 To assist an applicant, an agency or minister may include other information in a notice, for example, that:
- the agency or minister, in deciding whether to not impose or reduce a charge, can take into account matters other than financial hardship and the public interest in disclosure (s 29(5))
  - a deposit paid by an applicant is not refundable unless the agency or minister decides not to impose the charge or fails to make a decision on the applicant's FOI request within the statutory time limit, including any extension (s 12(3) of the Charges Regulations)
  - the applicant is not entitled to access any document until all charges are paid (s 11A(1)(b) of the FOI Act and s 11(1) of the Charges Regulations). This rule does not apply to a supervision charge unless the applicant has received an estimate of the charge (s 11(2) of the Charges Regulations).

## Disputing a preliminary estimate of a charge

- 4.56 On receiving a preliminary estimate of a charge, an applicant may, at any time, apply in writing to the agency or minister for the charge to be corrected, reduced or not imposed.

## Decision to impose a charge is discretionary

- 4.57 After receiving the applicant's written application, the agency or minister has a discretion to reduce or not impose the charge or to maintain the charge.

## Applicant's right to seek review and/or make complaint

- 4.58 If the agency or minister decides not to exercise its discretion to reduce or not impose a charge (an access refusal decision under s 53A(e) of the FOI Act), the applicant may seek review of the decision (but only *after* disputing a preliminary estimate of a charge issued under s 29(1) of the FOI Act) by applying for:
- internal review by the agency or minister (s 54), or
  - IC review (s 54L).

An applicant may apply for IC review of either:

- a decision on internal review of an access refusal decision about a charge (s 54C), or
  - an access refusal decision about a charge under s 29 (without first seeking internal review).
- 4.59 The Information Commissioner is of the view that it is usually better for an applicant to seek internal review of an agency or minister's decision before applying for IC review. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision.

- 4.60 An applicant may also make a written complaint to the Information Commissioner under s 70 of the FOI Act, whether or not they seek review of the agency's decision.
- 4.61 However, an applicant cannot seek IC review of a preliminary estimate of a charge issued under s 29(1) until they have notified the agency or minister, in writing, of one of the three things in s 29(1)(f) and the agency has made a decision on the amount of the charge payable under s 29(6), or the agency or minister has not notified the applicant of a decision under s 29(6) on the amount of the charge payable within 30 days (when the agency or minister is deemed to have made a decision that the amount of charge payable is the amount of the preliminary estimate of the charge).
- 4.62 For more information about:
- applying for internal review, see Part 9 of these Guidelines
  - applying for IC review, see Part 10 of these Guidelines
  - making a complaint to the Information Commissioner, see Part 11 of these Guidelines.

## Payment of a charge while seeking internal or IC review of charges decision

- 4.63 An applicant may apply to the agency or minister for a charge to be corrected, reduced or not imposed *and* also pay the charge (or deposit) so that the agency or minister continues processing the FOI request while a decision on the charge is made.
- 4.64 Payment of the charge does not necessarily indicate the applicant agrees with the imposition or calculation of the charge, nor does it prevent the applicant from seeking internal review or IC review of the charge (regardless of whether the applicant has sought internal review).<sup>16</sup> An FOI applicant may apply for internal review or IC review either before<sup>17</sup> or after<sup>18</sup> paying the charge as long as the application is made within the relevant statutory timeframe after the charges decision is made under s 29:
- 30 days for internal review (s 54C) or
  - 60 days for IC review (s 54S).
- 4.65 If the decision to impose the charge is overturned on either internal or IC review, the agency is required to refund the amount paid by the applicant (s 12(3)(a) of the Charges Regulations and s 55N of the FOI Act).

## Estimating a charge

- 4.66 The notice to an applicant under s 29(1) of an agency or minister's preliminary assessment of a charge can include an estimated charge, if all steps necessary to make a decision on the request have not yet been taken (ss 9(1), (2) and (3) of the Charges Regulations). In practice, the preliminary assessment may be based on two elements:
- a charge (based on Part 1 of Schedule 1 of the Charges Regulations) for work already done by the agency or minister, for example, search and retrieval of documents

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<sup>16</sup> *Justin Warren and Department of Human Services (Freedom of information)* [2018] AICmr 16 [35], [39]–[40]. See also *Justin Warren and Department of Human Services (No 2) (Freedom of information)* [2018] AICmr 17 [17]–[19].

<sup>17</sup> See *Justin Warren and Department of Human Services (No 2) (Freedom of information)* [2018] AICmr 17.

<sup>18</sup> See *Justin Warren and Department of Human Services (Freedom of information)* [2018] AICmr 16.

- an estimated charge for work still to be done.
- 4.67 An estimate based on work still to be done can relate to any item listed in Schedule 1 of the Charges Regulations, for example:
- a charge for further action that may be required to make a decision; such as search or retrieval, examination of documents, and consultation with affected third parties
  - a charge for providing access other than by personal inspection; such as photocopying, postage and supervision of an applicant by agency personnel while inspecting, hearing or viewing a document.
- 4.68 An estimated charge must be as fair and accurate as possible. An agency or minister should be mindful not to set an unreasonably high estimate which may hinder or deter the applicant from pursuing their FOI request because this is not in keeping with the objects of the FOI Act to facilitate and promote access at the lowest reasonable cost.
- 4.69 Furthermore, as discussed at [4.29]-[4.30] above, the estimate should be based on an assumption that the agency or minister maintains a well-organised record keeping system that enables easy identification and location of documents.
- 4.70 It is wise for an agency or minister, in estimating a charge, to be guided by previous experience dealing with FOI requests of a similar nature. Where the agency or minister has not dealt with FOI requests of a similar nature, it is recommended that the agency or minister obtain an estimate of the processing time by sampling the documents at issue.

## Charges calculators

- 4.71 A commonly used tool for estimating charges under s 29 is a ‘charges calculator’. Calculators come in different forms, but often contain a number of predetermined parameters based on assumptions about how long an FOI request should take to process.
- 4.72 A charges calculator cannot produce an accurate estimate without accurate inputs and caution is required when using such a resource. Some documents may contain complex material which may justify longer processing times, while others may be quite straightforward and require significantly less time to review.
- 4.73 A common parameter included in a charges calculator is that examining relevant pages for decision making will take five minutes per page, and for exempt material, an additional five minutes per page is needed for review. However, unless the document at issue is particularly complex, it may be difficult for an agency or minister to adequately justify an estimate that it will take 10 minutes to process each page of the relevant documents.<sup>19</sup>

## Sampling

- 4.74 Where a decision is made to use a charges calculator to estimate a charge, the agency or minister should examine a sample of the relevant documents and adjust the parameters of the charges calculator accordingly.
- 4.75 Generally, where a large number of documents have been identified in response to an FOI request and the agency or minister decides it is appropriate to impose a charge, there is an expectation that the agency or minister will obtain an accurate estimate by sampling a reasonable selection of the relevant documents.

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<sup>19</sup> ‘GD’ and Department of the Prime Minister and Cabinet [2015] AICmr 46 [21].

- 4.76 A representative sample of at least 10 percent of the documents is considered an appropriate sample size to assess processing time.<sup>20</sup> This provides the agency or minister with an indication of the time that may be required to make a decision on the request. However where the request involves a large number of documents, a smaller sample size may be appropriate. In all cases, a representative sample is required.
- 4.77 Agencies and ministers should assess the amount of time it will take to search for and/or retrieve the documents held in the representative sample, as well as the amount of time it will take to examine, consider any exemptions that may apply, and prepare a decision for those documents. The figures derived from the representative sample should then be used to calculate the total processing time for the documents within the scope of the applicant's request. See Part 3 of these Guidelines for further discussion of sampling in the context of practical refusals under s 24AA(1)(a) of the FOI Act.

## Adjusting an estimated charge

- 4.78 After making a decision on an FOI request where a charge was estimated under s 9 of the Charges Regulations, an agency or minister is required to calculate the final charge based on the actual time taken to process the request, using the applicable charges in Schedule 1 (s 10(1)). The new charge may be different to the estimated charge. If the new charge is less than the amount already paid by an applicant, a refund of the difference *must* be made (s 10(5)(a)). If the new charge is higher than the amount already paid, that payment will be treated as a deposit on account of the charge (s 10(5)(b)).
- 4.79 The 2019 Charges Regulations introduce new provisions allowing for adjustment of an estimated charge after the FOI request has been processed — see ss 10(2) and (3).
- 4.80 Section 10(2) provides that if the estimate of the charge is *more* than the actual amount the applicant is liable to pay (when all the work has been done on the request), the agency or minister *must* decrease the charge payable to reflect the actual cost of processing the request. For example, if the initial request is for a large number of documents and the estimated charge is therefore high, but the applicant then reduces the scope of the request which reduces actual processing costs, the agency or minister *must* reduce the charge to the actual cost of processing the request.
- 4.81 Section 10(3) provides that if the estimate of the charge is *less* than the actual amount the applicant is liable to pay (when all work has been done on the request), the agency or minister *may* increase the charge payable to the actual amount of the charge. However, an agency or minister cannot increase the charge under s 10 if the agency or minister decides to refuse access to the requested document (s 10(3)(b)). For example, if a request is for access to two documents and a decision is made to refuse access to one document, a charge increased under s 10 can only include the cost of processing the document to which access was given. Similarly, if a decision is made to refuse access to parts of a document, an increased charge under s 10 can only include the cost of processing that part of the document to which access has been granted.
- 4.82 Consistent with the objects of the FOI Act, situations where it may be appropriate for an agency or minister to exercise the discretion not to increase the charge under s 10(3) include:

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<sup>20</sup> For example, in *Tager and Department of the Environment* [2014] AICmr 59 [24], a 10 percent sample of the documents was used to estimate the cost of processing the applicant's request.

- where the amount payable is substantially higher than the estimated charge
- where the charge was underestimated due to agency error or poor record keeping or
- inefficient FOI processing practices mean that accessing documents or processing the request takes longer than anticipated.

4.83 It is open to an agency or minister, when processing an FOI request, to give interim advice to an applicant that a charge may be higher than the estimated charge and the reasons why it may be higher; it is good administrative practice to do so. The applicant can be invited to revise either the scope of the request or the preferred form of access, with a view to reducing the charge.

## Deposits

4.84 An agency or minister, in notifying an applicant under s 29(1) of the FOI Act of a liability to pay a charge or estimated charge, may require the applicant to pay a deposit (s 29(1)(e) of the FOI Act, s 12(1) of the Charges Regulations). The deposit cannot be higher than \$20 if the notified charge is between \$25 and \$100, or 25 percent of a notified charge that exceeds \$100 (s 12(2)). The agency or minister can defer work on the applicant's request until the deposit is paid or a decision is made not to impose the charge following an application by the applicant (s 31(2)).

## Refunds of deposits

- 4.85 A deposit paid by an applicant does not have to be wholly or partly refunded unless the agency or minister:
- decides to reduce (to an amount lower than the deposit paid) or not impose a charge following an application by the applicant under s 29(4) (see also s 12(3)(a) of the Charges Regulations)
  - fails to make a decision on the applicant's FOI request within the statutory time limit, including any extension (s 12(3)(b)), or
  - sets a final charge, after making a decision on the FOI request, that is lower than the amount already paid as a deposit (s 10(5)(a)).
- 4.86 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. It is open to the agency or minister to refund a deposit paid for access to a document if access is refused in full.
- 4.87 The agency should refund the deposit in the same way the deposit was paid (for example, direct credit into a bank account). The FOI Act does not provide for the issuing of a 'credit note' to offset potential charges for future FOI requests.

## Collecting a charge generally

4.88 Section 3(4) of the FOI Act provides that functions and powers given under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost. In keeping with this object, the method of payment required by an agency should facilitate prompt access to documents.<sup>21</sup>

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<sup>21</sup> 'ND' and Department of Human Services (*Freedom of information*) [2017] AICmr 119 [25].

Requiring payment of a charge by cheque or money order, without giving the option of electronic payment, does not facilitate and promote access to documents at the lowest reasonable cost and is therefore inconsistent with the objects of the FOI Act.

- 4.89 Further, requiring payment by cheque involves additional handling to process and clear funds; it can also attract fees. Cheques usually take at least three business days to clear and delays the provision of prompt access to documents. Payment by electronic funds transfer, credit or debit card, or online payment (for example, BPAY) is faster, more efficient and less costly for both the applicant and the agency and gives best effect to the FOI Act object of facilitating and promoting access to information, promptly and at the lowest reasonable cost.
- 4.90 If an applicant is liable to pay a charge, the charge must be paid before access to documents can be given (s 11A(1)(b) of the FOI Act and s 11(1) of the Charges Regulations). 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 (s 11(2)). Payment of the charge cannot be required in advance of inspection or viewing, unless the agency or minister has made a decision under ss 9(1)(c), (2) and (3)(c) of the Charges Regulations estimating the probable length of the period of inspection or viewing.
- 4.91 The Information Commissioner is of the view that a charge assessed by an agency under the Charges Regulations is not a debt due to the Commonwealth that can be recovered by the agency. Although the FOI Act states that an agency may decide 'that an applicant is liable to pay a charge' and an applicant may signify agreement to pay the charge (s 29(1)), other elements necessary to create a debt due to the Commonwealth are absent. For example, neither the FOI Act nor the Charges Regulations state that an assessed charge is a debt due to the Commonwealth, nor do they confer jurisdiction on any court to enforce a debt. Further, an assessed charge is not necessarily a settled amount and the FOI Act provides its own limited mechanism to ensure assessed charges are paid before access is granted.

## Collecting the remainder of a charge where deposit paid

- 4.92 The FOI Act does not set a time limit for an applicant to pay the remaining balance of a charge after a decision is made on the FOI request. If the applicant fails to pay the remainder of a charge after being notified of a decision on the request, or cannot be contacted, the request could be on hand indefinitely. This is because s 11 of the Charges Regulations provides that any charge in respect of the request must be paid before access can be given to documents. If the applicant does not pay the charge, the requested documents cannot be released and there is no mechanism in the FOI Act to finalise the request. Further, as noted at [4.92], a charge assessed by an agency under the Charges Regulations lacks many features of a debt due to the Commonwealth that can be recovered by an agency.
- 4.93 Good administrative practice would have the agency or minister ask the applicant to respond within a specified timeframe after receiving written notice of a decision and reasons with respect to the request by doing one of the following:
- paying the balance of the charge
  - seeking internal review or IC review, or
  - withdrawing the FOI request.
- 4.94 The agency should advise the applicant that if they do not receive the remaining balance within the specified timeframe, the FOI request will be taken to have been withdrawn. While the FOI Act does not specify a timeframe for the applicant's response, noting that an

applicant has 60 days in which to seek IC review of a decision relating to the imposition of a charge or the amount of a charge, 60 days can be regarded as a reasonable period.

## Correction, reduction or waiver of charges

- 4.95 As outlined in [4.11]–[4.13] above, after receiving a preliminary estimate of the charge under s 29(1), it is open to the applicant to apply for reduction or waiver of the charge. Where the applicant contends that the 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.<sup>22</sup> If an applicant contends that a charge should be reduced or waived, the agency or minister has a general discretion to decide that question. Two matters set out under s 29(5) of the FOI Act must be considered:
- a) whether payment of the charge, or part of it, would cause financial hardship to the applicant or to a person on whose behalf the application was made, and
  - b) 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.
- 4.96 In addition to considering these two matters, an agency or minister may consider any other relevant matter and, in particular, should give genuine consideration to any contention or submission made by an applicant as to why a charge should be reduced or not imposed. An agency or minister cannot fetter the discretion conferred by s 29(4) of the FOI Act by adopting a rule that confines the matters that can be considered or the circumstances in which a charge will be reduced or not imposed. For example, where the applicant agreed to pay a charge in a previous FOI request, an agency or minister cannot rely on this fact to impose a charge for all subsequent FOI requests by the same applicant without considering the merits of each request for reduction or waiver.<sup>23</sup>
- 4.97 Moreover, an agency or minister should always consider whether disclosure of a document will advance the objects of the FOI Act, even if the applicant has not expressly framed a submission on that basis. The objects of the FOI Act include promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government’s activities (s 3).
- 4.98 Section 29(5) mandates what a decision maker must take into account when determining whether to reduce or not impose a charge; the section does not require the applicant to establish both financial hardship *and* that the giving of access to the document is in the general public interest or in the interest of a substantial section of the public.
- 4.99 An agency or minister is also entitled to consider matters that weigh against those relied on by an applicant. For example, an agency may decide it is appropriate to impose an FOI charge where:
- the applicant can be expected to derive a commercial or personal benefit or advantage from being given access and it is reasonable to expect the applicant to meet all or part of the charge<sup>24</sup>

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<sup>22</sup> For example, see *Tager and Department of the Environment* [2014] AICmr 59 and *‘DL’ and Department of Immigration and Border Protection* [2014] AICmr 119.

<sup>23</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

<sup>24</sup> However, the fact that the document might form the basis of a journalistic article is not enough to demonstrate that the applicant can be expected to derive a commercial or personal benefit from being given access to the documents, because not all

- the documents are primarily of interest only to the applicant and are not of general public interest or of interest to a substantial section of the public<sup>25</sup>
- the information in the documents has already been published by an agency and the documents do not add to the public record
- the applicant has requested access to a substantial volume of documents and significant work will be required to process the request.

4.100 An agency or minister may decide not to impose a charge wholly or in part, but where the charge is only partially reduced, it should fully explain and justify the reduced charge (s 29(8)). If an agency or minister accepts that disclosure of a document will be in the general public interest or that there will be financial hardship to the applicant, it may be difficult for it to justify why a charge has been reduced instead of not imposed.<sup>26</sup> This is discussed further below.

## Financial hardship

4.101 Whether payment of a charge will cause financial hardship to an applicant is primarily concerned with the applicant's financial circumstances and the amount of the estimated charge. Financial hardship means more than an applicant having to meet a charge from his or her own resources. The decision in *'AY' and Australian Broadcasting Corporation*<sup>27</sup> referred to the definition of financial hardship in guidelines issued by the Department of Finance for the purpose of debt waiver decisions:

Financial hardship exists when payment of the debt would leave you unable to provide food, accommodation, clothing, medical treatment, education or other necessities for yourself or your family, or other people for whom you are responsible.

4.102 Different hardship considerations may apply if the request is made by an incorporated body or an unincorporated association.<sup>28</sup> The mere fact that costs for FOI requests have not been budgeted for has been held to be a commercial decision, rather than a matter of a lack of funds.<sup>29</sup>

4.103 An applicant relying on this ground will ordinarily be expected to provide some evidence of financial hardship.<sup>30</sup> For example, the applicant may rely on (and provide evidence of) receipt of a pension or income support payment, or provide evidence of income, debts or assets. However, an agency should be cautious about conducting an intrusive inquiry into an applicant's personal financial circumstances. Agencies need to have regard to the objects of the Privacy Act, which include minimising the collection of personal information

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articles researched will be written or published: see *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

<sup>25</sup> For example, see *Tennant and Australian Broadcasting Corporation* [2014] AATA 452.

<sup>26</sup> See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 and *'CK' and Department of Human Services* [2014] AICmr 83.

<sup>27</sup> [2014] AICmr 7 [20]. The definition has been retained in Finance guidelines that replace those referred to in the decision, see <https://www.finance.gov.au/resource-management/discretionary-financial-assistance/waiver-debt-mechanism/information-applicants/>

<sup>28</sup> *Australian Pain Management Association and Department of Health* [2014] AICmr 49.

<sup>29</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

<sup>30</sup> For example, see *'CK' and Department of Human Services* [2014] AICmr 83 [13]-[14]; *'AY' and Australian Broadcasting Corporation* [2014] AICmr 7 [18]-[24] and *'DL' and Department of Immigration and Border Protection* [2014] AICmr 119 [21]-[25].

to that required for the particular function or activity. For example, in this case, to make a decision whether to waive or reduce a charge.

- 4.104 Where an applicant demonstrates that payment of the charge will cause financial hardship, it may be difficult for the agency to justify why the imposition of a charge would be appropriate.<sup>31</sup>

## Public interest

- 4.105 The FOI Act requires an agency or minister to consider ‘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’ (s 29(5)(b)).<sup>32</sup> This test is different to, and can be distinguished from, public interest considerations that may arise under other provisions of the FOI Act.
- 4.106 Specifically, the public interest in s 29(5)(b) is different to the public interest test in s 11A(5) that applies to conditionally exempt documents. Nor will s 29(5)(b) be satisfied only by a contention that it is in the public interest for an individual with a special interest in a document to be granted access to it, or that an underlying premise of the FOI Act is that transparency is in the public interest.
- 4.107 An applicant relying on s 29(5)(b) should identify or specify the ‘general public interest’ or the ‘substantial section of the public’ that will benefit from this disclosure (s 29(1)(f)(ii)). This may require consideration of both the content of the documents requested and the context in which their public release would occur. Matters to be considered include whether the information in the documents is already publicly available, the nature and currency of the topic of public interest to which the documents relate, and the way in which a public benefit may flow from the release of the documents.<sup>33</sup>
- 4.108 There is no presumption that the public interest test is satisfied by reason only that the applicant is a Member of Parliament, a journalist, or a community or non-profit organisation. It is necessary to go beyond the status of the applicant and to look at all the circumstances. The fact that a media organisation may derive commercial benefit from publication of a story based on an FOI request is a relevant consideration, but it is not by itself a basis for declining to reduce or waive a charge.<sup>34</sup> Nor is an applicant required to show that they will publish the document,<sup>35</sup> although the applicant may be expected to draw a link between being granted access to the documents and a derivative benefit to either the general public interest or a substantial section of the public.
- 4.109 The ‘public interest’ is a broad concept that cannot be exhaustively defined. When considering the public interest, it is important that the agency or minister direct its attention to the advancement of the interests or welfare of the public, and this will depend

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<sup>31</sup> For example, in *‘CK’ and Department of Human Services* [2014] AICmr 83, the Acting Freedom of Information Commissioner was satisfied that payment of a charge would cause financial hardship to the applicant and decided that the charge should be waived in full.

<sup>32</sup> This question is considered in a number of IC review and AAT decisions. See, for example, *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 54; *Rita Lahoud and Department of Education and Training* [2016] AICmr 5; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 and *‘DL’ and Department of Immigration and Border Protection* [2014] AICmr 119.

<sup>33</sup> *Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [21].

<sup>34</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65.

<sup>35</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [22].

on each particular set of circumstances.<sup>36</sup> Further, the public interest is not a static concept confined or defined by strict reference points.<sup>37</sup> The following examples nevertheless illustrate circumstances in which the giving of access may be in the general public interest or in the interest of a substantial section of the public:

- The document relates to a matter of public debate, or to a policy issue under discussion within an agency, and disclosure will assist public comment on, or participation in, the debate or discussion.<sup>38</sup> For example, the regulation of firearms in the context of the Australian economy and public safety (Jon Patty and Attorney-General's Department (Freedom of information) [2018] AICmr 28 [29]); coal mining by an Australian business in Papua New Guinea (Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information) [2018] AICmr 13 [32]) and ASIC's regulation of major corporate financial institutions (Ben Butler and Australian Securities and Investments Commission (Freedom of information) [2017] AICmr 18 [28]–[29]).
- The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public as to why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.<sup>39</sup>
- The document will add to the public record on an important and recurring aspect of agency decision making.<sup>40</sup>
- The document is to be used for research that is to be published widely or that complements research being undertaken in an agency or elsewhere in the research community.<sup>41</sup>
- The document is to be used by a community or non-profit organisation in preparing a submission to a parliamentary or government inquiry, for example, on a law reform, social justice, civil liberty, financial regulation, or environmental or heritage protection issue.<sup>42</sup>

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<sup>36</sup> *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 [9].

<sup>37</sup> *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 [54].

<sup>38</sup> Such as Australia's humanitarian refugee resettlement program and deaths in immigration detention: see *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 and *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2014] AICmr 100.

<sup>39</sup> Such as the use of Commonwealth resources and expenditure of public funds: see *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of information)* [2015] AATA 584; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 54; *Tasmanian Special Timbers Alliance Inc and Department of the Environment and Energy (Freedom of information)* [2017] AICmr 124 and *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131.

<sup>40</sup> Such as the expenditure of taxpayer money by contractors funded to provide overseas development assistance on behalf of the Australian Government: see *Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of Information)* [2019] AICmr 15 [40]. Note also 'CF' and *Department of Finance* [2014] AICmr 73 and 'CW' and *Department of Finance* [2014] AICmr 99 on the issue of debt waiver. See also *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131 [33] regarding how 'taxpayer money is being spent in the ... context of international travel for overseas visitors or delegations'.

<sup>41</sup> See *McBeth and Australian Agency for International Development* [2012] AICmr 24 and *Knapp and Australian Securities and Investments Commission* [2014] AICmr 58.

<sup>42</sup> See *Fingal Head Community Association Inc and Department of Infrastructure and Regional Development* [2014] AICmr 70 and *Australian Pain Management Association and Department of Health* [2014] AICmr 49.

- The document is to be used by a member of Parliament in parliamentary or public debate on an issue of public interest or general interest in the member's electorate.<sup>43</sup>
- The document is to be used by a journalist to prepare a story for publication that is likely to be of general public interest.<sup>44</sup>

- 4.110 In applying these and related examples, an agency or minister may also consider whether the range or volume of documents requested by an applicant can be considered reasonably necessary for the purpose of contributing to public discussion or analysis of an issue.
- 4.111 The AAT decision of *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)*<sup>45</sup> explains that an agency should compare the number of documents within the scope of an FOI request and the cost of processing against the subject matter of the request when deciding whether to exercise its discretion to waive a charge on public interest grounds.<sup>46</sup> The decision in *Tasmanian Special Timbers Alliance Inc and Department of the Environment and Energy (Freedom of information)*<sup>47</sup> applied the balancing exercise in *MacTiernan* to decide whether the discretion to waive a charge on public interest grounds should be exercised.<sup>48</sup> To apply the *MacTiernan* balancing exercise, it is not necessary for the subject matter of the FOI request to be readily quantifiable in financial terms.<sup>49</sup>
- 4.112 Where an agency accepts that giving access to the document in question would be in the general public interest but decides not to waive the charge, the agency should adequately justify why it is appropriate for the charge to be imposed in the circumstances. The agency or minister should also consider whether imposing the charge would be at odds with the 'lowest reasonable cost' objective in s 3 of the FOI Act.<sup>50</sup>
- 4.113 An agency or minister cannot exercise the discretion in s 29(4) solely on the basis that, if the charge is not paid in full, the applicant would not be meeting the reasonable cost of processing their FOI application.<sup>51</sup> Nor should an agency or minister take into account

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<sup>43</sup> See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584 and *Fletcher and Department of Broadband, Communications and the Digital Economy (No. 3)* [2012] AICmr 15.

<sup>44</sup> See *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65; *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 54; *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 131 and *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2018] AICmr 13.

<sup>45</sup> [2015] AATA 584 [30].

<sup>46</sup> The Tribunal compared the number of documents identified (88 documents, comprising 498 pages) and the cost of processing the FOI request (\$2,291.36) against the subject of the FOI request (a proposed \$1 billion (plus) government (taxpayer) funded infrastructure project) and found that giving access to the documents in question would be in the general public interest or at the very least, in the interest of a substantial section of the public.

<sup>47</sup> [2017] AICmr 124 [33]–[34].

<sup>48</sup> The Information Commissioner compared the number of documents identified (510 documents, comprising 2,035 pages) and the cost of processing the FOI request (\$3,154) against the subject of the FOI request (departmental oversight of significant grants, including a \$2.2 million dollar grant to a non-profit organisation) and found that giving access to the documents in question would be in the general public interest.

<sup>49</sup> See 'MR' and *Department of Infrastructure and Regional Development (Freedom of information)* [2017] AICmr 102 [35]–[36]; *David Albuquerque and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 67 [24] and 'KW' and *Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 21 [25]–[28].

<sup>50</sup> This consideration is particularly relevant 'where the charge was based on an inefficient records management system and therefore the charge would transfer the cost of that inefficiency to the FOI applicant': *Ben Butler and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 18 [30].

<sup>51</sup> *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8 [28].

whether an applicant may use a document in a manner that may lead to misinterpretation or misunderstanding in public debate.<sup>52</sup>

## Other grounds for reduction or waiver

4.114 An agency or minister has a general discretion to reduce or not impose a charge, and this discretion is not limited to financial hardship or public interest grounds. The following non-exhaustive list of examples illustrates circumstances in which it may be appropriate to reduce or not impose a charge:

- The cost of calculating and collecting a charge might exceed the cost to the agency of processing the request.<sup>53</sup>
- A member of Parliament has requested access on behalf of a constituent to a document containing personal information, for which the constituent would not have been required to pay a charge.
- The applicant needs the document for a pending court or tribunal hearing.
- Giving access to the document could assure the agency that it has accorded procedural fairness to the applicant in an administrative proceeding the agency is conducting.
- The document is required for research purposes for which no commercial benefit will flow to the applicant.<sup>54</sup>
- Reduction or waiver of the charge would enhance the agency-client relationship.
- The agency was able to identify and retrieve the document easily and at minimal cost.
- The Information Commissioner or AAT has decided in similar circumstances that charges should not be imposed.

4.115 It may also be appropriate to reduce or waive a charge if the applicant responds to a charge notice by revising the terms of their request so that it requires less work to process.<sup>55</sup> However, where an agency or minister decides only to reduce rather than waive a charge in these circumstances, it will generally be appropriate to provide the applicant with a re-calculated charge estimate before making a final decision about the charge. Given the object of the FOI Act to provide prompt access at the lowest reasonable cost, agencies should be particularly careful to justify imposing a charge where it has previously been decided that a practical refusal reason exists, but either through consultation or on IC review, the practical refusal reason no longer exists or is found not to exist.<sup>56</sup>

## Agencies may retain charges collected

4.116 Charges imposed under the FOI Act are prescribed as a received amount for the purposes of s 27 of the *Public Governance, Performance and Accountability Rule 2014*. Agencies may retain such charges under s 74(1) of the *Public Governance, Performance and Accountability Act 2013*. For further details see Resource Management Guide No. 307: Retainable receipts,

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<sup>52</sup> *Real Health Care Reform Pty Ltd and Department of Health and Ageing* [2013] AICmr 60 [28].

<sup>53</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [31].

<sup>54</sup> *Knapp and Australian Securities and Investments Commission* [2014] AICmr 58 [41].

<sup>55</sup> *Rita Lahoud and Department of Education and Training* [2016] AICmr 5 [32]-[33].

<sup>56</sup> *Rita Lahoud and Department of Education and Training* [2016] AICmr 5 [38].

dated December 2017, which is available on the Department of Finance's website at [www.finance.gov.au](http://www.finance.gov.au).

## Review of decision to charge

4.117 A decision under the FOI Act declining to reduce a charge or not impose a charge is an access refusal decision and therefore subject to internal review, IC review and review by the AAT (ss 54, 54L and 57A). Each is a merit review process, in which the review authority will review whether the charge was correctly assessed, whether the charge should be reduced or waived on financial hardship or public interest grounds, or more generally whether the discretion to impose the charge should be exercised differently. For further guidance on internal review and review by the Information Commissioner, see Parts 9 and 10 of these Guidelines.

## Notifying the internal review applicant of an affirmed charges decision

4.118 The FOI Act does not set a time limit for an applicant to respond after the applicant has contested a charge and the agency has carried out an internal review. If the applicant fails to pay the new or reaffirmed charge or cannot be contacted, the request could be on hand indefinitely.

4.119 Good administrative practice would have the agency ask the applicant to respond to the written notice of an internal review decision (s 54C(4)) within a specified timeframe by doing one of the following:

- paying the charge or any deposit specified by the agency
- seeking an IC review of the charge, or
- withdrawing the FOI request.

4.120 The agency should advise the applicant that if they do not receive a response within the specified timeframe, the FOI request will be taken to have been withdrawn. While the FOI Act does not specify a timeframe for the applicant's response, 60 days can be regarded as a reasonable period because this is the time period during which the applicant can apply for IC review.