

PART 4 — CHARGES FOR PROVIDING ACCESS

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PART 4 — CHARGES FOR PROVIDING ACCESS

4.1 Section 29 of the FOI Act authorises an agency or minister to impose a charge for providing access to a document. The charge is to be assessed in accordance with the *Freedom of Information (Charges) Regulations 1982* (Charges Regulations). Important changes were made to the Act and the Charges Regulations in 2010 to abolish fees and some charges. FOI charges apply only to the initial access decision under Part III of the Act.

Guiding principles

4.2 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 under reg 3 of the Charges Regulations. In exercising that discretion the agency or minister should take account of the ‘lowest reasonable cost’ objective, stated in the objects clause 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.¹

4.3 A charge must not be used to discourage an applicant from exercising the right of access conferred by the FOI Act. Rather, charges should fairly reflect the work involved in providing access to documents on request. Implicit in the lowest reasonable cost objective is a prerequisite for sound record keeping so that an agency’s documents can be readily identified and found when an FOI request is received.

4.4 A decision to impose a charge should be transparent. An agency should ensure that the notice to an applicant of a charge fully explains and justifies that charge. This can avoid a later dispute over the imposition or amount of a charge.

4.5 Government policy before the 2010 amendments to the FOI Act required charges to be imposed unless an applicant made a case for a reduction or remission of charges. The Information Commissioner takes the view that this policy is not reflected in the Act as amended in 2010 and that agencies are not expected to exercise the discretion conferred by the Charges Regulations to impose a charge, unless in the agency’s view it is appropriate to do so. It is open to agencies to develop their own charging policy consistent with the legislation and these guidelines (see paragraph 4.60 below).

Summary of charges and legislative provisions

Charges

4.6 There is no charge for making:

- an application to an agency or minister for access to a document under Part III of the Act

¹ An assessment of charges based on the maximum rates outlined in the Schedule 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].

- an application for amendment or annotation of a personal record under Part V of the Act
- an application for internal review of a decision under Part VI of the Act
- an application for review by the Information Commissioner under Part VII of the Act
- a complaint to the Information Commissioner under Part VIIB of the Act.

4.7 The charges that may be imposed by an agency or minister for an initial access decision are specified in the Schedule to the Charges Regulations. Part I of the Schedule specifies charges related to making a decision on a request and Part II specifies charges for giving access to a document. The charges are listed in Table 1 below. Two important exceptions, discussed below at paragraphs 4.13–4.16, are that there is no charge for providing access to an individual’s own personal information under the FOI Act or for providing access outside the statutory processing period unless that period has been extended before the deemed decision date and the agency makes a decision within that extended period.

Table 1: Charges listed in Schedule to the Charges Regulations

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

4.8 A fee is payable under reg 19 of the *Administrative Appeals Tribunal Regulations 1976* for an application to the AAT for review of a decision of the Information Commissioner. The fee, which is increased every two years in line with the Consumer Price Index, was \$816 on 1 July 2012. The fee does not apply in prescribed circumstances that include an application by a person receiving legal aid or holding a Commonwealth health care or pensioner concession card (reg 19(6)), or payment of the fee being waived by a Registrar, District Registrar or Deputy District Registrar on financial hardship grounds (reg 19(6A)). Further information is set out in the AAT's website at www.aat.gov.au/FormsAndFees/Fees.htm.

Legislative provisions

4.9 The main provisions in the FOI Act and Charges Regulations concerning the imposition of charges are summarised in Table 2.

Table 2: Charges — summary of main legislative provisions

Legislative provision	Operation
Regulation 3	An agency or minister may decide that an applicant is liable to pay a charge at the rate fixed in the Schedule.
Section 29(1)	If an agency or minister decides that an applicant is liable to pay a charge, the applicant must be given a written notice of liability to that effect, including a preliminary assessment of the charge and all the matters listed in paragraph 4.19 below.
Section 29(2)	If an applicant does not notify the agency or minister as required within 30 days (or such further period allowed by the agency) the FOI request is taken to have been withdrawn (see paragraph 4.27 below).
Section 29(4), (5), (6)	An agency or minister must, within 30 days of receiving an applicant's contention on charges, make a decision whether to correct, reduce or waive a charge. The agency or minister must take into account whether payment of the charge would cause financial hardship, or whether giving access would be in the public interest (see paragraphs 4.44–4.49 below).
Section 29(7)	Failure by the agency or minister to make a decision within 30 days is taken to be a decision that the amount of the charge is the figure specified in the notice of preliminary assessment (see paragraph 4.44 below).
Section 29(8), (9)	If an agency or minister decides to reject an applicant's request to reduce or waive a charge, the applicant is to be given a written notice of the decision, the reasons for decision, and details of the applicant's right to complain to the Information Commissioner or seek an IC review (see paragraph 4.44 below).
Regulation 5	There is no charge for providing access to an applicant's personal information or for providing access outside the statutory processing period unless the Information Commissioner has extended that period (see paragraph 4.16 below).

Legislative provision	Operation
Regulation 9	In issuing a notice of a charge under s 29, an agency or minister may estimate the charge (based on the Schedule) if all steps necessary to make a decision on the request have not yet been taken.
Regulation 10	An agency or minister may adjust an estimated charge, after taking all steps necessary to make a decision on a request.
Section 11A Regulation 11	An applicant shall pay the required charge before being given access to a document, except for a charge for an officer to supervise inspection, hearing or viewing of a document.
Regulation 12	An agency or minister may require an applicant to pay a deposit of \$20 for an estimated charge of between \$20 and \$100 or 25% of the estimated charge if greater than \$100.
Section 31	If an applicant is notified during the statutory processing period that a charge is payable, that period is extended until the applicant pays the charge or is notified by the agency following a review that no charge is payable.

Charges are discretionary

4.10 Agencies and ministers have a discretion:

- whether to impose a charge for the staff time and resources expended in processing an FOI request (reg 3)
- to impose a lower charge than the charge specified in the Charges Regulations (reg 3)
- to reduce or waive a charge upon receiving a request from the applicant (s 29(4)) (see paragraphs 4.44–4.49 below).
- to draw an applicant’s attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information (s 3A(2)(b)).

4.11 In applying the Schedule to the Charges Regulations, agencies and ministers should bear in mind that the Schedule was first written in 1982, and that some specific chargeable activities may be outmoded. For example, the use of agency computers to produce copies of electronic documents is nowadays usually a negligible expense. On 24 March 2009, the Government announced that it would ask the Information Commissioner to undertake a comprehensive review of charges within 12 months of the Commissioner’s appointment. Pending any such review of the charging provisions, agencies and ministers’ offices should be guided by the ‘lowest reasonable cost’ objective in the FOI Act in deciding whether a charge specified in the Charges Regulations is warranted.

The Goods and Services Tax

4.12 The Goods and Services Tax (GST) is not payable on FOI charges. Section 81-5 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 excluded from GST in a written

determination of the Commonwealth Treasurer. Charges under the FOI Act are included in the Treasurer's Determination, last made on 15 December 2010.

Exceptions

Applicant's personal information

4.13 No charge is payable if an applicant is seeking access to a document that contains their own personal information (reg 5(1)).² 'Personal information' is defined in s 4(1) of the Act:

personal information means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Section 6 of the Privacy Act contains an identical definition of 'personal information'.

4.14 In essence, personal information is information about an identified or identifiable individual. The information may be private in nature or publicly known. It may be factual, descriptive or an opinion about that individual. The decisive quality is the connection between the information and an individual.

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

Decision not made within statutory time limit

4.16 Section 15(5)(b) of the Act provides that an applicant is to be notified of a decision on a request not later than 30 days after an agency or minister received the request. This period can be extended by an agency or minister to facilitate consultation with an affected third party or foreign government or organisation (s 15(6),(8)), by agreement with the applicant (s 15AA), or by the Information Commissioner (s 15AB). If an applicant is not notified of a decision on a request within the statutory time limit (including any extension), the agency or minister cannot impose a charge for providing access, even if the applicant was earlier notified that a charge was payable (reg 5(2), (3)). If a deposit was paid by the applicant it is to be refunded (reg 14).

4.17 If an agency fails to make a decision within the applicable statutory time limit, resulting in a deemed decision, the Information Commissioner may grant an extension of time under s 15AC on the agency's application. In these circumstances the agency may

² Alternatively, an individual may seek access to his or her personal information under Information Privacy Principle 6 of s 14 of the Privacy Act.

proceed to make an actual decision but cannot impose a charge because the decision is still regarded as out of time for charging purposes (reg 5). Agencies should distinguish carefully between this situation where there is a deemed decision and that where processing time is extended before the expiry of the original 30-day period (see paragraph 4.16 above).

Decision making time

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

Notifying, estimating, calculating, imposing and collecting charges

Notifying a charge

4.19 Section 29(1) provides that an applicant must be given notice in writing when an agency or minister decides under the Charges Regulations that the applicant is liable to pay a charge. 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 of calculation
- (c) the applicant's right to contend that the charge is wrongly assessed or should be reduced or waived
- (d) that the agency or minister, in considering any such request, 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 would be in the public interest
- (e) the amount of any deposit payable by the applicant (see also reg 13)
- (f) the obligation on the applicant, within 30 days or such further period allowed by the agency or minister, to agree to pay the charge, to dispute the charge or seek a waiver or reduction, or to withdraw the FOI request, and
- (g) that the FOI request will be taken to have been withdrawn if the applicant fails to respond within that period.

4.20 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 waive 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 to waive the charge or fails to make a decision on the applicant's FOI request within the statutory time limit, including any extension (reg 14)
- the applicant is not entitled to have access to any document until all charges are paid (s 11A(1)(b)). This rule does not apply to a supervision charge unless the applicant has received an estimate of the charge (see paragraph 4.29 below).

4.21 As discussed below at paragraph 4.44, an applicant upon receiving a notice that a charge is payable may apply to the agency or minister for the charge to be corrected, reduced or waived. If the agency or minister decides not to exercise this discretion as requested, the applicant may seek internal review or IC review or make a complaint to the Information Commissioner.

Estimating a charge

4.22 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 (reg 9). In practice, the preliminary assessment may be based on two elements:

- a charge (based on the Charges Regulations) for work already done by the agency or minister, for example, in search and retrieval of documents
- an estimated charge for work still to be done (reg 9).

4.23 The estimate based on work still to be done can relate to any item listed in the Charges Regulations, for example:

- a charge for further action that may be required to make a decision whether to grant access — such as search and 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 supervised inspection by agency personnel of inspection, hearing or viewing a document.

4.24 It is important that an estimate of charge is realistic and as accurate as possible. An agency or minister should be mindful that an applicant may think an estimate is set unreasonably high so as to hinder the applicant from pursuing their FOI request. It is prudent for an agency or minister in estimating a charge to be guided by previous experience in dealing with access requests of a similar nature. Furthermore, as discussed at paragraph 4.32 below, the estimate should be based on an assumption that the agency or minister maintains a high quality record system that enables easy identification and location of documents.

Adjusting an estimated charge

4.25 After making a decision on a request, an agency or minister is required to calculate the amount payable, based on the Charges Regulations (reg 10(1)). The new charge may be different from the estimated charge. A higher amount cannot be charged if the agency or minister decides not to grant the request for access (reg 10(2)). A higher amount can be charged only if the agency's decision is to give access to all documents without deletions and in the form requested (reg 10(3)). If the new charge is less than the amount already paid by an applicant, a refund of the difference shall be made (reg 10(4)(a)). If the new charge is higher than an amount already paid, that payment shall be treated as a deposit on account of the charge (reg 10(4)(b)).

4.26 It is open to an agency or minister, while processing an FOI request, to give interim advice to an applicant that a charge may be higher than the estimated charge. 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. Alternatively, the agency or minister could give the applicant access at that stage to documents that have been cleared for disclosure and ask the applicant to agree to further work on the request. If the amount payable is substantially higher than the estimated charge, the agency or minister should also consider not imposing the full charge, especially if the underestimate is due to agency error. This is consistent with the principle of providing access at the lowest reasonable cost.

Deposits

4.27 An agency or minister, in notifying an applicant under s 29(1) of a liability to pay a charge or estimated charge, may require the applicant to pay a deposit (ss 29(1), 29(3), reg 13). The deposit cannot be higher than \$20 if the notified charge is between \$25 and \$100, or 25% of a notified charge that exceeds \$100 (reg 12). The agency or minister can defer work on the applicant's request until the deposit is paid or a decision is made to waive the charge following a request from the applicant. If a deposit is not paid within 30 days or such further period allowed by the agency or minister, the FOI request is taken to have been withdrawn (s 29(2)).

4.28 A deposit paid by an applicant is not wholly or partly refundable unless the agency or minister:

- decides to reduce or waive a charge following a request from the applicant under s 29(3)
- fails to make a decision on the applicant's FOI request within the statutory time limit, including any extension (reg 14), or
- sets a final charge, after making a decision on the FOI request, that is lower than the amount already paid as a deposit (reg 10(4)(a)).

Collecting a charge

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

4.30 It is not clear, and has not yet been authoritatively resolved, whether a charge assessed by an agency under the FOI Charges Regulations is a debt due to the Commonwealth that can be recovered by an agency. While 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 are either absent or uncertain. For example, neither the FOI Act nor the Charges Regulations declare that an assessed charge is a debt due to the Commonwealth; nor do they confer jurisdiction upon any court to enforce a debt; an assessed charge is not necessarily an

ascertained or settled amount; and the FOI Act provides its own limited mechanism to ensure that assessed charges are paid before access is granted.

Charge for search or retrieval time

4.31 An agency or minister can charge for ‘the time spent ... in searching for or retrieving [a] document’ (Schedule, Part I, Item 2). This encompasses time spent:

- searching a file index to establish the location of a document
- physically locating a document and removing it from a file
- searching a file to locate a document
- consulting relevant officers to determine if a document exists.

4.32 An underlying assumption in calculating search and retrieval time is that the agency or minister maintains a high quality record system. Search and 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 (reg 2(2)(a)) or, if no such indication is given, in the place that reasonably should have been indicated in the filing system (reg 2(2)(b)). In summary, applicants cannot be disadvantaged by poor or inefficient record keeping by agencies or ministers. Time wasted by an officer in 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. For this purpose, the ‘filing system’ of an agency or minister should be taken as including central registries as well as other authorised systems used to record the location of documents.

Charge for decision making time

4.33 An agency or minister can charge for the time spent:

... in deciding whether to grant, refuse or defer access to [a] document or to grant access to a copy of the document with deletions, including the time spent

- (a) in examining the document;
- (b) in consultation with any person or body;
- (c) in making a copy with deletions; or
- (d) in notifying any interim or final decision on the request (Schedule, Part I, Item 5).

Item 5 further provides that there is no charge for the first five hours of decision making time.

4.34 Other actions not specifically listed in Item 5 could also be included in the charge for decision making. Examples are the time spent by an agency in preparing either a schedule of documents or a recommendation for the authorised decision maker. On the other hand, the time of other officers whom the decision maker consults in the course of making a decision would not ordinarily fall within that definition, as the authorised decision maker is expected to have the necessary skill and understanding to decide access issues. An agency or minister should also be cautious in including a copying or printing charge in respect of documents assembled for the decision maker. It is more appropriate that any such charge is imposed as part of the charge for providing access after a decision is made to grant access (as provided for in Schedule, Part II, Item 2).

4.35 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. It is important to note that the Charges Regulations stipulate a single hourly rate that applies regardless of the classification or designation of the officer who undertakes the work involved (s 94(2)(b)).

4.36 The Charges Regulations do not stipulate a method for charging for part of an hour of decision making time. The Information Commissioner's view is that if an agency or minister is to impose such a charge there should be a proportionate reduction in the charge.

Charge for actual costs incurred by agency

4.37 An agency or minister can impose a charge that does not exceed the actual costs incurred by the agency or minister in:

- retrieving and collating information stored on a computer or on like equipment (Charges Regulations, Schedule, Part I, Item 3)
- retrieving and collating information stored on a computer and using the computer or other equipment to make deletions from the record of the information (Part II, Item 4)
- producing a computer tape or disc (Part II, Item 4A)
- arranging for an applicant to hear a recording or view a stored image (Part II, Item 5)
- producing a copy of a recording, film or videotape (Part II, Item 6)
- posting or delivering a document to an applicant, as requested by the applicant (Part II, Item 8).

4.38 The 'actual cost' can include costs that are necessarily incurred in providing access to a document. For example, the actual cost of posting an item can include packaging. Similarly, the actual cost of producing a document by computer could include:

- the labour cost of staff who retrieve and collate the information stored on the computer
- the cost of materials that are consumed in the production process
- a proportion of indirect costs, to cover operation and servicing of the computer.

4.39 Modern digital technology has greatly reduced the cost of replicating electronically-stored documents, recordings and visual images. This should be reflected in FOI charges. Agencies and ministers should as far as practicable make use of the latest technology to give applicants access to documents at the lowest reasonable cost. FOI applicants should not be disadvantaged by inefficient electronic or document filing systems used by agencies or ministers.

4.40 An agency or minister must keep a full and accurate record of actual costs incurred, to enable the Information Commissioner when undertaking a review to examine whether a charge is justified.

Charge for access in an alternative form

4.41 An applicant who requests access in a particular form is entitled to receive it in that form, unless one of the exceptions in s 20(3) applies (see Part 3 of these Guidelines). If an alternative form of access is given, a higher charge cannot be imposed than if access had been given in the form requested by the applicant (s 20(4)).

4.42 If an applicant does not specify a particular form of access, the charge imposed cannot be higher than if access had been given in the form to which the lowest charge applies (reg 8).

Charge for access to exempt document

4.43 It may be 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 Act. For example, an agency can provide access to a document for which an exemption claim could be made (s 3A(2)(b)). 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)).

Correction, reduction or waiver of charges

4.44 An applicant who receives a notice under s 29(1) advising that a charge is payable may apply in writing to the agency or minister for the charge to be corrected, reduced or waived (s 29(4)). The application must be made within 30 days of receiving the notice or within such further period as the agency or minister allows (s 29(1)(f)). The application should set out the applicant's reasons for contending that the charge has been wrongly assessed or should otherwise be reduced or waived (s 29(1)(f)(ii)). The agency or minister is to provide a written notice of decision to the applicant, within 30 days or earlier if practicable (s 29(6)). If the decision is to deny the applicant's request in whole or in part, the notice of decision must set out the reasons for the decision and the applicant's right to seek internal or IC review of that decision or to complain to the Information Commissioner and the procedure for doing so (s 29(8)–(10)).

4.45 If an applicant contends that a charge has been wrongly assessed, the central issue to be considered is whether relevant provisions of the Act and the Charges Regulations have been correctly understood and applied. If, on the other hand, an applicant contends that a charge should be reduced or waived, the agency or minister has a general discretion to decide the case. Two matters stipulated in the Act (s 29(5)) must be considered:

- whether payment of the charge, or part of it, would cause financial hardship to the applicant or a person on whose behalf the application was made, and
- 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.

4.46 In addition to considering those 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 waived. An agency or minister cannot fetter the discretion conferred by s 29(4) of the Act by adopting a rule that confines the matters that will be considered or the circumstances in which a charge will be reduced or waived. Moreover, an agency or minister should always

consider whether disclosure of a document would advance the objects of the Act, even though an applicant has not expressly framed a submission on that basis. The objects of the Act include promoting better informed decision making, and increasing scrutiny, discussion, comment and review of the Government's activities (s 3).

4.47 An agency or minister is also entitled to consider matters that weigh against those relied upon by an applicant. The policy of the Act is that charges can be imposed for search and retrieval, decision making, inspection, electronic production, copying and delivery. By way of example, an agency may decide that 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 FOI charge
- 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
- the information in the documents has already been published by an agency and the documents do not add to the public record, or
- the applicant has requested access to a substantial volume of documents and significant work would be required to process the request.

4.48 It is open to an agency or minister to impose a charge even though it would cause financial hardship to the applicant, or a public interest purpose for disclosure has been established.³ However, there is no onus on an applicant to justify his or her case. It is for an agency or minister to reach a decision on the merits of the request.

4.49 An agency or minister may waive a charge wholly or in part. For example, a reduction in the charge payable may adequately address an applicant's claim that payment of the charge would cause financial hardship. On the other hand, if an agency or minister accepts that disclosure of a document would be in the general public interest, it may be harder to explain why a charge has been reduced instead of waived in full.

Financial hardship

4.50 Whether payment of a charge would cause financial hardship to an applicant is primarily concerned with the applicant's financial circumstances and the amount of the estimated charges. Financial hardship means more than an applicant having to meet a charge from his or her own resources.

4.51 An applicant relying on this ground could ordinarily be expected to provide some evidence of financial hardship. For example, the applicant may rely upon (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 policy of the Privacy Act, which is to minimise the collection of personal information to what is required for administrative decision making.

³ See *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8.

Public interest

4.52 The 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)).⁴ The issue is not whether it is in the public interest to waive or reduce a charge, nor whether it is in the public interest for a particular applicant to be granted access to a document. The public interest test for waiver is different also from the public interest test in s 11A(5) that applies to conditionally exempt documents.

4.53 In applying s 29(5)(b) it is important to identify the ‘general public interest’ or the ‘substantial section of the public’ that would benefit from disclosure. The FOI applicant may benefit from disclosure, but for the purposes of s 29(5)(b) there should also be a benefit flowing more generally to the public or a substantial section of the public. Often this will require consideration both of the content of the documents and the context of their release — for example, whether the documents relate to a matter of public debate or for decision by government. In other cases it may be clear from the applicant’s request that, if the document sought exists, the Act does not apply to it. In these circumstances, the decision maker would not need to consider the contents of the document.⁵

4.54 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 other circumstances. The fact that a media organisation may derive commercial benefit from publication of a story based on an FOI Act request is a relevant consideration, but is not alone a basis for declining to reduce or waive a charge. Nor is an applicant required to show that they will publish the document.⁶ The decisive issue is whether disclosure (and any resulting media item) will be of general or identifiable public interest.

4.55 An important change to the FOI Act in 2010 should also be taken into account in applying s 29(5)(b). From 1 May 2011 agencies are required, with some exceptions, to publish on a website information about documents that have been disclosed following a request under the Act (s 11C). The policy of the Act is that documents disclosed in response to individual requests should be made available to the public generally. Agencies and ministers should be more inclined than they may have been prior to the changes to decide that disclosure of a document — especially a document relating to the policy processes of government — would be of general or identifiable public interest and that a charge should not be imposed.

⁴ This question is considered in a number of IC review decisions. See, for example, *Besser and Department of Infrastructure and Transport* [2011] AICmr 2; *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8; *Besser and Department of Industry, Innovation, Science, Research and Tertiary Education* [2012] AICmr 13; *Fletcher and Department of Broadband, Communications and the Digital Economy (No. 3)* [2012] AICmr 15; *Briggs and Department of the Treasury (No. 2)* [2012] AICmr 17; *McBeth and Australian Agency for International Development* [2012] AICmr 24.

⁵ See, for example, *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184, [29].

⁶ *Encel and Secretary, Department of Broadband Communications and the Digital Economy* [2008] AATA 72 at paragraph [90].

4.56 The ‘public interest’ is a concept of wide import that cannot be exhaustively defined.⁷ The following examples nevertheless illustrate circumstances in which it may be thought appropriate by an agency or minister to reduce or waive a charge under s 29(5)(b) for granting access to a document under the Act:

- The document relates to a matter of public debate, or a policy issue under discussion within an agency, and disclosure of the document would assist public comment on or participation in the debate or discussion.⁸
- The document relates to an agency decision that has been a topic of public interest or discussion, and disclosure of the document would 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.⁹
- The document is to be used by a researcher in research that is to be published widely or that complements research being undertaken in an agency or elsewhere in the research community.¹⁰
- 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 liberties, financial regulation or environmental or heritage protection issue.
- 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.¹¹
- The document is to be used by a journalist in preparing a story for publication that is likely to be of general public interest.

4.57 In applying those and related examples, an agency or minister may also consider whether the range or volume of documents requested by an applicant could be considered reasonably necessary for the purpose of contributing to public discussion or analysis of an issue. If an FOI applicant has sought more documents than is considered reasonably necessary for the stated purpose, the agency or minister may consider a partial reduction of the charge, or decline to reduce or waive the charge. 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 will not be meeting the reasonable cost of processing their FOI application.¹²

⁷ *Deloitte Touch Tomatsu v Australian Securities Commission* (1995) 54 FCR 562 at 579.

⁸ See *Briggs and Department of the Treasury (No. 2)* [2012] AICmr 17, [16]–[18] for a discussion of the public interest in publishing early drafts of a document that has been published.

⁹ See *Besser and Department of Infrastructure and Transport* [2011] AICmr 2 for a discussion of the public interest in giving access to documents revealing the use of Commonwealth resources.

¹⁰ See *McBeth and Australian Agency for International Development* [2012] AICmr 24.

¹¹ See *Fletcher and Department of Broadband, Communications and the Digital Economy (No. 3)* [2012] AICmr 15.

¹² *Baljurda Comprehensive Consulting Pty Ltd and the Australian Agency for International Development* [2011] AICmr 8, [28].

Other grounds for reduction or waiver

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

- The cost of calculating and collecting a charge might exceed the cost to the agency of processing the request.
- 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.
- The document is similar to a document that the agency has published on its website under s 11C of the Act.
- 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 marginal cost.
- The Information Commissioner or AAT has decided in similar circumstances that charges should not be imposed.

Application of moneys received

4.59 Charges imposed under the FOI Act are prescribed as *Relevant Agency Receipts* for the purposes of s 31 of the *Financial Management and Accountability Act 1997*. Agencies may retain such charges under regs 15 and 16 of the *Financial Management and Accountability Regulations 1997*. For further details see Finance Circular 2008/07, dated 26 June 2008, which is available on the website of the Department of Finance and Deregulation at www.finance.gov.au.

Agency charging procedures

4.60 The Information Commissioner suggests that it would be good administrative practice for agencies to develop and publish on their website their own internal procedures for imposing charges, consistent with these guidelines. It will assist the public to be advised of the agency's practice or approach in imposing charges, and the supporting evidence the agency requires from an applicant who requests a reduction or waiver of a charge.

4.61 Agencies should give applicants an early indication of the likely cost of their requests and an opportunity to modify or withdraw requests if they wish. Agencies should assist applicants to identify the specific documents they are seeking, so enabling them to focus

their request on the documents required thereby minimising potential charges. This approach will also help agencies to avoid unnecessarily expending resources on searching and retrieving documents that the applicant does not actually want.

4.62 In response an applicant may:

- decide to pay the deposit if they have not objected to the estimated charge
- if requesting a reduction or remission of a charge, postpone paying the deposit until the outcome of that request, or
- pay the deposit (or the full estimated charge) pending a decision on reduction or waiver of the estimated charge. This action terminates the extension of the processing period following a 's 29 notice' of liability to pay charges. If the agency or minister decides to reduce or to waive the charge, the deposit should accordingly be reduced or refunded.

Review of decision to charge

4.63 A decision under the FOI Act declining to reduce a charge or not to 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). 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

4.64 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.

4.65 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.

4.66 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, the Information Commissioner recommends that the agency provide a reasonable period. A 30-day period would usually be reasonable.