



Australian Government

Office of the Australian Information Commissioner

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security
PO Box 60121
Parliament House
Canberra ACT 2600

Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

Dear Committee,

I provide additional information arising from the evidence given by me at the public hearing in Sydney on 13 August 2019.

Responses to questions asked

1. The Honourable Dr Mike Kelly AM, Member for Eden-Monaro: 'Do you offer guidance with respect to the public interest test and what might constitute a legitimate whistle blower incident?'

Office of the Australian Information Commissioner (OAIC) response:

The OAIC provides guidance with respect to the public interest test in the *Freedom of Information Act 1982* (FOI Act). However the OAIC does not provide guidance on what might constitute a legitimate whistle blower incident because it is not within the Information Commissioner's powers or functions under the *Australian Information Commissioner Act 2010* (AIC Act) or the FOI Act.

Attachment A to this letter provides relevant sections of the FOI Act and the guidance the OAIC provides about the public interest test.

The OAIC is satisfied that the public interest test in relation to conditional exemptions in the FOI Act is appropriately adapted to effectively balance the public's right of access to government held information with justifiable reasons not to release some government held information.

The Act itself indicates that access to a document that is conditionally exempt at a particular time must be given to the applicant unless access to the document at that time would, on balance, be contrary to the public interest.

For the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest the FOI Act sets out some factors that favour access and factors that are irrelevant to that decision. The FOI Guidelines which ministers and agencies must have regard to set out further guidance include examples of factors that may favour the information not being disclosed. These factors for and against disclosure are not exhaustive and, within the parameters of the FOI Act, the FOI Guidelines are updated from time to time to include further factors, to reflect Information Commissioner review decisions and as circumstances arise that would benefit from further clarification.

2. The Honourable Mark Dreyfus QC, Member for Isaacs: ‘Ms Falk, are you in a position to provide a set of statistics to the committee ... [in relation to] ... FOI handling at the Commonwealth level?’

OAIC response:

Australian Government agencies and ministers provide statistics to the OAIC regarding FOI requests received, response times, outcomes and charges notified and collected. The table below provides these statistics as reported by agencies. The confirmed figures for 2018-19 will be published in the OAIC’s 2018-19 Annual Report.

FOI requests received 2016–17 to 2018–19

| Year | Personal | % | Other | % | Total | % Change |
|---------|----------|-------|-------|-------|--------|----------|
| 2016–17 | 32,383 | 81.94 | 7,136 | 18.06 | 39,519 | + 4.01 |
| 2017–18 | 28,199 | 81.88 | 6,239 | 18.12 | 34,438 | -12.86 |
| 2018–19 | 32,440 | 83.44 | 6,439 | 16.56 | 38,879 | +12.90 |

Response times 2016–17 to 2018–19 for determined FOI requests

| Response time | 2016–17 total | % | 2017–18 total | % | 2018–19 total | % |
|--------------------------------------|------------------|-------|------------------|-------|------------------|-------|
| Within statutory time | 19,607 | 57.62 | 26,879 | 84.86 | 24,893 | 82.58 |
| Up to 30 days over statutory time | 3,800 | 11.17 | 1,381 | 4.36 | 2,386 | 7.92 |

| | | | | | | |
|---------------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| 31-60 days over statutory time | 2,829 | 8.31 | 644 | 2.03 | 1,245 | 4.13 |
| 61-90 days over statutory time | 2,595 | 7.63 | 670 | 2.12 | 880 | 2.92 |
| More than 90 days over statutory time | 5,198 | 15.28 | 2,100 | 6.63 | 740 | 2.45 |
| Total | 34,029 | 100.01 | 25,968 | 100.00 | 30,144 | 100.00 |

Outcomes of FOI requests finalised 2016-17 to 2018-19

| Decision | 2016-17 | % | 2017-18 | % | 2018-19 | % |
|-------------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| Granted in full | 18,877 | 55.47 | 15,778 | 49.81 | 15,623 | 51.83 |
| Granted in part | 11,767 | 34.58 | 10,767 | 34.00 | 10,541 | 34.97 |
| Refused | 3,385 | 9.95 | 5,129 | 16.19 | 3,980 | 13.20 |
| Total Determined | 34,029 | 100.00 | 31,674 | 100.00 | 30,144 | 100.00 |
| Transferred | 763 | | 641 | | 639 | |
| Withdrawn | 3844 | | 5089 | | 7087 | |
| Total finalised | 38,636 | | 37,404 | | 37,870 | |

Charges collected

| Year | Requests received | Requests - charges notified | % | Total charges notified | Total charges collected | % Change (collected) |
|---------|-------------------|-----------------------------|------|------------------------|-------------------------|----------------------|
| 2016-17 | 39,519 | 1,317 | 3.33 | \$505,394 | \$147,043 | |
| 2017-18 | 34,438 | 1,029 | 2.99 | \$383,531 | \$115,863 | -21.21% |

| | | | | | | |
|---------|--------|-----|------|---------|---------|--------|
| 2018-19 | 38,879 | 822 | 2.11 | 357,039 | 122,774 | +5.94% |
|---------|--------|-----|------|---------|---------|--------|

The OAIC provides information about the FOI Act charging regime at **Attachment B** to this letter.

3. The Honourable Mark Dreyfus QC, Member for Isaacs: ‘Do you know how many requests under the Commonwealth Freedom of Information Act are refused entirely in reliance on the national security exemption in section 33?’

OAIC response:

Australian Government agencies are required to report the number of times they have claimed exemptions under the FOI Act to the OAIC each quarter. However there is no requirement for agencies to also report whether the application of the exemption resulted in the FOI request being refused entirely, or whether it resulted in access to only part of a document being refused.

Section 33 has four subsections:

- national security
- defence of the Commonwealth
- international relations of the Commonwealth
- information communicated in confidence by or on behalf of a foreign government.

The data collected from Australian Government agencies is not broken down into these subsections.

As a result, the OAIC has statistics about the number of times section 33 has been applied each financial year, but does not have data about which subsection within section 33 was applied, or whether it resulted in access being entirely refused or whether partial access was granted.

The OAIC can provide the following information about the use of section 33 over the past three years, noting the 2018-19 figures are provisional.

- 2018-19 737 4.85% of all exemptions applied
- 2017-18 699 4.93% of all exemptions applied
- 2016-17 607 4.41% of all exemptions applied

4. The Honourable Mark Dreyfus QC, Member for Isaacs: ‘Bret Walker SC, a former Independent National Security Legislation Monitor, and the Right to Know coalition have put forward a proposal that there should be a new overarching legislation that defines in a restrictive fashion what information must and must not be kept secret. Do you have any thoughts to offer about that kind of proposal? ... What do you think about such a proposal for a framework that would include auditing and reporting

requirements, including public reporting so that the public can gain some sense of how much information the government is intent on keeping secret?’

OAIC response

Under the FOI Act, documents may be exempt from disclosure if they are subject to certain secrecy provisions in other legislation. Section 38 of the FOI Act is intended to preserve the operation of specific secrecy provisions in other legislation, including in cases where no other exemption or conditional exemption is available under the FOI Act.

In applying the exemption under section 33 (documents affecting national security, defence or international relations) a document’s classification marking (such as ‘secret’ or ‘confidential’) is not of itself conclusive of whether the exemption applies – the content and context of the document also need to be taken into account.

I note that in the initial press articles reporting this proposal by Australia’s Right to Know Coalition this new overarching regime in relation to secrecy provisions was proposed as a separate proposal to a proposal to ‘properly review freedom of information laws’.

Further, the attachment to the Australia’s Right to Know Coalition’s submission to the inquiry includes extracts from the *Australian Security Intelligence Organisation Act 1979*, the *Criminal Code Act 1995* and the *Crimes Act 1914*. This appears to indicate that the Coalition intends the ‘new overarching legislation’ will apply to those Acts and not to the FOI Act.

The OAIC notes that the Attorney-General’s Department has policy responsibility for secrecy offences in the Criminal Code, criminal law policy and protective security policy. The Department of Home Affairs has policy responsibility for national security policy and operations and law enforcement policy and operations.

As a general proposition I consider that reporting is an important component of accountability in any oversight system. However, I would need to understand the detail of the proposal more thoroughly in order to offer an opinion on whether it would further the objects of the FOI Act.

Please do not hesitate to contact my office if further information is required.

Yours sincerely



Angelene Falk
Australian Information Commissioner

27 August 2019

Attachment A

The public interest test in the FOI Act and Information Commissioner guidance on its application

Section 11 of the FOI Act gives members of the public a general right of access to documents of an agency or official documents of a Minister.

However subsections 11A(4) and (5) provide that the agency or Minister is not required to give access to documents if they are exempt or conditionally exempt.

Conditionally exempt documents are subject to a public interest test; exempt documents are not. Subsection 11A(5) provides that an agency or a minister is not required to provide access to a conditionally exempt document unless (in the circumstances) *giving access to the document at that time would, on balance, be **contrary to the public interest***.

Section 11B sets out factors that must, and must not be, be taken into account when deciding whether giving access to a conditionally exempt document would, on balance, be contrary to the public interest. Section 11B states:

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

- (b) access to the document could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
- (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

No factors against access are specified in section 11B. However the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines) provide guidance to agencies and members of the public about the application of the public interest test in section 11B.

Section 93A of the FOI Act requires agencies and ministers to have regard to the FOI Guidelines when exercising powers or performing functions under the FOI Act. Further, subsection 11B(5) specifically requires agencies and ministers to have regard to the FOI Guidelines when applying the public interest test when determining whether giving access to requested documents would be contrary to the public interest.

Relevant parts of the FOI Guidelines as at 25 August 2019 are extracted below.

Part 6 — Conditional exemptions

...

The public interest test

- 6.4 There is a single public interest test to apply to each of the conditional exemptions. This public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account.
- 6.5 The public interest test is considered to be:
 - something that is of serious concern or benefit to the public, not merely of individual interest¹

¹ British Steel Corporation v Granada Television Ltd [1981] AC 1096. The 1979 Senate Committee on the FOI bill described the concept of 'public interest' in the FOI context as: 'a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.' Senate Standing Committee on Constitutional and Legal Affairs, Report on the Cth Freedom of Information Bill 1978, 1979, paragraph 5.25.

- not something of interest to the public, but in the interest of the public²
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests³
- necessarily broad and non-specific,⁴ and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public⁵

6.6 It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.

Applying conditional exemptions and the public interest

- 6.7 The decision maker is not required to consider the public interest test (s 11A(5)) until they have first determined that the document is conditionally exempt. A decision maker cannot withhold access to a document simply because it is conditionally exempt. Disclosure of conditionally exempt documents is required unless in the particular circumstances and, at the time of the decision, there is, on balance, countervailing harm which offsets the inherent public interest of giving access.
- 6.8 The pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure. If a decision is made that a conditionally exempt document should not be disclosed, the decision maker must include the public interest factors they took into account in their statement of reasons under s 26(1)(aa) (see Part 3 of these Guidelines).
- 6.9 The six steps in determining if a document is conditionally exempt and applying the public interest test are set out below.

Step 1: Determine if the document is conditionally exempt

- 6.10 A document is conditionally exempt if it satisfies all the elements of any of the eight conditional exemptions listed above at [6.2]. For each conditional exemption, the harm threshold that must be reached is specified in the provision. The exception is the deliberative processes exemption (s 47C), which does not include any requirement of

² Johansen v City Mutual Life Assurance Society Ltd (1904) 2 CLR 186.

³ As explained by Forge DP in Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945 at [54] citing McKinnon v Secretary, Department of Treasury [2005] FCAFC 142; (2005) 145 FCR 70; 220 ALR 587; 88 ALD 12; 41 AAR 23 at [231]; 139; 78; 92 per Jacobson J with whom Tamberlin J agreed, citing Sankey v Whitlam [1978] HCA 20; (1978) 140 CLR 1 at 60 per Stephen J.

⁴ Because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

⁵ Sinclair v Maryborough Mining Warden [1975] HCA 17; (1975) 132 CLR 473 at 480 (Barwick CJ).

harm, only that the document includes deliberative matter. Specific guidance on the criteria to be met in each of the eight conditional exemptions is provided later in this Part.

- 6.11 A decision maker's initial consideration of the harm that may arise is concerned with whether the document meets the criteria for being a conditionally exempt document. This may require a balancing of public interest and non-public interest factors.⁶ However, this is not a determination of where on balance the public interest lies as s 11A(5) requires a decision maker to separately undertake a balancing exercise of public interest factors. Section 11A(5) does not allow room for consideration of factors that cannot be framed in terms of the public interest, or aspects of it.⁷
- 6.12 For example, s 47G(1)(a) concerns documents that relate to the lawful business or professional affairs of an individual, or the lawful business, commercial or financial affairs of an organisation or undertaking. In order to find that s 47G(1)(a) applies, a decision maker would need to be satisfied that if the document were disclosed there would be: an unreasonable adverse effect, on the business or professional affairs of an individual, or the lawful business, commercial or financial affairs of an organisation or undertaking.
- 6.13 These criteria require more than simply asserting that a third party's business affairs would be adversely affected by disclosure. The effect would need to be unreasonable. This requires a balancing of interests, including the private interests of the business and other interests such as the public interest. Where other interests, for example environmental interests, outweigh the private interest of the business this conditional exemption cannot apply.⁸ Likewise, where the documents reveal unlawful business activities the 47G(1)(a) conditional exemption cannot apply (see [6.180] below).

Step 2: Identify the specific harm threshold

- 6.14 Because each exemption is different, there is necessarily a high degree of specificity in the considerations relevant to each decision about granting access. This directly affects how the factors favouring disclosure and those favouring non-disclosure are determined. These factors must be directly relevant to both the particular harm threshold of the conditional exemption and to the particular document, the particular circumstances and the particular time.
- 6.15 Using the previous example of s 47G(1)(a), the specific harm that must be shown is an 'unreasonable adverse effect' on the business or professional affairs of a person, or the business, commercial or financial affairs of an organisation or undertaking.

⁶ For example, as with the s 47G, business affairs public interest conditional exemption.

⁷ Bell and Secretary, Department of Health (Freedom of Information) [2015] AATA 494 [49].

⁸ See Deputy President Forgie's discussions in Bell and Secretary, Department of Health (Freedom of information) [2015] AATA 494 particularly at [44]. The Information Commissioner has discussed and followed the 'Bell' approach in a number of recent IC review decisions, see for example Linton Besser and Department of Employment [2015] AICmr 67.

- 6.16 While both Steps 1 and 2 involve consideration of harm, there is a distinction in the nature and purpose of this consideration. In Step 1, the consideration relates to whether or not the harm threshold has been met in order to determine whether the document is conditionally exempt. Step 2 relates to quantifying the harm as a preparatory step to weighing the factors in favour and against disclosure.

Step 3: Identify the factors favouring disclosure

- 6.17 The FOI Act sets out four factors favouring access, which must be considered if relevant. They are that disclosure would:
- a. promote the objects of the Act
 - b. inform debate on a matter of public importance
 - c. promote effective oversight of public expenditure
 - d. allow a person to access his or her personal information (s 11B(3))
- 6.18 For example, disclosure of a document that is conditionally exempt under s 47G(1)(a) might, in the particular circumstances, both inform debate on a matter of public importance, and promote effective oversight of public expenditure. These would be factors in favour of disclosure in the public interest. Similarly, it would be a rare case in which disclosure would not promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the government's activities.
- 6.19 The four factors favouring disclosure are broadly framed but they do not constitute an exhaustive list. Other factors favouring disclosure may also be relevant in the particular circumstances. A non-exhaustive list of factors is below.

Public interest factors favouring disclosure

- a. promotes the objects of the FOI Act, including to:
 - i. inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community
 - ii. reveal the reason for a government decision and any background or contextual information that informed the decision
 - iii. enhance the scrutiny of government decision making
- b. inform debate on a matter of public importance, including to:
 - i. allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official⁹
 - ii. reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
 - iii. reveal deficiencies in privacy or access to information legislation¹⁰

⁹ See also Carver and Fair Work Ombudsman [2011] AICmr 5.

¹⁰ See 'FG' and National Archives of Australia [2015] AICmr 26.

- c. promote effective oversight of public expenditure
- d. allow a person to access his or her personal information, or
 - i. the personal information of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests
 - ii. the personal information of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household)
- e. contribute to the maintenance of peace and order
- f. contribute to the administration of justice generally, including procedural fairness¹¹
- g. contribute to the enforcement of the criminal law
- h. contribute to the administration of justice for a person
- i. advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies
- j. reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment
- k. contribute to innovation and the facilitation of research

Step 4: Identify any factors against disclosure

- 6.20 The FOI Act does not list any factors weighing against disclosure. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that harm may result from the disclosure of some types of documents in certain circumstances; for example, where disclosure could prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information. Such policy considerations are reflected in the application of public interest factors that may be relevant in a particular case.
- 6.21 Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.
- 6.22 A non-exhaustive list of factors against disclosure is provided below.

¹¹ This refers to administration of justice in a more general sense. Access to documents through FOI is not intended to replace the discovery process in particular proceedings in courts and tribunals, which supervise the provision of documents to parties in matters before them: 'Q' and Department of Human Services [2012] AICmr 30, [17].

Public interest factors against disclosure

- a. could reasonably be expected to prejudice the protection of an individual's right to privacy, including where:
 - i. the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests
 - ii. the personal information is that of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive
 - iii. the personal information is that of a government employee in relation to personnel management and the disclosure of the information could be reasonably considered to reveal information about their private disposition or personal life.¹²
- b. could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct
- c. could reasonably be expected to prejudice security, law enforcement, public health or public safety
- d. could reasonably be expected to impede the administration of justice generally, including procedural fairness
- e. could reasonably be expected to impede the administration of justice for an individual
- f. could reasonably be expected to impede the protection of the environment
- g. could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency
- h. could reasonably be expected to prejudice an agency's ability to obtain confidential information
- i. could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
- j. could reasonably be expected to prejudice the competitive commercial activities of an agency
- k. could reasonably be expected to harm the interests of an individual or group of individuals
- l. could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General¹³

¹² See 'GC' and Australian Federal Police [2015] AICmr 44, Paul Cleary and Special Broadcasting Service [2016] AICmr 2.

¹³ See Australian Broadcasting Corporation and Commonwealth Ombudsman [2012] AICmr 11.

- m. could reasonably be expected to discourage the use of agency's access and research services¹⁴
- n. could reasonably be expected to prejudice the management function of an agency
- o. could reasonably be expected to prejudice the effectiveness of testing or auditing procedures

Step 5: Ensure that no irrelevant factor will be considered

6.23 The decision maker must take care not to consider factors that are not relevant in the particular circumstances. The FOI Act also specifies certain factors which must not be taken into account, as explained at [6.78] below.

6.24 The irrelevant factors are:

- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- access to the document could result in any person misinterpreting or misunderstanding the document
- the author of the document was (or is) of high seniority in the agency which the request for access to the document was made
- access to the document could result in confusion or unnecessary debate (s 11B(4))

Step 6: Weigh the relevant factors to determine where the public interest lies

6.25 The decision maker must determine whether access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against disclosure. The timing of the request may be important. For example it is possible that certain factors may be relevant when the decision is made, but would not be relevant if the request were to be reconsidered sometime later. In such circumstances a new and different decision could be made.

6.26 In weighing the factors for and against release of a document, it is not sufficient simply to list the factors. The decision maker's statement of reasons must explain the relevance of the factors and the relative weights given to those factors (s 26(1)(aa)) (see Part 3).

6.27 To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts of the matter at the time the decision is made.

¹⁴ See 'FG' and National Archives of Australia [\[2015\] AICmr 26](#).

Conditional public interest exemptions and classes of documents

6.28 In the course of processing an FOI request, an agency may come to a view that a certain class of documents should always be exempt due to particular recurring factors weighing against the public interest in disclosure. However, an agency cannot rely on a class claim contention when withholding a document under a conditional exemption. Rather, agencies and ministers must administer each request individually with regard to the contents of a document and apply the public interest test to the particular document to decide whether an exemption claim should be upheld at that time.¹⁵

¹⁵ See Crowe and Department of the Treasury [2013] AICmr 69 [36]–[45], Cornerstone Legal Pty Ltd; Australian Securities and Investment Commission [2013] AICmr 71 [32]–[41] and [53] and ‘FI’ and Australian Securities and Investments Commission [2015] AICmr 28 [14].

Attachment B

Information about the charging regime in the FOI Act

The 2010 reforms to the FOI Act removed the ability to apply a \$30 application fee for requests for documents under the FOI Act.

However agencies and ministers have a discretion to impose (or not impose) a charge in respect of a request for access to a document or for providing access. The charge must be assessed in accordance with the *Freedom of Information (Charges) Regulations 2019* and relates to actual resources that may be expended in processing the request or providing access.

There is no charge for providing access to an applicant's own personal information or if access is provided outside the statutory time period. The first five hours of decision-making time is free.

The FOI Guidelines outline the following principles that agencies and minister must consider when deciding whether to impose charge, and the amount of any charge:

1. Agencies and ministers should interpret the 'lowest reasonable cost' object in section 3(4) of the FOI Act as requiring consideration of the lowest reasonable cost to the applicant, to the agency or minister, and to 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 will generally be more appropriate not to impose a charge.
2. 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.
3. Charges should fairly reflect the work involved in providing access to documents on request.
4. Charges are discretionary and should be justified on a case by case basis.
5. Agencies should encourage administrative access at no charge where appropriate.
6. Agencies should assist applicants to frame FOI requests.
7. Agencies should draw an applicant's attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information (section 3A(2)(b)).
8. A decision to impose a charge should be transparent.

Some leading IC review and AAT decisions in relation to charges include:

- *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2015] AICmr 65* – when 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. This case also stands for the proposition that the fact a media organisation may derive a commercial benefit from publication of a story based on documents released in response to an FOI request is a relevant consideration, but it is not by itself a basis for declining to reduce or waive a charge.

- *Ben Butler and Australian Securities and Investments Commission (Freedom of information)* [2017] AICmr 18 – the 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
- *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2014] AICmr 100 – when deciding whether to waive a charge on the basis that giving access to the requested documents may be in the general public interest or in the interest of a substantial section of the public it is relevant to consider whether the requested 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
- *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of information)* [2015] AATA 584 – when deciding whether to waive a charge on the basis that giving access to the requested document may be in the general public interest or in the interest of a substantial section of the public it is relevant to consider whether the document relates to a decision that has been a topic of public interest or discussion, and disclosure of the document will better inform the public about why or how the decision was made, including highlighting any problems or flaws that occurred in the decision making process.
- *McBeth and Australian Agency for International Development* [2012] AICmr 24 – when deciding whether to waive a charge on the basis that giving access to the requested documents may be in the general public interest or in the interest of a substantial section of the public it is relevant to consider whether 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.
- *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2015] AATA 584 – when deciding whether to waive a charge on the basis that giving access to the requested document may be in the general public interest or in the interest of a substantial section of the public it is relevant to consider whether 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.
- *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [2018] AICmr 13 – when deciding whether to waive a charge on the basis that giving access to the requested document may be in the general public interest or in the interest of a substantial section of the public it is relevant to consider whether the

document is to be used by a journalist in preparing a story for publication that is likely to be of general public interest