

1986

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FREEDOM OF INFORMATION LAWS AMENDMENT BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by Authority of the
Deputy Prime Minister and Attorney-General,
the Honourable Lionel Bowen, M.P.)

FREEDOM OF INFORMATION LAWS AMENDMENT BILL 1986

OUTLINE

These amendments to the Freedom of Information Act 1982 and the Freedom of Information (Charges) Regulations implement Government initiatives to reduce the net operational and administrative costs of the Freedom of Information Act whilst maintaining maximum public access to information held by Government.

The Bill will amend the Act and Regulations to:

- . introduce a \$30 application fee for an FOI request;
- . increase the charge for agency search and retrieval time to \$15 an hour;
- . introduce a charge of \$20 per hour for agency decision-making and consultation time;
- . introduce an application fee of \$40 for internal review requests;
- . provide that no fees or charges will be payable in respect of requests for access to personal income maintenance documents;
- . maintain the present 45 day time limit on answering requests from 1 December 1986;
- . strengthen provisions for refusal of requests on workload grounds;
- . reduce the grounds for remission of charges;
- . reduce the obligations on agencies to publish s.8 and s.9 statements and to provide statistics;
- . make miscellaneous and consequential amendments.

FINANCIAL IMPACT STATEMENT

It is calculated that, allowing 60% for overheads on salaries, the administration of the FOI Act cost the Commonwealth \$16.5m in 1984/85 whilst revenue from charges of only \$22,000 was collected. Preliminary figures for 1985/86 are costs of \$14m and revenue of \$58,000.

It is estimated that the proposals in the Bill will result in cost savings of about \$4m and revenue of about \$4m. There may be further small but unquantifiable benefits.

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NOTES ON CLAUSES

PART I - PRELIMINARY

Clauses 1 and 2 - Short Title and Commencements

1. The first two clauses of the Bill provide for the short title and commencement of the legislation. The legislation will come into operation 14 days after it receives the Royal Assent. This will allow adequate time to inform agencies of their new obligations under the Act without unduly delaying the revenue and savings benefits.

PART II - AMENDMENTS OF THE FREEDOM OF INFORMATION ACT 1982

Clause 3 - Principal Act

2. Clause 3 identifies the Freedom of Information Act 1982 as the Principal Act.

Clause 4 - Interpretation

3. This clause is to amend s.4 of the Act by changing the definition of "request" in sub-section 1 and adding a new sub-section (8) which provides that the Regulations may declare an application fee applicable in respect of an application under s.15(1) for access to documents or s.54(1) for internal review of a decision.

Clause 5 - Publication of Information Concerning Functions and Documents of Agencies

4. Section 8 statements concerning agency organisation and functions are currently separately published as part of the Commonwealth Government Directory. They significantly duplicate material normally included in agency Annual

Reports. Section 8(3) will be amended to provide that the statements be published in agency Annual Reports or in the Annual Report of the responsible Minister's department, thus avoiding wasteful duplication.

Clause 6 - Certain Documents to be Available for Inspection and Purchase

5. Section 9 currently requires publication in the Gazette of a statement (index) of manuals, guidelines and other internal documents used by agencies in decision-making. There has been little evidence of public use of such material sufficient to justify printing and publication in bulk. Section 9 would be amended to provide for copies of the index to be available for inspection and purchase at the Information Access Offices established pursuant to s.28 of the Act. This will avoid printing and publication costs without seriously diminishing public access to such information.

6. Consequential amendments will preserve the existing time-frame for publication of s.9 statements.

Clause 7 - Requests for Access

7. Section 15(1) provides the basic definition of an FOI request. It will be modified to provide that a request is made when made in writing accompanied by the application fee, if any. The effect would be that, where an application fee is payable, there would be no obligation to deal with a request unless that fee had been paid.

Clause 8 - Requests Involving Use of Computers, etc

8. This is a technical drafting amendment of s.17(1)(a) to remove a possible implication that a request can be made other than in accordance with s.15(1).

Clause 9 - Access to Documents to be Given on Request

9. The amendment to s.18 is made for the same reason as the amendment to s.17 under clause 8.

Clause 10 - Processing of Requests, etc

10. Section 19(1)(a) is amended in the same way and for the same reason as s.17 is amended by clause 8.

11. Section 19(3) is amended to provide that the time within which requests complying with s.19(1) must be processed is not to reduce to 30 days from 1 December 1986 but is to remain at 45 days.

12. The amendment to s.19(4) is consequential upon the amendment to s.19(3).

Clause 11 - Requests may be Refused in Certain Cases

13. In essence, the current s.24(1) allows a request to be refused where it has been defined in terms of all documents in a specified class and processing would involve an unreasonable workload in searching for and retrieving the documents. It does not cover the cases where a large number of individually identified documents is requested or where the documents requested are readily located but there is an unreasonable workload in deciding upon exempt matter.

14. Clause 11 will modify s.24(1) to take account of both the abovementioned problems. The general test will be the likely total work in dealing with the request under the Act. It will provide that this test can not be avoided by splitting a request into a number of smaller requests. Total workload will be ascertained having regard to location and retrieval of relevant documents and to the consultation and deliberation involved in deciding upon exempt matter.

15. Section 24(1) will provide that a multi-document request may be refused where the agency or Minister is satisfied at any time after receipt that the likely total work would substantially divert the resources of the agency from its other operations, would interfere substantially with the performance by the Minister of the Minister's functions, or would result in substantial delays in dealing with other requests.

16. A "multi-document request" will be defined in s.24(1A) to mean a request expressed to relate to classes of documents as in the present s.24(1), or which relates to a number of specified documents. Section 24(1A) also permits the aggregation for the purposes of s.24(1) of a number of requests made at the same or different times by the same or a number of persons whom the agency or Minister believes on reasonable grounds to have acted in concert in making the requests. Thus s.24 cannot be bypassed by dividing a large request into a number of smaller requests.

17. Section 24(1B) sets out matters to which regard shall be had in ascertaining the likely total work involved in dealing with a multi-document request. It is not practicable to prescribe specific limits to acceptable workload. Thus, whilst in general terms it would seem a substantial diversion of resources for a large agency to devote more than, say, 5 staff-days to processing a single request, a somewhat smaller workload could totally disrupt a small agency or office - particularly if it arose at a time when the staff were heavily pressed by other commitments.

Clause 12 - Persons to be Notified of Liability to Pay Charges

18. Section 29 of the Act will be amended to make it clear that an application fee is not a charge of which an applicant need be notified.

Clause 13 - Charge May, in Certain Circumstances, be Remitted in Whole or in Part

19. Section 30 is amended to remove as a mandatory consideration, in remission of a charge, the question of whether the giving of access is in the general public interest or in the interest of a substantial section of the public. This is the ground which has, in practice, caused greatest difficulty in application.

20. In light of recent experience of persons making FOI requests through agents it is also proposed to make it clear that remission on grounds of financial hardship or personal affairs (s.30(3)(a) or (b)) shall apply in respect of a person on whose behalf a request is made.

Clause 14 - Remission of Application Fees

21. The existing provisions in s.30 for remission of discretionary charges are not procedurally suited to, and will not apply to, remission of compulsory application fees. A new s.30A will permit remission of an application fee on the more limited grounds (than under s.30) that payment of the application fee would cause financial hardship to, and that the document sought relates to the personal affairs of, the person seeking access.

22. Section 30A(2) provides that, where all or part of an application fee is remitted under s.30A(1), that fee is not taken to be payable in relation to an application for access to documents or for internal review of a decision.

Clause 15 - Documents Containing Material Obtained in Confidence

23. Recent decisions of the Administrative Appeals Tribunal have indicated that s.45 as amended in 1983 may not exempt confidential information from outside Government (e.g. information provided orally by a business) from disclosure

where it is incorporated in an internal working document prepared by an agency or Minister. This is not consistent with the original intention of s.45(2) as indicated by explanatory materials distributed at the time that sub-section was enacted. The defect will be remedied by the proposed amendment to ensure that confidences owed to persons other than officials and Ministers will be protected.

Clause 16 - Internal Review

24. The amendment to the final words of s.54(1) provides that a request for internal review of a decision is to be accompanied by any applicable application fee. The effect is that there is no obligation to deal with a request for internal review until the application fee, if any, has been paid.

25. The amendment to s.54(1)(b) makes it clear that payment of an application fee is not a matter for internal review.

Clause 17 - Applications to Administrative Appeals Tribunal

26. The amendment to s.55(1)(c) has the consequence that payment of application fees is not a matter for review by the Administrative Appeals Tribunal under s.55(1).

Clause 18 - Reports to Parliament

27. Section 93 currently requires the Minister to report annually on the operation of the FOI Act and a wide range of statistical information must be provided, at considerable cost, by agencies for this purpose. It is proposed to amend s.93(3) to very much simplify the statistical information which must be reported. This has been reduced to the minimum considered necessary to permit monitoring of the general operation of the Act.

Clause 19 - Regulations

28. Section 94(2)(b) currently prohibits the making of regulations imposing a charge for time spent in deciding whether a document contains exempt matter. This is inconsistent with the charge for such time which is to be introduced by Clause 27. The provision is accordingly repealed.

29. The amendment to sub-section 94(2)(c) is consequential and extends to any charge for decision-making the principle that charges shall not be dependent on the classification or designation of the officer who undertakes the work involved.

Clause 20 - Schedule 2

30. In May 1985, functions in relation to the investigation of Medicare fraud and overservicing were transferred to the Health Insurance Commission from the Department of Health. It is no longer appropriate that the Commission should be totally exempt from the operation of the Act and its transfer from Part I to Part II of the Schedule will provide that it is exempt only in relation to documents concerning its competitive commercial activities.

Clause 21 - Application

31. This provision has the effect that the new basis for remission of charges under s.30 will apply in respect of applications for remission whether made before or after the commencement of the Act. No hardship to applicants need result as the amended sub-section 30(3) leaves open the possibility of considering the public interest even though such consideration is no longer mandatory.

PART III - AMENDMENTS OF THE FREEDOM OF INFORMATION (CHARGES) REGULATIONS

Clause 22 - Freedom of Information (Charges) Regulations

32. This clause provides that the abovementioned Regulations are in Part III referred to as "the Regulations".

Clause 23 - Citation

33. This amendment has the effect that the citation to the Regulations becomes "Freedom of Information (Fees and Charges) Regulations".

Clause 24 - Liability to Pay Charges

34. The amendment to Regulation 3(1) excludes application fees from the general provisions relating to charges in the Regulations.

Clause 25

35. Regulations 5, 6 and 7 of the Regulations are repealed as the new charging arrangements are incompatible with the special charging regimes previously applying to requests for personal documents or involving minimal search. In practice the effects of the change will be minimal having regard to the remission and exemption grounds. New Regulations are substituted as follows.

Application Fees

36. A new Regulation 5 establishes, subject to new Regulation 6 (see below):

- an application fee of \$30 in respect of FOI requests (s.15(1) of the Act); and

an application fee of \$40 in respect of applications for internal review of decisions (s.54(1) of the Act).

General Charges Not Applicable in Relation to Certain Documents

37. A new Regulation 6 defines a prescribed benefit to mean a pension, allowance or benefit payable under certain specified enactments and payments of a like nature the purpose of which is to provide income support to persons of inadequate means.

38. New Regulation 6(2) then provides that Regulation 4 (which establishes charges) does not apply in relation to documents concerning payment to the applicant of a prescribed benefit where the applicant has not had FOI access during the preceding 3 months or, if he has had such access, there has been a material change to the documents requested.

39. The effect is that a person seeking access to personal income maintenance documents will normally not be liable to pay charges.

40. Regulation 6(3) similarly limits the application of new Regulation 5 so that no application fees will normally be payable by persons seeking access to personal income support documents.

Clause 26 - Charges to be Paid before Access is Granted

41. The amendment to Regulation 11 is consequential upon the deletion of Part III of the Schedule (see Clause 27).

Clause 27 - Schedule to Regulations

42. Part I of the Schedule to the Regulations itemises charges applicable in respect of a request for access to a document (c.f. Regulation 4):

- . the current \$8 charge in respect of the administrative procedures involved in processing a request is now to be subsumed in the \$30 application fee and Item 1 is accordingly deleted;
- . the \$12 hourly charge at Item 2 in respect of searching for and retrieving a document is increased to \$15 per hour;
- . a charge of \$20 per hour in respect of time spent deciding whether to grant, refuse or defer access to a document (with or without deletions) is introduced as Item 5.

43. Parts III and IV of the Schedule are deleted as a consequence of Clause 25.

Clause 28 - Application

44. This clause provides that the amendments of the Regulations apply prospectively. The new fees and charges will only apply:

- . to requests received after commencement of the Amendment Act;
- . in respect of provision of access to a document, where that access was requested after the commencement of the Amendment Act; and
- . in respect of internal review applications received after commencement of the Amendment Act.

Clause 29 - Amendment or Repeal of Regulations

45. This provision makes it clear that the Regulations can be further amended in future by Regulations in the usual way.