

**DOCUMENT FOR TABLING FOR SENATE COMMUNITY AFFAIRS
LEGISLATION COMMITTEE**

TOBACCO FREEDOM OF INFORMATION REQUESTS:

**Points from the Secretary of the Department of Health and Ageing
19 October 2011**

Numbers

- Between April 2010 and 18 October 2011, the Department received 63 Freedom of Information (FOI) requests covering large numbers of plain packaging-related documents.
 - This includes 52 requests from the tobacco industry and 11 requests from other applicants.
 - A summary of the requests and their status has been tabled.
- As at 18 October 2011, the Department had 35 current FOI requests on hand from the tobacco industry.

Matters under appeal

- At least two of the plain packaging-related FOI requests sought access to Government legal advices on plain packaging.
 - Legal advices are covered by legal professional privilege and are not generally released.
- One of the requests related to a 1995 legal advice on plain packaging. In March 2011, the AAT upheld the Department's decision to refuse access to this advice.
 - The decision was appealed to the Federal Court. On 23 August 2011, the Federal Court upheld the AAT's decision.
 - The applicant is appealing the matter to the High Court.
- Another request – made to the Prime Minister's Office – sought access to a 2010 legal advice on plain packaging.
 - The tobacco industry also appealed this to the AAT.
 - On 15 August 2011, the AAT upheld the decision to refuse access and the period in which to appeal to the courts has expired.
- In early November 2011, the AAT is to hear an appeal on another FOI request that was made to the Department seeking access to some 344 documents, to which access had been previously refused or partly refused.

OAIC and Ombudsman

- In addition to external appeals over decision-making, the tobacco industry has made complaints to the Office of the Australian Information Commissioner and the Ombudsman about the Department's handling of requests, including charges.
 - The Department has consistently used the standard whole of government FOI charges calculator to calculate charges.
- There is currently one FOI complaint with the Commonwealth Ombudsman, regarding two related FOI requests from the tobacco industry.
 - The Department is awaiting the outcome of the Ombudsman's investigation of this matter.
- A further three tobacco FOI matters are currently being investigated by the Office of the Australian Information Commissioner (OAIC).

Costs and charges

- I have previously set out for the Committee some of the issues relating to costs and charges for these FOI requests.
- I spoke about two particularly large omnibus requests from the tobacco industry:
 - One which started at over 10,000 files and a \$1.4m charge which was negotiated down over a six month period to 242 files containing over 92,000 documents, with a charge of over \$367,000.
 - A second which started at 5,800 files with a charge of \$637,000, which was negotiated down over six months to 39 files with a charge of \$25,000.
- I spoke about the gap between what the Department is able to charge to process requests and what it costs the Department to process them.
 - The Department can only charge \$15 per hour for search and retrieval and \$20 per hour for decision-making time.
 - The average total cost of employing an APS6 officer – the average level for which the Department is funded – is between \$44.80 and \$50.54 per hour.
 - The Department is not able to cost-recover for negotiations on scope, for internal appeals, nor for the handling of matters in the AAT or in the Courts (though there may be some recourse to costs in the Courts).
- I have emphasised that the Department takes its commitments to open-ness in government and to the FOI process seriously, but that in some cases, large and repeated requests do amount to an unreasonable diversion of resources.
- I have asked Departmental officers to start a discussion with the Office of the Australian Information Commissioner about whether some of these claims could be considered to be vexatious.