OAIC Discussion Paper on Fees and Charges

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As was said in the ALRC Report 77, *Open government: a review of the federal FOI Act 1982*, Chapter 14:

> "It is counterproductive for the Act to encourage involvement in government but effectively disqualify citizens from participating by imposing prohibitive charges. The cost to agencies of administering the Act must be viewed in the context of the legislation's role in furthering democratic accountability.
>
> In the Review's view, applicants should make some contribution to the cost of providing government-held information but that contribution should not be so high that it deters people from seeking information. The fees and charges regime should reflect the fact that the FOI Act is primarily about improving government accountability and the public's participation in decision making processes, not about generating revenue or ensuring cost recovery."

I agree that the aim of having fees and charges is not cost-recovery (which it does very inadequately) or even user-pays (as the charges are not reflective of the real costs). However, the question of fees and charges in the FOI Act should not be considered in isolation, but rather seen as one element of what has been called the "administrative defences" in the Act. An appropriate balance of these administrative defences, to protect agencies from abuses of the right of access and as a demand-control mechanism, with the pro-disclosure/ openness and accountability objectives, should be the aim of any reform.

No matter the level at which fees and/or charges are set, there is a small group of applicants for whom it is no deterrent at all, and in fact amounts to cheap labour from their point of view. For example, a well-heeled commercial litigant would happily pay a Commonwealth agency tens of thousands of dollars for an FOI request relating to their litigation, as the FOI charging rates are so low compared to those charged by legal practitioners or even paralegals.

The provision permitting an agency to refuse to deal with an application as it would be "a substantial and unreasonable diversion of resources" is essential, but is under-utilised in practice by agencies. Many agencies have taken on FOI applications requiring hundreds and even thousands of hours, where this is a questionable use of scarce public resources. Although the Commonwealth case law in this area will no doubt be developing rapidly within the next few years through decisions of the OAIC, the present case law in the Commonwealth appears to discourage agencies from arguing this provision as the threshold is perceived to be very high. By comparison, in New South Wales, the ADT case law on the analogous provision has upheld agency refusals based on workloads not much above 40 hours. As a result, New South Wales agencies are more confident in arguing this provision, and are much less likely to embark on cases involving hundreds of hours of processing time. This is not to say

that there cannot be a compelling argument for spending hundreds of hours on a particular matter where it would not be "unreasonable" as the purpose served would be worth the expenditure of public resources.

The UK and Scottish models, which permit an agency to refuse to process a request involving more than £450 to £600 of staff time [equating roughly to 30 hours' work], also recognize that there should be an upper limit which is set per request.

Personal requests

In order to give force to the fundamental privacy principle concerning the right of access to one's own personal information, it is appropriate not to have an application fee for such requests. However, historically there have been a number of problem areas associated with access to personal information, and these need to be addressed.

One is the disproportionate use of the right to access personal information by current and former public servants, often engaged in protracted disputes with their agencies. As the definition of "personal information" is so broad, workplace information falls into this category. (In some jurisdictions, such as Ireland, and the pre-2009 case law in Queensland, such information about public servants was excluded from the ambit of "personal information".) The Commonwealth provision section 15A was another attempt to limit this overuse.

Even within the field of the right of access to personal information, there should be some administrative defences available to agencies. These are needed to deal with very large volumes of material, for example, client files in excess of 2000 pages. (I am familiar with many cases in which files were in excess of 5000 pages. Some of these reflected that the client had been in dispute with the agency over a long period of time, and their use of FOI to seek access and amendment, sometimes repeatedly, reflect the poor relations between them and the agency. The poor state of relations between the client and the agency reduced the likelihood of reaching negotiated agreements as to reductions in scope or extensions of time frame to enable the agency to meet its responsibilities under the Act.) While the reformed Federal Act now includes a provision to refuse to deal with repeat applications, agencies have not been empowered to refuse "vexatious" requests, a power reserved to the OAIC. If agencies had this power, they could then use it to minimise the number and frequency of extraordinarily or excessively large requests. Such refusals would, of course, be subject to review in the normal manner.

A key element which is almost never addressed in reviews of the legislation is that of adequate levels of resources being provided to agencies to deal with their FOI workloads in an effective and timely manner. Unlike activities such as public relations, agencies cannot control their FOI workloads. There are many examples of agencies which are inadequately resourced relative to their FOI workloads, and for such agencies the existence of a range of administrative defences and demand control mechanisms is essential. In an environment with sufficient staff resources to adequately handle FOI activities, these protections would be much less significant, indeed perhaps unnecessary.

Where resources are inadequate, it seems needlessly harsh for an agency to have to refund all charges when statutory deadlines are not met. Certain categories of applicants (such as frequent users) now have an incentive not to cooperate with agencies, either in reducing the scope of a request or in agreeing to extensions of time, wherever such lack of cooperation is likely to gain them their requested information for free.

The underlying policy objective for the refund of charges for overdue requests, that is, to act as an incentive to agencies for prompt processing and compliance with statutory timeframes, could still be met by the requirement to refund a proportion of the charges (e.g. 25%), which would alleviate the problem of discouraging users from negotiating the scope and timeframe.

Processing very small amounts of money, whether in the form of application fees or charges, is uneconomical for most agencies, as the cost of processing such payments through their finance systems is more than the revenue gained. Many agencies are disinclined to pursue charges, advance deposits, etc., as the cost of the paperwork would often exceed the charges. Historically only a very small proportion of the charges notified are actually collected, and while this is for a variety of reasons, the net result is that agencies do not see the effort as worth the result. Any fees or charges regime should have provision for waiver on the ground that processing or collecting the charges would be uneconomical, although it could be left to each agency to determine the precise level, based on the relative efficiency of its own finance system.

Waiver on ground of financial hardship

For personal applications, if there were to be any fees or charges, there should be a ground of reduction or waiver based on the applicant demonstrating financial hardship (e.g. students, those holding Centrelink cards). For non-personal requests, the existence of waiver based on financial hardship has been open to a degree of abuse, such as when an organisation "rents a pensioner" to make an FOI application for them. A number of jurisdictions have enacted provisions to limit such abuse; for example, in the Queensland *Right to Information Act:*

> "S. 66 (2) The agency or Minister must decide to waive any processing charge, or access charge, for the application if
> (a) for an applicant who is an individual
> (i) the request is accompanied by a copy of a concession card; and
> (ii) the agency or Minister considers the applicant is the holder of a concession card; and
> (iii) the agency or Minister considers the applicant is not making the application for some other person who is seeking to avoid the payment of a charge; …"

Where applicants agree to pay charges but lose interest or fail to pay final charges, agencies are left with few options, as it is usually uneconomical to pursue such matters as debts. The Irish FOI Act includes a provision in s.10(1)(f) in which monies due from previous FOI applications have to be paid before processing of a subsequent application is undertaken:

> "10(1) A head …. may refuse to grant the request if …

(f) a fee or deposit payable under section 47 in respect of the request concerned or in respect of a previous request by the same requester has not been paid."

Under the reformed FOI Act, the provision to not charge an applicant for the first five (5) hours' work to some extent (amongst other benefits) addresses the issue of having to notify uneconomical charges. However, in practice, the next two or three hours' work then become uneconomical to notify, as they are amounts totalling no more than $50 or $60. In practice this extends the "free area" to more like eight (8) hours.

In Queensland (*RTI* Regulation 5), while there is no charge for processing time less than 5 hours, once it exceeds that amount the entire period is chargeable.

> **"5 Amount of processing charge: Act, s 56**
> (1) The processing charge under section 56 of the Act for an access application for a document is:
> (a) if the agency or Minister spends no more than 5 hours processing the application: nil; or
> (b) if the agency or Minister spends more than 5 hours processing the application: $6.00 for each 15 minutes or part of 15 minutes spent processing the application.
> *Example:*
> *If the agency or Minister spends 3 hours processing an access application for a document there is no processing charge.*
> *If the agency or Minister spends 6 hours processing an access application for a document the processing charge is: 6 hours x 60 (to convert to minutes) / 15 (to determine the number of 15 minute blocks) x $6.00."*

[This Regulation has been incorrectly interpreted in the OAIC Discussion Paper on page 23 as if the first five hours is always free.]

In either model, the fact that there is no charge for less than 5 hours can be an incentive to applicants to narrow their requests to a more manageable size in order to avoid paying charges. This should assist agencies to manage their FOI workloads. However there should be consideration given to enacting provisions which prevent abuse of the "5 hours free" exception, such as applicants who split what would otherwise be a very large request (incurring not only charges, but potentially attracting the "substantial and unreasonable diversion of resources" refusal) into many smaller requests designed to fall below 5 hours each. As s.24(2) allows 2 or more requests relating to the same subject matter to be aggregated to assess the workload, a similar mechanism should also be possible when assessing the charges.

There should also be a ground of waiver or reduction in the public interest. This has been given effect in different forms in various jurisdictions. In some, it is reflected in allowing members of Parliament the right to make requests at no charge, or up to a capped limit, reflecting their role as elected representatives.

I have responded to several of the questions posed in the Issues paper below, however many have been addressed in my general comments above.

Application fees

General questions

3. Is it appropriate that the FOI Act does not impose an application fee for making:

- an FOI request for personal information?

  Yes, it is appropriate that the Act does not impose an application fee where it is a request for the applicant's own personal information, or where the applicant is an authorised agent of the record-subject whose information is sought.

  Where a mixture of personal and non-personal information is sought, an application fee would be appropriate if there is such a fee for a non-personal request.

- an application for internal review of an access refusal or access grant decision?

  Yes, it is appropriate not to have an application fee for this.

- an application for Information Commissioner review of an access refusal or access grant decision?

  Yes, it is appropriate not to have an application fee for this.

  In the 1980s, when a filing fee to seek a review by the AAT was introduced, it had an immediate impact in reducing the number of reviews sought, in particular, by individuals. The presence of this filing fee has had a detrimental impact on the development of a wide-ranging body of external review case-law at the Federal level.

  A more recent example of this occurred in Ireland in 2003, when very high fees (for example, 150 euros to seek review by the OIC) dramatically reduced the number of reviews sought.

  In many jurisdictions, the OICs have been deluged by such large numbers of requests for external review that they quickly develop a backlog of cases. There is some advantage in having a very small or nominal application fee for external review as a demand control mechanism; however, the level of any such fee should be set very low (for example, $20).

4. If you support FOI application fees, what level of fee should be imposed? Should it be subject to annual or biennial increase?

At present, application fees in Australia are in the range of $20 -$40, and this would appear to be a reasonable level of fee, if one were to be imposed. Many of these fees were set up to 20 years ago, with no system of increase. Where there are annual/biennial increases (eg: Queensland), the resulting amount is often set at an odd level ($32.50, $34.40) and websites, forms and other publications often contain an out of date amount, resulting in many applicants having slightly underpaid their application fee. (While searching today, I found several non-government websites still referring to the "$31.00" application fee in Queensland, which was applicable nearly 10 years ago.) An increase every 5 years, to a fee which is a "round number" would be preferable.

For applicants

5. Would application fees for FOI requests deter you from making an application?

A reasonable application fee [between $15 and $30] would not deter me from making an application.

6. Would fees for internal review or Information Commissioner review deter you from seeking review of an access refusal or access grant decision?

A reasonable fee ($20) for internal review or IC review would not deter me from seeking such a review, but a fee of more than $50 probably would.

For agencies
7. What effect has the abolition of application fees had on FOI requests to your agency?

It is my understanding, from advice from agencies with whom I have been working, that the abolition of application fees has led to an increase, particularly in non-personal requests.

8. What effect has the abolition of fees had on applications for internal review in your agency?

Any statistical trends in relation to applications for internal review would be skewed by the recent legislative changes to make internal review optional, which has led to a reduction of applications for internal review.

Scale of charges
General questions
9. Is the scale of charges in the FOI Regulations appropriate (as set out in Table 2)? In particular, are the following charges appropriate?

An increasing expense to agencies arises from the need to use off-site storage, frequently through private sector contractors, to store their records. In Queensland the access charges specified in the RTI Regulations permit agencies to recover such out-of-pocket costs from the applicant. The Queensland Regulations also provide for the recovery of any licensing fees (payable to third party vendors) for software that must sometimes be provided (along with the actual materials requested) in order for recipients to view or read or otherwise access information on certain media (e.g. X-rays on discs).

- search and retrieval: $15.00 per hour
- decision making: first five hours free and $20 per subsequent hour

  If there is an hourly rate of charge, it would be less complicated to be set at the same rate for searching and decision making. The range of $20-$30 per hour would be reasonable.
- transcript: $4.40 per page

  The rate should reflect the actual cost.
- photocopy: $0.10 per page

  A rate of 20c per page would be reasonable.

Imposition of charges

13. Is it appropriate that no charge is payable where the applicant is not notified of a decision on a request within the statutory time limit (including any extension)?

Where resources are inadequate, it seems needlessly harsh for an agency to have to refund all charges when statutory deadlines are not met. Certain categories of applicants (such as frequent users) now have an incentive not to cooperate with agencies, either in reducing the scope of a request or in agreeing to extensions of time, wherever such lack of cooperation is likely to gain them their requested information for free.

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For agencies

15. What is the maximum charge that your agency has imposed? What is the typical range of charges that your agency has imposed?

I am aware of a number of cases where agencies have charged over $15,000 for a (very large) request, although they should perhaps have considered the substantial and unreasonable diversion option first.

16. Where charges are notified, does this result in narrowing the scope of the request?

From my experience in a number of agencies, it frequently results in narrowing the scope.

17. Where charges are imposed, does this result in applicants withdrawing their requests?

This occasionally results in withdrawal of the request.

Exceptions

General questions

Correction, reduction or waiver of charges

23. In what circumstances should charges be reduced or waived? Does the public interest test for waiver of fees need to be amended?

There should be a ground of waiver or reduction in the public interest. This has been given effect in different forms in various jurisdictions. In some, it is reflected in allowing members of Parliament the right to make requests at no charge, or up to a capped limit, reflecting their role as elected representatives.

24. If reduction or waiver of charges is sought, what evidence of financial hardship should be required?

Holding one of the Centrelink concession cards (Pensioner or Health Care Concession Cards) would demonstrate financial hardship adequately; in addition, children and full-time students should qualify as being in financial hardship. Non-profit organisations should be able to demonstrate this through presentation of their financial statements (and guidance on this is probably available from the Queensland Information Commissioner, for example, who is empowered to approve applications

by non-profit organisations to have their financial hardship status recognized.)

For agencies

27. Does your agency experience difficulties in refunding charges?

For some agencies, the cost of processing a refund would often exceed the amount of the refund. A creative option has been to offer the applicant to hold the money as a credit towards future requests (this is really only applicable to frequent applicants such as journalists or MPs).

Note: I regret that time has not permitted me to respond to every question raised. I would be happy to provide further information about any of my responses if required.

Note about the author:
I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory; I have also worked on implementing FOI in Ireland, the United Kingdom, the Cayman Islands and China. Much of this time has been as an FOI practitioner, consultant and trainer. I have personally made over a thousand initial and review FOI decisions, and have trained over 10,000 staff in FOI in Australia and overseas. I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. My comments are based on my 30 years experience as a practitioner and consultant to numerous agencies in the field of FOI.