

## Senate Economics Legislation Committee

### ANSWERS TO QUESTIONS ON NOTICE

#### Treasury Portfolio

Budget Estimates

2017 - 2018

**Division/Agency:** Australian Securities and Investment Commission

**Question No:** 102

**Topic:** FOI

**Reference:** Written

**Senator:** Ketter, Chris

#### Question:

1. In relation to the Australian's two year process to get documents surrounding media releases from ASIC, why did ASIC continued to insist that there should be a charge, when they accepted that provision of the documents would be in the public interest?
  - Charging a fee is permitted under the FOI Act. However, in the case before the information commissioner, ASIC accepted that the provision of the documents was in the public interest. Under paragraph 4.86 of the FOI Guidelines, Where an agency accepts that giving access to the document in question would be in the general public interest, but decides not to waive the charge, the agency should adequately justify why it is appropriate for the charge to be imposed in the circumstances.

#### Answer:

##### Time to process FOI request

On 23 February 2015 Ben Butler lodged an FOI request with ASIC seeking access to documents relating to the development of twelve media releases (MRs) issued over a nine year period concerning Enforceable Undertakings ASIC entered into with various institutions.

In relation to the reference that it took two years for Mr Butler to be provided with the documents captured by his FOI request, ASIC notes that Mr Butler sought review by the Information Commissioner (IC) of ASIC's decision to impose charges on 15 May 2015. The IC delivered his decision on 21 February 2017. ASIC determined not to seek review of the IC's decision and commenced the release of the documents to Mr Butler on 12 April 2017. ASIC released further documents to Mr Butler on 17 May 2017 and 5 June 2017 following the expiry of third party review rights, in line with the provisions of the FOI Act. ASIC would have proceeded to release the relevant documents to Mr Butler at any time prior to 21 February 2017 upon payment of charges in the amount of \$4,380.

##### Charging to access the documents

The FOI Act expressly permits an agency to impose a charge for providing access to a document. These charges must be assessed in accordance with the relevant regulations. Under guidelines issued by the IC, the charges imposed by an agency are meant to fairly reflect the work involved in providing access to the requested documents.

On 17 April 2015 ASIC advised Mr Butler of its decision to impose charges in the amount of \$4,380. The charges reflected the scope of the FOI request (which concerned documents

generated over a 9 year period), and the time required to ensure ASIC complied with its obligation to take all reasonable steps to locate documents falling within the scope of the FOI request.

Mr Butler requested ASIC waive the charges on the basis that there was significant public interest in the matters the subject of the FOI request. ASIC declined to waive the charges as it considered that:

- the charges it imposed were reasonable given the scope of the request and the resources required to process it;
- the media organisation with whom the applicant was employed had the financial resources available to pay the charges (whether imposing the charge would cause financial hardship is one of two mandatory considerations under the FOI Act);
- it was reasonable to infer that the media organisation with whom the applicant was employed would derive a commercial benefit from access to the documents;
- whilst there was some public interest in the documents being disclosed, the interest was insufficient to warrant the charges being waived. In this regard, ASIC's practice of providing advance notice of MRs to affected parties in specified circumstances is already a matter of public record (see ASIC Information Sheet 152 *Public comment on ASIC's regulatory activities*);
- the IC Guidelines provide (at paragraph 4.56) that there is no presumption that the public interest test is satisfied by reason only that the applicant is a journalist; and
- taking into account all relevant considerations, it was ASIC's view that it would be inconsistent with the provisions of the FOI Act if it was required to process the request without imposing a charge.

The IC found that release of the documents was in the general public interest and that the benefit in allowing access to the documents outweighed considerations against waiving the charge as put forward by ASIC.