CHAPTER 19

ACCESS CHARGES

19.1 Since the FOI Act came into force in 1982, there have been three regimes for charging for FOI access. The original regime applied from 1 December 1982 until 30 June 1985. The Freedom of Information (Charges) Regulations (Amendment) introduced a revised scheme which applied from 1 July 1985 until the Regulations were disallowed by the Senate on 13 November 1985. The original regime then revived and continued until 18 November 1986, when the revisions introduced by the Freedom of Information (Amendment) Act 1986 took effect. The table indicates the key features of the three regimes.

Comparison of Charging Regimes

Item	Original	Disallowed	Current
Administration	$8	$20	Nil
Application fee	Nil	Nil	$30
Search & Retrieval	$12 ph	$30 ph	$15 ph
Decision-making time	Nil	Nil	$20 ph
Supervision of Inspection	$12.50 ph	$16 ph	$12.50 ph
Photocopying	10c pp	10c pp	10c pp
Transcription & copies other than photocopies	$4.40 pp	$5 pp	$4.40 pp
Other services costs (eg. computer-time, replaying tapes etc)	actual cost	actual cost	actual cost
Applications for which above charges do not apply	documents where search time <2hrs and access given by provision of photocopy (special charges apply) personal affairs where inspection <2hrs or copying <100 pages (no charges)	income support documents (no charge)	income support documents (no charge)

19.2 All three schemes require applicants to pay access charges (other than application fees) only where agencies or Ministers decide that the applicants should do so. There is thus discretion whether a charge which may be levied is in fact levied. The Government guidelines discussed below indicate how the discretion is to be exercised.

19.3 Where an agency has decided that an applicant is liable to pay a charge, the applicant may seek review of that decision,[1] or apply to have the charge wholly or partly remitted.[2] Remission of application fees, which were introduced in 1986, may also be sought.[3] Financial hardship if payment is required, whether the requested documents relate to the applicant's 'personal affairs', and whether granting of access is in the general public interest are all relevant to remission of charges or fees.[4]

19.4 The combined effect of exemptions from charges, exercises of discretion not to levy charges, and successful applications for the remission of charges have meant that few charges and little revenue has been collected from FOI applicants. In addition, agencies were reluctant to calculate charges in complex cases under the original charging regime because of the complexity of the charging structure, or to initiate recovery where it would be costly.[5]

General principles

19.5 The Committee (with the exception of Senator Stone) is concerned that in determining the appropriate level of charges to be imposed upon FOI applications and appeals, too much emphasis has been placed upon economic factors (such as cost recovery) at

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1. FOI Act, ss.54(1)(b) and 55(1)(c).
2. FOI Act, s.30(1).
3. FOI Act, s.30A(1).
4. FOI Act, ss.30(3) and 30A(1)(b).
5. IDC Report, p. G3.

the expense of the admittedly unquantifiable social (and political) benefits derived from the right of access to documents conferred by the FOI Act.

19.6 Whilst Senator Powell would prefer that no charges were imposed upon applications for, and provision of, access to documents under the FOI Act, she has joined with the remainder of the Committee in the recommendations made in the remainder of this chapter and chapter 20.

19.7 The Committee acknowledges the difficulty of formulating an appropriate regime for charging for FOI requests. In its 1979 Report, the Committee accepted that some charges should be paid, both as a reflection of the 'user pays' principle and as a deterrent to trivial, over-broad, or poorly framed requests.[6] On the other hand, it is necessary to ensure that the charging regime does not limit the range of people able to afford to use the legislation. Further, the reconciliation of these competing aims must be relatively simple.

19.8 A scheme which is complex or uncertain in its application may deter bona fide applicants, be excessively costly to administer, or preclude the levying and collection of charges properly payable. The Committee received a number of submissions which argued that the original charging regime was excessively complex.[7]

19.9 Any charges will deter some potential FOI applicants. Some people will decide that the information is worth less than the cost of obtaining it. However, there is no firm basis upon which to calculate the degree of the deterrent effect of any

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6. 1979 Report, para. 11.3. E.g. the submission of the Department of the Special Minister of State, p. 2 (during the period in 1985 when higher charges applied, 'the Department's experience was that applicants were more eager than before to define their requests more carefully').
7. E.g. submissions from the Inter-Agency Consultative Committee on FOI, p. 5; the Department of Community Services, p. 1; the Department of Health, p. 35 (Evidence, p. 1255); and the Department of Defence, p. 13.

given charging regime, as the IDC Report pointed out.[8] This, in turn, means that it is not possible to make any precise estimate of the revenue which may be raised or the cost-saving which may be achieved under any revised charging regime.

19.10 The application fee and increased charges introduced by the 1986 amendments applied only for 7 1/2 months of the 1986-87 financial year. Because of this, because the most common types of requests were not affected by the change, and because of the effect of extraneous factors, the statistics for the full year are of limited value in assessing the impact of the amendments. The statistics indicate that the number of section 19 access requests fell by 8.6% to 29,880, while the amount of fees and charges collected rose by 114% to $161,490.[9] On a quarterly basis, formal requests fell from about 8000 per quarter before the changes to about 6500 after.[10]

19.11 Some agencies have reported that a marked reduction in requests occurred after the introduction of the application fee and increased charges.[11] Others reported that there had been little impact, or a slight decline in the number of requests received.[12] One lobby group informed the Committee that it had restricted its use of FOI as a result of the change.[13]

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8. IDC Report, p. G6. See also the first supplementary submission from the Attorney-General's Department, p. 5.
9. FOI Annual Report 1986-87, pp. 8 and 26.
10. Figures derived from graph in the FOI Annual Report 1986-87, p. 9, after making allowance for the fact that the pre-September 1986 figures included section 15 requests. More detailed quarterly figures are not provided in the Report.
11. E.g. FOI Annual Report 1986-87, p. 116 (Department of Employment and Industrial Relations). According to the Commissioner of Taxation, Annual Report 1986-87, p. 100 (Appendix 5), the number of access requests received during 1986-87 represented a 41% reduction in the number of requests received in the previous year (5742 reduced from 9658) - a result which the Commissioner described as a 'direct effect of the increased charging scale introduced by the' 1986 amendments.
12. E.g. FOI Annual Report 1986-87, p. 117 (Australian Federal Police).
13. Submission from Australians for Animals, pp. 4 and 5.

19.12 From an administrative point of view, the simplest charging regime would be one which imposed a small, flat fee upon all applicants. The fee would be non-refundable and there would be no scope for exemption, waiver or remission. Some agencies proposed the introduction of this type of regime.[14]

19.13 However, the Committee does not consider that this would reflect the 'user pays' principle adequately. Nor would it deter over-broad or poorly framed requests. At the same time, a small fee might deter people with limited means from lodging proper requests. The Committee considers that some of the benefits of administrative simplicity should be surrendered in order to achieve these other objectives.

Specific charges

19.14 Users drew the Committee's attention to specific aspects of charging, such as photo-copying charges, transcription charges and charges for computer time.[15] However, in general, these comments related to allegations of overcharging or misinterpreting the regulations in particular cases, rather than issues of principle. Matters of this type are most appropriately resolved by Administrative Appeals Tribunal or the Ombudsman in particular instances.

19.15 The present charge for photocopying is 10 cents per page. This has remained unchanged since the commencement of FOI.

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14. E.g. submission from the Department of Arts, Heritage & Environment, p. 7.

15. For example, it appears from material presented to the Committee that the Department of Trade determines 'actual cost' usage in providing FOI access to records held on computer by reference to an amount of 20 cents per record processed. This amount in turn is calculated by reference to Departmental guidelines on cost recovery. The Committee suspects that full inquiry would reveal that the costs sought to be recovered include the capital and overhead costs of the computer system. Where the computer system was installed for non-FOI reasons, it is not appropriate that any capital and overhead costs be charged to FOI users: only direct costs should be charged to the FOI requester.

Some agencies recommended that this should be increased.[16] One of the IDC's recommendations was to 'amend the Regulations to raise photocopy charges to reflect the actual cost to agency'.[17]

19.16 The Committee does not support this recommendation. First, the Committee does not believe that the expense to each agency of determining its actual cost of photocopying at each place where it does FOI access-related copying can be justified. Secondly, there is a danger that in working out the 'actual cost', agencies will include capital and other overhead costs for copiers used primarily for non-FOI purposes. Where the purchase of equipment is justified on non-FOI grounds, and the FOI-related use is merely incidental, it is improper to ascribe any element of the fixed costs related to that equipment to FOI. Thirdly, the Committee regards the current charge as roughly reflecting actual costs, although there may be considerable variation between agencies.[18] Not all agency FOI-related copying is done under optimum conditions. But the Committee would consider any charging system for photocopying that resulted in a cost to the user of more than 10 cents per page unreasonable.

Application fees

19.17 The present charging regime provides that agencies are not obliged to process an otherwise valid access request unless the request is accompanied by the payment of an 'application fee' of $30.[19] There is provision for requests for some types of

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16. Submissions from the Australian Federal Police, p. 4 (Evidence, p. 461); the Department of Communications, p. 6.
17. IDC Report, p. 4 (Option A14) endorsed by the second supplementary submission from the Department of Local Government and Administrative Services, p. 5.
18. The prices charged by a random sample of commercial photocopying services in Canberra in November 1987 ranged from 8c to 15c per page. In some cases, the per page costs fell as the number of pages to be copied increased. Presumably, similar variations will be evident amongst agencies depending upon the volume of material photocopied and the quality of the photocopiers employed.
19. FOI Act, s.15(1); FOI (Fees and Charges) Regs, reg.5.

documents to be exempt from the payment of fees and for applicants to seek remission of fees.

19.18 Some submissions opposed on principle the automatic levying of any fee for making a request.[20] In addition, any application fee may deter some potential users.

19.19 Subject to the scope and operation of the exemption and remission provisions (discussed below), the Committee does not regard the imposition of application fees as unreasonable. The imposition of fees deters frivolous applications,[21] and goes some way towards implementing the 'user pays' principle. The Committee does not accept that the 'right' of access necessarily entails that applications should be free.

19.20 However, the Committee is concerned that the $30 fee may be excessive, and may deter meritorious applicants. In addition, it is not clear how the figure of $30 was selected. It is intended to cover the cost of basic administrative procedures involved in processing the request.[22] It appears that this increase is intended to reflect a move towards full cost-recovery. Under the original scheme, provision was made for an $8 charge for administrative procedures, while the disallowed scheme contained provision for a $20 charge for the same purpose.

19.21 The Committee accepts that there should be some allowance for inflation, and the 1982 amount of $8 should therefore be increased. But inflation alone cannot explain an

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20. Submissions from Dr A. Ardagh, p. 5; the Library Association of Australia, p. 7; and Mr Paul Chadwick, p. 7.
21. According to the third supplementary submission from the Attorney-General's Department, p. 1, para. 3, 'It is not possible to say with any degree of certainty what effect the introduction of application fees and increased charges have had on the level of frivolous or vexatious requests. A quick telephone poll of FOI co-ordinators in a cross-section of major agencies suggests, however, that there has probably been a decline in such requests in agencies ... in which there is a low incidence of income maintenance related requests.'
22. Senate, Hansard, 25 September 1986, p. 804 (Senator Grimes).

increase from $8 to $30 in four years, nor from $20 to $30 between July 1985 and November 1986. The Government argued that the increase from $8 to $20 was partially influenced by the fact that it had proved to be necessary for officers of higher seniority (and hence higher salary) to handle FOI requests than had been anticipated originally.[23] This does not explain the major part of the increase from $20 to $30. It may be that a significant part of the increase from $8 to $30 represents a shift from partial towards full cost-recovery.

19.22 The Committee does not accept that the amount of the fee should be set with a view to full cost-recovery. The Committee takes the view that a fixed application fee of $15 would both deter frivolous applications and contribute towards the costs of FOI.

19.23 **The Committee recommends that the $30 application fee be reduced to $15.**

19.24 Senator Stone dissents from this recommendation.

Charges for search and retrieval

19.25 The original, the disallowed and the current charging regimes all provide for a charge for the time spent searching for and retrieving documents. The amounts are respectively $12, $30 and $15 per hour. The current scheme also introduces a new basis for charging: the time spent deciding whether to grant, refuse or defer access to a requested document or to grant access to a copy with deletions. This includes times spent in consultation with any person and in notifying any interim or final decision upon the request. The applicable amount is $20 per hour.

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23. Senate, Hansard, 13 November 1985, p. 2052 (Senator Gareth Evans).

19.26 The Committee accepts that it is appropriate to provide for a charge for search and retrieval time where access is granted, and regards the current rate of $15 per hour as appropriate.

19.27 However, **the Committee recommends that there be an upper limit upon the amount of time for search and retrieval which may be chargeable in respect of any one request.**

Charge for decision-making time

19.28 There is no data upon the amount of time agencies spend making decisions. Consequently, it is not possible to determine whether the time spent is decreasing as familiarity with FOI increases. While it is clear that agencies spend a significant amount of time making decisions, the Committee is unable to determine whether inefficient agencies, or those less disposed to openness, have tended to spend increased time in decision-making to thwart the operation of the FOI Act. However, in the comparable area of charging for search and retrieval time, no cases of excessive charging due to inefficiently organised filing or agencies' attempts to inflate charges were brought to the Committee's notice.[24]

19.29 Requests for documents containing business information are not typical of all requests. But the Inter-Departmental Committee Report estimated that in 1984-85 an average of 0.5 staff-days were spent on search and retrieval in response to each FOI request for business information. The corresponding average of the time spent on matters which would be chargeable as decision-making time under the current charging regime was at

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24. The Inter-Departmental Committee Report pointed out (p. G10) that substantial decision-making time in the processing of FOI requests is not a ploy to delay disclosure, but reflects the complex policy issues raised by some requests. In addition, agencies must be prepared to justify decision-making time if a complaint is made to the Ombudsman or a charge appealed to the AAT.

least 10 staff days.[25] The total cost of this time spent on consultation and deliberation was $2.1m.[26]

19.30 In the light of this, the Committee does not oppose the imposition of charges in respect of decision-making time.[27] It is appropriate that some degree of cost-recovery should be attempted. The ability to recover costs in this way will be affected by the scope of exemption from and remission of FOI charges. The relevant provisions are discussed below.

19.31 The Committee also accepts that $20 per hour is a reasonable rate if decision-making time is to be a chargeable item.[28]

19.32 However, **the Committee recommends that there be an upper limit upon the amount of decision-making time which may be chargeable in respect of any one request.**

Charges where no documents located

19.33 The original charging regime provided that some charges were payable in respect of requests for access, while other charges applied to the provision of access.[29] In theory at least, it was possible for administration and search and retrieval charges to be payable even where no relevant documents were located.

19.34 Under the current regime, this may become more common because the $30 application fee must be paid in order that the request constitute a valid FOI access request. There is no

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25. IDC Report, p. C17.
26. Total derived from data in IDC Report, pp. C17 and C22.
27. Contrast the views of the Administrative and Clerical Officers Association: Evidence, pp. 1172-73; and submission from Dr A. Ardagh, pp. 5-6.
28. Cf. IDC Report, p. G10.
29. FOI (Charges) Regs. 1982, Schedule I lists the first category, Schedules II, III, IV list charges in the second category.

express provision for the refund of this fee if no documents are located or no access is provided. Search charges may be paid and not refunded in cases in which no documents are located.

19.35 There are two arguments for imposing charges even though no documents are located or access is not granted. First, agencies are required to perform the work and incur the expense as a result of the request.[30] Secondly, information that no relevant documents exist may be of considerable value to the applicant.[31] Similarly, it may be of considerable value to an individual to learn that an agency does not hold any information, or a particular type of information, relating to the individual.

19.36 However, the Committee acknowledges that most FOI applicants do want to see the documents requested. For these people, it is unsatisfactory that they should be required to pay fees and charges yet obtain nothing in return. The possibility that this may happen may deter some potential applicants from seeking access. In addition, attempts to collect charges which have been notified frequently prove difficult when no access has been granted. Agencies often have to write off these charges as bad debts.

19.37 On balance, the Committee does not recommend that there be any automatic refund of any fees or charges paid if no relevant documents are located or no access is granted. It follows that the Committee does not believe that there should be

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30. Cf. Submission from Telecom Australia, p. 5 (Evidence, p. 753).

31. For example, one witness informed the Committee of a case in which he requested access to documents which he believed did not exist - Evidence, p. 447 (Confederation of Australian Industry). The object of the request was to confirm that the Government had failed to carry out certain economic studies prior to launching particular policy proposals. Confirmation would thus have enabled the applicant to attack the proposals for having been researched inadequately. For different examples, where documents exist but access is refused, see Evidence, p. 169 (Attorney-General's Department); Evidence, p. 1030 (Australian Broadcasting Tribunal); Kyrou E., 'Administrative Law: A Sunrise Industry for the Legal Profession?', (1987) 25(6) Law Society Journal 45, pp. 49-50.

any automatic refund in the less drastic case, where access is granted to a copy of the requested document from which deletions have been made. Insuperable administrative problems would arise if agencies were required to assess the extent to which such access was of some value to the applicant.

Statutory limits on chargeable search or decision-making time

19.38 There are several reasons for limiting the number of hours for which applicants may be charged, even though agency staff may spend more hours in search and retrieval and/or decision-making in processing the request. First, it was never intended that full cost-recovery apply to FOI. Secondly, a statutory ceiling may go some way toward meeting the objection that time-based charges may mean that applicants have to pay for agency inefficiency, obstructionism, unjustified caution etc.[32] Thirdly, a ceiling may enable applicants to determine in advance the maximum amount for which they may be charged, apart from variables such as per page photocopying charges.

19.39 Any system of statutory limits may operate unfairly as between those making simple and complex requests. Simple requests may be processed within the limited hours, and therefore all hours may be chargeable. Complex requests may require more time, and not all the hours expended will be chargeable. Consequently people making simple requests will contribute proportionately more to cost-recovery than people making complex requests. It follows that applicants have no incentive to modify or circumscribe a request where it has been established that the processing of the request will exceed the limits on chargeable hours.

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32. Submission from the Ombudsman, p. 8: 1/6 of complaints investigated to finality result in findings of deficient processing by agencies of FOI requests (Evidence, p. 1315); 'The Age' pp. 21-22 (Evidence, pp. 266-67); joint submission from the Australian Consumers' Association, Inter Agency Migration Group, Welfare Rights Centre, pp. 12-15 (Evidence, pp. 861-64).

19.40 On this view, it may be preferable to charge a significantly lower hourly rate but have no ceiling upon the chargeable hours. This would mean that the rate of cost-recovery would be constant across all types of requests, whether simple or complex. It would also give all applicants subject to the charges an equal incentive to frame their requests as precisely as possible. However, a scheme of this type provides no checks upon inefficient, ultra-cautious etc. agencies charging for excessive hours. For this reason the Committee favours introducing a system of statutory limits.

19.41 The simplest form of statutory limit would be to set a single amount as a ceiling. Any combination of hours spent on search and retrieval and/or on decision-making would be chargeable up to this limit. Section 22 of the Victorian FOI Act provides that the total of all the chargeable elements shall not exceed $100, except where the request involves the use of computers.

19.42 The IDC Report considered introducing separate limits for search/retrieval and decision-making time, and within each of these categories a limit of 1 hour where the request related to personal documents relating to the applicant and 15 hours for all other documents.[33]

19.43 For the purposes of comparison, the Inter-Departmental Committee estimated the mean cost of providing access in 1985-86 to be $310.[34] The average cost per request of providing access to particular categories of documents was as follows:

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33. IDC Report, p. G.9.
34. IDC Report, p. A19.

Document Type	Total Requests (%)	Costs per Request
Personal	24,544 (73.8)	194
Business (private sector)	2,273 (6.9)	637
Personnel	4,005 (12.1)	340
Policy	1,195 (3.6)	997
Internal administration	372 (1.1)	114
Law enforcement	97 (0.3)	2,632
Business (public sector)	134 (0.4)	1,906
Other	608 (1.8)	980

19.44 These figures give some indication of the way in which ceilings on chargeable time will result in less than full cost-recovery. It should be noted that the definition of 'personal' for the purpose of this table may not be identical to the category of 'personal documents' for the purpose of the one hour time limit proposed by the Inter-Departmental Committee. Some 'personnel' and 'law enforcement' documents may relate to the personal affairs of applicants in the relevant sense. However, the Committee does not regard the possibility of disputes over whether a request relates to 'personal' or 'other' documents as sufficient grounds for rejecting different ceilings for different categories of documents.[35]

19.45 In chapter 15 above, the Committee recommended that Part V of the Act should not be constrained by any narrow interpretation of the phrase 'personal affairs' adopted in the context of section 41. For the purposes of the distinction between 'personal' and 'other' documents in this context, the Committee considers that the wider Part V interpretation of 'personal' should apply.

19.46 **The Committee recommends that the Part V interpretation of 'personal affairs' be applied for the purpose of determining whether a document is a personal document for the purposes of the charging regime.**

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35. On this difficulty, see the submission from the Department of Aviation, p. 2.

19.47 On balance, the Committee favours a system of different limits according to the category of documents sought over a system imposing a single limit. The former enables the charges for providing access to documents containing personal information to be kept relatively low, and thus to be consistent with the principle that subjects of official files should be able to gain access to that information.[36] Charges for other categories of documents, where this principle is not relevant, may be higher.[37] For this reason, and to avoid further complication, there should only be two categories, personal and other. For ease of administration, the same hourly limits should apply to search/retrieval time and to decision-making time.

19.48 The Committee considers that limits of 2 hours for personal and 15 hours for other requests should be adopted. The maximum cost to an applicant of a request for personal documents, using the hourly rates accepted above, would be $15 application fee + (2 x $15 =) $30 search/retrieval time + (2 x $20 =) $40 decision-making time = $85. On the same basis, the maximum for any other type of document would be $15 + ($15 x 15 hours =) $225 search/retrieval time + ($20 x 15 hours =) $300 decision-making time = $540. Charges for any supervised access, photocopying etc. would be additional in both cases.

19.49 In many cases, of course, persons seeking access to personal documents will be exempted from charges and their fees will be remitted. (See discussion below on this point.)

19.50 The Committee also records its view that these limits should not be linked to the section 24 test of unreasonably burdensome requests. It should not be possible to characterise,

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36. Cf. Privacy Bill 1986, Information Privacy Principle 6.
37. Contrast submission from Dr A. Ardagh, p. 7, where it is argued that differential charging for access to personal and other documents risks reducing FOI to little more than a set of privacy provisions.

even prima facie, requests as unreasonably burdensome merely because these limits have been exceeded.[38]

19.51 The Committee recommends that the maximum charge for a request for access to (i) personal documents, be application fee plus a 2 hour search/retrieval time-fee plus a 2 hour decision-making time-fee; and (ii) other types of documents, be application fee plus a 15 hour search/retrieval time-fee plus a 15 hour decision-making time-fee.

19.52 The Committee further recommends that the fact that the cost of processing a request exceeds the maximum charges not be a relevant factor for the purposes of the section 24 workload test.

Exemption from charges and remission of charges

19.53 In principle, the Committee regards as appropriate the provisions which exempt categories of requests from any requirement to pay application fees or charges, supplemented by an opportunity for applicants to ask agencies to exercise their discretion to a remit fees and/or waive charges in particular cases.

19.54 The category of requests exempted from fees and charges is limited to requests for access to documents that contain information relating to a claim for, or decision in relation to, the payment to the applicant of a 'prescribed benefit'. This term is defined by the FOI (Fees and Charges) Regulations, reg.6(1) as:

> a pension, allowance or benefit payable under -
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> (a) the Seamen's War Pensions and Allowances Act 1940
> (b) the Social Security Act 1947;
> (c) the Student Assistance Act 1973; or

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38. Contra: submission from the Department of Local Government & Administrative Services, p. 12.

(d) the Veterans' Entitlements Act 1986, and any payment of a like nature the purpose of which is to provide income support to persons of inadequate means.

19.55 The Committee considered whether it would be possible to cast the exemption in narrower terms, leaving to all those excluded from exemption the right to seek remission of FOI fees and charges on grounds of financial hardship.[39] (Remission is discussed below.) The Committee considered that it would be too cumbersome to list in the FOI Act or Regulations all the payments under these Acts which are neither means/assets tested nor otherwise restricted by their nature to those in financial need.

19.56 If the Government were to devise a simple administrative regime which more precisely targeted the classes of persons who are exempted from fees and charges, the Committee would not object to the replacement of the list contained in the FOI (Fees and Charges) Regulations.[40]

Discretions not to levy a charge

19.57 Agency discretions not to impose charges provide one reason why charges are imposed in respect of such a small proportion of FOI requests. First, an agency may treat requests as falling outside the FOI Act altogether, and provide the material free of charge. In theory, it is arguable that sub-section 94(3) of the FOI Act requires that whatever charges ought to be imposed for access under the Act should also be imposed where access is granted apart from the Act. In practice, no-one has any motive to argue this point.

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39. Dr A. Ardagh argued in her submission, p. 6, that this exemption may be drawn too widely. Not everyone in receipt of benefits, allowances etc. under these Acts is unable to afford to pay for FOI access. Not all payments provided by the Acts are means and/or assets tested.

40. E.g. entitlement to possession of a (Pensioner) Health Benefit card might be an appropriate criterion by which to grant exemption from fees and charges.

19.58 Secondly, regulation 3 of the FOI (Fees and Charges) Regulations confers a discretion on an agency whether to impose charges upon FOI applicants. Government guidelines direct a charge should not be imposed where:

> . the documents to which access is sought are documents of a kind which are customarily made available free of charge ...
>
> . the levying of such a charge in a particular case would be inconsistent with existing practices in relation to making documents or information available on request. (Thus, if it is the practice of an agency to allow its clients access to its documents free of charge or at a nominal charge less than those fixed by the Regulations, that practice should continue).[41]

19.59 The Committee accepts that it would not be consistent with the object of FOI to charge in such cases. It may be that as recollections fade as to what was customarily made available without charge or what were the practices prior to the introduction of the FOI Act, some amendment to the wording of these guidelines will be required. The Government guidelines also state that

> charges should be imposed and a deposit collected in respect of every request under the Act. Sensible administration suggests, however, that where an applicant would obviously apply for and be granted remission under section 30 of the Act, no charge should be imposed. In these instances agencies and Ministers should exercise the discretion under section 29 and decide not to impose a charge. But it is emphasised that this course should be followed only in the clearest cases for remission - normally remission is a matter to be considered only when the applicant seeks it.[42]

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41. FOI Memorandum No. 29/1 (June 1985), para. 17.
42. FOI Memorandum No. 29/1 (June 1985), para. 19. See also FOI Memorandum No. 41 (revised, June 1985), paras. 6-7.

19.60 The Committee does not disagree with this. But it appears that a significant number of agencies ignore the last sentence of the quoted passage. Where requests are for personal documents, some agencies assume that applicants would apply for remission in each case, and that it would be appropriate in each case to grant that remission.

19.61 Applying this approach across the board simplifies an agency's administration of the FOI Act. However, one effect of adopting this approach is that applicants to whom charges apply and who could afford to pay the charges are not asked to pay. Instead the cost falls upon the taxpayers. The Committee regards this as unsatisfactory.

19.62 **The Committee recommends that the grounds for remission be altered so as to make it clear that the fact that documents relate to the applicant's personal affairs is not of itself sufficient reason for granting a remission automatically.**

19.63 However, the Committee recognises that, unless all discretion to waive charges is removed, agencies will be able to waive charges in particular cases or entire classes of cases. It would not be practical to remove all discretions.

19.64 The Committee regards any loss of revenue resulting from the unnecessary waiver of FOI charges as a matter for the Government. It merely draws attention to the fact that a significant number of applicants who could, consistently with FOI principles, be asked to pay charges are apparently not being notified of charges.

19.65 The Administrative Review Council raised the issue whether such a significant point as the grounds for discretionary waiver should be dealt with in the Act or Regulations, rather

than be left to administrative guidelines.[43] The Committee has a preference for having such matters dealt with in legislation as a matter of principle. This both permits parliamentary control, and facilitates public awareness.[44] Further, the Administrative Appeals Tribunal may not give due weight to the administrative guidelines.[45] However, in practice, no difficulties have arisen out of the guidelines. The Committee does not, therefore, recommend that the substance of these guidelines be put in legislative form.

Remission

19.66 Sub-section 30(3) provides for the basis upon which agencies may remit charges:

> Without limiting the matters which the agency or Minister may take into account for the purpose of determining whether or not to remit a charge under sub-section (2), the agency or Minister shall take into account-
>
> (a) whether the payment of the charge or of any part of the charge would cause financial hardship to the applicant or to a person on whose behalf the application was made;
>
> (b) whether the document to which the applicant seeks access relates to the personal affairs of the applicant or a person on whose behalf the application was made; and
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> (c) whether the giving of access is in the general public interest or in the interest of a substantial section of the public.

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43. Submission from the Administrative Review Council, p. 59.
44. For comment on the balance between matters dealt with in guidelines and in the Regulations see Senate Standing Committee on Regulations and Ordinances, 73rd Report, p. 17 (December 1982) and 74th Report, pp. 9-10 (March 1984).
45. E.g., the discussion in Re Waterford and Attorney-General's Department (No. 2) (1986) 9 ALD 482, pp. 487-88.

19.67 Section 30A provides for remission of the application fee on the same basis as paragraphs 30(3)(a) to (c). However, these are the only grounds for remission. There is no equivalent in section 30A to the sub-section 30(3) formula, 'without limiting the matters' etc. As a result, there is wider scope for remission of charges than there is for remission of the application fee.

19.68 The Committee does not see any reason for this distinction.

19.69 **The Committee recommends that the wider sub-section 30(3) formula apply also to section 30A remission of application fees.**

19.70 The Committee supports the availability of remission on financial hardship grounds.[46] In 1985-86, two-thirds of applications for remission relied upon this ground alone.[47] Apparently no difficulties have arisen in determining whether 'financial hardship' exists in practice.

19.71 The Attorney-General Department's guidelines state that remission 'should be granted where the documents to which the applicant seeks access relate to the personal affairs of the applicant in the absence of other relevant countervailing factors'.[48] The only example given of a relevant factor is where the applicant has refused an offer of access outside the Act. Financial hardship cases aside, the Committee sees no reason why

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46. Cf. 1979 Report, para. 11.41.
47. FOI Annual Report 1985-86, p. 27.
48. FOI Memoranda No. 41 (revised, June 1985), para. 10.

the fact that documents relating to personal affairs are sought should give rise to what is in effect a presumption that fees and charges should not be payable.[49]

19.72 The Committee recognises that individuals should be able to discover and inspect information held by government about them. The ceilings proposed above should ensure that requests relating to this type of material will not incur excessive charges. A presumption that access should be free does not seem to be justified.

19.73 The Committee also supports the remission of charges where access is in the general public interest,[50] although applications for remission on this ground are relatively infrequent.[51] Arguments have been made that this ground of remission should be clarified.[52] It is suggested that working journalists should be entitled to the remission as a matter of course.[53] Alternatively, it has been argued that there should be presumption that journalists are not entitled to remission as a matter of course.[54] There has also been debate over whether parliamentarians should be entitled to remission as a matter of course.[55]

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49. Cf. submission from the Department of Foreign Affairs, p. 7 (Evidence, p. 1062); Evidence, pp. 936-39 (Australian Consumers' Association); p. 1175 (Administrative and Clerical Officers Association); p. 1205 (Department of Finance). Contrast the submissions of the Privacy Committee (NSW), pp. 4-5; and the Young Liberal Movement of Australia, p. 1.
50. Cf. 1979 Report, para. 11.42.
51. FOI Annual Report 1985-86, p. 27: 8% of remission applications relied solely on public interest grounds in 1985-86.
52. E.g. submissions from the Department of Foreign Affairs, p. 7 (Evidence, p. 1062); the Political Reference Service Ltd, p. 15 (Evidence, p. 965); the Department of Aviation, p. 2.
53. Evidence, pp. 285-290 ('The Age'), 318-19 (Mr R. Howells); submission from Mr Paul Chadwick, p. 4.
54. Submission from the Department of Transport, p. 5.
55. See for example the following comments made in the Parliament: House of Representatives, Hansard, 9 October 1985, pp. 1651-53 (N.A. Brown); Senate, Hansard, 13 November 1985, p. 2048 (Senator Missen), pp. 2052-53 (Senator G. Evans), p. 2060 (Senator Puplick).

19.74 Mr Lindsay Curtis, of the Attorney-General's Department, described the policy on remission for journalists:

> Our policy position, in line with the government policy, is that there is not automatic exclusion of journalists, and that we would ordinarily, I think, expect journalists to pay because, let us be frank, for the most part they are making requests on behalf of the papers which they represent. I think to that extent they may be distinguished, for example, from members of parliament who do not have commercial organisations behind them.[56]

19.75 The main points of the guideline with respect to grants of remissions to Parliamentarians are:

- requests on behalf of constituents to be treated for remission purposes as if made by the constituent directly;

- requests for material normally provided in answer to a Parliamentary Question and able to be provided within the workload limits normally applicable to answering Parliamentary Questions - remission to be granted;

- requests for information contained in a document which would normally be provided to the Member of Parliament in accordance with the Government Guidelines for Access by Individual Members of Parliament to Public Servants and Officers of Statutory Authorities - remission to be granted; and

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56. Evidence, p. 120. The Administrative Appeals Tribunal has rejected automatic waiver of fees for requests by journalists: see for example Re Fewster and Department of Prime Minister and Cabinet (17 December 1986) para. 13.

- all other requests to be referred to the Minister responsible for the agency or to be dealt with in accordance with any guidelines issued by that Minister.[57]

19.76 The Committee takes the view that the position with respect to remission for both journalists and members of Parliament is satisfactory. No change is recommended.

Review of agency decisions on remission of charges

19.77 The first step in collecting FOI charges is for the agency to decide that it will impose a charge in relation to a request. The applicant must be notified of this decision. Applicants may seek review of this decision in the same way as they may seek the review of decisions to refuse access, that is, by internal review,[58] and review by the Administrative Appeals Tribunal.[59]

19.78 Alternatively, the applicant may, in effect, concede liability and ask the agency to grant a remission under section 30 of some or all of the notified charges. No provision is made for internal review of the decision whether to remit charges. The Administrative Appeals Tribunal has no jurisdiction to review an agency's decision in respect of remission.[60]

19.79 In 1979, the Committee opposed the suggestion that the Administrative Appeals Tribunal should be able to review decisions to waive or reduce fees.[61] However, in its submission, the Administrative Review Council argued that, contrary to the Committee's apprehensions in 1979, experience has shown that the

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57. FOI Memorandum No. 41 (June 1985), para. 13.
58. FOI Act, s.54(1)(b).
59. FOI Act, s.55(1)(c).
60. Re Waterford and Attorney-General's Department (1985) 8 ALD 545; Re Howells and Australian Telecommunications Commission (5 February 1987).
61. 1979 Report, paras. 11.43-11.44.

Tribunal is unlikely to confuse the question of remission, where the status, motives, etc of the applicant are relevant, with questions of rights of access, where these matters are not relevant.[62]

19.80 The Committee notes that the sub-section 30(3) listing of criteria for the grant of remission reduces the prospect that irrelevant criteria may be taken into account. Similarly, in dealing with questions of awards of costs (s.66), the Administrative Appeals Tribunal is required to deal with matters which are analogous to those relevant to remission. Further, the Administrative Appeals Tribunal deals with similar matters in reviewing agencies' discretionary decisions to impose charges under section 29.

19.81 One factor which the Administrative Appeals Tribunal may consider when reviewing a section 29 decision to impose a charge is whether it would be administratively futile to impose a charge where the applicant would be likely both to seek and to be granted a remission under section 30.[63] In order to review section 29 decisions, the Administrative Appeals Tribunal must have regard to the criteria listed in sub-section 30(1), although the criteria governing section 29 decisions are theoretically distinct from the criteria governing remission decisions under section 30.

19.82 Administrative Appeals Tribunal Deputy President Hall has commented that the overlap between these two theoretically distinct sets of criteria 'may lead to possible confusion and may be wasteful of resources'.[64] He made the further point that

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62. Submission from the Administrative Review Council, pp. 51-57, esp. p. 57.
63. Re Waterford and Attorney-General's Department (No. 2) (1986) 9 ALD 482, p. 488; Re Bailey and Commonwealth Tertiary Education Commission (8 December 1986), para. 17(f).
64. Re Waterford and Attorney General's Department (1985) 8 ALD 545, p. 553.

> if there is to be a reviewable discretion at all in respect of the imposition of charges, there may be a question whether, in the light of experience gained since the time of the Senate Committee's deliberations, there is a need for more than one discretionary decision in that regard (cf the US FOI Act).[65]

19.83 The Committee does not object to the Administrative Appeals Tribunal reviewing agency decisions on the remission of charges. The ordinary FOI Act facilities of internal review and Administrative Appeals Tribunal review should be available in respect of decisions on remission of charges and application fees.

19.84 This conclusion leads to the further question whether decisions to remit charges (s.30) should be merged with decisions to impose those charges (s.29). The Committee recognises that it may be administratively less complex to have a single (reviewable) decision whether charges should be paid. However, this would require the consolidation of the two separate sets of criteria for the section 29 and section 30 decisions.

19.85 At present, the section 29 criteria focus upon matters which are largely within the knowledge of the agency. For example, whether the documents requested are of a type to which access is customarily provided free of charge. In general, these criteria may be applied in the absence of any expression of view or argument by the applicant. By contrast, to the extent that they are set out in the FOI Act, the remission criteria tend to focus upon matters which can be decided properly only after the applicant's views have been heard.

19.86 This is not an insurmountable bar to consolidating the decisions. It may be possible to require applications to contain any argument which the applicants might wish to make as why charges should not be payable in respect of their applications.

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65. Ibid.

This would require applicants to be aware that agencies had a discretion with respect to the imposition of charges, and to know the relevant criteria. This presupposes a knowledge which many applicants may lack.

19.87 Alternatively, agencies may be able to make only tentative decisions about the imposition of charges. Their decisions would become binding and charges payable only if, after being notified of the tentative decision and the criteria for not imposing/remitting the charges, applicants did not seek the variation of those decisions. It is possible that some refinement of detail would be necessary. However, the Committee considers that this approach would be workable.

19.88 In general, this approach would avoid the requirement that applicants should possess detailed knowledge about the FOI Act, whilst enabling agencies to consider all the relevant information before making any firm decision whether to waive charges. The criteria which should be taken into account in reaching this decision should be a combination of those relevant to section 29 and section 30, as was discussed above.

19.89 **The Committee recommends that the section 29 and section 30 decisions be consolidated.**

Deposits

19.90 'The Age' suggested that agencies should not be able to require the payment of deposits for charges which applicants are liable to pay.[66] Alternatively, some agencies advocated strengthening the ability to require payment of deposits as a precondition to processing requests.[67] In its submission, the Treasury stated that:

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66. Submission from 'The Age', p. 27 (Evidence, p. 212).
67. E.g. submission from Telecom Australia, p. 5 (Evidence, p. 753).

> Treasury experience indicates that charging a deposit before work commences reduces the incidence of frivolous requests ... Under the Regulations as they apply at the moment, however, it is not usually possible to seek a deposit.[68]

19.91 The Committee considers that the requirement that application fees should be payable in advance, introduced as part of the new charging regime which took effect in November 1986, will provide adequate deterrence in those situations where deposits cannot be required or are administratively difficult to impose. Accordingly, the Committee has not examined the Regulations relating to deposits in detail.

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68. Submission from the Department of Treasury, p. 9 (Evidence, p. 623). See also the submission from the Department of Local Government & Administrative Services, p. 11, on the difficulty of requiring a deposit under the current regulations.