

Charges and fees

The present provisions: safeguards and weaknesses

11.1 The Bill clearly contemplates that members of the public who use the Freedom of Information legislation will have to pay for the documentary information that they acquire. Clause 16 provides that payment of a prescribed charge is a condition to be met before access is given to a non-exempt document. Clause 49 confers power upon the Governor-General to make regulations for, among other things

(a) the making of charges of amounts, or at rates, fixed by or in accordance with the regulations for access to documents (including the provision of copies or transcripts) in accordance with this Act, including requiring deposits on account of such charges;

In addition, clause 37 (6) provides that the powers of the Administrative Appeals Tribunal 'extend to matters relating to charges payable under this Act in relation to a request'. It is clear, therefore, that charges are likely to be levied, though no indication is given either in the Bill or in the explanatory statements that accompany it, as to the criteria in accordance with which the charges will be assessed or the procedures by which they will be levied.

11.2 This omission has been much criticised in submissions received by this Committee from members of the public and from community groups. While there is no evidence that prohibitive charges will be levied by agencies, naturally a fear exists that the right of access conferred by the Bill will be too expensive to utilise. In part this fear is based upon reference to practices that have prevailed under the United States Freedom of Information Act. Before 1974, that Act was drafted in similar terms to the Australian Bill, in that it permitted agencies to impose charges in accordance with regulations made under the Act. Each agency could establish its own charges, and fee practices varied substantially from agency to agency. There was a difference first in the quantum of the fees charged—search fees varied from \$3 to \$7 per hour, and while the copying charge was 5c per page in some agencies, it went as high as \$1 per page in others.¹ A number of agencies ordinarily waived the payment of charges, while it was alleged that others used the power to deter members of the public from making requests—for instance, one inquirer was asked by the FBI to pay \$37 607 before the Rosenberg documents would be released.² Other prevailing practices also confirmed the opinion of critics that fees were employed to undermine the right of access: some agencies required pre-payment of expected fees before a search would be undertaken; others demanded a minimum fee (as high as \$10) regardless of the number of documents requested or disclosed; and it was alleged that there were agencies that would not charge regular clients, but would charge others. Since 1974, when the United States Act was amended following public criticism of fee practices during Congressional hearings on the Act, a considerably greater degree of standardisation has prevailed in charging practices. But search

¹ Australia, Parliament, *Royal Commission on Australian Government Administration (R.C.A.G.A.)* (Dr H. C. Coombs, Chairman). *Appendix, Volume Two*, Parl. Paper 187/1976, Canberra 1977, pp. 78-9.

² See 'Prying on the Truth—FOI in the USA', *Rupert* No. 1, February 1976, p. 5.

fees for Freedom of Information Act requests differ widely from agency to agency, so much so that according to Irene Emsellem, a staff member of Senator Kennedy's Judiciary Committee, 'the single most important action needed by Congress is uniformity in fees and fee waivers'. Miss Emsellem noted that charges for searches by agency 'professionals' vary from \$3 an hour at the Department of Health, Education and Welfare to \$12 an hour at the Nuclear Regulatory Commission. Computer search charges range from \$6.50 at the Federal Trade Commission to a huge \$188 an hour at the Justice Department.³

11.3 We do not contest the assumption inherent in the present Bill that *some* charges and fees will be required to be paid. Only mild opposition has been expressed to this Committee against the principle that agencies should be empowered to levy charges in return for granting access to documents. The Library Association of Australia and the Australian Advisory Council on Bibliographical Services expressed the view that a system for disclosure of government information is comparable in objectives to the public library system, and both should be publicly subsidised to the same extent.⁴ The Company Directors Association submitted that public subsidy was justified on the basis that the Bill would facilitate good relations with the business community.⁵ While we endorse in theory the principle that the cost of safeguarding democratic rights, including perhaps 'the right to know', should be borne by the community, it is clear to us that the right of access conferred by the Bill will commonly be used by individuals to obtain information for private uses only, or to promote a private benefit or gain. While this is a legitimate use of the Bill, it does not call for public subsidy. There are practical reasons also why a power to levy charges must exist. If documents could be obtained free of charge, there is a distinct danger that agencies could be beleaguered with requests for most documents that are brought into existence. Certainly instances occurred in the United States where individual requests have demanded 'tons of records and literally millions of pieces of paper'.⁶ Although it would be wrong if the Bill required that applicants had a 'need to know', or that requests had to be genuinely made, or if it provided that agencies could refuse to answer requests deemed to be frivolous or vexatious, quite clearly charges are a practical safeguard of the administrative efficiency of government.

11.4 Most of the criticism on charges has concerned the absence of any safeguards in the Bill to ensure that charges will be reasonable and will not be imposed inconsistently or incorrectly. We think this criticism is well made and believe it is useful, therefore, to consider the nature of the safeguards which presently exist.

11.5 Clause 49 provides that charges will either be specified, or be calculated in accordance with rates specified, in the regulations. There will be one set of regulations applying to all agencies; and to this extent at least a uniform code will be observed. In accordance with normal parliamentary procedures,⁷ the regulations will be subject to scrutiny and disallowance by either House of

³ A. Weinstein 'Open Season on "Open Government"', *The New York Times Magazine*, 10 June 1979, p. 32.

⁴ Submission no. 95, incorporated in *Transcript of Evidence*, p. 2062 and Submission no. 75, p. 18.

⁵ Submission no. 160, p. 1.

⁶ R. L. Saloschin, 'The Freedom of Information Act: A Governmental Perspective' in F. E. Rourke (ed.), 'A Symposium: Administrative Secrecy: A Comparative Perspective'. *Public Administrative Review* (Jan./Feb. 1975), pp. 10, 12.

⁷ *Acts Interpretation Act 1901*, s. 48.

Parliament, and to particular scrutiny also in the first instance by the Senate Standing Committee on Regulations and Ordinances. The actual charge imposed upon an applicant in accordance with the regulations can be reviewed, pursuant to clause 37 (6) of the Bill which provides that the powers of the Administrative Appeals Tribunal to review agency decisions regarding a request for access 'extend to matters relating to charges payable under this Act in relation to a request'. This rather cryptic provision means, we assume, that a person who has been granted access to a document, but feels that the charge imposed is too high—in that, for example, the wrong rate was imposed, or that the agency miscalculated the search time involved—can appeal to the Tribunal. If so, the Tribunal would be empowered merely to decide whether a particular charge was authorised by the Act, i.e., was in accordance with the rates specified in the regulations. If the charge was authorised, and properly calculated in the circumstances, the Tribunal's power would be at an end, however unreasonable or high it felt the authorised charge may have been. It may be that the language of clause 37 (6) can be argued to be wide enough to give the Tribunal a general discretion to fix whatever fees it deems appropriate in the circumstances, but we believe that a narrower reading would probably prevail.

11.6 There are still many matters concerning charges that are not regulated by the provisions to which we have referred and are not protected by the avenues for scrutiny or review. In particular, questions arise as to what services and material will be charged for, what the actual level of charges will be, when deposits on account of charges will be required, and the whole question of waiver of fees and charges. Little guidance on these matters is given in the statements or explanations which accompany the Bill. The 1976 IDC Report commented merely that the schedule of charges to be prescribed by regulation

should be based on direct cost of search calculated at hourly rates taking account of the staff employed in dealing with the request. The 'direct' cost of search should encompass normal departmental search procedures and would not extend to the cost, for example, of locating a mislaid document. Where information is held on a microcopy, cinematograph film, videotape, sound recording tape or the like, standard charges related to the cost of retrieval should be prescribed. The copying of a document should be charged for at prescribed rates.

Where the cost of complying with a request is likely to exceed a prescribed amount, provision should be made for a department to inform the applicant of the estimated cost and obtain a deposit before proceeding further with the request. In all cases a department should be required to locate a requested document and inform applicants that upon receipt of a specified charge the document will be made available. There would be no charge made when a request for a document was not met.⁸

11.7 The most that is contained in the statements that accompany the Bill is a short comment in the *Background Notes* that the regulation on charges will take into account these recommendations.⁹ To our mind too little indication has been given as to the nature of the provisions on charges that will ultimately be adopted. Although many of the fears expressed to this Committee in submissions and evidence may ultimately prove to be unfounded, it is quite understandable that these fears should be held at this time. Most of the existing uncertainties will be clarified once the regulations are published, but we see no reason why the resolution

⁸ Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Inter-departmental Committee*. Parl. Paper 400/1976, Canberra, 1977, paras 19.5 and 19.6.

⁹ Australia, Attorney-General's Department, *Freedom of Information Bill 1978—Background Notes, 'Criticisms, Explanations and Answers'*, AGPS, Canberra, 1978, p. 14.

of some of these questions should wait that long. Questions regarding costs are as important in a Freedom of Information Bill as questions regarding exemptions. It would have been a straightforward matter for some explanation to be given, for instance, on whether and in what circumstances fees would be waived, and we regret that this advice has not been forthcoming.

11.8 Our consideration of this matter has led us to conclude that many, though not all, of the points which are the subject of uncertainty should be resolved in the Bill and not in the regulations. We acknowledge that the Bill is at present framed in accordance with the customary drafting practice of leaving to the regulations the actual charges or rates of calculation to be adopted. This approach is obviously sensible, since both inflationary changes and administrative experience which necessitates the need for amendments require that the charge or rate of calculation be susceptible to ready amendment. This amendment can be effected more easily in regulations, which only require gazettal, than in a Bill which requires passage through both Houses of Parliament. It would be impractical to insert the actual rates of charge in the Bill, and we do not recommend any change in that respect.

11.9 There are however other matters which could be fixed or determined from the outset. They include the services and materials for which agencies should be entitled to levy charges; standardisation of charges; the time at which charges (including deposits) should be required to be paid; and the question of waiver of charges. Our consideration of the few references to charges in the departmental submissions illustrates this, as some agencies have apparently made assumptions in these respects that should be determined instead by Parliament, while submissions indicate inconsistencies could readily develop in the fee practices of agencies. For instance, the Commissioner for Employees' Compensation evidently assumes that charges must now be levied even for material otherwise free of charge¹⁰ while the Office of Women's Affairs indicated its support for waiving fees where research time is less than one hour or the applicant is disadvantaged.¹¹ Again, some agencies have clearly assumed that a fee component should be the time spent by an officer examining a document to determine if it contains exempt information on preparing it for inspection.¹² The next section of this chapter contains our recommendations on those principles which we believe should be incorporated in the Act, rather than left to the regulations.

Setting of charges for services and materials

11.10 Perhaps the most immediately pressing question is the determination of whether, in principle, certain charges should be levied at all, and if so, what criteria should apply in fixing actual rates. We consider these issues in relation to, successively, charges for initial search and retrieval; charges for the examination of the material so retrieved to determine whether it is exempt; charges for the inspection by the applicant of documents to which access is granted; and charges for copying and materials.

11.11 *Search and retrieval fees.* There appears to be common agreement that an agency should be able to charge for the time spent conducting a routine search

¹⁰ Submission no. 99, para 13.

¹¹ Reply of 16 March 1979 by Department of Home Affairs to Public Service Board Survey on resource implications of Freedom of Information Bill, Committee Document no. 67, p. 13.

¹² e.g. Department of Social Security, Submission no. 117 incorporated in *Transcript of Evidence* p. 2137 and Department of Education, Submission no. 66, para. 6.

through the registry system for a document. There are, however, at least three different ways in which the search fee could be calculated.

11.12 One option is to charge each applicant a *set retrieval fee*, say of \$10. This would be similar to the system that initially operated in relation to the records of Medibank, when any person could obtain his records from the Health Commission for a fee of \$8. The advantages of a set fee are that it is a system that is simple to operate, and is likely to be inexpensive to members of the public. The main disadvantage is obvious: that an agency could spend considerable time in answering a request without being able to recoup the direct costs involved—for instance, if an individual request seeks a large number of documents, or if the records requested are described qualitatively and time is spent in locating documents that fit the request description. This option is also susceptible to abuse. For instance, a number of applicants all seeking similar documents from one agency might be able to aggregate their requirements into one request, and pay a single request fee. The option could also tend to rigidify and make the charging of fees automatic where otherwise an agency may have been inclined to provide documents free of charge, for instance on the basis that the request is a routine one, or could be handled simply and quickly.

11.13 The second option is to charge a *set retrieval fee with discretionary variations*, i.e. to allow the agency to charge at an hourly rate in certain defined circumstances—for instance, if a large number of documents is requested, if the anticipated search time will exceed a set number of hours, or if the documents are requested by reference only to the subject matter with which they deal. The main difficulty with this option is the identification of a reasonably precise criterion, that is not too broad or uncertain, to govern the use of the discretionary variation. We have not pursued this matter further, as in our opinion the same result will in a practical sense be achieved in most cases by use of the third option.

11.14 The third option, which we favour, is to have a *set hourly rate* applying to the time spent searching for a document—for instance, the rate could be \$6 per hour, regardless of what level or rank of officer carried out the search. This option combines the advantages of simplicity, ease of calculation and amenability to challenge when a miscalculation is claimed. In practice, this option may possibly combine the advantages of the above option. What is likely to happen is that many agencies might not charge at all if the fee is small (for example, is less than \$10 or involves search time of less than one hour) for the reason that costs involved in calculating the sum payable may be as large as the costs that are so recovered. Certainly this is what has occurred in the United States. Hence charges are applied mainly to the more expensive inquiries. If this approach is to be adopted, it will be necessary to confer upon agencies, in addition to the discretionary waiver or reduction power that we recommend later in this chapter for impecuniosity and public interest reasons, a discretion to waive fees, in effect for administrative reasons, in respect of any individual request.

11.15 It is, of course, possible to adopt the 'set hourly rate' principle with several variations. For example, the United States Justice Department distinguishes between 'clerical searches' where the charge is calculated as follows: 'For each one quarter hour spent by clerical personnel in excess of the first quarter hour in

searching for and producing a requested record, \$1.00¹³ and on the other hand 'nonroutine, nonclerical searches' where the formula is expressed in these terms:

Where a search cannot be performed by clerical personnel, for example, where the task of determining which records fall within a request and collecting them requires the time of professional or managerial personnel, and where the amount of time which must be expended in the search and collection of the requested records by such higher level personnel is substantial, charges for the search may be made at a rate in excess of the clerical rate, namely for each one quarter hour spent in excess of the first quarter hour by such higher level personnel in searching for a requested record, \$2.00.¹⁴

However, we believe that, on balance, it would be simpler and more efficient—and probably no more costly in the long run for the agency to administer—for a single flat rate to apply whatever the personnel level involved.

11.16 A particular question arises as to the basis on which search and retrieval fees should be levied in relation to computer-stored information. In Chapter 8 we have already discussed the operation of clause 15 of the Bill which spells out, among other things, the procedures applicable to the granting of access to such information. We state here our belief that it is proper that applicants be charged fees approximating the real cost to the agency concerned of the personnel and machine time involved in generating the output required. As an indication of what has been thought appropriate in this respect by at least one United States central agency (while noting at the same time, as we said in paragraph 11.2, that the Justice Department's computer fees are higher than those applying elsewhere) we quote the following further extract from the United States Department of Justice's 1977 Annual Freedom of Information Act Report:

<i>Computer time charges (includes personnel cost):</i>		\$
1. Central processor charge per hour	.	188.00
2. Main storage charge per 1000	per hour50
3. Channel charges per hour	.	.74
4. Card reading per 1000 cards	.	.20
5. Printing per 1000 lines	.	.43
6. Card punching per 1000 cards	.	10.70
7. Tape mount	.	.50
8. Specific device charges		
a. IBM 2200 Cathode ray tube or equivalent per hour	.	4.20
b. IBM 3330 Disk storage or equivalent per hour	.	39.72
c. IBM 2314 Disk storage or equivalent per hour	.	39.72
d. IBM 3420 Tape Drive or equivalent per hour	.	44.59 ¹⁵

11.17 Recommendation: Charges for the search and retrieval of information should be fixed on a single set hourly rate basis, with provision for the agency to waive or reduce any such charge if it deems it appropriate in the circumstances.

11.18 Examination of documents. An important question is whether charges should be levied only for the time taken to search for or locate a document, or whether it should also cover the time spent examining a document in order to determine whether it is exempt or contains exempt matter that should be deleted before disclosure. Charges are likely to be much higher if examination time is included. In many instances this may be the only time that is chargeable—for example, if a request is made for an internal report on a particular topic, there

¹³ United States, Department of Justice, Freedom of Information Act, *Annual Report to Congress 1977*, Committee Document no. 60, p. 15.

¹⁴ *ibid.*

¹⁵ *ibid.*

may be no search time involved, because the identity and location of the report is readily ascertainable. But if it is a lengthy report that deals, say, with issues of national security, or with trade secrets of a named corporation, many hours may be spent by senior officers of the agency in examining its contents. Since the time of the officers may well be diverted for a considerable period from other equally important agency business (even necessitating perhaps the eventual employment of additional senior staff), there is a difficult question as to whether these costs to the public should be reflected in the charges that are made under the Bill.

11.19 It is usual practice in the United States for no charges of this kind to be levied. Again the position of the United States Justice Department is typical, the relevant fee guideline being expressed as follows:

Examination and related tasks in screening records. No charge shall be made for time spent in resolving legal or policy issues affecting access to records of known contents. In addition, no charge shall be made for the time involved in examining records in connection with determining whether they are exempt from mandatory disclosure and should be withheld as a matter of sound policy.¹⁶

11.20 We are aware of the budgetary strain that will undoubtedly be placed on a number of agencies if this approach is adopted. There will be some classes of requests—particularly in relation to defence and security matters—which will often require very lengthy screening indeed. These problems will be further multiplied as our recommendations with respect to the phasing in of access to prior documents come into effect, although it is to be noted, of course, that the Bill already provides for a degree of retrospectivity to the extent that access may be obtained under clause 10 (2) to past documents which are necessary to enable an understanding of later-created ones. We gave careful consideration, then, to whether there should not be some provision enabling, if only in limited and exceptional circumstances, the discretionary imposition of an appropriate examination fee. In the event, the majority of us take the view, on balance, that no examination fees of any kind ought to be charged. We are led to this conclusion both by the difficulties and uncertainties we see as being inevitably associated with the administration of any examination fee system, and our belief that there is no reason in principle why the financial burden upon an applicant should depend upon the inherent sensitivity of the material to which he seeks access (or for that matter, upon the varying sensitivities of the particular officers engaged in examining it).

11.21 We believe that, as time goes by and the Freedom of Information legislation becomes well established, less and less time will in fact be needed for examination purposes. This will result not only from increased familiarity with the legislation and its standards, but also from the likely adoption of different attitudes and practices at the time that documents are created. Attention will become better focused on what information contained in the document can be released and what should be withheld (or reviewed afresh when a request is received). We understand, for instance, that in the United States many agencies now make an attempt in the creation of internal working documents to separate fact and opinion. Additionally, corporations supplying documents to the Government are asked by some agencies to mark those portions of the documents that should be considered for exemption.¹⁷ A similar practice also exists with documents relating to national security, where the Executive Order establishing the

¹⁶ *ibid.*

¹⁷ e.g. United States, Food and Drug Administration, Regulations 21 FR S. 4.44-4.46.

security classification system requires that the classified portions of documents be specifically identified (see further discussion in Chapter 16); unclassified portions could not be withheld pursuant to the 'national security' exemption in the United States Freedom of Information Act. Practices such as these, if adopted in Australia, would clearly ensure efficiency in the administration of the Bill—a benefit both to the Executive and to the public. However, if agencies do not choose to adopt such practices, in our opinion members of the public should not have to bear the cost under the Bill.

11.22 There is also another issue of consistency. If some agencies adopt practices to speed the examination and release of material, while others do not, members of the public who make requests under the Bill will be forced to pay higher charges to the latter. The same disproportion could arise in other ways. Those agencies which, by comparison with others, are less disposed to openness are likely to spend relatively more time in examining requested documents. It hardly seems fair or just, in a Bill designed to confer rights of access, that an agency's charges are inversely related to its commitment to the philosophy underlying the Bill.

11.23 These variations may exist not only between agencies, but within an agency. Consider the evidence from the Department of Social Security:

Some calculation can be made of the workload involved in preparing a file for perusal. A straightforward file would take about 15 minutes to prepare counting time required for identification, location and extraction. Other files including those containing a large number of exempt documents would probably require an hour to prepare. In the case of longstanding files, such as family allowance and pensions, the state of the file and the possibility that access could reveal sensitive personal details (such as de facto relationships) would require more time to prepare the file for access.¹⁸

This brief example shows that charges, if based on examination time, would vary according to a number of factors which should not be reflected in the charge paid by members of the public.

11.24 Recommendation: No charge should be made for the time spent in examining material to determine whether access should be granted to it.

11.25 *Inspection by applicant.* When an applicant who has been granted access to material desires, either before obtaining copies or instead of obtaining copies of it, to inspect it by way of reading, viewing or listening as the case may be, certain additional personnel costs may well be incurred by agencies in making that possible. Such costs might involve the supervision of a reading room, the running of a film or videotape, or the playing of a tape recorder. Often the costs of this kind attributable to any individual applicant will be trivial, in that the personnel time involved is either minimal, or shared out in the supervision of a number of personnel simultaneously, or occupied simultaneously in conducting other agency business (e.g. routine clerical tasks): in these circumstances we believe that agencies will neither need nor desire to levy supervision charges. But in those exceptional circumstances where the personnel time attributable to satisfying the requirements of individual applicants is not in fact trivial, we see no reason why an agency should not be entitled to make a charge accordingly. The charge in question would be calculated by reference to the identifiable direct on-cost, and we would imagine that in most circumstances it could not legitimately exceed a figure of approximately \$5 per hour.

¹⁸ Submission no. 117, incorporated in *Transcript of Evidence*, p. 2135-6.

11.26 Recommendation: Agencies should be entitled to charge an applicant the identifiable direct on-cost incurred in supervising the inspection by him of material to which he is granted access.

11.27 Copying and material charges. Agencies should be entitled to charge the identifiable direct on-costs incurred by them in photocopying documents, supplying sound or video-cassettes, computer print-outs and so on. Examples of charges specified in the 1977 fee guidelines of the United States Justice Department, other parts of which have been quoted above, are as follows:¹⁹

Copies. For copies of documents (maximum of 10 copies will be supplied) \$0.10 per copy of each page.

<i>Computerized Records—Material charges:</i>	\$
1. One-part paper per 1000	11.00
2. Two-part paper per 1000	17.63
3. Three-part paper per 1000	28.95
4. Four-part paper per 1000	37.52
5. Five-part paper per 1000	50.83
6. Stock Hollerith cards per 1000	1.78
7. Magnetic tape per reel	9.50
8. Disk pack, each	775.00

<i>Tape Recordings—Material charges:</i>	
1. 45 minute cassette56
2. 60 minute cassette60
3. 90 minute cassette77

11.28 We are particularly concerned that the photocopying charges imposed by agencies should be reasonable. Depending on how one takes into account, if at all, the depreciation of the machine concerned, the 'identifiable direct on-cost' might be capable of enormous variation. We state simply that we would regard any charge higher than 10 cents per page, at current values, as probably being unreasonably high.

11.29 Recommendation: Agencies should be entitled to charge applicants the reasonable costs incurred by them in supplying copies of paper documents, sound and video-recordings and similar materials.

11.30 Notification of charges. It is important that applicants know in advance the kinds of costs they may be liable to incur in securing access to information under the Bill. Where common or standard services and materials are required, it should be sufficient for this purpose that the relevant fee structure be adequately publicised in the proposed Freedom of Information Handbook (see Chapter 8) and elsewhere, with no necessity for direct personal notification. Where, however, quite substantial fees are likely to be incurred, we believe it appropriate that there be a requirement of advance notification before such charges can be levied. We recommend the adoption in this respect of the system applicable in the United States Department of Justice, which is embodied in that agency's fee guidelines as follows:

Notice of anticipated fees in excess of \$25. Where it is anticipated that the fees chargeable under this section will amount to more than \$25, and the requester has not indicated in advance his willingness to pay fees as high as are anticipated, the requester shall be notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In such cases, a request will not be deemed to have been received until the requester is notified of the anticipated cost and agrees to bear it.

¹⁹ Committee Document no. 60, cited footnote 13, p. 15.

Such a notification shall be transmitted as soon as possible, but in any event within five working days, giving the best estimate then available. The notification shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request so as to meet his needs at lower cost.²⁰

11.31 Recommendation: Where it is anticipated that fees and charges in excess of \$25 are likely to be incurred by an applicant, a mandatory system of advance notification should apply before such charges can be levied.

Standardisation of charges

11.32 Two questions arise for consideration here: whether the charges imposed under the Bill should be uniform across all agencies, and whether such charges should be uniform for all classes of applicants. We consider that both questions should be resolved in the affirmative.

11.33 Clause 49 provides simply for the making of regulations in relation to 'the making of charges of amounts, or at rates fixed by or in accordance with the regulations'. We do not read the language of this clause, as it is presently drafted, as requiring either a single set of regulations applicable to all agencies, or that the charges set as between different agencies be uniform. It is, however, in our view important in the interests of fairness that there be such uniformity. While there may be commercial or budgetary considerations that might be thought to justify a variation in charges, noticeable variations from agency to agency are likely to be interpreted by the public as being an attempt by those agencies charging at higher rates to undercut the rights conferred by the Bill. So far as practicable the Bill should empower agencies to recover costs they have incurred. However we do not see that this policy has to be pursued to a point where the operation of the Bill could cause unnecessary suspicion and criticism likely to impair its success as a measure that is designed to assist, and not hamper, the public. The fact that a small amount might not be recovered by some agencies as a result of consistency being required is, in our opinion, outweighed by the considerations to which we have referred.

11.34 We have given consideration to the question of whether the fees and charges incurred under the Bill should be uniform for all classes of applicants. Some possibilities that suggest themselves are that differential rates should apply to those seeking personal records as distinct from other classes of information, that lesser rates—or perhaps no rates at all—should apply to pensioners seeking personal information, or that commercial organisations be obliged to pay higher rates for information that they seek for business purposes. We are firmly of the opinion, however, that no such differentials should apply. Not only would they often be productive of great administrative inconvenience, but they would also tend to undermine, once again, the basic underlying principle of the Bill that the nature of the needs or interest of the individual applicant should be quite irrelevant to his exercise of rights under it. Anything which imports, as a routine administrative matter, a requirement that the reasons for a particular application be closely scrutinised, should be resisted. However we make it clear that we think there is a strong case to be made for the discretionary waiver or reduction of fees in appropriate individual cases, and we take up this point further below.

²⁰ *ibid.*

11.35 Recommendation: Clause 49 should be amended to specifically provide for the imposition of fees and charges on a uniform basis as between different agencies. There should be no variation of scale charges as between different classes of applicants.

Time at which charges to be paid

11.36 Quite clearly no charge would be payable unless the document requested is disclosed, even though considerable time may be spent in searching for and examining that document. Consequently payment of a charge should not be required until the access decision has been made; to require otherwise would unnecessarily discourage requests. This procedure should be stated in the Act itself.

11.37 A question arises as to whether, in accordance with the recommendation in the 1976 IDC Report, prepayment of a deposit on account of a charge may be required where the estimated costs are likely to exceed a prescribed amount. This is clearly envisaged by the Bill, insofar as clause 49 makes specific provision enabling regulations to be made 'requiring deposits on account of such charges'. We agree with this principle: in cases where much search time may be involved, and a waiver of charges seems unlikely, an agency may fairly seek some assurance that the ultimate charge will be paid and that its diversion of agency resources will not be wasted.

11.38 It is important, however, that deposits should not be required to be paid unnecessarily or unreasonably. Once again the United States Department of Justice fee guidelines afford a useful precedent:

Advance deposit. (1) Where the anticipated fee chargeable under this section exceeds \$25, an advance deposit of 25% of the anticipated fee or \$35, whichever is greater, may be required.

(2) Where a requester has previously failed to pay a fee under this section, an advance deposit of the full amount of the anticipated fee may be required.²¹

We believe that the outlines of a system to this effect should be incorporated not only in the regulations but in the Bill itself. There is a good administrative reason for this, as well as a principled one. This is that, as a practical matter, the sixty-day time limit should not run during the period elapsing between request for, and payment of, a deposit. However, if the procedure for payment of deposits is contained solely in the regulations, it is arguable that the regulations could not override the time limit provision contained in the Bill.

11.39 Recommendations:

- (a) **Normally charges levied under the Bill should not be required to be paid until an affirmative access decision has been made;**
- (b) **Agencies should be entitled to require, where the anticipated fee chargeable exceeds \$25, an advance deposit of 25% of the anticipated fee; and**
- (c) **Where an applicant has previously failed to pay a charge under the legislation, agencies should be entitled to require an advance deposit of the full amount of the anticipated fee.**

Waiver of fees

11.40 The present Bill contains no provisions specifically authorising or encouraging the waiver or reduction of fees for any reason. This is to be contrasted with the situation under the United States Freedom of Information Act,

²¹ *ibid.*

where is it provided that agencies can waive or reduce fees when 'furnishing the information can be considered as primarily benefiting the general public'²² and where there is also an option to disregard charges for 'indigent requestors'.²³ The omission of clauses to this effect in Australia has been much criticised by a number of persons and organisations making submissions to us.²⁴ It may be that the regulations will contain such provisions, but we are not aware of any such government intention. It may also be, depending on the language in which the regulations couch the obligation to pay various fees and charges, that there will in any event (even in the absence of explicit provision) be a residual discretion left with agencies to waive or reduce fees in cases they regard as appropriate. We feel, however, that this whole matter is too important to be left in the general state of uncertainty which presently prevails, and that the Bill should state on its face the basic principles which should be applicable.

11.41 We believe that the case for allowing for the discretionary waiver or reduction of fees where an applicant is impecunious is unanswerable, and there should be an explicit power conferred upon ministers and agencies to this effect. What counts as 'impecuniosity' should depend in any particular case both upon the means of any particular applicant or organisation on the one hand, and upon the amount of the fees and charges in issue on the other. To take a simple example, the retrieval and copying of a two-page social security record may represent a minimal financial burden even for a pensioner, while the retrieval and copying of all files bearing upon a long-running repatriation compensation matter might on the other hand represent a substantial imposition for anyone.

11.42 We also believe that there should be explicit provision, as in the United States, for reduction or waiver by agencies or ministers when the provision of information 'can be considered as primarily benefiting the general public' rather than being for the benefit or gain of the individual applicant. Even more so than in the case of waiver for impecuniosity, the exercise of the proposed discretion is likely to be a difficult and often sensitive matter, but we again believe, on balance, that the provision of such an explicit power is desirable. It is likely to have a particular utility for community interest organisations and groups, working in such areas as environment protection, education, social welfare and civil liberties, who operate on shoestring budgets yet are intimately concerned with the kind of policy formulation in the public interest that it is one of the basic objectives of any freedom of information legislation to promote. We note in passing that it should not be assumed that the conferring of discretionary powers specifically upon ministers in this area will, any more than anywhere else, necessarily add significantly to ministers' personal workloads; the exercise of such powers can, and of course should, in all but the most intractable cases, be delegated by the minister down the line to his departmental officers.

11.43 The real problem, as we see it, which arises with respect to the waiver or reduction of fees is whether any such discretionary decision should be appealable to the Administrative Appeals Tribunal. On the one hand, the conferring of a right of appeal, here as elsewhere, has obvious attractions, ensuring both

²² United States Freedom of Information Act 1974, paragraph 5 U.S.C. 552 (a) (4) (A).

²³ United States, Freedom of Information Act, Sub-part A—*Production or Disclosure under 5 U.S.C. 552 (a)*, 16.9 (a).

²⁴ e.g. Freedom of Information Legislation Campaign Committee, Submission no. 9, incorporated in *Transcript of Evidence*, p. 164; Women's Electoral Lobby (Victoria), Submission no. 7, incorporated in *Transcript of Evidence*, p. 367; Australian Council of Social Services, Submission no. 48, incorporated in *Transcript of Evidence*, p. 440.

that the ministerial or agency decision will be carefully made in the first place and that it is capable of rectification if manifestly wrong. But on the other hand there is a real problem involved in the Tribunal becoming concerned with any kind of decision which involves it in considering and adjudicating in any way upon the applicant's case: to do so is inevitably, in our view, to commence a slide away from the crucial underlying principle of the legislation, namely, that access to information is a matter of right and not in any sense contingent upon a showing of need or interest or merit. It may be that a distinction can be drawn between a Tribunal finding as to entitlement to access on the one hand, and a finding as to entitlement to fee reduction or waiver on the other: there is a conceptual distinction. But we believe that there is in practice a danger of matters becoming blurred, and that it would be better if the Tribunal confined itself entirely to dealing with matters other than the status or situation of individual applicants. (As we indicated earlier in this chapter, the Tribunal would still retain under clause 37 (6)—or a re-drafted version of it—some jurisdiction in relation to fees questions, but that jurisdiction would be confined to questions of proper calculation rather than to the waiver or reduction issues we are here considering.)

11.44 The inability to appeal from a ministerial or agency decision on a waiver or reduction application would not mean that a disgruntled applicant would be entirely without redress. The responsible minister would still be answerable to the Parliament for his exercise of discretion in any particular case, and it can be assumed that the political pressures upon him to ensure that such decisions were sensible and appropriate would be not inconsiderable.

11.45 Recommendation: The Bill should explicitly confer upon ministers and agencies the discretionary power to waive or reduce fees where an applicant is impecunious or where the provision of the information in question can be considered as primarily benefiting the general public. The exercise of such discretionary powers should not be subject to appeal to the Administrative Appeals Tribunal.