

PS LA 2005/4 (Withdrawn) - Fees and charges for requests under the Freedom of Information Act 1982

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 Law Administration Practice Statement PS LA 2005/4 was withdrawn on 29 October 2010. PS LA 2005/4 advised tax officers of the policy regarding the imposition of fees and charges for requests for documents under the *Freedom of Information Act 1982*. Regulations under that Act and the Australian Information Commissioner's guidelines provide clear guidance on fees and charges. Accordingly, a replacement product is not required.

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PS LA 2005/4

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FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: Fees and charges for requests under the *Freedom of Information Act 1982*

PURPOSE: To advise Tax officers of the policy in relation to the imposition of fees and charges in respect of requests for documents.

STATEMENT

1. Government policy requires that, where applicable, Freedom of Information (FOI) fees should be collected and charges imposed for providing access to documents, unless one or more of the reasons for remission of fees or for reduction or non-imposition of charges is established (see paragraphs 46-60 below).
2. The level of fees and charges is designed to ensure that users of the *Freedom of Information Act 1982* (FOI Act) make a contribution towards the cost of providing access to the documents. It is not a partial or full cost recovery regime for agencies.
3. Discretions conferred by the FOI Act and the *Freedom of Information (Fees and Charges) Regulations* (the Regulations) must be exercised where possible to facilitate and promote the disclosure of information promptly and at the lowest reasonable cost (see *Re Waterford and Attorney-General's Department (No.2)* (1986) 9 ALD 482; *Re Bailey and Commonwealth Tertiary Education Commission* 12 ALD 165).

4. In accordance with the Regulations, fees and charges will apply for requests for documents under the FOI Act, unless they are waived or reduced. Fees are to be remitted and charges are to be waived or reduced where an FOI applicant provides sufficient evidence that payment would cause financial hardship (see paragraphs 47-48), where release of the information would be in the public interest (see paragraphs 49-57) or for any other proper reason (see paragraph 58).
5. If a person is entitled to access their documents under Tax Office administrative arrangements, a request for access to those documents should not be processed as an FOI request. Instead it should be referred to the relevant Tax Office Business Line (for example the Operations line's Payment and Product Processing area) for actioning and determination of any amount payable.
6. FOI Officers at the APS 4 level and above are authorised to release or exempt documents under the FOI Act, and to determine whether or not fees and charges are to apply.

EXPLANATION

7. That access to one's own personal information should, in general, be free was a primary recommendation of the joint report of the Administrative Review Council (ARC) Report No 44 and the Australian Law Reform Commission (ALRC) Report No 77 (1995) *Open Government, A review of the Freedom of Information Act 1982*.
8. This recommendation has been further supported by the Commonwealth Ombudsman in his report, *Investigation of Administration of Freedom of Information (FOI) in Commonwealth Agencies 1998*. The Australian National Audit Office (ANAO) report No 57 *Administration of Freedom of Information Requests* June 2004 notes the adoption of such a policy by agencies.
9. These reports have also identified a need for greater clarity about FOI fees and charges, the Ombudsman noting that 'there is a concern that charges are being unreasonably determined and applied by agencies as a means of deterring FOI requests'.
10. The Tax Office is concerned to ensure that FOI requests are charged at a reasonable rate, and in a manner which conforms with both the Regulations and the objectives of the FOI Act, which are to promote greater openness through increased access to information at the lowest reasonable cost to the applicant (subsection 3(2) of the FOI Act).

Ordinarily Available Documents

11. Documents which may be accessed under the FOI Act are documents which are already in existence and which are not otherwise publicly available to applicants or available for purchase from the Tax Office (see section 12 of the FOI Act).

12. Sometimes requests are made under the FOI Act for access to documents which are available under an administrative arrangement. In such cases the officer receiving the request will determine whether the material requested can properly be disclosed outside the FOI Act. If it can, the request, together with any payment, should be referred to the relevant Tax Office Business Service Line (for example Client Account Service in the Operations Sub Plan) for action.
13. Requests which should be referred to the Client Account Service area include requests for an entity's own income tax returns, copies of payment summaries and notices of assessment. Other documents subject to administrative arrangements include copies of a person's own correspondence, employment declarations, Prescribed Payments System (PPS) dockets, Higher Education Contributions Scheme (HECS) assessments, Business Activity Statements (BASs), Income Activity Statements (IASs) and any other form sent to the Tax Office by the applicant. Requests for these documents should be referred to the relevant Business Service Line for action.
14. Currently, the only fee imposed in respect of these documents is a \$10.00 fee for retrieval of a tax return or employment declaration. This fee, which is not an FOI fee or charge, is explained in the Taxpayers' Charter and is considered appropriate given the amount of time required to retrieve material of this kind. Any monies paid in excess of the set fee are to be remitted by the line area to the person making the request.

Application Fees

15. Paragraph 15(2)(e) of the FOI Act provides that for a request to be valid it must be accompanied by an application fee (as set by regulation 5 of the Regulations). In some instances, an applicant may request that the fee be remitted. Where no fee is forwarded and the applicant asks for remission of the application fee, the application will not be valid until the request for remission has been granted or, if remission is refused, until the application fee has been received. However, where no fee has been tendered, but it is clear that remission will be granted, it is not appropriate to require the fee to be paid before deciding to remit it.

Lowest Fee to be applied

16. There are two application fees:
 - a \$30.00 fee for an application under subsection 15(1) of the FOI Act for access to documents (see subsection 15(2) and regulation 5(a) of the Regulations), and
 - a \$40.00 fee for an application under subsection 54(1) of the FOI Act for an internal review (regulation 5(b)).

Note that there is no application fee for a request under section 48 of the FOI Act to amend or annotate records of personal information. Note also, the internal review fee applies to all subsection 54(1) applications (including review of a decision refusing to amend a personal record); and there is no application fee for an application for internal review made by a third party consulted under sections 26, 27 or 27A of the FOI Act.

Imposition and Notification of Estimate of Charges

17. In addition to an application fee, charges for search and retrieval of documents and for decision-making are to be applied before documents are provided (see paragraphs 23 and following for charging rates). However, no charge is actually imposed until the applicant has agreed to accept the charge (usually by the payment of a deposit) or the amount of the charge has been waived or reduced. Where 30 days (or any further period allowed for notifying the agency¹) has elapsed since the receipt of the estimate of charges and no response has been received from the FOI applicant, the request is treated as having been withdrawn.
18. Once a charge has been accepted, and the Tax Office has formally imposed the charge, it becomes a debt payable to the Commonwealth. Any decision to forgive or not pursue that debt must be taken in accordance with the *Financial Management and Accountability Act 1997*.
19. If an applicant asks us to reduce or not to impose a charge, we must take all reasonable steps to make a decision about the charge and to notify the applicant of the decision as soon as practicable, but no later than 30 days after we receive the request. After receiving representations from the applicant on the estimate of charges, we may make one of the following further decisions:
 - not to impose a charge at all
 - to reduce the amount of the charge as estimated, or
 - to impose a charge in the amount originally estimated.
20. The decision to impose a charge and the amount of the charge are subject to a right in the applicant to seek an internal review (and subsequent Administrative Appeals Tribunal (AAT) review) of the decision (paragraphs 54(1)(d) & 55(1)(d) of the FOI Act). If we have not made a decision within the 30 day period, we are deemed to have imposed the charge estimated, and the applicant may appeal directly to the AAT for review of the deemed decision. The applicant's acceptance of the estimate may be evidenced by payment of the deposit. On receipt of the deposit, we will proceed to process the application.

Deposits

21. Regulation 12(1)(b) of the Regulations provides that a deposit may be required. It sets the deposit at \$20.00 where the total charges estimated are between \$25.00 and \$100.00; and is 25% of the total charges estimated, where that sum is in excess of \$100.00.

¹ A 60 day time limit applies where statutory consultation is required under subsection 15(6) of the FOI Act. Statutory consultation is required when the documentation:

- is likely to affect Commonwealth relations (section 26A of the FOI Act);
- relates to business affairs of a third party (section 27 of the FOI Act)
- contains personal information of a third party (section 27A of the FOI Act)

22. When an applicant receives a notice under subsection 29(1) of the FOI Act (notification of liability to pay a charge), or subsection 29(6) (decision on application for reduction or non-imposition of the charge), the 30 day time limit for notifying a decision on the original request (if it has not already expired) is put on hold until one of the following events occurs (see subsections 31(1) and (3) of the FOI Act):
- the charge or relevant deposit is paid
 - reduction or non-imposition of the charge is sought, whether initially or on internal review, and either a non-imposition request is granted by the agency, or any reduced charge or appropriately reduced deposit is paid
 - the AAT sets aside a decision to impose a charge, or
 - if the AAT substitutes a reduced charge, payment is received of that reduced charge or appropriately reduced deposit.

Charges Capped on FOI Requests for Personal Information

23. In accordance with the Schedule of the Regulations, charges are capped for providing an FOI applicant with their own personal information. The maximum charge for access to the applicant's personal information is capped at \$30.00 for search and retrieval, and \$40.00 for decision-making. Where access is by provision of a copy of the documents, a copy fee of 10 cents per page is applicable and no capping applies to that charge.
24. Where an FOI request is for access by inspection, rather than a copy of the documents, the inspection fee is also capped. The first two hours are without charge, after which a charge of \$6.25 per half hour or part thereof applies.
25. Information about an individual's business or commercial activities is personal information. Consequently, there is a cap on a sole trader's request for information about an audit of his business. Similarly, there is a cap on requests from the trustee or legal agent of a sole trader or individual carrying on a business or managing investments. Note that personal information does not apply to an entity which is not an individual.
26. Where the documents sought comprise both personal information and non-personal information, documents are to be sorted into two categories:
- 1) documents personal to the applicant, and
 - 2) the remaining documents.

Capped rates apply only to documents coming within the first category. Normal charges apply to the remaining documents. Where there are very few non-personal documents, it may be appropriate to apply the capped rates to all of the documents.

Uniform Rates for Fees

27. Section 94 of the FOI Act provides that all Commonwealth agencies will levy the same rate of fees and charges for all applicants and document types. The rates are those laid down in the Regulations (see **Attachment A**). This is not inconsistent with the cap on charges for requests for personal information, as all charges for processing requests from an FOI applicant for personal information about themselves will be similarly capped.

28. In respect of charges for searching or making a decision about access or facilitating access, a single hourly rate is to apply regardless of the classification level of the officer who is to retrieve the documents (Part I, item no 2 of the Regulations).
29. For supervision during an inspection of documents, the only costs which may be charged are those set out in the Regulations. There should always be supervision to prevent harm to Tax Office records.

Calculating Charges (Part II, item no 1 of the Regulations)

30. When a decision is made to impose a charge, the charge may be made up of charges for work already done (if it was necessary to undertake search and retrieval to calculate charges estimates) and an estimate of charges for work still to be done. The latter approach is preferable because of the possibility of the applicant withdrawing the request. Estimates of charges are to be based on the time and processes likely to be involved in dealing with a request, and include search and retrieval time and decision-making time.

Search and retrieval time

31. In estimating the time for search and retrieval of documents officers are entitled to rely on the estimated average time spent by them in locating similar files in response to other FOI requests. Similarly, average times for decision making or for inspection of documents by applicants may be relied on in making estimates of inspection time.
32. The term 'time spent in searching for or retrieving' a document includes time spent:
 - searching a file index to establish the location of a document (whether that is done manually or by computer)
 - physically locating and extracting the document from the place where it is held
 - reading a file to locate a document relevant to a request, and
 - consulting with other officers to determine if documents exist - for example on personal computers.
33. An electronic calculator program in Microsoft Excel is available for FOI officers to use as a guide to the application of charges as set out in the Regulations. Officers must ultimately exercise discretion in deciding the appropriate level of fee to be charged.
34. The Regulations provide for a charge of \$15.00 per hour for searching and retrieving documents.
35. An applicant cannot be required to pay greater charges because our registry or filing system is not efficient. Regulation 2(2)(b) of the Regulations provides, in effect, that where the filing system in the agency or Minister's office ought reasonably to have indicated, but does not indicate, the location of a document, any time spent (other than the time that would have been spent had the filing system indicated the correct location of the document) in tracing the document to its location will be ignored in calculating the time spent in searching for or retrieving the document.

Decision making time

36. The Regulations provide for a charge of \$20.00 an hour in respect of time spent in deciding whether to grant, refuse or defer access to a document, or to grant access to a copy of a document with deletions (but not of an internal review request).
37. As in the case of search and retrieval time, this charge is imposed irrespective of the classification or designation of the officer who undertakes the work involved (paragraph 94(2)(b) of the FOI Act). Decision making time includes time spent on any of the following matters:
- examining the document
 - consulting with any person or body
 - making a copy with deletions (section 22 of the FOI Act),
 - preparing a recommendation for a decision-maker, and
 - notifying an interim or final decision on the request, including preparation of a schedule of documents.
38. A charge cannot be made for the time of persons who are consulted by a decision-maker in the course of making their decision. Care is to be taken not to inflate the estimates by including the time of other advisers and consultants to the decision-maker. Photocopying charges may be imposed, but must not also be included in the general photocopying charge.

Actual costs incurred

39. Certain charges are required to be fixed at an amount not exceeding the actual costs incurred:
- in producing a document by the use of a computer or other like equipment
 - in respect of arrangements made for an applicant to hear a recording or view a film or videotape, or
 - in producing a copy of a recording, film or videotape, or of a computer tape or computer disk.
40. The Tax Office may be required to justify before the AAT the 'actual costs incurred'. Therefore, it is necessary to ensure that sufficient records of those costs are kept (for example expenditure on the hire of a venue for an applicant to view a film).
41. Where the actual costs of providing the access are likely to be high (for example in relation to documents produced by the use of a computer or like equipment), it is imperative that the applicant be informed of the estimated full amount at the time of notification of estimated charges (subsection 29(1) of the FOI Act).

42. The Regulations provide that where access is to be given to a copy of a document and it is, at the request of the applicant, to be posted or delivered to him at a place other than an Information Access Office², the charge is to be an amount not exceeding the cost of postage or delivery. The cost of postage or delivery includes incidental costs - for example the cost of suitable packing to protect a copy of a videotape or computer disk.

FOI requests made by Tax officers

43. Where a current or former Tax officer wishes to obtain access to their personnel records, section 15A of the FOI Act provides that they must follow the current Tax Office corporate policy in respect of access to personnel management records. Personnel records include all documents concerning that officer's employment with the Tax Office, for example selection reports, grievance procedures and internal investigation material.
44. The officer will be advised that the request has been forwarded to the relevant personnel area and any application fees will be returned. If the officer is dissatisfied with the material provided through this channel, that person may make a valid FOI request.
45. FOI charges are to be levied at the same rate as any other request from any member of the public. Tax officers are entitled to seek a waiver of fees and charges on the grounds of hardship, public interest or any other proper reason.

Waiver or Reduction of Fees or Charges

46. Although expenses are incurred by the Tax Office in processing FOI requests, there are cases where these costs will be absorbed. The Tax Office must consider a request to waive fees or charges (section 30A and subsections 29(4) and (5) of the FOI Act apply in respect of fees and charges respectively). Requests of this kind should be made in writing and should set out in some detail the reasons for the request.

Financial hardship

47. One basis for waiver or remission is to ensure that a person's financial hardship does not preclude them from seeking access to information under the FOI Act. Criteria which may be considered as being relevant in determining hardship include the following:
- assets and liabilities
 - employment status
 - available cash flow, and
 - a comparison of the applicant's financial position (assets/liabilities/cash reserves) in relation to the potential FOI costs.

² Regional offices of the Australian Archives in the capital cities of all States and Territories provide the facilities of the Information Access Offices.

48. A person should not be able to organise his or her financial affairs so that all money is spent prior to paying FOI fees and charges. An unemployed person is not necessarily impecunious and the payment of a \$30.00 application fee will not necessarily cause hardship. Similarly, potential FOI charges of \$200.00 would not cause hardship to a person with significant cash reserves and usual levels of debt.

Public interest

49. A request for waiver of fees on the grounds of public interest must set out the basis for the request and the Tax Office decision should set out all public interest factors considered. There are no specific criteria for determining whether the release of material is in the public interest. The Department of Prime Minister and Cabinet FOI Memorandum No. 29 refers to:
- whether the benefit from the release of the information contained in the particular documents will flow to the public at large, or a substantial section of the public, and
 - the need to consider whether both the contents of the documents and the context of their release are in the public interest.
50. In other words, the decision-maker should consider whether the information will come to the attention of the public, and if access were given whether it would be to the benefit of the public to have that information. There is no automatic right of reduction or waiver for journalists or Members of Parliament.
51. The creation of specific criteria on which to determine the public interest has been considered undesirable by the ALRC/ARC³; however, some factors which should be considered in a public interest test include:
- that it is in the public interest generally to have government information accessible
 - whether a document discloses the reasons for a decision
 - whether disclosure of information would contribute to a debate on a matter of public interest, and
 - whether disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.
52. The ALRC/ARC also referred to some factors which should not be considered as relevant to considering release of information in the public interest. These factors include:
- the seniority of the author or recipient of the document or the subject of the document
 - whether disclosure would confuse the public; specifically, where there is a possibility that the public might not readily comprehend any tentative quality of the information
 - that disclosure would cause a loss of confidence in the government, and

³ Australian Law Reform Commission; Report 77; Administrative Review Council; Report No 40; *Open Government: a review of the Federal Freedom of Information Act 1982*; December 1995.

- that disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document.
53. The fact that the document may contain information which may be of curiosity value to the public, or a substantial section of the public, does not necessarily mean that giving access to the document is 'in the public interest'. On the other hand, if the giving of access to the specific documents would contribute valuable material to public debate on an issue, doing so will be in the public interest.
 54. Lack of public discussion before release need not mean that the giving of access is not in the public interest. Giving access to information which would benefit the general public, or a substantial section of the public, if it were made more widely known is in the public interest whether or not there is an existing debate
 55. In *Re Herald and Weekly Times Ltd and Secretary, Department of Finance and Administration* [2002] AATA 506 regarding an applicant's claim for non-imposition or waiver of charges, President O'Connor rejected the applicant's claims that the overriding public interest lay in access to the documents because Members of Parliament have no private affairs in relation to the discharge of their Parliamentary functions and resolving any conflict between their public duties and private interests requires full and complete disclosure of the information sought.
 56. The AAT also rejected claims that the media has a special role to play in matters of electoral concern and that the public interest discretion must be exercised in a manner that facilitates settled constitutional purposes (in particular, freedom of political communication). The AAT stated that the duty of the executive as formulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 must be read in the context of the structure and purpose of the FOI Act which was not in consideration in that case.
 57. The AAT stated the test to be satisfied is that the documents, if released, would come to the attention of the public or a significant section of the public and that the disclosure would add to that which is already publicly known. The AAT concluded that while there is a public interest in knowing how public funds are expended, the documents sought are not current and there is no guarantee of publication should they be released. The applicant's commercial enterprise as a publisher and its stated proposal to publish only those documents which were considered to be newsworthy were also relevant factors to be considered.

Waiver or reduction on other grounds

58. Other proper grounds for waiver or reduction of fees and charges should be considered. Matters which could be taken into consideration in determining whether or not to reduce or not to impose a fee or charges include the number and complexity of the documents involved, the possible end use of the documents, the ease of access to the information, relationship management, and, external and internal timeframes.

59. Where the applicant has made an FOI request for documents which are usually made available administratively free or for only a small fee, the FOI fees and charges should be reduced accordingly. Additionally, there may be occasions where administrative convenience will justify waiver or reduction for small amounts involved.

Countervailing Factors

60. Countervailing factors which may be considered, particularly in relation to claims for waiver or remission on the grounds of public interest, will include where the applicant will use the information for commercial purposes (*Herald and Weekly Times Ltd and Secretary, Department of Finance and Administration* [2002] AATA 506).

<i>subject references</i>	Fees and Charges Freedom of Information
<i>legislative references</i>	<i>Financial Management and Accountability Act 1997</i> <i>Freedom of Information Act 1982</i> sections 12, 22, 26, 27, 27A, 94 and subsections 3(2), 15(2), 29(1), 29(4), 29 (5), 29(6), 54(1) Paragraph 15(2)(e), 54(1)(d), 55(1)(d) 94(2)(b) <i>Freedom of Information (Fees and Charges)</i> <i>Regulations;</i> Regulations 4, 5, 12 and Schedule 1, Part 1, item 2 <i>Income Tax Assessment Act 1936</i>
<i>related public rulings</i>	
<i>related practice statements</i>	PS CM 2005/05 (RM) Processing Freedom of Information requests in the Tax Office PS LA 2005/3 Authorisation to request information under the <i>Freedom of Information Act 1982</i> PS LA 2005/5 Provision of third party information under the <i>Freedom of Information Act 1982</i> PS LA 2005/6 Release of officers' names under the <i>Freedom of Information Act 1982</i>
<i>case references</i>	<i>Re Bailey and Commonwealth Tertiary Education</i> <i>Commission</i> 12 ALD 165 <i>Lange v Australian Broadcasting Corporation</i> (1997) 189 CLR 520 <i>Re Herald and Weekly Times and Secretary,</i> <i>Department of Finance and Administration</i> [2002] AATA 506 <i>Re Waterford and Attorney-General's Department</i> (No.2) (1986) 9 ALD 482
<i>other references</i>	Attorney General's FOI Memorandum No. 29 Attorney General's FOI Memorandum No 19 Australian Law Reform Commission Report 77 Administrative Review Council Report No 40 - <i>Open</i> <i>Government: a review of the federal Freedom of</i> <i>Information Act 1982</i> , December 1995. Commonwealth Ombudsman's Report <i>Investigation</i> <i>of Administration of Freedom of Information (FOI)</i> <i>in Commonwealth Agencies</i> 1998. Australian National Audit Office Report No 57 <i>Administration of Freedom of Information</i> <i>Requests</i> June 2004
<i>file references</i>	TRIM 05 -972

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Other Business Lines consulted	All
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	7 August 2008 Contact officer details updated

Attachment A - Fees and Charges Applicable to FOI requests

Description	Fee	Freedom of Information (Fees & Charges) Regulations
Fee accompanying request for access	\$30.00	Regulation 5(a)
Fee accompanying application for internal review of decisions	\$40.00	Regulation 5(b)
Search and retrieval time	\$15.00 per hour (up to \$30.00 maximum for personal information)	Schedule, Part I
Decision-making time	\$20.00 per hour (up to \$40.00 maximum for personal information)	Schedule, Part I
Extracting and producing written documents from computers or other equipment	no more than the actual costs incurred in production of the document	Schedule, Part II
Transcripts of sound recordings, shorthand, etc	\$4.40 per page	Schedule, Part II, Item No 7
Copies, other than photocopies of written documents	\$4.40 per page	Schedule, Part II, Item No 3
Photocopies of documents	\$0.10 per page	Schedule, Part II, Item No 2
Copies on computer tape or disk	no more than the actual costs incurred	Schedule 1, Part II, Item No 4
Replaying or copying film or tapes	no more than the actual costs incurred	Schedule 1, Part II, Item No 4A – 6
Inspection of the documents (the first two hours of inspection of a personal record is free)	\$6.25 per half hour (or part thereof)	Schedule 1, Part II, Item No 1
Postage of documents released under FOI	no more than the actual costs incurred	Schedule 1, Part II, Item No 8
Retrieval of Returns, Employment Declarations etc	\$10.00 per return, declaration or notice	*this is an administrative arrangement not an FOI request