

From: [OAIC - FOI DR](#)
To: foi@health.gov.au
Cc: [FIELDS,Anna](#)
Subject: s22 - Recent charges decision and invitation to make a revised decision
Date: Monday, 12 September 2022 1:31:27 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
s22 [Charges Letter.pdf](#)
Importance: High

Our reference: s22
Agency reference: s22

FOI Contact Officer
Department of Health and Aged Care

By email: foi@health.gov.au

Recent charges decision and invitation to make a revised decision

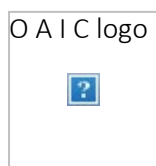
Dear FOI Contact Officer

Please find attached a letter, advising the Department of a recent charges decision and inviting the Department to make a revised decision in the matter.

Please note, the Information Commissioner will share the submissions you provide during IC review with the applicant unless there are compelling reasons not to. However, we do not provide the applicant with copies of the documents at issue. Should you wish to provide submissions in confidence, please refer to the [IC Review Procedure Direction](#) which sets out the process for making such a request.

Regards

Anna



Anna Fields | Senior Review Adviser (Legal)
Freedom of Information Regulatory Group
Office of the Australian Information Commissioner
GPO Box 5218 Sydney NSW 2001 | oaic.gov.au
1300 363 992 | foidr@oaic.gov.au

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Australian Government

Office of the Australian Information Commissioner

Our reference: s 22 [REDACTED]

Your reference: s 22 [REDACTED]

FOI Contact Officer
Department of Health and Aged Care

By email: foi@health.gov.au

Recent charges decision and invitation to make a revised decision

Dear FOI Contact Officer

I refer to the Information Commissioner review (IC review) of a decision of the Department of Health and Aged Care (the Department) made on 30 July 2020 in relation to s 22 [REDACTED] application under the *Freedom of Information Act 1982* (the FOI Act).

The key issue in this IC review is whether the Department's decision to impose a charge, and not to reduce or not impose that charge under s 29 of the FOI Act, was the correct and preferable decision in the circumstances.

The purpose of my letter is to:

- inform you of a recent decision by the Freedom of information Commissioner (FOI Commissioner) that is relevant to the IC review
- invite the Department to consider making a revised decision under s 55G of the FOI Act relieving the applicant from liability to pay the charge, or, alternatively, to make submissions in response.

Recent decision

On 29 July 2022 the FOI Commissioner made a decision in '*ABX*' and *Department of Veterans' Affairs (Freedom of information)* [2022] AICmr57 (29 July 2022) (ABX).

The applicant sought IC review of a decision of the Department of Veterans' Affairs (DVA) to impose a charge of \$403.45 to process an FOI request. The request was for documents that were not in a discrete form and required DVA to reproduce them using systems that were ordinarily available to them for retrieving or collating stored information.

ABX considers:

- whether a charge should be imposed where the cost to the Commonwealth of assessing, imposing and collecting the charge from the applicant might exceed the cost to DVA of processing the applicant's request (or the amount of the charge itself)
- whether a charge for electronic production of documents (Part 1 Item 3 of Schedule 1 of the *Freedom of Information (Charges) Regulations 1982*)¹ should be assessed on an actual cost basis, being the hourly rate attributable to the classification or designation of the officer who undertakes the work involved.

The FOI Commissioner explained that, as a general rule:

- a charge should not be imposed in circumstances where the cost of assessing, imposing and collecting a charge is likely to be greater than the charge itself. In those circumstances, imposing a charge will generally only serve to delay or discourage access while incurring a net cost to the Commonwealth
- where a request for access requires the use of a computer to produce information in a discrete form, agencies should consider the true nature of the activity involved in processing the request. Where the true nature of that activity is essentially similar to a search and retrieval activity, a fair and reasonable charge is best calculated by applying the fixed hourly rate set out in the Charges Regulations for search and retrieval.²

The FOI Commissioner accepted that, in the circumstances of the matter before him, the cost of calculating and collecting a charge might exceed the amount of the charge itself.³ He noted that the object set out in s 3(4) is not limited to the provision of access at the lowest reasonable cost, but also expresses a parliamentary intention that functions and powers under the FOI Act must be performed and exercised to facilitate and promote the prompt public access to information. The FOI

1 In *ABX*, the *Freedom of Information (Charges) Regulations 1982* (the 1982 Regulations) were applicable in relation to the applicant's request for access. The 1982 Regulations were repealed by the *Freedom of Information (Charges) Regulations 2019* (the 2019 Regulations) on 21 March 2019. However, they apply only in relation to requests for access made on or after their commencement on 1 April 2019 (see s 13(1) of the 2019 Regulations). It should be noted that the substantive provisions of the 2019 Regulations are in essence the same as those of the 1982 Regulations. Accordingly, the principles set out in this decision can be applied equally when considering the imposition of a charge under the 2019 Regulations.

2 *ABX* [3].

3 In *ABX*, the Department of Veterans' Affairs purported to vary its decision under s 55G of the FOI Act to reduce the charges to \$145.84. However, a revised decision under s 55G can only be made to fully relieve the applicant of the liability to pay a charge, see [9].

Commissioner was satisfied that having regard to these considerations, and the public resource already applied in relation to the matter, warranted a decision that no charge be applied in the circumstances.

Invitation to make a revised decision under s 55G or to provide submissions

In *ABX*, the FOI Commissioner noted that agencies should reconsider whether a charge should be imposed having regard to the amount of the charge imposed and the public resource applied to date.

We are of the view that the cost of calculating and collecting a charge in this IC review may exceed the amount of charge itself.

Section 55G of the FOI Act relevantly provides:

(1) An agency or Minister may vary (or set aside and substitute) an access refusal decision (the **original decision**) in relation to a request or an application under section 48 at any time during an IC review of the access refusal decision if the variation or substitution (the **revised decision**) would have an effect of:

...

(b) relieving the IC review applicant from liability to pay a charge; or

...

Accordingly, we invite the Department to consider making a revised decision under s 55G of the FOI Act relieving the applicant from liability to pay the charge.

Next steps

If the Department wishes to make a revised decision under s 55G of the FOI Act, please provide the revised decision to the applicant and the OAIC by **Tuesday 4 October 2022**.

Alternatively, please provide submissions in response by the same date. Your response should address why charges should be imposed in the circumstances, having regard to the amount of the charge and the public resource applied to date.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a cursive-style name.

Anna Fields
Senior Review Officer (Legal)

12 September 2022

From: OAIC - FOI DR
Sent: Friday, 9 September 2022 2:48 PM
To: Education - FOI
Cc: FIELDS,Anna

s22 [redacted] - Recent charges decision and invitation to make a revised decision

s22 [redacted] Charges Letter.pdf

s22 [redacted]

FOI Contact Officer
 Department of Education, Skills and Employment

By email: foi@education.gov.au

Recent charges decision and invitation to make a revised decision

Dear FOI Contact Officer

Please find attached a letter, advising the Department of a recent charges decision and inviting the Department to make a revised decision in the matter.

Please note, the Information Commissioner will share the submissions you provide during IC review with the applicant unless there are compelling reasons not to. However, we do not provide the applicant with copies of the documents at issue. Should you wish to provide submissions in confidence, please refer to the [IC Review Procedure Direction](#) which sets out the process for making such a request.

Regards

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Australian Government

Office of the Australian Information Commissioner

Our reference: **§ 22**

FOI Contact Officer
Department of Education, Skills and Employment

By email: foi@education.gov.au

Recent charges decision and invitation to make a revised decision

Dear FOI Contact Officer

I refer to the Information Commissioner review (IC review) of a decision of the Department of Education, Skills and Employment (the Department) made on 7 August 2020 in relation to **§ 22** application under the *Freedom of Information Act 1982* (the FOI Act).

The key issue in this IC review is whether the Department's decision to impose a charge, and not to consider whether to reduce or not impose that charge under s 29 of the FOI Act, was the correct and preferable decision in the circumstances.

The purpose of my letter is to:

- inform you of a recent decision by the Freedom of information Commissioner (FOI Commissioner) that is relevant to the IC review
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Recent decision

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The applicant sought IC review of a decision of the Department of Veterans' Affairs (DVA) to impose a charge of \$403.45 to process an FOI request. The request was for documents that were not in a discrete form and required DVA to reproduce them using systems that were ordinarily available to the Department for retrieving or collating stored information.

ABX considers:

- whether a charge should be imposed where the cost to the Commonwealth of assessing, imposing and collecting the charge from the applicant might exceed the cost to DVA of processing the applicant's request (or the amount of the charge itself)
- whether a charge for electronic production of documents (Part 1 Item 3 of Schedule 1 of the *Freedom of Information (Charges) Regulations 1982*)¹ should be assessed on an actual cost basis, being the hourly rate attributable to the classification or designation of the officer who undertakes the work involved.

The FOI Commissioner explained that, as a general rule:

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Commissioner was satisfied that having regard to these considerations, and the public resource already applied in relation to the matter, warranted a decision that no charge be applied in the circumstances.

Invitation to make a revised decision under s 55G or to provide submissions

In *ABX*, the FOI Commissioner noted that agencies should reconsider whether a charge should be imposed having regard to the amount of the charge imposed and the public resource applied to date.

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(1) An agency or Minister may vary (or set aside and substitute) an access refusal decision (the **original decision**) in relation to a request or an application under section 48 at any time during an IC review of the access refusal decision if the variation or substitution (the **revised decision**) would have an effect of:

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(b) relieving the IC review applicant from liability to pay a charge ...

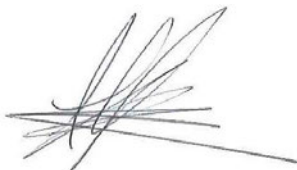
Accordingly, we invite the Department to consider making a revised decision under s 55G of the FOI Act relieving the applicant from liability to pay the charge.

Next steps

If the Department wishes to make a revised decision under s 55G of the FOI Act, please provide the revised decision to the applicant and the OAIC by **Friday 30 September 2022**.

Alternatively, please provide submissions in response by the same date. Your response should address why charges should be imposed in the circumstances, having regard to the amount of the charge and the public resource applied to date.

Yours sincerely



Anna Fields
Senior Review Officer (Legal)

9 September 2022

From: OAIC - FOI DR
Sent: Friday, 9 September 2022 9:54 AM
To: foi@awe.gov.au

s22 Recent charges decision and invitation to make a revised decision

s22 Charges Letter.pdf

Importance: High

s22

FOI Contact Officer
Department of Agriculture, Water and the Environment

By email: foi@awe.gov.au

Recent charges decision and invitation to make a revised decision

Dear FOI Contact Officer

Please find attached a letter, advising the Department of a recent charges decision and inviting the Department to make a revised decision in the matter.

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Australian Government

Office of the Australian Information Commissioner

Our reference: s 22 [REDACTED]

Your reference: s 22 [REDACTED]

FOI Contact Officer

Department of Agriculture, Water and the Environment

By email: foi@awe.gov.au

Recent charges decision and invitation to make a revised decision

Dear FOI Contact Officer

I refer to the Information Commissioner review (IC review) of a decision of the Department of Agriculture, Water and the Environment (the Department) made on 19 February 2021 in relation to s 22 [REDACTED] application under the *Freedom of Information Act 1982* (the FOI Act).

The key issue in this IC review is whether the Department's decision to impose a charge, and not to reduce or not impose that charge under s 29 of the FOI Act, was the correct and preferable decision in the circumstances.

The purpose of my letter is to:

- inform you of a recent decision by the Freedom of information Commissioner (FOI Commissioner) that is relevant to the IC review
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Recent decision

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The applicant sought IC review of a decision of the Department of Veterans' Affairs (DVA) to impose a charge of \$403.45 to process an FOI request. The request was for documents that were not in a discrete form and required DVA to reproduce them using systems that were ordinarily available to them for retrieving or collating stored information.

ABX considers:

- whether a charge should be imposed where the cost to the Commonwealth of assessing, imposing and collecting the charge from the applicant might exceed the cost to DVA of processing the applicant's request (or the amount of the charge itself)
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Invitation to make a revised decision under s 55G or to provide submissions

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We are of the view that the cost of calculating and collecting a charge in this IC review may exceed the amount of charge itself.

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(1) An agency or Minister may vary (or set aside and substitute) an access refusal decision (the **original decision**) in relation to a request or an application under section 48 at any time during an IC review of the access refusal decision if the variation or substitution (the **revised decision**) would have an effect of:

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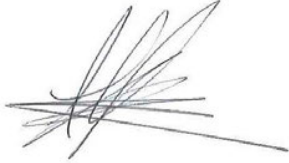
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Alternatively, please provide submissions in response by the same date. Your response should address why charges should be imposed in the circumstances, having regard to the amount of the charge and the public resource applied to date.

Yours sincerely

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Anna Fields
Senior Review Officer (Legal)

9 September 2022

From: OAIC - FOI DR
Sent: Monday, 12 September 2022 2:25 PM
To: foi@health.gov.au
Cc: FIELDS,Anna

s22 - Recent charges decision and invitation to make a revised decision

s22 Charges Letter.pdf

Importance: High

s22

FOI Contact Officer
Department of Health and Aged Care

By email: foi@health.gov.au

Recent charges decision and invitation to make a revised decision

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Australian Government

Office of the Australian Information Commissioner

Our reference: § 22

Your reference: § 22

FOI Contact Officer
Department of Health and Aged Care

By email: foi@health.gov.au

Recent charges decision and invitation to make a revised decision

Dear FOI Contact Officer

I refer to the Information Commissioner review (IC review) of a decision of the Department of Health and Aged Care (the Department) made on 20 September 2021 in relation to § 22 application under the *Freedom of Information Act 1982* (the FOI Act).

The key issue in this IC review is whether the Department's decision to impose a charge, and not to reduce or not impose that charge under s 29 of the FOI Act, was the correct and preferable decision in the circumstances.

The purpose of my letter is to:

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Yours sincerely

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Anna Fields
Senior Review Officer (Legal)

12 September 2022

From: OAIC - FOI DR
Sent: Friday, 9 September 2022 10:50 AM
To: foi@awe.gov.au
Cc: FIELDS,Anna

s22 - Notice of IC review application and request for documents
s22 - Charges
Decision.pdf

Importance: High

s22

FOI Contact Officer
Department of Agriculture, Water and the Environment

By email: foi@awe.gov.au

Notice of IC review application and request for documents

Dear FOI Contact Officer

Please find attached the notice of IC review and request for documents.

Please note, the Information Commissioner will share the submissions you provide during IC review with the applicant unless there are compelling reasons not to. However, we do not provide the applicant with copies of the documents at issue. Should you wish to provide submissions in confidence, please refer to the [IC Review Procedure Direction](#) which sets out the process for making such a request.

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Australian Government

Office of the Australian Information Commissioner

Our reference: s22

Agency reference: s22

FOI Contact Officer

Department of Agriculture, Water and the Environment

By email: foi@awe.gov.au

Notice of IC review application and request for documents

Dear FOI Contact Officer

The Office of the Australian Information Commissioner (OAIC) has received an application for Information Commissioner review of a decision made by the Department of Agriculture, Water and the Environment (the Department) under the *Freedom of Information Act 1982* (the FOI Act). A copy of the IC review application and the decision under review are attached.

Scope of IC review

The key issue in this IC review is whether the Department's decision to impose a charge, and to not reduce or not impose that charge under s 29 of the FOI Act, was the correct and preferable decision in the circumstances.

The IC review applicant contests the respondent's reasons for imposing a charge of \$150.83 for the processing of the applicant's request, as set out in the decision under review.

Guidelines issued under s 93A of the FOI Act

The FOI Guidelines provide at [4.19]- [4.20] the following advice:

Agencies and ministers have a discretion:

- not to impose a charge for the staff time and resources expended in processing an FOI request (s 8 of the *Freedom of Information (Charges) Regulations 2019* (the Charges Regulations)), independently of an applicant contending that a charge be reduced or waived

- to impose a charge lower than the charge specified in the Charges Regulations (s 8)
- to reduce or waive a charge after an applicant contests a charge (s 29(4)) (see [4.95]–[4.114]).

Agencies and ministers should be guided by the ‘lowest reasonable cost’ objective in s 3 of the FOI Act in deciding whether a charge specified in the Charges Regulations is warranted; there is no obligation on an agency to charge for access. Agencies and ministers may need to balance a number of factors in reaching decisions concerning access to documents and related charges. The overall impact of charges in recovering costs to government does not, of itself, justify imposing a charge for an individual request.

Recent decision

On 29 July 2022, the Freedom of information Commissioner (FOI Commissioner) made a decision in ‘*ABX and Department of Veterans’ Affairs (Freedom of information)*’ [2022] AICmr57 (29 July 2022) (*ABX*).

The applicant sought IC review of a decision of the Department of Veterans’ Affairs (DVA) to impose a charge of \$403.45 to process an FOI request. The request was for documents that were not in a discrete form and required DVA to reproduce them using systems that were ordinarily available to DVA for retrieving or collating stored information.

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- whether a charge should be imposed where the cost to the Commonwealth of assessing, imposing and collecting the charge from the applicant might exceed the cost to DVA of processing the applicant’s request (or the amount of the charge itself)
- whether a charge for electronic production of documents (Part 1 Item 3 of Schedule 1 of the *Freedom of Information (Charges) Regulations 1982*)¹ should be

¹ In *ABX*, the *Freedom of Information (Charges) Regulations 1982* (the 1982 Regulations) were applicable in relation to the applicant’s request for access. The 1982 Regulations were repealed by the *Freedom of Information (Charges) Regulations 2019* (the 2019 Regulations) on 21 March 2019. However, they apply only in relation to requests for access made on or after their commencement on 1 April 2019 (see s 13(1) of the 2019 Regulations). It should be noted that the substantive provisions of the 2019 Regulations are

assessed on an actual cost basis, being the hourly rate attributable to the classification or designation of the officer who undertakes the work involved.

The FOI Commissioner explained that, as a general rule:

- a charge should not be imposed in circumstances where the cost of assessing, imposing and collecting a charge is likely to be greater than the charge itself. In those circumstances, imposing a charge will generally only serve to delay or discourage access while incurring a net cost to the Commonwealth
- where a request for access requires the use of a computer to produce information in a discrete form, agencies should consider the true nature of the activity involved in processing the request. Where the true nature of that activity is essentially similar to a search and retrieval activity, a fair and reasonable charge is best calculated by applying the fixed hourly rate set out in the Charges Regulations for search and retrieval.²

The FOI Commissioner accepted that, in the circumstances of the matter before him, the cost of calculating and collecting a charge might exceed the amount of the charge itself.³ He noted that the object set out in s 3(4) is not limited to the provision of access at the lowest reasonable cost, but also expresses a parliamentary intention that functions and powers under the FOI Act must be performed and exercised to facilitate and promote the prompt public access to information. The FOI Commissioner was satisfied that having regard to these considerations, and the public resource already applied in relation to the matter, warranted a decision that no charge be applied in the circumstances.

in essence the same as those of the 1982 Regulations. Accordingly, the principles set out in this decision can be applied equally when considering the imposition of a charge under the 2019 Regulations.

² *ABX* [3].

³ In *ABX*, the Department of Veterans' Affairs purported to vary its decision under s 55G of the FOI Act to reduce the charges to \$145.84. However, a revised decision under s 55G can only be made to fully relieve the applicant of the liability to pay a charge, see [9].

Request for information

After considering Part 4 of the FOI Guidelines and the FOI Commissioner's decision, we are of the view that the cost of calculating and collecting a charge in this IC review may exceed the amount of charge itself.

We request that the Department provide the following information to the OAIC by **Friday 30 September 2022**:

- a revised decision under s 55G of the FOI Act waiving the charges in full or alternatively,
- the information set out in Paragraph 10.100 of the Guidelines issued under s 93A of the FOI Act with the information that the Respondent must provide to the OAIC. Please provide the information outlined in paragraph 10.100 of the Guidelines that relate to this review.

Compliance with this notice can be met by delivering the response to foidr@oaic.gov.au by **Friday 30 September 2022**. If the Department wishes to make a revised decision, a copy should also be sent to the IC review applicant.

Obligations during the IC review process

The obligations of the Respondent during the IC review process are set out under:

- ss 55D, 55DA and 55Z of the FOI Act
- Part 10 of the [Guidelines issued under s 93A of the FOI Act](#), which agencies and ministers must have regard to when performing a function or exercising a power under the FOI Act

- Direction as to certain procedures to be followed in IC reviews issued under s 55(2)(e)(i) of the FOI Act.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Anna Fields', written in a cursive style.

Anna Fields

Reviews Team
Freedom of Information Regulatory Branch
Office of the Australian Information Commissioner

[Enclosed: IC review application and decision under review].



Freedom of Information complaint investigation - Notice on completion under s 86 of the FOI Act by Freedom of Information Commissioner, Elizabeth Tydd

| | |
|------------------------------|---|
| Complainant | s 22 |
| Respondent | Department of Industry, Science and Resources |
| Completion date | 26 February 2024 |
| OAIC reference number | s22 |
| Department reference numbers | s22 |

Background

- On 21 April 2021, s 22 on behalf of the s 22 (the complainant) made a complaint under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) about the Department of Industry, Science and Resources (the Department) in relation to the processing 3 FOI requests (Department references: s22)¹²

¹ I acknowledge that the complainant provided a copy of a notice of 22 July 2019 (Department reference: 190428). This notice relates to a request of 29 April 2019 to the Department of Environment and Energy (DEE). On 1 February 2020, the DEE's energy functions were transferred to the Department of Industry, Science, Energy and Resources. On 1 June 2022, following the change of government, the climate change and energy functions were subsequently transferred to the Department of Climate Change, Energy, the Environment and Water (DCCEEW). As it presently stands, DCCEEW is the Department responsible for the actions of the former DEE: [Machinery of Government \(MoG\) changes to our department from 1 July 2022 | Department of Industry, Science and Resources](#). I have therefore not had regard to this notice as part of this FOI complaint process.

² Similar to above, I acknowledge that the complainant provided a copy of a notice of 11 June 2019 (Department reference: s22). This notice relates to a request of 11 April 2019 to the Clean Energy Regulator (CER). The CER is an independent statutory authority which also sits within the portfolio of DCCEEW. As it presently stands, DCCEEW is the Department responsible for the actions of the CER. I have therefore not had regard to this notice as part of this FOI complaint process.

2. On 15 February 2022, an officer of the Office of the Australian Information Commissioner (OAIC) undertook preliminary inquiries with the complainant under s 72 of the FOI Act.
3. On 21 February 2022, the complainant provided a response to the preliminary inquiries of 15 February 2022.
4. On 17 August 2023, pursuant to s 75 of the FOI Act, the OAIC gave notice to the complainant and the Department that it would be commencing an investigation into the FOI complaint. As part of the notice to the Department, the OAIC requested information from the Department under s 76(2) of the FOI Act.
5. On 14 and 29 September 2023, the Department provided a response to the notice of 17 August 2023.
6. On 5 October 2023, the OAIC provided an opportunity to the complainant to provide a response to the Department's response of 15 September 2023.
7. On 6 October 2023, the complainant provided a response.
8. The key procedural events in this FOI complaint are set out at **Attachment A**.
9. This document is a Notice on completion of the investigation of the FOI complaint made by the complainant prepared in accordance with s 86 of the FOI Act.
10. Section 86 of the FOI Act requires that I give you notice of:
 - the investigation results (see s 87 of the FOI Act)
 - the investigation recommendations, if any (see s 88 of the FOI Act), and
 - the reasons for the investigation results and the making of the investigation recommendations.

Summary of investigation results and recommendations

11. Having regard to the nature of the FOI complaint, I have concluded that the Department did not properly scrutinise the data input into the charges calculator and therefore cannot be satisfied that it represented an accurate preliminary assessment of charge. I find the FOI complaint to be substantiated.
12. In consideration of the above, I make the following recommendations pursuant to s 88 of the FOI Act:

- a. By **25 March 2024**, the Department is to amend its FOI Procedural Manual under subheading '4.2.12 Step Eleven – Charges' to state that there is an expectation when using a charges calculator that the FOI officer undertake sampling to ensure that the data input provides an accurate estimate.
 - b. Within 1 month of making the amendments, by **22 April 2024**, the Department is to providing training to its FOI officers to ensure they are aware of the expectation to undertake sampling when using a charges calculator.
 - c. By **26 August 2024**, the Department's FOI area is to undertake a review of all Charges Notices and Charges Decisions issued 26 February 2024 and 26 August 2024 to ensure that the amendments to the FOI Procedural Manual have been effectively implemented into the Department's practices and procedures.
 - d. As soon as practicable, but no later than 2 weeks after the assessment (**9 September 2024**), the Department report the results of the assessment referred to in paragraph (c) to the OAIC. The report should also include steps the Department is seeking to take to address circumstances where a charge was imposed using a charges calculator and sampling was not undertaken.
13. I make the following suggestions pursuant to s 87(d) of the FOI Act:
- a. By **25 March 2024**, the Department is to upload the documents relevant to the complainant's third request of 1 December 2020 (Department reference 67625) onto its disclosure log, or provide submissions to the OAIC outlining the reasons why these documents cannot be included on the disclosure log.
 - b. If relevant, within 2 weeks of uploading the documents (no later than **8 April 2024**), the Department is to advise the OAIC the documents have been uploaded to the disclosure log and provide a link to the relevant documents.

Investigation results

14. Section 87 of the FOI Act provides for my investigation results to set out the matters that I have investigated and my opinions and conclusions about those matters. I have considered all the material provided by the Department and the complainant in this matter.

The matters for investigation

15. The complaint raises 2 matters for investigation, namely:
 - a. whether the Department imposed charges which were disproportionate to the work required to process the requests, and

b. whether the Department did not properly scrutinise the charge determined by the Australian Government Solicitor (AGS) calculator (charges calculator).

16. The matters raised have a significant degree of overlap, so I have decided to address them together.

Consideration of matters for investigation

Complainant's allegation(s)

17. In **s 22** complaint of 21 April 2021, the complainant confirmed that **s 22** wished to pursue a FOI complaint in relation to the 'Department imposing disproportionate charges on **s 22** Freedom of Information requests'.

s22 [Redacted]

[Redacted]

| [Redacted]

| [Redacted]

| [Redacted]

| [Redacted]

s22 [Redacted]

[Redacted]

[Redacted]

[Redacted]

c. to reduce or waive a charge after an applicant contests a charge (s 29(4) of the FOI Act).

24. The FOI Guidelines at [4.53] provide under the subheading 'Estimating a charge' that:

An estimated charge must be as fair and accurate as possible. An agency or minister should be mindful not to set an unreasonably high estimate which may hinder the applicant from pursuing their FOI request.

25. The FOI Guidelines at [4.88] provides examples of when it may not be appropriate to reduce or not impose a charge, including when the Information Commissioner or AAT has decided in similar circumstances that charges should not be imposed.

26. Section 9 of the Charges Regulations provides that if the agency decides that a FOI applicant is liable to pay a charge, it may fix the amount to pay in respect of a charge. Relevant to this matter, the amount of the charge is ascertained in accordance with Schedule 1 of the Charges Regulations if all steps that are necessary to enable a decision to be made on the request have been taken by the agency.

27. The FOI Guidelines at [4.56] – [4.59] state that a 'charges calculator' is a commonly used tool for estimating charges under s 29 of the FOI Act. The FOI Guidelines note that a charges calculator cannot produce an accurate estimate without accurate inputs and urges caution when using such a resource: see FOI Guidelines at [4.57].

28. The FOI Guidelines at [4.60] – [4.62] provides that where a large number of documents have been identified as being within the scope of the request and the agency decides that it is appropriate to impose a charge, there is an expectation that the agency will obtain an accurate estimate by sampling a reasonable selection of relevant documents, that being 10% of the documents falling within the scope of the request.

The Department's submissions

29. In its submissions of 14 September 2023, the Department submitted that it exercised the discretion to impose a charge on the basis of the particular facts and circumstances of the FOI requests and 'at each point in time in the decision-making process (estimate of charge, consideration of estimate and calculation of actual charge)' in accordance with the FOI Act, the FOI Guidelines, and the Charges Regulations. In the submissions of 14 September 2023, the Department submitted that it had developed template emails and draft decisions with respect to estimating and imposing charges to ensure its decisions are accurate,

consistent and 'take into [account] the factors relevant to the imposition of a charge'. The Department confirmed that all estimates of charges are second counselled before being sent to the decision maker for consideration, and all notices of charges are second counselled before being sent to a FOI applicant.

30. The Department stated that it used the charges calculator developed by AGS to 'ensure that charges are calculated accurately and imposed at the lowest reasonable cost'. The Department confirmed that it undertakes a sampling process '[w]here a large number of documents have been identified'. The Department further submitted that it 'scrutinises the estimate produced by the AGS calculator to ensure it represents the lowest reasonable cost to the FOI applicant'.
31. The Department submitted that the estimate of charges of 8 September 2020 was proportionate to the work undertaken to process the complainant's requests. The Department otherwise relied upon the findings in its decision of 28 September 2020 as to the reasons why the charge was later reduced. The Department submitted that:

The department's later decision to waive the charge in full does not undermine its earlier decisions. Rather, it reflects the department's practice of assessing charges at each relevant point in time in the decision-making process to ensure that charges are reasonable in the circumstances of the FOI request, taking into account all relevant factors, including the impact of the passage of time and any new or changing public interest concerns.

32. Attached to the submissions of 14 September 2023 were extracts from the Department's FOI Procedure Manual. Relevantly, the FOI Procedural Manual states that an FOI officer must review the documents to confirm whether it is appropriate to recommend to the decision-maker that charges be imposed. The recommendation will be based on (a) if the charge is over \$100.00; (b) an estimate of how much work is involved in redacting documents and preparing the decision; (c) an estimate of how much work is involved in consulting any third parties; and/or (d) any other relevant factors particular to the FOI request. The amount of charge imposed should be (a) determined bearing the objects of the FOI Act in mind; (b) reasonable, taking into account all relevant factors; and (c) proportionate to the cost of making a decision and providing access, as well as any general public interest supporting release of the requested documents.

33. In its submissions of 29 September 2023, the Department stated that:

The department submits that its decision-making procedures in respect of imposing charges is consistent with the legislative framework for charges and relates aspects of the FOI Guidelines as discussed in *ABX*. Accordingly, the department reiterates the submissions it made ... [in] its submissions dated 14 September 2023.

34. On 17 January 2024, an officer of the OAIC requested copies of documents relating to the charges calculators and sampling undertaken by the Department. On 9 February 2024, the Department provided the requested documents, including copies of the charges calculators used to calculate the relevant estimate of charges. In the covering email, the Department confirmed it had not undertaken sampling before issuing the Charges Notice 'because the full suite of documents was able to be ascertained for each request'.

My opinions in relation to matters considered under the investigation

35. Once the Department decided it was appropriate in the circumstances to find the complainant was liable to pay a charge, it was open to the Department to use a charges calculator to calculate the estimate of charges.

The Department has made submissions to the effect that due to the small size of documents falling within scope of the request, it did not undertake sampling. I have independently reviewed the documents released to the complainant in response to the requests of 25 October 2019 and 21 August 2020 (Department references: 63684 and 66858) on the Department's Disclosure Log. Both requests involved approximately 45 pages each. I accept this is not a large number of documents. and that the Department's approach in not undertaking sampling reflected the FOI Guidelines (v 1.7) in place at the time these Charges Decisions were made.⁴

36. However, from my reading of the submissions of 14 September 2023, it appears as though the Department maintains this is appropriate (see summary of submissions at [30] above). I draw attention to the current version of the FOI Guidelines (v 1.8) which provides at [4.74] that while charges calculator can be a useful tool in estimating the charge liable to be paid, sampling should be undertaken when a charge calculator is being used.
37. For clarity, I note that the current FOI Guidelines (v 1.8) at [4.74] reflects the OAIC's position in respect of the use of charges calculators. This differs from the approach outlined in the FOI Guidelines (v 1.8) at [4.75] which, similar to the earlier versions of the FOI Guidelines, refers to instances where there is a large number of documents regardless of whether a charges calculator is used or not. In other words, there is presently an expectation that sampling will be undertaken when a charges calculator is being relied upon irrespective of the number of documents falling within the scope of the request. This is because the charges calculators cannot produce an accurate estimate without accurate inputs.

⁴ From my review, the documents relevant to FOI request 67625 do not appear on the disclosure log.

38. As noted above at [36], I am concerned that the Department continues to undertake actions under the FOI Act which are outdated. For this reason, my recommendation above at [12.a] of this Notice is to ensure that the Department's FOI Procedure Manual reflects the updated expectation as outlined in the FOI Guidelines v 1.8.
39. In any event, there is nothing before me to suggest that the time entered into the charges calculator at the time of the requests is anything other than a generalised, non-specific estimate provided for by the calculator. For example, in the charges calculator provided by the Department, there is 2 hours provided for "Consult third parties – enter average per third party hours" in respect of all 3 of the requests. This indicates to me that this input was not specific to the request but was a generic estimate utilised by the Department whenever third party consultation was required regardless of whether the consultation would take 2 hours or not.
40. In my view, the Department does not appear to have actively engaged with the charges calculator to ensure that the information input into it was accurate. This approach is inconsistent with the FOI Guidelines which provides that charges should be as fair and accurate as possible.⁵ It also does not align with the 'lowest reasonable cost' principle.
41. As per the FOI Guidelines at [4.53], imposing a charge can hinder members of the public from seeking access to documents and can delay access. This is not compatible with the objects of the FOI Act (s 3) which provides that the functions and powers given by the Act are to be performed and exercised, as far as possible, to facilitate and promote access to information, promptly and at the lowest reasonable cost: see FOI Guidelines at [4.5]. This is particularly so in circumstances where an agency cannot be certain that the charge imposed is accurate.
42. For these reasons, I find that that the Department's processes do not align with the FOI Act and the FOI Guidelines insofar as the Department did not undertake a process to ensure that the charge was accurately estimated. I find that the complainant's submissions that the Department did not critically, or meaningfully, assess the results of the charges calculator are substantiated. Further, I find that the Department's unfettered reliance on the charges calculator did not meet the objects of s 3 of the FOI Act.

⁵ FOI Guidelines at [4.53].

43. Finally, I consider it is appropriate to point out that the Department's decisions do not provide adequate reasoning for the weighing exercise it was required to undertake prior to make a determination to reduce or not impose a charge.
44. The Department appears to have a template statement in their charges decisions as follows:
- I also note that in recognition of the general public interest in allowing access to government information, the FOI Act provides for the first five hours of decision making time to be free of charge for all applications. I note that this discount has been applied to the Charge.
45. This paragraph is merely a statement of the principle required to be considered as part of the decision-making process. It does not reflect the Department's thoughts on that process.
46. The next paragraph of the Department's template decisions goes on to state whether the charge has been reduced, not imposed, or maintained. However, while this paragraph outlines the decision, it does not explain why it came to this conclusion or how the principles identified above has been applied.
47. While templates are important tools which can assist in the ensuring consistency in decision-making, agencies are still required to provide sufficient reasons so an applicant can understand the decision-making process. The Department should be mindful to address how it reached its decision.
48. I trust the Department will take this feedback on board in respect of future decisions.

My conclusions in relation to the matters investigated

49. Having regard to the nature of the FOI complaint, I have concluded that the Department did not properly scrutinise the data input into the charges calculator and therefore cannot be satisfied that it represented an accurate preliminary assessment of charge. I find the FOI complaint to be substantiated.

My recommendations

50. In consideration of the above, I make the following recommendations pursuant to s 88 of the FOI Act:
- a. By **25 March 2024**, the Department is to amend its FOI Procedural Manual under subheading '4.2.12 Step Eleven – Charges' to state that there is an expectation when using a charges calculator that the FOI officer undertake sampling to ensure that the data input provides an accurate estimate.

- b. Within 1 month of making the amendments, by **22 April 2024**, the Department is to providing training to its FOI officers to ensure they are aware of the expectation to undertake sampling when using a charges calculator.
- c. By **26 August 2024**, the Department's FOI area is to undertake a review of all Charges Notices and Charges Decisions issued 26 February 2024 and 26 August 2024 to ensure that the amendments to the FOI Procedural Manual have been effectively implemented into the Department's practices and procedures.
- d. As soon as practicable, but no later than 2 weeks after the assessment (**9 September 2024**), the Department report the results of the assessment referred to in paragraph (c) to the OAIC. The report should also include steps the Department is seeking to take to address circumstances where a charge was imposed using a charges calculator and sampling was not undertaken.

51. I make the following suggestions pursuant to s 87(d) of the FOI Act:

- a. By **25 March 2024**, the Department is to upload the documents relevant to the complainant's third request of 1 December 2020 (Department reference 67625) onto its disclosure log, or provide submissions to the OAIC outlining the reasons why these documents cannot be included on the disclosure log.
- b. If relevant, within 2 weeks of uploading the documents (no later than **8 April 2024**), the Department is to advise the OAIC the documents have been uploaded to the disclosure log and provide a link to the relevant documents.



Elizabeth Tydd
Freedom of Information Commissioner
26 February 2024



ATTACHMENT B Background

Department reference **s22**

1. On 25 October 2019, the complainant made a request under s 15 of the FOI Act (First Request).
2. On 13 November 2019, the Department notified the complainant that **s 22** was liable to pay a charge pursuant to s 29(1) of the FOI Act (First Charges Notice). The Department provided a preliminary estimate of charge in the amount of \$699.94.
3. On 15 November 2019, the complainant notified the Department pursuant to s 29(1)(f) of the FOI Act that **s 22** contended the charge should be reduced. Although not expressly stated, the complainant challenged the estimate of time for processing the request provided by the Department.
4. On 13 December 2019, the Department notified the complainant of its decision to reduce the charge by excluding the search and retrieval time provided for in the charges estimate (First Charges Decision). The reduction of the charge totalled \$438.69. The Department was satisfied that the calculation of the preliminary estimate of charges was accurate and not wrongly assessed.
5. On 23 March 2020, a delegate of the Department made a substantive decision regarding access to the documents requested as part of the First Request.
6. On 25 March 2020, the complainant emailed the Department noting that the documents released as part of the substantive decision (6 documents or 46 pages) were less than the number of documents identified in the First Charges Notice and First Charges Decision (19 documents or 148 pages). The complainant asked whether there was a final calculation of charges after the decision was made.
7. On 26 March 2020, the Department stated that the final total amount of the charge was \$460.80.

Department reference **s22**

8. On 21 August 2020, the complainant made a request under s 15 of the FOI Act (Second Request).

9. On 3 September 2020, the Department notified the complainant that it was liable to pay a charge pursuant to s 29(1) of the FOI Act (Second Charges Notice). The Department provided a preliminary estimate of charge in the amount of \$146.77.
10. On 3 September 2020, the complainant wrote to the Department and asked why the Department was 'going to take 5 hours of search and retrieval time to locate 4 documents?'
11. On the same day, the Department responded that this reflected the 'actual time take to search and retrieve' the documents.
12. On 8 September 2020, the complainant notified the Department pursuant to s 29(1)(f) of the FOI Act that it contended the charge should be reduced. The complainant stated that § 22 did not believe the Department's estimate reflected the time it would take to undertake the tasks. The complainant stated that the Department's Charges Decisions are 'often inflated and at odds with those imposed by other agencies that also use the AGS charges calculator (for requests of a similar size)'.
13. On 28 September 2020, the Department notified the complainant of its decision to reduce the charge by 50% (Second Charges Decision). The reduction of the charge totalled \$73.38. The Department was satisfied that the calculation of the preliminary estimate of charges was accurate and not wrongly assessed. In considering the other grounds for reduction, the Department's reason were almost identical to those within the First Charges Decision.
14. On 28 September 2020, the complainant emailed the Department regarding the Second Charges Decision, including whether the 50% discount was being applied.
15. Also on 28 September 2020, the complainant applied for an Information Commissioner (IC) review of the Second Charges Decision under s 54N of the FOI Act (OAIC reference: §22).
16. On 15 October 2020, a delegate of the Department made a substantive decision regarding access to the documents requested as part of the Second Request. The Department noted that the actual costs of processing the request totalled \$58.39. As the complainant had already paid a deposit of \$36.69, the complainant was required to pay the balance owing of \$21.71 before the document could be released.
17. On 9 April 2021, as part of the IC review process, a delegate of the Department made a decision pursuant to s 55G of the FOI Act. The Department varied the Second Charges Decision to 'relieve [the complainant] from liability to pay a charge (s 55G(1)(b)) before a review by the OAIC is finalised'. The Department otherwise did not provide any reasons for varying the Second Charges Decision.

18. On 21 April 2021, the complainant withdrew s 22 application for an IC review of the Second Charges Decision.

Department reference s22

19. On 1 December 2020, the complainant made a request under s 15 of the FOI Act (Third Request).
20. On 22 December 2020, the Department notified the complainant that it was liable to pay a charge pursuant to s 29(1) of the FOI Act (Third Charges Notice). The Department provided a preliminary estimate of charge in the amount of \$167.79.
21. On 6 January 2021, the complainant notified the Department pursuant to s 29(1)(f) of the FOI Act that it contended the charge should be reduced on public interest grounds.
22. On 28 January 2021, the Department notified the complainant of its decision to reduce the preliminary estimate of charge on public interest grounds and impose a charge of \$100 (59.5% reduction) (Third Charges Decision). The Department was satisfied that the calculation of the preliminary estimate of charges was accurate and not wrongly assessed. In considering the other grounds for reduction, the Department's reason were almost identical to those within the First and Second Charges Decision.

OAIC reference s22

23. On 21 April 2021, the complainant made a FOI complaint under s 70 of the FOI Act about how the Department processed an FOI request of 21 August 2020. The complainant raised concerns that the Department imposed disproportionate charges on the request.
24. On 15 February 2022, an officer of the OAIC requested further information from the complainant.
25. On 21 February 2022, the complainant provided a response to the request of 15 February 2022 and attached copies of the First, Second, and Third Charges Notices, the First, Second and Third Charges Decisions, as well as various emails between the complainant and the Department in respect of those Notices and Decisions.
26. On 17 August 2023, pursuant to s 75 of the FOI Act, the OAIC gave notice to the complainant and the Department that it would be commencing an investigation into the FOI complaint. As part of the notice to the Department, the OAIC requested information from the Department under s 76(2) of the FOI Act.

27. On 14 and 29 September 2023, the Department provided a response to the notice of 17 August 2023.
28. On 5 October 2023, the OAIC provided an opportunity to the complainant to provide a response to the Department's response of 15 September 2023.
29. On 6 October 2023, the complainant provided a response.
30. On 17 January 2024, the OAIC requested further information from the Department.
31. On 9 February 2024, the Department provided the requested documents.
32. On 16 February 2024, the OAIC requested that 3 of the documents be provided in a different format. On the same day, the Department provided copies in another format.



Australian Government
Office of the Australian Information Commissioner

Our reference: s22
Agency reference: s22

FOI Contact Officer

Department of Industry, Science, Energy and Resources

By email: foi@industry.gov.au

Freedom of Information Complaint – s 22
[Redacted]

Dear FOI Contact Officer

The Office of the Australian Information Commissioner (OAIC) has received an FOI complaint about the Department of Industry, Science and Resources (the Department), made under s 70 of the *Freedom of Information Act 1982* (Cth) (FOI Act), from the s 22 [Redacted]

Please find attached a copy of s 22 FOI complaint dated 21 April 2021, together with a copy of the additional information provided by s 22 in support of their FOI complaint on 21 February 2022.

The OAIC has decided to conduct an investigation into this complaint under s 69(1) of the FOI Act.¹ This is a notice to you pursuant to s 75(1) of the FOI Act.

Complaint allegations

s 22 has raised concerns about the Department’s handling of your FOI request dated 21 August 2020 (Agency ref: s22), complaining that:

1. the Department imposed charges that are disproportionate to the work required to process the request, and
2. the Department did not properly scrutinise the charge determined by the Australian Government Solicitor (AGS) calculator.

¹ See paragraphs 11.5 and 11.6 of the *Guidelines issued by the Information Commissioner under s 93A of the FOI Act*.



Request for information

In accordance with s 76(2) of the FOI Act, please provide the following information requested below by **31 August 2023**:

1. Information about the Department's process calculating a charge, including:
 - a. Copies of the Department's policies, procedures and/or guidelines in respect of the decision-making process about imposing charges
 - b. Submissions on the process the Department undertakes to calculate a charge, including the preliminary assessment as well as the actual charge
 - c. Submissions on the recent IC review decisions² and whether the Department has modified its decision-making processes or procedures in respect of imposing charges since these IC review decisions were made.
2. Submissions on the **s 22** contentions, including:
 - a. that the charge imposed is disproportionate to the work undertaken.
 - b. that the Department does not properly scrutinise the estimate provided for by the AGS calculator.
3. Any other submission the Department wishes to make.

Our investigation

On completing an investigation, the Information Commissioner will provide a 'Notice on completion' to the Department and to the complainant pursuant to s 86 of the FOI Act. The Information Commissioner's notice must include the investigation results, the investigation recommendations (if any), the reasons for those results and any recommendations (s 86(2)). The 'investigation results' under s 87 are:

- the matters that the Information Commissioner has investigated

² See 'ABX' and Department of Veterans' Affairs (Freedom of information) [2022] AICmr 57, Paul Farrell and Services Australia (Freedom of information) [2023] AICmr 27 and John Abbot and Bureau of Meteorology (Freedom of information) [2023] AICmr 54.

- any opinion that the Information Commissioner has formed in relation to those matters
- any conclusions that the Information Commissioner has reached
- any suggestions that the Information Commissioner believes might improve the agency's processes
- any other information of which the Information Commissioner believes the agency should be aware.

The Department's submissions may be provided to the complainant for their review and comment or referred to in the Notice on completion.

The outcome of the investigation will be published on the OAIC's website with any comments that the Department wishes to give under s 86(3) of the FOI Act.

Further information about the process in an FOI complaint can be found in [Part 11](#) of the FOI Guidelines. We note that the OAIC may seek further information once the Department's response to this notice is received.

If you would like to discuss this matter, please contact Naoimh Donaghy on 02 9297 9072 or email naoimh.donaghy@oaic.gov.au. Please quote the reference number above.

Yours sincerely

Jackie Scolyer
Acting Director Reviews and Investigations
Freedom of Information

17 August 2023



Australian Government
Office of the Australian Information Commissioner

Our reference: s22 [REDACTED]

Department References: s22 [REDACTED]

Megan Quinn PSM

Secretary

Department of Industry, Science and Resources

By email: meghan.quinn@industry.gov.au

Cc: foi@industry.gov.au

Freedom of information complaint investigation – Notice on completion

Dear Secretary Quinn

I refer to the complaint made by s 22 [REDACTED] on behalf of the s 22 [REDACTED] (the complainant) under s 70 of the *Freedom of Information Act 1982* (FOI Act) about the Department of Industry, Science and Resources (the Department) in relation to the processing of 3 FOI requests (Agency reference 63684; 66858; 67625). The FOI complaint relates to:

- a. whether the Department imposed charges which were disproportionate to the work required to process the requests, and
- b. whether the Department did not properly scrutinise the charge determined by the Australian Government Solicitor (AGS) calculator (charges calculator).

On 17 August 2023, the Office of the Australian Information Commissioner (OAIC) provided a notice to the Department under s 75 of the FOI Act advising of the commencement of an investigation into the FOI complaint and requesting information.

The Department provided responses to the notice and request for information on 14 September 2023, 29 September 2023, and 9 February 2024.

I apologise for the delay in finalising this investigation and confirm that processes have been revised to elevate timeliness in the finalisation of complaints under the FOI Act.

I am writing in accordance with s 86 of the FOI Act to notify you that I have completed my investigation into the FOI complaint and to advise you of the outcome.

I am required to give you notice of:

- the investigation results (see s 87 of the FOI Act)
- the investigation recommendations, if any (see s 88 of the FOI Act), and
- the reasons for the investigation results and the making of the investigation recommendations.

The notice setting out these matters is at **Attachment A**.

My conclusions

Having regard to the nature of the FOI complaint, I have concluded that the Department did not properly scrutinise the data input into the charges calculator and therefore cannot be satisfied that it represented an accurate preliminary assessment of charge. I find the FOI complaint to be substantiated.

My recommendations

In considering whether to make any investigation recommendations, I have taken into account all of the information provided by the Agency in relation to its current FOI processes and resources.

Pursuant to s 88 of the FOI Act, I make the following recommendations to the Department that I believe the Department ought to implement:

- a. By **25 March 2024**, the Department is to amend its FOI Procedural Manual under subheading '4.2.12 Step Eleven – Charges' to state that there is an expectation when using a charges calculator that the FOI officer undertake sampling to ensure that the data input provides an accurate estimate.
- b. Within 1 month of making the amendments, by **22 April 2024**, the Department is to providing training to its FOI officers to ensure they are aware of the expectation to undertake sampling when using a charges calculator.
- c. By **26 August 2024**, the Department's FOI area is to undertake a review of all Charges Notices and Charges Decisions issued between 26 February 2024 and 26 August 2024 to ensure that the amendments to the FOI Procedural Manual have been effectively implemented into the Department's practices and procedures.
- d. As soon as practicable, but no later than 2 weeks after the assessment (**9 September 2024**), the Department report the results of the assessment referred to in paragraph (c) to the OAIC. The report should also include steps the Department is seeking to take to address circumstances where a charge was imposed using a charges calculator and sampling was not undertaken.

2. I make the following suggestions pursuant to s 87(d) of the FOI Act:

- a. By **25 March 2024**, the Department is to upload the documents relevant to the complainant's third request of 1 December 2020 (Department reference 67625) onto its disclosure log, or provide submissions to the OAIC outlining the reasons why these documents cannot be included on the disclosure log.
- b. If relevant, within 2 weeks of uploading the documents (no later than **8 April 2024**), the Department is to advise the OAIC the documents have been uploaded to the disclosure log and provide a link to the relevant documents.

I make no suggestions pursuant to s 87(d) of the FOI Act.

Next steps

Comments under s 86(3) of the FOI Act

Under s 86(3) of the FOI Act, the Department may provide any comments about the Notice on completion that it wishes to make. If the Department wishes to make any comments, please do so by **11 March 2024**.

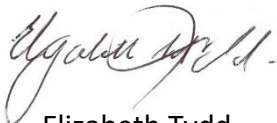
A copy of the Notice with the Department's comments will be provided to the complainant pursuant to s 86(4) of the FOI Act. If I do not receive any comment from the Department by **11 March 2024**, I will proceed to provide a copy of the Notice to the complainant at that time.

I do not consider that this Notice contains matters of the kind mentioned in s 89C(2) of the FOI Act and I will therefore provide the complainant with a copy of this Notice pursuant to s 86(4) of the FOI Act on or after **11 March 2024**.

I propose to publish a summary of this Notice and any comments from the Department on the OAIC's website.

If you would like to discuss this matter, please contact Jackie Scolyer on (02) 9942 0585 or email jackie.scolyer@oaic.gov.au. Please quote the OAIC reference number above in any correspondence.

Yours sincerely



Elizabeth Tydd
Freedom of Information Commissioner
26 February 2024

OAIC - FOI DR

From: OAIC - FOI DR
Sent: Wednesday, 17 January 2024 10:25
To: Freedom of Information
Subject: Response required by 31.01.24 – s 22 [redacted] and the Department of Industry, Science and Resources – OAIC ref. s22 [redacted]
Attachments: RE: Response required by 02.11.23 - s 22 [redacted] and Department of Industry, Science and Resources - OAIC ref s22 [redacted] [SEC=OFFICIAL]

Our reference: s22 [redacted]

Agency reference: s22 [redacted]

FOI Contact Officer

Department of Industry, Science, and Resources

By email: foi@industry.gov.au

Freedom of Information Complaint – s 22 [redacted]

Dear FOI Officer

I refer to the FOI complaint made by s 22 [redacted] on behalf of the s 22 [redacted] (the complainant's) of 8 March 2022 regarding the manner in which the Department of Industry, Science, and Resources (the Department) handled a request made under s 15 of the *Freedom of Information Act 1982* (FOI Act).

I confirm receipt of the Department's submissions of 14 and 29 September 2023. On 6 October 2023, the complainant provided a response – see attached.

Request for further information

Having reviewed these submissions, the OAIC is of the opinion that further information is required to finalise this complaint. In accordance with s 76(2) of the FOI Act, I would be grateful if you could provide the following:

- A copy of the template Charges Calculator referenced in the FOI Procedural Manual under the subheading '4.2.12 Step Eleven – Charges'.
- Copies of any of the Charges Calculator used as part of processing the FOI requests relevant to the complaint (Agency reference: s22 [redacted]).
- Confirmation as to whether the Department undertook sampling as part of processing the FOI requests relevant to the complaint.
 - If so, please provide relevant evidence of the sampling process.
 - If not, please provide submissions why not.
- Copies of internal emails from the FOI branch to the decision-maker recommending the imposition of a charge for each of the relevant decisions.
- Any further submissions in response to the complainant's email of 6 October 2023.

Next steps

Please provide the above information by **31 January 2024**.

Kind regards,

Naoimh

The logo for the Office of the Australian Information Commissioner (OAIC), consisting of the letters 'OAIC' in white on a dark blue square background.

Naoimh Donaghy (she/her)

Legal secondee

Office of the Australian Information Commissioner

Sydney | GPO Box 5288 Sydney NSW 2001

P +61 2 9297 9072 **E** foidr@oaic.gov.au

Please note I work part-time on Wednesdays, Thursday and Fridays.

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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OAIC - FOI DR

From: OAIC - FOI DR
Sent: Monday, 26 February 2024 13:28
To: meghan.quinn@industry.gov.au
Cc: Freedom of Information
Subject: Response required by 08.03.24 - Notice on Completion - s 22 [redacted] and Department of Industry, Science and Resources - s22 [redacted]
Attachments: s22 [redacted] - s 22 - Letter to R encl. s 86 notice.pdf; s22 [redacted] - s 44 - Notice on Completion.pdf

Our reference: s22 [redacted]
Department References: s22 [redacted]

Megan Quinn PSM
Secretary
Department of Industry, Science and Resources

By email: meghan.quinn@industry.gov.au
Cc: foi@industry.gov.au

Freedom of information complaint investigation – Notice on completion

Dear Ms Quin

Please find attached our letter of today’s date, with relevant attachments. Please note a response is required by 8 March 2024.

Kind regards,

Naoimh



Naoimh Donaghy (she/her)
Legal secondee
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
E foidr@oaic.gov.au

Please note I work part-time on Mondays, Tuesdays and Wednesdays.

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Our reference: s22 [REDACTED]

Agency reference: s22 [REDACTED]

FOI Contact Officer

Department of Health and Aged Care

By email: foi@health.gov.au

Freedom of Information Complaint – s 22 [REDACTED]

Dear FOI Contact Officer

The Office of the Australian Information Commissioner (OAIC) has received a FOI complain about the Department of Health and Aged Care (the Department) made under s 70 of the *Freedom of Information Act 1982* (FOI Act) from s 22 [REDACTED] (the complainant).

Please find **enclosed** a copy of the complainant's correspondence dated 7 September 2021.

The OAIC has decided to conduct an investigation into this FOI complaint under s 69(1) of the FOI Act.¹ This is a notice to the Department pursuant to s 75(1) of the FOI Act.

Complaint allegations

The complainant raises concerns that the Department did not provide adequate assistance to the complainant so that they could pay a charge and secure the release of documents requested under s 15 of the FOI Act.

Our investigation

On 23 August 2023, the OAIC made preliminary inquiries with the Department pursuant to s 72 of the FOI Act. On 29 August 2023, the Department provided a response.

¹ See the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) at [11.6] and [11.7].

On 7 September 2023, the OAIC sought clarification from the Department in respect of its response of 29 August 2023. On 27 September 2023, the Department provided a further response.

A copy of the Department's response has been provided to the complainant for a response. Once a response is received, the OAIC will proceed to completing its investigation.

On completing an investigation, the Information Commissioner will provide a 'Notice on completion' to the Department and to the complainant pursuant to s 86 of the FOI Act. The Information Commissioner's notice must include the investigation results, the investigation recommendations (if any), the reasons for those results and any recommendations (s 86(2)). The 'investigation results' under s 87 are:

- the matters that the Information Commissioner has investigated
- any opinion that the Information Commissioner has formed in relation to those matters
- any conclusions that the Information Commissioner has reached
- any suggestions that the Information Commissioner believes might improve the agency's processes
- any other information of which the Information Commissioner believes the agency should be aware.

The Department's submissions may be provided to the complainant for their review and comment or referred to in the Notice on completion.

The outcome of the investigation will be published on the OAIC's website with any comments that the Department wishes to give under s 86(3) of the FOI Act.

Further information about the process in an FOI complaint can be found in [Part 11](#) of the FOI Guidelines. We note that the OAIC may seek further information from the Department once a response is received from the complainant.

If you would like to discuss this matter, please contact Naoimh Donaghy on 02 9297 9072 or email foidr@oaic.gov.au. Please quote the reference number above.

Yours sincerely

Handwritten initials 'JS' in a cursive, black ink style.

Jackie Scolyer

Acting Director Reviews and Investigations
Freedom of Information

23 October 2023



Freedom of Information complaint investigation - Notice on completion under s 86 of the FOI Act by Freedom of Information Commissioner, Elizabeth Tydd

| | |
|-------------------------|------------------------------------|
| Complainant | s 22 |
| Respondent | Department of Health and Aged Care |
| Completion date | 26 February 2024 |
| OAIC reference number | s22 |
| Agency reference number | s22 |

Background

1. On 7 September 2021, s 22 (the complainant) made a complaint under s 70 of the *Freedom of Information Act 1982* (the FOI Act) about the Department of Health and Aged Care (the Department) in relation to the processing of s 22 FOI request s22
2. The key procedural events in this FOI complaint are set out at **Attachment A**.
3. This document is a Notice on completion of the investigation of this FOI complaint made by the complainant prepared in accordance with s 86 of the FOI Act.
4. Section 86 of the FOI Act requires that I give you notice of:
 - the investigation results (see s 87 of the FOI Act)
 - the investigation recommendations, if any (see s 88 of the FOI Act), and



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- the reasons for the investigation results and the making of the investigation recommendations.

Summary of investigation results and recommendations

5. I have concluded that throughout the process – from issuing the initial charges notice of 9 June 2021 and through the FOI Complaint’s process – the Department has acted inconsistently with the FOI Act, the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations), and/or FOI Guidelines in respect of finding the complainant liable to pay a charge in relation to **§ 22** FOI request/s. My finding that the Department failed to provide adequate assistance to the complainant to make a payment of a charge reflects a failing by the Department to act consistently with the FOI Act and/or FOI Guidelines from the initial exercise of charges functions by the Department and continuing.
6. In consideration of the above, I make the following recommendations pursuant to s 88 of the FOI Act:
 - a. By **26 August 2024**, the Department is to update its FOI Guidelines/Procedure Manual such that it better reflects the Charges process in accordance with the FOI Act and/or FOI Guidelines. In particular, the amendments should highlight the discretionary nature of charges, the expectation that sampling will occur when using a charges calculator, and the ongoing obligation of the Department to continue to be satisfied that the charge should be imposed.
 - b. By **25 November 2024**, the Department’s FOI branch is to undergo training to ensure compliance with the updated FOI Guidelines/Procedure Manual. Evidence of the training is to be created and retained by the Department.
7. I have made the following suggestions under s 87(d) of the FOI Act:
 - a. By **25 March 2024**, the Department give consideration to providing the complainant with a full refund of the deposit of \$60, having particular regard to the findings above at [55]-[56].
 - b. The Department is to provide an update to the OAIC as soon as practicable (but no later than by **25 March 2024**) as to whether a full refund has been, or will be, provided.



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Investigation results

8. Section 87 of the FOI Act provides for my investigation results to set out the matters that I have investigated and my opinions and conclusions about those matters. I have considered all the material provided by the Department and the complainant in this matter.

The matters for investigation

9. The complaint has raised concerns that that the Department did not provide adequate assistance to s 22 so that s 22 could pay a charge and secure the release of documents s 22 had requested under s 15 of the FOI Act. In my view, the nature of this FOI complaint gives rise to the consideration as to whether there was an ongoing obligation on the Department to assist the complainant, including giving consideration as to whether the complainant was liable to pay a charge.

Whether the Department provided adequate assistance to the complainant to pay a charge

Complainant's allegation

10. In s 22 FOI complaint of 7 September 2021, the complainant stated that s 22 had made 'numerous attempts via telephone and email to contact the department to make payment to therefore release documents under this FOI request, however they are not responding'.
11. On 26 October 2022, in response to inquiries from the OAIC, the complainant stated that when s 22 tried to make payment of the balance of the charge, s 22 'never received a call back our (sic.) email other than that the accounts team were not operating due to the ACT (Australian Capital Territory) lockdowns'.



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Legislation and Guidelines¹

12. Section 3(4) of the FOI Act outlines the objects of the FOI Act to include parliament's intention that functions and powers given by the FOI Act are to be 'performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost'.
13. Section 29(1) of the FOI Act, and s 8 of the Charges Regulations, provide a discretion for a charge to be imposed in respect of a request for access to a document or the provision of access to a document under the FOI Act. Under s 29(1)(f)(ii), within 30 days of being notified of the charge, a FOI applicant may contend the charge has been wrongly assessed, should be reduced or not imposed, or both.
14. The FOI Guidelines at [4.71] – [4.74] provides that a charges calculator cannot produce an accurate estimate without accurate inputs. Where a decision is made to use a charges calculator to estimate a charge, the agency should examine a sample of the relevant documents and adjust the parameter accordingly.
15. The FOI Guidelines at [4.75] – [4.77] provides that where a large number of documents have been identified in response to an FOI request and the agency decides its appropriate to impose a charge, there is an expectation that the agency or Minister will obtain an accurate estimate by sampling a reasonable selection of relevant documents. A representative sample size of at least 10 percent is generally considered an appropriate sample size to assess the processing time. Agencies and Ministers should assess the amount of time it will take to search for and/or retrieve the documents held in the representative sample, as well as the amount of time it will take to examine, consider any exemptions that may apply, and prepare a decision for those documents.
16. Pursuant to s 29(4) of the FOI Act, if a FOI applicant contends the charge under s 29(1)(f)(ii), the agency may decide that the charge is to be reduced or not imposed. This is, in effect, a discretion to determine whether a FOI applicant in any particular case should have a liability to pay a charge imposed on them.

¹ References to the FOI Act and the FOI Guidelines are to the Act and Guidelines as in force in the period 21 April 2021, when the complainant made their FOI request, to 21 September 2021, when the Department made its substantive access refusal decision. In this case, the material part of the FOI Guidelines is Part 4. The relevant version of that Part is 1.8 which was in force from 9 February 2020 to present (see summary of version changes to s 93A guidelines: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/summary-of-version-changes-to-s-93a-guidelines>).



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17. The FOI Guidelines at [4.56] provides that agencies or Ministers could include payment options in the preliminary assessment notice to enable efficient payment by applicants in the event that they do not wish to contest the charge.
18. The FOI Guidelines at [4.64] provides that payment of a charge does not necessarily indicate the applicant agrees with the imposition or calculation of the charge.
19. Section 9 of the Charges Regulations provides that if the agency decides that a FOI applicant is liable to pay a charge, it may fix the amount to pay in respect of a charge. Relevant to this matter, the amount of the charge is ascertained in accordance with Schedule 1 of the Charges Regulations if all steps that are necessary to enable a decision to be made on the request have been taken by the agency.
20. The FOI Guidelines at [4.68] – [4.69] provides that the estimated charge must be as fair and accurate as possible, and based upon the assumption that the agency maintains a well-organised record keeping system that enables easy identification and location of documents.
21. Section 10(2) of the Charges Regulations provides that if the amount fixed under s 9 of the Charges Regulations in respect of a charge is more than the actual amount that the FOI applicant would be liable to pay in respect of the charge, the agency must adjust the estimate of the charge to the amount equal to the actual amount.
22. The FOI Guidelines at [4.86] – [4.87] provide that it is open to the agency or Minister to refund a deposit paid for access to a document if access is refused in full. The agency should refund the deposit the same way it was paid.

The Department's submissions

23. On 1 November 2022, the OAIC conducted preliminary inquiries with the Department pursuant to s 72 of the FOI Act. On 23 November 2022, the Department provided a response to the OAIC's preliminary inquiries as follows:

The Canberra lockdown commenced on 12/8/2021, shortly after the charge notice was issued to the applicant in relation to this FOI request. The lockdown presented a range of challenges for the department and other entities.

The department acted as quickly as possible to make a range of necessary arrangements to support operations during the shutdown, including provision for payments for FOI requests and other matters.



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The department had more than 400 active FOI requests on hand (plus internal and IC reviews) at the end of the week in which this complaint was made to the OAIC. Before the pandemic, the department generally had up to 30 active FOI requests on hand at a time. The department was taking a range of steps to respond to the surge, including recruiting and training additional FOI case officers as quickly as possible but the sharp increase in the volume of requests and the impact of the pandemic on our workforce resulted in delays in processing.

24. On 23 August 2023, the OAIC conducted further preliminary inquiries. In response, on 29 August 2023, the Department relevantly confirmed that the complainant had paid the deposit of \$60, but that the remaining balance of \$180 had not yet been paid.

25. On 25 September 2023, the OAIC conducted further preliminary inquiries. On 27 September 2023, the Department provided a response in which it confirmed it had not refunded the deposit of \$60 to the complainant. The Department stated:

The assessment of charges included an amount of \$60.00 for the work undertaken to search and retrieve documents relevant to **s 22** request. The department submits the quantum for search and retrieval of the documents is reasonable and proportionate, and does not exceed the actual amount the complainant was liable to pay. The applicant sought waiver of the charges decision on the basis of public interest (and did not raise financial hardship). In addition to considering the public interest, in exercising their discretion not to waive or reduce the charge, the authorised officer considered factors such as the time and effort to search and retrieve relevant documents (consistent with *Tennant and the Australian Broadcasting Corporation* [2014] AATA 252). ... the complainant has not sought review of that decision. On that basis, the department would not be willing to refund the deposit.

In the circumstances, it is not clear that [reg 10](#) of the *Freedom of Information (Charges) Regulations 2019* or paragraph [\[4.86\]](#) of the FOI Guidelines requires the department to refund the amount of the deposit. We also note that reg 12 sets out the circumstances in which the agency is required to refund a deposit, which do not appear to be applicable.

26. The Department further stated that it had not sought payment of the outstanding amount of \$180. The Department submitted:

The basis for the department to revisit the exercise of a discretion under the FOI Act by an authorised officer over 2 years after the decision not to waive the charges was made is not immediately clear, particularly as the department understands **s 22** complaint relates to **s 22** inability to communicate with the department in order to pay the charges and **s 22** had not sought review of the charges decision itself.

However, in circumstances where the documents were found to be exempt in full from release, the department will 'waive' the remaining balance of the charges (\$180.00) on the basis that the total amount fixed prior to the decision would be more than the actual amount **s 22** would have been liable to pay if access to the documents was provided (reg 10 of the FOI



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Charges Regulations). We note that at the time of the charges decision, the decision to refuse access to all documents in full had not been made.

27. On 29 November 2023, the OAIC requested further information from the Department under s 76 of the FOI Act. In response, on 12 December 2023, the Department confirmed that it did not undertake sampling prior to issuing the notice pursuant to s 29(1) of the FOI Act (Charges Notice). The Department stated that the FOI Guidelines at [4.75] state that there is an expectation that sampling be undertaken where 'a large number of documents have been identified'. The Department submitted that the complainant's request only amounted to a 'relatively small number (twelve) of documents'. The Department submitted that the original assumption of the estimate of assessment and redaction times per page were 'low' compared to the 'common parameter' referred to in the FOI Guidelines at [4.73]. The Department further submitted:

The complainant's contention seeking a waiver of charge (on 14 June 2021) and the internal review request (of 4 July 2021) were made on the grounds of public interest. As the complainant did not contend that the charges were excessive or incorrectly calculated, there was no specific reason for the department to reconsider the charge estimate for either its notice of decision to impose a charge dated 28 June 2021 or internal review decision dated 3 August 2021.

28. Further, the Department submitted that when Canberra went into 'lockdown' due to the COVID-19 pandemic, the FOI Section's hotline 'could not be staffed'. Further, the Department's Accounts Section, which is responsible for processing charges, was also working remotely during lockdown. As a result, changes were made to the Department's usual processes and communication channels which appears to have cause confusion and contributed to delays in processing payments.
29. The Department further stated that it did not 'understand the complaint to relate to the decision that the complainant was liable to pay a charge, but rather relates to the department's failure to assist **s 22** make a payment'. The Department acknowledged that it would have been appropriate to advise the complainant that the FOI Section's hotline was unattended and provide alternative methods of contact as soon as practicable after the commencement of lockdown, and to have contacted the applicant immediately in response to **s 22** email of 31 August 2021; that being the email in which the complainant had 'left numerous messages to make payment over the last 2 weeks' and requested someone return **s 22** call.



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My opinions in relation to matter for investigation

30. The Department appears to accept that it did not provide a timely response to the complainant at the time of **s 22** inquiries, primarily due to the COVID-19 imposed lockdown in the Australian Capital Territory (ACT) commencing on 12 August 2021.
31. I acknowledge that the COVID-19 pandemic was unprecedented and resulted in large parts of the community being quickly and unexpectedly sent into lockdowns or put under 'stay at home' or 'remote working' orders from State and Territory officials.
32. However, the Department is engaged in the exercise of statutory functions relevant to a core function and as such it should have adequate protocols to allow its staff to continue working remotely. This is particularly so in circumstances where:
 - a. the Department was at the epicentre of information, news, and updates about the COVID-19 pandemic and at the time of the lockdown, COVID-19 had been at the forefront of the Australian public's health concerns for a period of approximately 18 months
 - b. the Department is a Federal agency with offices across Australia², including offices in both Victoria and New South Wales that had already undergone significant periods of 'remote working'
 - c. the Department has not adequately explained why the FOI Hotline was not forwarded to another telephone when the lockdown commenced
 - d. from the documents before me, there is nothing to suggest that the Department requested the complainant's contact details so that payment could be taken over the phone, and
 - e. the Department ought to have anticipated there would have been delays in processing FOI requests during this period and considered seeking extensions of time where appropriate and providing adequate oversight of requests during this period.

² [State and territory offices | Australian Government Department of Health and Aged Care](#)



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33. Therefore, I place limited weight on the Department's submissions.
34. In addition, despite being aware of the complainant's concerns since September 2021, there is no evidence before me that the Department has subsequently taken any steps to discuss the charge with the complainant nor explain the process to either pay the outstanding amount, or to advise **s 22** that **s 22** was no longer required to pay the charge. In my view the circumstances require proactive engagement with the applicant to demonstrate the Departments commitment to the exercise of these statutory functions.
35. The Department's lack of engagement with the complainant throughout the request and FOI complaints process has led to significant and avoidable delays. The Department's approach is inconsistent with the objects of the FOI Act, namely that the functions and powers given by the FOI Act are to be performed and exercised, as far as possible, promptly (s 3(4) of the FOI Act).
36. Furthermore, for the reasons outlined below, it is clear to me that the Department did not undertake appropriate processes to ensure the accuracy of the estimate either at the time of the decision of 28 June 2021 (Charges Decision) or the internal review decision (Charges IRD) of 3 August 2021.
37. The Department has confirmed that it did not undertake a sampling process and incorrectly relies upon the FOI Guidelines at [4.75] to explain why it did not do so. However, the Department ought to have had regard to the FOI Guidelines at [4.74] which provides:
- Where a decision is made to **use a charges calculator** to estimate a charge, the agency or minister should **examine a sample of the relevant documents** and adjust the parameters of the charges calculator accordingly.
- (my emphasis)
38. The Department confirmed it utilised a charges calculator, yet did not undertake sampling. This approach is inconsistent with the FOI Guidelines specifically at [4.74].
39. Had the Department undertaken a sampling process in accordance with the FOI Guidelines, the Department would have been aware that the ultimate outcome of the substantive decision – that being, the complainant was not granted access to any of the requested documents – prior to issuing the Charges Notice, Charges Decision and/or the Charges IRD.



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40. Insofar as the Department stated that there was 'no specific reason' for it to reconsider the charge estimate as the complainant had only requested a waiver of the charge, this is a fundamental misunderstanding of the internal review process.
41. The internal review process is a merits review process in which the Department is able to take a fresh look at its original decision, as per s 54C(3) of the FOI Act. This requires an internal review decision maker to be satisfied that the original decision was correct and preferable. In circumstances where the decision being reviewed pertains to s 29(4) of the FOI Act, this requires the decision-maker to be satisfied that the charge should be reduced or not imposed. While the applicant's response under s 29(1)(f)(ii) certainly guides this process, the internal review decision-maker must first be satisfied that the charge has been correctly calculated.
42. In circumstances where, the Department is not satisfied that the preliminary estimate of a charge in the Charges Decision was accurate, I have made a suggestion of refund to the applicant.
43. The objects of the FOI Act provide that the functions and powers given by the Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, "promptly" and "at the lowest reasonable cost". As per the FOI Guidelines at [4.20], imposing a charge can deter members of the public from seeking access to documents and can delay access.
44. It is evident that the Department did not turn its mind to consider whether the decision on review was the correct and preferable decision. In my view, the Department's approach to the charges process is inconsistent with the objects of the FOI Act, the FOI Guidelines at [4.114] - [4.115], as well as the broad discretion to consider other relevant matters under s 29(5) of the FOI Act.
45. Furthermore, s 10 of the Charges Regulations makes clear that the obligation to adjust a charge lies with the agency. An FOI applicant should not be required to continue to request a review of the charge once the agency ought to have become aware of the likely discrepancy between the estimated charge and the charge that constituted the 'actual amount' of processing the request.
46. In accordance with s 10(2) of the Charges Regulations, the Department was required to consider whether the estimate of charges is accurate to the work undertaken at the time of the access refusal decision.



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47. The Department did not do this. Instead, the Department's access refusal decision of 21 September 2021 – in which it was decided that the complainant would not be provided access to any documents – states:

Charges

...

You have paid a deposit of \$60.00. The outstanding balance of your charge is \$180.00. Your payment for the outstanding balance is \$180.00. Your payment for the outstanding balance of charges should be received within 30 days by way of cheque (made payable to the Department of Health), money order or credit care.

48. The initial estimate of charge was \$240. The paragraph extracted at [47] makes clear that the Department took no steps to review or adjust the estimate of charge at the time of the access refusal decision, as it was still seeking \$240 as a total payment of the charge.

49. Contrary to s 10(2) of the Charges Regulations, and to the Department's submissions, it is clear that the Department continued to seek payment from the complainant for the outstanding amount as part of the access refusal decision despite knowing that **s 22** would not be granted access to any of the requested documents.

50. Finally, once the Department became aware that the complainant would not be granted access to the requested documents, it would have been appropriate for the Department to consider whether it should have refunded the deposit in accordance with the FOI Guidelines at [4.86]. While I accept the Department's submission that there is no requirement to provide a refund, I consider it is certainly appropriate to provide a refund in circumstances where:

- a. an FOI applicant will not receive any of the requested documents, and
- b. the Department cannot provide sufficient evidence to support the calculation of the deposit in the first instance.

51. The Department's approach in not refunding the deposit does not align with the objects of the FOI Act, namely facilitating and promoting public access to information 'at the lowest reasonable cost'. The amount of taxpayers' dollars incurred by both the Department, as well as the OAIC, in investigating this complaint would far exceed the \$60 deposit in dispute.



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52. For these reasons, I find that the Department's practices and processes do not accord with ss 9 and 10 of the Charges Regulations, nor ss 3 or 29 of the FOI Act, nor Parts 9 and 10 of the FOI Guidelines.

My conclusions in relation to the matters investigated

53. I have concluded that throughout the process – from issuing the initial charges notice of 9 June 2021 and through the FOI Complaint's process – the Department has acted inconsistently with the FOI Act, the Freedom of Information (Charges) Regulations 2019 (Cth) (Charges Regulations), and/or FOI Guidelines in respect of finding the complainant liable to pay a charge in relation to **s 22** FOI request/s. My finding that the Department failed to provide adequate assistance to the complainant to make a payment of a charge reflects a failing by the Department to act consistently with the FOI Act and/or FOI Guidelines from the initial exercise of charges functions by the Department and continuing.
54. Having regard to the above, I consider it is appropriate that the Department give careful consideration as to whether it should provide the complainant with a refund. I note that it remains open to the complainant to make an Information Commissioner (IC) review application under s 54N of the FOI Act. This process will take additional time, resources, and tax-payers dollars if an IC review were to proceed, which would cost significantly above the \$60 deposit the Department has received to date. The Department give careful consideration as to whether requiring the complainant to undertake an IC review to obtain a refund aligns with the objects of the FOI Act, the Charges Regulations, and the FOI Guidelines.

My recommendations

55. In consideration of the above, I make the following recommendations pursuant to s 88 of the FOI Act:
- a. By **26 August 2024**, the Department is to update its FOI Guidelines/Procedure Manual such that it better reflects the Charges process in accordance with the FOI Act and/or FOI Guidelines. In particular, the amendments should highlight the discretionary nature of charges, the expectation that sampling will occur when using a charges calculator, and the ongoing obligation of the Department to continue to be satisfied that the charge should be imposed.



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- b. By **25 November 2024**, the Department's FOI branch is to undergo training to ensure compliance with the updated FOI Guidelines/Procedure Manual. Evidence of the training is to be created and retained by the Department.

56. I have made the following suggestions under s 87(d) of the FOI Act:

- a. By **25 March 2024**, the Department give consideration to providing the complainant with a full refund of the deposit of \$60, having particular regard to the findings above at [55]-[56].
- b. The Department is to provide an update to the OAIC as soon as practicable (but no later than by **25 March 2024**) as to whether a full refund has been, or will be, provided.

A handwritten signature in black ink, appearing to read 'Elizabeth Tydd'.

Elizabeth Tydd

Freedom of Information Commissioner

26 February 2024



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ATTACHMENT A Background

1. On 21 April 2021, the complainant made a FOI request under s 15 of the FOI Act to the Treasury.
2. On 28 April 2021, the Department accepted a partial transfer from the Treasury under s 16 of the FOI Act.
3. On 9 June 2021, the Department notified the complainant that **s 22** was liable to pay a charge under s 29(1) of the FOI Act. The preliminary assessment of the charge was \$240.
4. On 14 June 2021, the complainant contended that the charge should not be imposed under s 29(1)(f)(ii) of the FOI Act on public interest grounds.
5. On 28 June 2021, under s 29(4), the Department decided that the charge would not be waived.
6. On 4 July 2021, the complainant requested an internal review of the Department's decision under s 54B of the FOI Act.
7. On 3 August 2021, the Department affirmed the decision of 28 June 2021.
8. On 7 September 2021, the complainant made a complaint to the OAIC under s 70 of the FOI Act.
9. On 10 September 2021, the complainant paid a deposit of \$60.
10. On 21 September 2021, the Department made an access refusal decision.
11. On 25 October 2022, the OAIC made inquiries with the complainant as to whether the issue had been rectified. On the same day, the complainant confirmed that it had not.
12. On 26 October 2023, the OAIC sought clarification from the complainant. The complainant provided a response.
13. On 18 November 2022, the OAIC made preliminary inquiries with the Department under s 72 of the FOI Act.
14. On 23 November 2022, the Department provided a response to the preliminary inquiries.
15. On 23 August 2023, the OAIC made further preliminary inquiries with the Department.



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16. On 29 August 2023, the Department provided a response to the further preliminary inquiries.
17. On 7 September 2023, the OAIC made further preliminary inquiries with the Department.
18. On 27 September 2023, the Department provided a response to the further preliminary inquiries.
19. On 23 October 2023, the OAIC notified the parties under s 75 of the FOI Act that it would be commencing an investigation of this FOI complaint. The complainant was invited to provide submissions in reply to the Department's responses to the OAIC's preliminary inquiries.
20. The complainant did not provide a response to this request.
21. On 29 November 2023, the OAIC made a request for further information from the Department.
22. On 12 December 2023, the Department provided a response.



Australian Government
Office of the Australian Information Commissioner

Our references: s22

Your reference: s22

Mr Blair Comley PSM
 Secretary
 Department of Health and Aged Care

By email: Blair.Comley@health.gov.au

CC: FOI@health.gov.au s47E(d) ;
 s47E(d)

Freedom of information complaint suggestion – s 22

Dear Mr Comley

I refer to a complaint by s 22 (the complainant) about the Department of Health of Aged Care (the Department) under the *Freedom of Information Act 1982* (the FOI Act) (OAIC reference numbers: s22)

On 26 February 2024, I sent a Notice on completion to the Department. In that notice, I made a suggestion pursuant to s 87(d) of the FOI Act that the Department give consideration to providing the complainant with a full refund of the deposit of \$60 because I found that: *In circumstances where, the Department is not satisfied that the preliminary estimate of a charge in the Charges Decision was accurate, I have made a suggestion of refund to the applicant.*

I am bringing to your attention the action taken by your staff in relation to my recommendation made to: promote Parliament's intent that functions and powers given by the Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.¹ Accordingly, discretions should be exercised to promote the objects of the Act. The charging regime provided operates largely on a discretionary basis.

On 27 March 2024, Tommy s 47E(d) Acting Principal Lawyer of the Department's Freedom of Information section advised that the Department had sought legal advice from the Australian Government Solicitor regarding the suggestion to consider refunding the deposit of \$60 and that the Department had formed the view that neither the FOI Act nor the *Freedom of Information (Charges) Regulations 2019* (Charges Regulations) authorise refunding the \$60.

¹ FOI Act s 3(4)

The Department suggests that the only method by which this issue can be resolved is by way of an Information Commissioner (IC) review.

Having regard to the objects of the FOI Act, as well as the Department's responsibilities under s 15 of the *Public Governance, Performance and Accountability Act 2013*, requiring this matter to proceed to an Information Commissioner (IC) review to consider whether the Department exercised the discretion to find the complainant liable to pay a charge in accordance with s 29 of the FOI Act adds to the ongoing unnecessary expenditure of tax-payer dollars. Further, there is no prohibition on the Department exercising an administrative discretion to provide a refund.

However, in the interest of ensuring there is no further delay, the Office of the Australian Information Commissioner (OAIC) has accepted the complainant's application for an IC review. The OAIC will contact the Department separately to seek the revised decision under s 55G of the FOI Act.

Should you wish to discuss this matter further, please contact me at any time Elizabeth.tydd@oaic.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Elizabeth Tydd', written in a cursive style.

Elizabeth Tydd
Freedom of Information Commissioner

3 April 2024

SCOLYER,Jackie

From: SCOLYER,Jackie
Sent: Wednesday, 3 April 2024 8:43
To: COMLEY, Blair
Cc: foi@health.gov.au; s47E(d); s47E(d); OAIC - FOI DR
Subject: OAIC references: s22 Your reference: s22 - Letter from FOIC
Attachments: s22 - Letter to Secretary Department of Health.docx.pdf

Our references: s22
Your reference: s22

Mr Blair Comley PSM
Secretary
Department of Health and Aged Care


By email to: Blair.Comley@health.gov.au
Copy to: FOI@health.gov.au; s47E(d); s47E(d)

Freedom of information complaint suggestion – s 22

Dear Secretary Comley

Please find attached a letter of today's date from Freedom of Information Commissioner, Elizabeth Tydd in relation to the above matter.

Yours sincerely,
Jackie Scolyer

 **Jackie Scolyer** (she/her)
Director | Reviews and Investigations
Freedom of Information Branch
Office of the Australian Information Commissioner
P +61 2 9246 0585 | E jackie.scolyer@oaic.gov.au

OAIC - FOI DR

From: OAIC - FOI DR
Sent: Monday, 26 February 2024 11:42
To: Blair.Comley@health.gov.au
Cc: FOI
Subject: Response required by 11.03.24 - s 22 [redacted] and Department of Health - OAIC ref. [redacted]
Attachments: s22 [redacted] - s 22 [redacted] - Letter to Respondent encl. Notice on Completion.pdf; s22 [redacted] - s 22 [redacted] - Notice on Completion.pdf

Our reference: s22 [redacted]
Agency Reference: s22 [redacted]

Mr Blair Comley PSM
Secretary
Department of Health and Aged Care
By email to: Blair.Comley@health.gov.au
Copy to: FOI@health.gov.au

Freedom of information complaint investigation – Notice on completion

Dear Secretary Comley

Please find attached our letter of today’s date, with relevant annexures. Please note a response is due by **11 March 2024**.

Kind regards,

Naoimh

 **Naoimh Donaghy** (she/her)
Legal secondee
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
E foidr@oaic.gov.au

Please note I work part-time on Wednesdays, Thursday and Fridays.

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Australian Government
Office of the Australian Information Commissioner

Our reference: s22

Agency Reference: s22

Mr Blair Comley PSM

Secretary

Department of Health and Aged Care

By email to: Blair.Comley@health.gov.au

Copy to: FOI@health.gov.au

Freedom of information complaint investigation – Notice on completion

Dear Secretary Comley

I refer to the complaint made by s 22 (the complainant) under s 70 of the *Freedom of Information Act 1982* (FOI Act) about the Department of Health and Aged Care (the Department) in relation to the Department's decision that the complainant was liable to pay a charge for the processing of their FOI request (Department's reference: s22)

I apologise for the delay in finalising this investigation and confirm that processes have been revised to elevate timeliness in the finalisation of complaints under the FOI Act.

The Office of the Australian Information Commissioner (OAIC) provided a notice to the Department under s 75 of the FOI Act advising it of the commencement of an investigation into the complainant's FOI complaint and requested information on 23 October 2023. The Department provided a response on 12 December 2023.

I am writing in accordance with s 86 of the FOI Act to notify you that I have completed my investigation into the FOI complaint and to advise you of the outcome.

I am required to give you notice of:

- the investigation results
- the investigation recommendations (if any), and
- the reasons for the investigation results and the making of the investigation recommendations.

The notice setting out these matters is at **attached**.

My conclusions

I have concluded that throughout the process – from issuing the initial charges notice of 9 June 2021 and through the FOI Complaint’s process – the Department has acted inconsistently with the FOI Act, the *Freedom of Information (Charges) Regulations 2019 (Cth)* (Charges Regulations), and/or FOI Guidelines in respect of finding the complainant liable to pay a charge in relation to **s 22** FOI request/s. My finding that the Department failed to provide adequate assistance to the complainant to make a payment of a charge reflects a failing by the Department to act consistently with the FOI Act and/or FOI Guidelines from the initial exercise of charges functions by the Department and continuing.

My recommendations

In considering whether to make any investigation recommendations, I have taken into account all of the information provided by the Department in relation to its current FOI processes and resources.

Pursuant to s 88 of the FOI Act, I make the following recommendations:

- a. By **23 August 2024**, the Department is to update its FOI Guidelines/Procedure Manual such that it better reflects the Charges process in accordance with the FOI Act and/or FOI Guidelines. In particular, the amendments should highlight the discretionary nature of charges, the expectation that sampling will occur when using a charges calculator, and the ongoing obligation of the Department to continue to be satisfied that the charge should be imposed.
- b. By **23 November 2024**, the Department’s FOI branch is to undergo training to ensure compliance with the updated FOI Guidelines/Procedure Manual. Evidence of the training is to be created and retained by the Department.

My suggestions

I have also made the following suggestion under s 87(d) of the FOI Act:

- a. By **25 March 2024**, the Department give consideration to providing the complainant with a full refund of the deposit of \$60.
- b. The Department is to provide an update to the OAIC as soon as practicable (but no later than by **25 March 2024**) as to whether a full refund has been, or will be, provided.

Next steps

Comments under s 86(3) of the FOI Act

Under s 86(3) of the FOI Act, the Department may provide any comments about the Notice on completion that the Department wishes to make. If the Department wishes to make any comments, please do so by **11 March 2024**.

The Department must notify the OAIC as to whether it accepts and will implement the recommendations set out in this Notice on completion, please advise the OAIC by **11 March 2024**.

I have provided a copy of this Notice on completion to the complainant.

I will publish a copy or summary of this Notice on completion and any comments from the Department on the OAIC's website.

If you would like to discuss this FOI complaint investigation please contact Jackie Scolyer, Director Reviews and Investigations on (02) 9942 0585 or email Jackie.scolyer@oaic.gov.au. Please quote the OAIC reference number above in any correspondence.

Yours sincerely



Elizabeth Tydd

Freedom of Information Commissioner
26 February 2024

OAIC - FOI DR

From: OAIC - FOI DR
Sent: Wednesday, 29 November 2023 6:09
To: FOI
Subject: Response required by 13.12.23 – s 22 [REDACTED] and Department of Health and Aged Care – s22 [REDACTED]

Our reference: s22 [REDACTED]

Agency reference: s22 [REDACTED]

FOI Contact Officer

Department of Health and Aged Care

By email: foi@health.gov.au

Freedom of Information Complaint – s 22 [REDACTED]

Dear FOI Contact Officer

I refer to the FOI complaint made by s 22 [REDACTED] (the complainant) of 7 September 2021 under s 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act) regarding the manner in which the Department of Health and Aged Care (the Department) handled a request. Specifically, the complainant raises concerns that the Department did not assist s 22 [REDACTED] to make final payment of a charge.

I confirm receipt of the Department's responses of 23 November 2022, 29 August 2023 and 27 September 2023.

Request for further information

The Information Commissioner is in the final stages of completing their investigation of the FOI complaint. However, pursuant to s 76(2) of the FOI Act, further information is required from the Department before the investigation can be completed.

Please provide a response to the following questions by **13 December 2023**:

1. Whether the Department undertook any sampling prior to issuing:
 - a. the Charges Notice of 9 June 2021
 - b. the Charges decision of 28 June 2021
 - c. the internal review decision of 3 August 2021

If so, please provide evidence of the sampling process. If not, please explain why the Department did not undertake a sampling process.
2. In the response of 27 September 2023, the Department stated that the *"assessment of charges included an amount of \$60.00 for the work undertaken to search and retrieve documents relevant to s 22 [REDACTED] request"*. The Department submitted that *"the quantum for search and retrieval of the documents is reasonable and proportionate, and does not exceed the actual amount the complainant was liable to pay"*. Please provide evidence in support of this submission (for example contemporaneous files notes from the FOI officer completing the search and retrieval of the relevant documents).
3. In the response of 23 November 2022, the Department submitted that the delays in contacting the complainant regarding payment of the deposit were linked to the Canberra lockdown on 12 August 2021. Other than an excess in FOI applications, please confirm what other specific difficulties FOI officers faced in respect of contacting FOI applicants and processing FOI requests during the lockdown period (12 August 2021 to 15 October 2021).

4. Please provide any other submissions the Department wishes to make regarding its practices and procedures for deciding whether an FOI applicant is liable to pay a charge and relevant to the complaint currently under investigation.

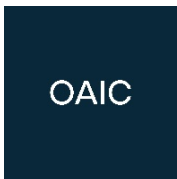
For awareness, the Department's practices and procedures for finding an FOI applicant liable to pay a charge, imposing the charge, and seeking payment of the charge is being considered as part of the investigation of the FOI complaint.

Next steps

I look forward to receiving your response by **13 December 2023**. As this FOI complaint is in the final stages of investigation, pursuant to s 86 of the FOI Act, a Notice on Completion will be issued shortly thereafter.

Kind regards,

Naoimh



Naoimh Donaghy (she/her)
Legal secondee
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
P +61 2 9297 9072 E foidr@oaic.gov.au

Please note I work part-time on Wednesdays, Thursday and Fridays.

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OAIC - FOI DR

From: OAIC - FOI DR
Sent: Monday, 23 October 2023 12:54
To: FOI
Subject: s 22 and Department of Health and Aged Care - OAIC ref. s22 - Agency
ref. s22
Attachments: s 22 - s22 - s75 Notice to Respondent.pdf

Our reference: s22
Agency reference: s22

FOI Contact Officer
Department of Health and Aged Care
By email: foi@health.gov.au

Freedom of Information Complaint - s 22

Dear FOI Contact Officer

Please find attached our letter of today's date.

Kind regards,

Naoimh



Naoimh Donaghy (she/her)
Legal secondee
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
P +61 2 9297 9072 E foidr@oaic.gov.au

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From: [ENGLISH,Carl](#)
To: [Education - FOI](#)
Subject: s22 - IC review application - s 22
Date: Thursday, 29 February 2024 4:09:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Our reference: s22

FOI contact officer

Department of Education
Sent by email: foi@education.gov.au

IC review s22 – Request for further information

Dear FOI contact officer

I write to you in relation to s 22 IC review application of a charges decision made by the Department of Education (the Department) under the *Freedom of Information Act 1981* (Cth) (the FOI Act).

I note that I intend to progress this matter to the Information Commissioner for their decision under s 55K of the FOI Act shortly. Before I do so, I wish to provide the Department a final opportunity to provide any final submissions it wishes to provide in this matter.

I refer to a recent IC review decision made in relation to a decision made to impose charges for processing a request - *Paul Farrell and Services Australia (Freedom of information)* [2024] AICmr 37 (15 February 2024) (*Paul Farrell*). In *Paul Farrell* the Information Commissioner set aside a decision made by Services Australia to impose a charge of \$658.50, with particular reference to the public interest in release of the relevant documents. You may wish to consider this recent decision if the Department wishes to provide further submissions.

If the Department wishes to provide further submissions, please provide the submissions by **14 March 2024**. I intend to progress this matter to the Information Commissioner on the basis of the information held by the OAIC after that date.

Kind regards



Carl English (he/him)
Assistant Director, Freedom of information Regulatory Group
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
P +61 2 9942 4169 E carl.english@oaic.gov.au

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From: [OAIC - FOI DR](#)
To: [Foi](#)
Subject: s22 - IC review application - s 22 and Department of Agriculture, Fisheries and Forestry
Date: Tuesday, 9 April 2024 11:34:00 AM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Our reference: s22

Agency reference: s22

FOI Contact Officer

Department of Agriculture, Fisheries and Forestry

Sent by email: foi@agriculture.gov.au

IC review application - s 22 and Department of Agriculture, Fisheries and Forestry

Dear FOI contact officer

I write to you in relation to s 22 application for IC review of a decision made by the Department of Agriculture, Fisheries and Forestry (the Department) to impose a charge for processing an FOI request.

I intend to progress this matter to our decisions team shortly. The role of the decisions team is to assist the Information Commissioner in making a decision under s 55K of the *Freedom of Information Act 1982* (the FOI Act). However before I do so, the Office of the Australian Information Commissioner (OAIC) needs further information from the Department to assist the Information Commissioner to make their decision.

The basis of the Department's estimates

In its submissions, the Department estimated that the total cost of decision-making in relation to the applicant's request to be \$795 (prior to the deduction of 5 hours decision time - \$100). The Department further explained the basis of this estimate as follows:

... an estimated 3 hours for writing a statement of reasons equated to \$60, examining approximately 900 pages for decision-making at 2 minutes per page amounted to \$600 and redacting the number of pages which are to be partially disclosed, at 3 minutes per page amounted to \$135.

The Department therefore estimates that 5 minutes per page would be required to examine and redact the documents at issue.

In previous IC review decisions, it has generally been accepted that between 30 seconds to 5 minutes per page is a reasonable estimate of time required for an agency to both assess and edit (redact) documents. Generally where it has been accepted that an estimate at the high end of the range is reasonable, the documents at issue have been complex or sensitive.

The FOI guidelines explain at [4.75]:

Generally, where a large number of documents have been identified in response to an FOI request and the agency or minister decides it is appropriate to impose a charge, there is an expectation that the agency or minister will obtain an accurate estimate by sampling a reasonable selection of the relevant documents.

Information required

To assist the Information Commissioner to make their decision in this IC review, please provide the following by **23 April 2024**:

- Evidence in relation to any sampling exercise conducted by the Department that demonstrates that its estimate that 5 minutes per page is an accurate reflection of the time that would be required to examine and redact the documents at issue
- Submissions addressing any particular complexities and/or sensitivities in relation to the documents, such as the exemptions likely to apply and the number of documents that may require redaction
- Any other information the Department wishes to provide to justify its decision in this matter.

I note that any submissions the Department makes will be provided to the applicant unless there are compelling reasons not to do so.

If at any stage of the IC review, the Department reconsiders its decision that the applicant is liable to pay a charge to contribute to the processing of their request, the Department should notify the OAIC as soon as possible. The Department has two options to resolve the IC Review in such a circumstance:

1. The Department may make a revised decision under s 55G waiving the charge in full
2. A short decision can be made under s 55K of the FOI Act putting into effect the Department's revised position that the applicant is not liable to pay a charge. An example of such a decision is '*AIP and Department of Education (Freedom of information)* [[2024](#)] AICmr 63 (27 March 2024)

If you have any questions about this email, I can be contacted on 02 9942 4169.

Kind regards



Carl English (he/him)

Assistant Director, Freedom of information Regulatory Group

Office of the Australian Information Commissioner

Sydney | GPO Box 5288 Sydney NSW 2001

P +61 2 9942 4169 **E** carl.english@oaic.gov.au

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From: [ENGLISH,Carl](#)
To: [Education - FOI](#)
Subject: s22 - IC review application - s 22
Date: Thursday, 29 February 2024 4:39:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Our reference: s22

FOI contact officer

Department of Education
Sent by email: foi@education.gov.au

IC review s22 – Request for further information

Dear FOI contact officer

I write to you in relation to s 22 IC review application of a charges decision made by the Department of Education (the Department) under the *Freedom of Information Act 1981* (Cth) (the FOI Act).

I note that I intend to progress this matter to the Information Commissioner for their decision under s 55K of the FOI Act shortly. Before I do so, I wish to provide the Department a final opportunity to provide any final submissions it wishes to provide in this matter.

I refer to a recent IC review decision made in relation to a decision made to impose charges for processing a request - *Paul Farrell and Services Australia (Freedom of information)* [2024] AICmr 37 (15 February 2024) (*Paul Farrell*). In *Paul Farrell* the Information Commissioner set aside a decision made by Services Australia to impose a charge of \$658.50, with particular reference to the public interest in release of the relevant documents. You may wish to consider this recent decision if the Department wishes to provide further submissions.

If the Department wishes to provide further submissions, please provide the submissions by **14 March 2024**. I intend to progress this matter to the Information Commissioner on the basis of the information held by the OAIC after that date.

Kind regards



Carl English (he/him)
Assistant Director, Freedom of information Regulatory Group
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
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From: [DONAGHY, Naoimh](#)
To: [FOI](#)
Subject: Response required by 21.09.23 - s22 - s 22 and Department of Health and Aged Care [SEC=OFFICIAL:Sensitive]
Date: Thursday, 7 September 2023 4:50:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image005.png](#)
[image004.jpg](#)
[image003.jpg](#)

Our reference: s22
Your ref: s22

FOI Contact Officer
Department of Health and Aged Care
By email: foi@health.gov.au

Freedom of Information Complaint – s 22

Dear Stephanie

Thank you for your below email and the relevant attachments.

Question 2

I understand your response to question 2 to mean that the remaining balance of the charge is outstanding and that the Department has not refunded the deposit. Please confirm if my understanding is correct.

If so, please provide submissions as to whether the Department would be willing to refund the deposit in circumstances where no documents were released to the complainant. In providing your response, please have regard to [reg 10](#) of the *Freedom of Information (Charges) Regulations 2019*, as well as paragraphs [\[4.86\]](#) of the FOI Guidelines.

Question 3

In respect of your response to question 3 below, I confirm the complainant has not yet exercised s 24 right to IC review. However, in light of the above, I would be grateful if the Department you could please confirm whether the Department would be willing to waive the charge. If not, please provide submissions why.

Next steps

Please provide your submissions by **21 September 2023**. Please provide these submissions in a format which we can provide to the complainant.

Once I receive your response and had the opportunity to consider it, I will then provide you with an update on the next steps in the complaints process.

Kind regards,

Naoimh



Naoimh Donaghy (she/her)
Legal seconded
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
P +61 2 9297 9072 E foidr@oaic.gov.au

Please note I work part-time on Wednesdays, Thursday and Fridays.
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From: FOI <FOI@health.gov.au>
Sent: Tuesday, August 29, 2023 3:35 PM
To: OAIC - FOI DR <foidr@oaic.gov.au>; DONAGHY, Naoimh <Naoimh.Donaghy@oaic.gov.au>; FOI <FOI@health.gov.au>
Subject: Health response - s22 - s 22 and Department of Health and Aged Care [SEC=OFFICIAL:Sensitive]

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Our ref: s22
Your ref: s22

Dear Naoimh

Freedom of Information Complaint – s 22

I refer to your email below seeking further information in relation to a complaint by s 22 regarding the manner in which the department handled a request made under s 15 of the *Freedom of Information Act 1982*.

I set out your questions and the department's response below in blue for ease of reference.

1. Has the charge has been paid (partially or in full)? *The charge has been paid in part. A deposit of \$60.00 was paid on 10 September 2021. Please see attached receipt issued to s 22 by the department.*
 - a. If so, what date was the charge paid? *See above.*
 - b. If not, what is the remaining balance? *The remaining balance is \$180.00.*
2. Has the complainant been given access to the documents? *s 22 was notified on 21 September 2021 of the decision to refuse access to 12 documents in full. Please see attached email correspondence to s 22 of that date.*
3. Would the Department be amendable to waiving the charge in the circumstances? *I understand that your inquiries relate to a complaint by s 22 under s 70 of the FOI Act, which is focussed on the applicant's purported inability to contact the department to pay a charge for processing s 24 FOI request. I would be grateful if you confirm whether s 22 has exercised s 22 right to seek IC review of the department's access refusal decision in relation to the imposition of the charge under s 29 of the FOI Act.*

You also asked whether the department has any objections to release of the department's response of 23 November 2021 to the OAIC's preliminary inquiries regarding complain, as shown in your email. I confirm the department has no objections to release of the submissions as set out below.

Please feel free to contact me about any of the above.

Stephanie s 47E(d)
Principal Lawyer – Freedom of Information Section
Legal Advice and Legislation Branch

Legal & Assurance Division | Corporate Operations Group

Australian Government Department of Health and Aged Care
T: s 47E(d) | E: s 47E(d)
Location: Sirius Building 5.N.325; MDP 516
PO Box 9848, Canberra ACT 2601, Australia

Please note I work Monday to Thursday

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From: OAIC - FOI DR <foidr@oaic.gov.au>
Sent: Wednesday, 23 August 2023 4:03 PM
To: FOI <FOI@health.gov.au>
Subject: Response required by 06.09.23 – s 22 – s 22 and Department of Health and Aged Care [SEC=OFFICIAL:Sensitive]

OFFICIAL: Sensitive

Our reference: s 22

FOI Contact Officer
Department of Health and Aged Care
By email: foi@health.gov.au

Freedom of Information Complaint – s 22

Dear FOI contact officer

I have recently been allocated the FOI complaint made by s 22 (the complainant) of 7 September 2021 regarding the manner in which the Department of Health and Aged Care (the Department) handled a request made under s 15 of the *Freedom of Information Act 1982*.

Request for information

The complaint largely relates to the complainant's purported inability to contact the Department to pay a charge in or around August 2021 to secure the release of documents. To assist us in progressing this FOI complaint, we would be grateful for the Department's response to the following questions:

1. Has the charge has been paid (partially or in full)?
 - a. If so, what date was the charge paid?
 - b. If not, what is the remaining balance?
2. Has the complainant been given access to the documents?
3. Would the Department be amendable to waiving the charge in the circumstances?

I would be grateful for a response by **6 September 2023** in a format which can be provided to the complainant.

Respondent's submissions

On 23 November 2021, the Department provided the following response to the Oaic's preliminary inquiries regarding the FOI complaint:

| | | | | |
|-----|------|------------|---|--|
| s22 | s 22 | 08/09/2021 | Inability to contact the Department to pay the processing charge. | <p>s22</p> <p>The Canberra lockdown commenced on 12/8/2021, shortly after the charge notice was issued to the applicant in relation to this FOI request. The lockdown presented a range of challenges for the department and other entities.</p> <p>The department acted as quickly as possible to make a range of necessary arrangements to support operations during the shutdown, including provision for payments for FOI requests and other matters.</p> <p>The department had more than 400 active FOI requests on hand (plus internal and IC reviews) at the end of the week in which this complaint was made to the Oaic. Before the pandemic, the department generally had up to 30 active FOI requests on hand at a time. The department was taking a range of steps to respond to the surge, including recruiting and training additional FOI case officers as quickly as possible but the sharp increase in the volume of requests and the impact of the pandemic on our workforce resulted in delays in processing.</p> |
|-----|------|------------|---|--|

Please confirm whether the Department has any objections to the Oaic providing a copy of this summary to the complainant for response. If so, please provide reasons for your objections by **6 September 2023**.

Please call if you wish to discuss.

Kind regards,

Naoimh



Naoimh Donaghy (she/her)
 Legal seconded
 Office of the Australian Information Commissioner
 Sydney | GPO Box 5288 Sydney NSW 2001
 P +61 2 9297 9072 E foidr@oaic.gov.au

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