



**Freeing up government information:  
submission to Office of the Australian  
Information Commissioner's review of  
charges under the *Freedom of  
Information Act 1982* Discussion Paper**

**Edward Santow, Chief Executive Officer and Lizzie  
Simpson, Senior Solicitor**



# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. It works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's work on Freedom of Information

PIAC has a long-standing interest in the operation of the *Freedom of Information Act 1982* (Cth) (the FOI Act). For over 15 years, PIAC has used freedom of information legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588 (*Re Organon*).

PIAC also continues to be involved in two FOI matters relating to the Department of Defence's handling, exchange and rendition of people, including military prisoners. This project began in 2005, when PIAC made FOI requests to the Department of Defence and the Department of Foreign Affairs and Trade for all information regarding the rendition of detainees. PIAC appealed the Department of Defence decision to the Administrative Appeals Tribunal. In 2010 and 2011, PIAC reached a settlement with the Department of Defence wherein the Department provided to PIAC a significant proportion of the documents that it had previously claimed with exempt from disclosure under the FOI Act. PIAC has subsequently published these documents, and an

analysis of their meaning and implications, on a dedicated website (<http://military.piac.asn.au>), as well as working with journalists on this issue.

PIAC also acted for the UK All Party Parliamentary Group on Extraordinary Rendition (APPGER) in relation to APPGER's FOI request to the Australian Department of Defence. APPGER is a group of 60 UK MPs who are investigating Britain's involvement in extraordinary renditions linked to the war in Iraq and Afghanistan.

PIAC has also written papers and contributed to debates about freedom of information legislation including making submissions to:

- the Australian Law Reform Commission in respect of its inquiry into the FOI Act in March and July 1995;<sup>1</sup>
- the NSW Ombudsman in respect of his review of the *Freedom of Information Act 1989* (NSW);<sup>2</sup>
- the NSW Government in relation to its public consultation draft into its Government Information legislative package;<sup>3</sup>
- the Commonwealth government in response to its exposure drafts of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009;<sup>4</sup> and
- the Senate Finance and Public Administration Committee on the Commonwealth freedom of information reforms<sup>5</sup>.

---

<sup>1</sup> Australian Law Reform Commission, *Open government: a review of the federal Freedom of Information Act 1982, Report No 77* (1995) (ALRC Report 77). See also, Kate Harrison, *Access to government using the Freedom of Information Act* (1983) PIAC; PIAC and Council of Social Services of NSW, *Freedom of Information: Community Information Program* (1988); Chris Shanahan, *Confidence and Confidentiality: Freedom of Information – Public and Private Right* (1992) PIAC; Fiona McMullin, *Public interest issues in exemption claims under the Commonwealth Freedom of Information Act: experiences of the Public Interest Advocacy Centre 1984-1994* (1994) PIAC; Bill McManus, *Australian Law Reform Commission – Review of the Freedom of Information Act 1982 (Cth): Submission in response to Discussion Paper No 59* (1995) PIAC; PIAC, *Australian Law Reform Commission Inquiry into the Freedom of Information Act 1982 (Cwth): Submission in response to issues paper 12 'Freedom of Information'* (1995); PIAC, *Submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* (2009).

<sup>2</sup> Lizzie Simpson, Ee-von Lok and Claire O'Moore, *Freeing up information: response to the NSW Ombudsman's Review of Freedom of Information Law in NSW* (2008) Public Interest Advocacy Centre <[http://www.piac.asn.au/publications/pubs/sub20081111\\_20081117.html](http://www.piac.asn.au/publications/pubs/sub20081111_20081117.html)> at 10 November 2011.

<sup>3</sup> Lizzie Simpson, *Improving government accountability through Information Access: Submission in response to the NSW Government's public consultation draft, Open Government Information legislative package*, Public Interest Advocacy Centre < <http://www.piac.asn.au/sites/default/files/publications/extras/09.06.05-PIAC-NSWFOISub.pdf>> at 10 November 2011.

<sup>4</sup> Lizzie Simpson, *Putting public interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* Public Interest Advocacy Centre < <http://www.piac.asn.au/sites/default/files/publications/extras/09.05.19-PIAC-FedFOISub.pdf>> at 10 November 2011.

Lizzie Simpson, Senior Solicitor at PIAC, also gave evidence at the public hearing before the Senate Finance and Public Administration Committee in relation to the Commonwealth FOI reforms on 15 February 2010.

## General comments

PIAC congratulates the Australian Government and the Office of the Australian Information Commissioner (OAIC) on the recent amendments that improve some of the substantive provisions of the FOI Act, as well as the procedures under which the Act operates. One of the improvements that flowed from the 2010 FOI reforms was the abolition of application and review fees. Furthermore, PIAC is also pleased that the OAIC has initiated this inquiry into the current structure of processing charges for FOI requests in a timely manner.

PIAC does not, in this submission, respond to all the issues raised in the OAIC's discussion paper but instead discusses the main issues that PIAC believes are essential to the successful reform of the charging system.

---

<sup>5</sup> Lizzie Simpson, *Freedom of information repackaged: submission to the Senate Finance and Public Administration Committee on the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre  
<[http://www.piac.asn.au/sites/default/files/publications/extras/10.01.29-PIAC-sub\\_re\\_Cth\\_FOI\\_reforms.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/10.01.29-PIAC-sub_re_Cth_FOI_reforms.pdf)> at 10 November 2011.

# PIAC's response to specific questions

## Question 1 (role of fees and charges)

PIAC understands that the two main arguments in favour of imposing fees and charges under FOI legislation are: (1) the need to recover the costs of processing freedom of information requests; and (2) the idea that costs may act as a deterrent against spurious claims.

PIAC is not convinced by either argument. In relation to the first, PIAC notes the comments in the Solomon report that the existing system of costs does not actually reflect the costs involved in processing requests.<sup>6</sup> Furthermore, PIAC submits that the idea of recovering costs from FOI users is at odds with the idea that FOI legislation is about the fundamental right of individuals to access information.

As the Electoral and Administrative Review Commission commented in its 1990 report:

Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.<sup>7</sup>

Moreover, while this right vests in individuals and organisations that use FOI legislation, successful FOI applications promote increased transparency in the workings of government – something that is critical to the functioning of Australia's constitutionally-protected system of representative and responsible government. The High Court has consistently affirmed the constitutional foundation of this principle. As early as 1912, Griffiths CJ wrote of the right of 'every free citizen ... [to] access ... the institutions [of government], and of due participation in the activities of the nation'.<sup>8</sup> More recently, in the cases that deal with freedom of political communication, the High Court stated that this freedom is 'an indispensable element in representative government', with the system requiring that electors be fully informed, and be able to participate, in government.<sup>9</sup>

In relation to the second argument, PIAC is concerned that the existing costs in some cases may deter reasonable requests, and not just potentially vexatious requests. PIAC suggests that there may be other more effective ways of dealing with vexatious requests.

---

<sup>6</sup> Ibid, 186.

<sup>7</sup> Electoral and Administrative Review Commission, *Report on Freedom of Information* (1990) 181 cited in Freedom of Information Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act (2008)* < [http://www.rti.qld.gov.au/\\_data/assets/pdf\\_file/0019/107632/solomon-report.pdf](http://www.rti.qld.gov.au/_data/assets/pdf_file/0019/107632/solomon-report.pdf) > at 21 November 2011, 185.

<sup>8</sup> *R v Smithers; Ex parte Benson* (1912) 16 CLR 99.

<sup>9</sup> *Australian Capital Television v Cth* (1992) 177 CLR 106, per Mason CJ.

### Question 3 (application fees)

PIAC contends that there should not be any fees for initial applications, or OAI review under the FOI Act.

PIAC believes that the imposition of fees sits uncomfortably with the constitutional and democratic principles discussed above – namely, that individuals have a right to access information, and that such fundamental rights should not be made conditional on paying for them. This is a cost that government should bear as part of fulfilling its democratic responsibilities of being transparent and accountable to the people.

On a practical level, PIAC is not convinced that the existing fees bear a precise connection to the costs involved in acknowledging receipt of a freedom of information request and making an initial assessment of the request, particularly if the application fee is reduced on the basis of financial hardship or public interest to only \$15 to make an initial application and \$20 to seek an internal review.

PIAC notes that other jurisdictions, including the UK, Tasmania and the Australian Capital Territory, do not charge any fees for initial requests or internal reviews.<sup>10</sup>

### Question 11 (different approach to charges)

PIAC firmly maintains the position that the idea of recovering costs from applicants is at odds with the fundamental principle that the freedom of information regime concerns the right of individuals to access information:

[R]ights should not be made conditional on paying for them. This is a cost that government should bear as part of fulfilling its democratic responsibilities of being transparent and accountable to the people. On a practical level, PIAC is not convinced that the existing fees actually cover the costs involved in acknowledging receipt of a freedom of information request and making an initial assessment of the request, particularly if the application fee is reduced on the basis of financial hardship or public interest to only \$15 to make an initial application and \$20 to seek an internal review.<sup>11</sup>

Therefore, PIAC submits that the FOI Act should be amended so that the charges that an agency may impose in respect of a freedom of information request should be based on the amount of information provided rather than the time taken to process a request. This was the approach recommended in ALRC Report 77.<sup>12</sup>

Given that the amount of fees and charges collected by agencies represents a tiny amount of the cost of administering the FOI Act, PIAC suggests that the argument that the imposition of these

---

<sup>10</sup> Simpson with Lok and O'Moore, above n 2, 27.

<sup>11</sup> Ibid, 34.

<sup>12</sup> Australian Law Reform Commission (ALRC), *Open Government: a review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1995), <  
<http://www.austlii.edu.au/au/other/alrc/publications/reports/77/>> 21 November 2011, 187.

charges and fees is based on cost recovery is highly flawed. For example, in 2007-8, the total amount of fees and charges collected represented only 1.76% of the total costs of administering the FOI Act.<sup>13</sup>

The ALRC approach has a number of advantages. Firstly, it would be easier for an agency to calculate costs on this basis and would ensure that the calculation of costs was more transparent to, and understandable by, applicants. It would also improve the consistency of charging across different government agencies.

Moreover, PIAC is of the view that applicants should not be penalised if agencies do not have efficient record-management systems. If an agency's record-keeping systems are such that it takes many hours to process even a simple freedom of information request, the applicant should not be made to pay for that time. Indeed, the approach proposed is likely to encourage agencies to reconsider and improve their existing records management system. Similarly, such an approach to costs would encourage applicants to narrow their search to only those documents that they are really interested in, and hence, are prepared to pay for. It would also deter agencies from over-reliance on exemptions, given that if agencies refused to grant access to documents they would not be able to impose any charges in relation to that decision.

This proposal is consistent with the recommendations made by the Independent Review Panel in its report in 2008<sup>14</sup>, and reflects the criticisms of the ALRC in its review that '[r]ecords management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence'.<sup>15</sup>

### ***Recommendation***

---

1. *Charges should not be levied in respect of applications made under the Freedom of Information Act 1982 (Cth).*
2. *Alternatively, PIAC recommends that charges for processing a request be calculated on the basis of the documents received, not the time taken to consider a request or retrieve the information requested.*

### **Question 13 (no charges were the applicant isn't notified with the statutory time limit)**

PIAC supports the current approach that an agency should not be able to impose processing charges if the agency fails to notify the applicant of a decision within the statutory time limit. In PIAC's experience, one of the biggest problems with the FOI Act (prior to amendment) was that there were ongoing delays by agencies in processing FOI requests and this provision is one way of discouraging delays in processing FOI requests.

---

<sup>13</sup> Department of Prime Minister and Cabinet, *FOI Annual Report 2007-8*, 13.

<sup>14</sup> Freedom of Information Independent Review Panel, above n 7, Recommendations 61-71.

<sup>15</sup> Australian Law Reform Commission, above n 12.

## **Question 20 (no charges for requests involving an applicant's own personal information)**

As noted above, PIAC takes the view that there should be no fees or charges for information disclosed pursuant to the FOI Act. Where government holds an individual's personal information, it seems particularly unfair that the individual be charged to access their own information. For this reason, PIAC submits that there is a very compelling case against imposing charges in respect of FOI requests in those circumstances.

## **Question 22 and 23 (reduction of charges)**

PIAC takes the view that s 29(5) of the FOI Act should continue to allow for a reduction in (or waiver of) charges for demonstrated financial hardship and for public interest applications.

However, in PIAC's experience while agencies are generally prepared to reduce fees and charges when its clients can demonstrate financial hardship (for example, by providing a pensioner card), they are extremely reluctant to reduce fees on the basis of public interest. PIAC suggests that consideration should be given to ways to encourage agencies to use this discretion more often. One way of doing so would be to provide a non-exhaustive list of factors that might be taken into account in considering this public interest criterion. In addition, it would be of assistance to provide training or targeted guidance on this issue to government agencies.