

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Freedom of Information (Charges) Regulations 2019

Introduction

The *Freedom of Information Act 1982* (the Act) gives members of the public a legally enforceable right of access to government-held documents, subject to exemptions and exceptions.

Subsection 94(1) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act and, in particular, making provision for or relating to the making of charges of amounts or at rates in respect of requests for access to documents or the provision of access to documents in accordance with the Act, including requiring deposits.

Subsection 94(2) of the Act provides that without limiting the generality of subsection 94(1), regulations under that subsection relating to the making of charges:

- (a) shall not vary the rate of charge according to whether a document is a document of a particular agency or class of agency;
- (b) shall provide for a charge for time spent in undertaking search or retrieval of a document, or in making a decision on a request for access, to be calculated at a single hourly rate, regardless of the classification of the officer who undertakes the work; and
- (c) may provide for a charge for direct costs in making an officer available to supervise the inspection by a person of a document.

Purpose and Operation of the Instrument

An agency or minister may impose a charge for providing access to a document under section 29 of the Act. The *Freedom of Information (Charges) Regulations 1982* (the previous Regulations) prescribe processing charges in connection with requests for access made under the Act.

The purpose of the *Freedom of Information (Charges) Regulations 2019* (the new Regulations) is to remake the previous Regulations with the same effect to ensure their continued operation. Minor amendments have been made to ensure fitness for purpose and consistency with current drafting practices, update various provisions to reflect the current terms of the Act and to remove obsolete or unnecessary provisions. The proposed Regulations do not introduce any new charges and charges have not increased from the previous rates.

Consultation

Consistent with the requirements of the *Legislation Act 2003* to consult, the Office of the Australian Information Commissioner, Department of Education, Department of Agriculture and Water Resources, Department of the Prime Minister and Cabinet, Attorney-General's Department, Department of Defence, Department of Health, Department of Human Services,

Comcare, Department of Home Affairs, Australian Taxation Office, Department of Finance, Department of the Environment and Energy, Department of Infrastructure, Regional Development and Cities and Department of Foreign Affairs were consulted on the proposal to remake the current Regulations.

In early 2018, the department had prepared draft Regulations with a different effect in several aspects. However, key agencies raised concerns when consulted on the proposed amendments. Given these concerns, the department considered it was preferable to not proceed with any of the proposed amendments and recommended remaking the Regulations to have the same effect as the current Regulations.

The Office of the Australian Information Commissioner was also consulted on the text of the proposed Regulations and has confirmed the proposed Regulations have the same effect as the current Regulations.

The Office of Best Practice Regulation (OBPR) was consulted and advised that a Regulation Impact Statement is not required. The OBPR reference is ID: 23060.

Other Details

Details of the new Regulations are at **Attachment A**.

A Statement of Compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at **Attachment B**.

The new Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the *Freedom of Information (Charges) Regulations 2019*

Part 1–Preliminary

Section 1 – Name

This section provides that the title of the proposed Regulations is the *Freedom of Information (Charges) Regulations 2019*.

Section 2 – Commencement

This section provides that the Regulations commence on 1 April 2019, which is the date that the previous Regulations (*Freedom of Information (Charges) Regulations 1982*) are scheduled to sunset.

Subsection (1) provides that each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.

The note to subsection (1) clarifies that the table only relates to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments to the instrument.

Subsection (2) provides that information in column 3 of the table is not part of the instrument. It is designed to assist readers, and may be updated or changed in any published version of these Regulations. Column 3 includes the date of 1 April 2019.

Section 3 – Authority

This section provides that the *Freedom of Information (Charges) Regulations 2019* are made under the *Freedom of Information Act 1982*.

Section 4 – Schedule 2

This section provides that each instrument that is specified in Schedule 2 to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

Section 5 – Definitions

The note provides that a number of expressions used in this instrument are defined in the Act, including agency, applicant, document, document of an agency, officer, official document of a Minister, personal information and request.

Subsection (1) also provides that, in this instrument

- ‘Act’ means the *Freedom of Information Act 1982*
- ‘relevant agency’, in relation to a request, means the agency to which the request has been made or is taken, under section 16 of the Act, to have been made.

- ‘relevant Minister’, in relation to a request, means the Minister to whom the request has been made or is taken, under section 16 of the Act, to have been made.

Subsection (2) provides that, for the purposes of this instrument, the time spent by an agency or a Minister in searching for or retrieving a document

- if the document is not found in the place in which, according to the filing system of the agency, or the office of the Minister, it ought to be located—is the time the agency or Minister would have spent in searching for or retrieving the document if the document had been found in that place; and
- if the filing system of the agency, or the office of the Minister, ought reasonably to have indicated, but does not indicate, the place in which the document is located—is the time that would have been spent by the agency or Minister in searching for or retrieving the document if that filing system had indicated the place in which the document is located and the document had been found in that place.

Subsection (3) provides that, for the purposes of this instrument, time spent by a person in searching for or retrieving a document of a Minister, or in doing a thing related to making a decision on a request for access to a document of a Minister, is taken to be time spent by the Minister in doing that activity.

Part 2—Charges

Section 6 – Charges

This section provides for the purposes of section 94 of the Act the charges set out in Part 1 of the Schedule 1 apply in respect of a request for access to a document of an agency or an official document of a Minister and the charges set out in Part 2 of Schedule 1 apply in respect of the provision of access to a document of an agency or an official document of a Minister.

The note provides the charges set out in Part 1 of the Schedule 1 do not apply to an application under section 54 or 54A of the Act since the Act defines request as an application made under subsection 15(1) of the Act.

Section 7 – Exceptions to charges

Subsection (1) provides that no charge applies where an applicant is seeking access to their own personal information.

Subsection (2) provides that no charge applies if an applicant does not receive notice of a decision on their request within 30 days (the period mentioned in paragraph 15(5)(b) of the Act) and that period has not been extended as permitted in the following circumstances:

- with the agreement of the applicant (in accordance with section 15AA),
- where certain third party consultation is necessary (in accordance with subsections 15(6) and (8)), or
- where the Australian Information Commissioner extends the decision making period upon being satisfied a further period is justified to deal with a complex or voluminous request (in accordance with subsection 15AB(2)).

Subsection (3) provides that no charge applies if the period for providing notice of a decision has been extended in accordance with one of the provisions mentioned above, but the applicant has not been notified within the extended period.

Section 8 – Decision by agency or Minister that applicant liable to pay charge

This section provides that an agency or Minister may make either or both a decision that the applicant is liable to pay a charge in respect of the request for access to the document and a decision that the applicant is liable to pay a charge in respect of the provision of access to the document.

Note 1 provides that the relevant agency or relevant Minister must have regard to the objects of the Act in deciding whether to make either or both of the decisions under this section.

Note 2 provides that if the relevant agency or relevant Minister makes a decision under this section, the relevant agency or relevant Minister must notify the applicant in writing under section 29 of the Act.

Section 9 – Estimate of charge may be fixed in certain circumstances

Subsection (1) sets out the circumstances where the estimate of a charge may be fixed by the relevant agency or Minister. It provides that section 9 applies if:

- an agency or Minister decides the applicant is liable to pay a charge in respect of a request for access to a document and the agency or Minister has not taken any or all of the steps necessary to enable the agency or Minister to make a decision on the request
- an agency or Minister decides the applicant is liable to pay a charge in respect in respect of the provision of access to a document and the agency or Minister has not taken any or all of the steps necessary to enable the applicant to be given access to the document
- an agency or Minister decides that access to a document is to be given to an applicant under the supervision of an officer of the agency or a person employed as a member of staff of the Minister under section 13 or 20 of the *Members of Parliament (Staff) Act 1984* and the applicant is liable to pay a charge in respect of the period during which the officer or member of staff supervises that access.

Where the circumstances in subsection (1) apply, subsection (2) provides that an agency or Minister may fix the amount that an applicant is liable to pay in respect of a charge.

Subsection (3) provides the amount of the charge is such amount as would, in the opinion of the agency or Minister, be the amount ascertained in accordance with Schedule 1 if, at the time the agency or Minister decides that the applicant is liable to pay the charge:

- an agency or Minister has not taken any or all of the steps necessary to enable the agency or Minister to make a decision on the request all steps that are necessary to enable a decision to be made on the request had been taken by the agency or Minister
- the agency or Minister has not taken any or all of the steps necessary to enable the applicant to be given access to the document all steps that are necessary to enable the applicant to be given access to the document had been taken by the agency or Minister; or

- access to a document is to be given to an applicant had accessed the document under the supervision of an officer of the agency or a person employed as a member of staff of the Minister under section 13 or 20 of the *Members of Parliament (Staff) Act 1984* or the applicant is liable to pay a charge in respect of the period during which the officer or member of staff is to supervise that access--the applicant had accessed the document and the period during which the officer or member of staff supervised the applicant was a period determined by the relevant agency or relevant Minister to be the period reasonably required to access the document.

Subsection (4) provides that if an agency for a Minister has fixed an amount in respect of a charge under this section, the applicant is, subject to section 10, liable to pay the charge in the amount so fixed.

Section 10 – Adjustment of estimate of charge fixed under section 9

Subsection (1) provides for an agency or Minister to fix, as the amount of the charge, an amount equal to the amount ascertained in accordance with Schedule 1 where:

- an amount is fixed under section 9 in respect of a charge; and
- the amount fixed does not equal the amount (the actual amount) that, but for section 9, the applicant would be liable to pay in respect of the charge had that amount been ascertained after: a decision had been made on the request; all steps necessary to enable the applicant to be given access to the document had been undertaken; or the applicant had accessed the document.

Subsection (2) provides if the amount fixed under section 9 in respect of a charge is more than the actual amount that the applicant would be liable to pay in respect of the charge, the agency or Minister must fix, as the amount of the charge, an amount equal to the actual amount.

Subsection (3) provides if the amount fixed under section 9 in respect of a charge is less than the actual amount that the applicant would be liable to pay in respect of the charge and the charge is not in respect of a request for access to a document in which a decision refusing to give access to the document has been made by the agency or the Minister the agency or Minister may fix, as the amount of the charge, an amount that is equal to the actual amount in respect of the charge.

Where a charge has been estimated under section 9, without taking any or all of the steps necessary to enable the agency or Minister to make a decision on the request, the agency or Minister is required to calculate the final charge based on the actual time taken to process the request, using the applicable charges in Schedule 1 of the new Regulations. If the adjusted charge is higher than that estimated under section 9, subsection 10(3) gives the agency or Minister discretion not to increase the amount of the adjusted charge to reflect the cost of processing the request.

Paragraph 10(3)(b) has the effect that an agency or Minister cannot adjust the charge under section 10 if the agency or Minister decides to refuse access to the requested document. This means that if a request is for two documents and a decision is made to refuse access to one document, the charge adjusted under section 10 can only include the cost of processing the document to which access was given.

In exercising the discretion to adjust the charge under subsection 10(3), the agency or Minister should always have regard to the objects of the Act which include that Parliament intends that functions and powers under that 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. Situations in which it may be appropriate to exercise the discretion not to adjust the charge under section 10 include when the amount payable is substantially higher than the estimated charge, when the charge was underestimated due to agency error or poor record keeping, or inefficient freedom of information processing practices mean that accessing documents or processing requests takes longer than anticipated.

It is good administrative practice for agencies and Ministers to give applicants interim advice that a charge may be higher than the estimated charge and the reasons why it may be higher. The applicant can then revise either the scope of the request or the preferred form of access, with a view to reducing the charge.

Further guidance about exercising the discretion in paragraph 10(3)(b) will be provided in the Guidelines issued by the Australian Information Commissioner under section 93A of the Act.

Subsection (4) provides that, if an agency or Minister has fixed an amount in respect of a charge under subsection (2) or (3), the applicant is liable to pay the amount so fixed in lieu of the amount fixed under section 9 in respect of the charge.

Subsection (5) provides that, if the applicant has paid to the agency or a Minister an amount fixed under section 9 in respect of the charge, then:

- the applicant is entitled to a refund of an amount equal to the amount of the excess if the amount paid under section 9 exceeds the amount fixed in respect of the charge under this section, or
- the amount paid by the applicant under section 9 is taken to be a deposit on account of the charge fixed in respect of the charge under this section if the amount paid under section 9 is less than the amount fixed under this section.

Section 11 – Charge to be paid before access to documents is given

Subsection (1) provides that any charge for request to access to a document or the provision of access to a document is to be paid before access is given under paragraph 11A(1)(b) of the Act.

Subsection (2) provides that subsection (1) does not apply to a charge of the kind referred to in item 1 or 2 of the table in clause 2 of Schedule 1 unless the charge is payable in an amount that was fixed under section 9 because of the circumstance referred to in paragraph 9(1)(c).

Section 12 – Deposits

Subsection (1) provides that an agency or Minister may determine that the applicant is required to pay a deposit on account of the charge and the amount of that deposit where an agency or Minister decides that an applicant is liable to pay a charge in respect of a request for access to a document or the provision of access to a document and the agency's or Minister's preliminary assessment of the amount of the charge exceeds \$25.

The note provides that the applicant must be notified of the amount of the deposit, under paragraph 29(1)(e) of the Act.

Subsection (2) provides that the amount of the deposit must not exceed \$20 if the preliminary assessment of the amount of the charge exceeds \$25 but does not exceed \$100 or must not exceed 25% of the amount of the charge if the preliminary assessment of the amount of the charge exceeds \$100.

Subsection (3) provides that the agency or Minister must refund any deposit paid by the applicant on account of the charge if the agency or Minister decides under section 29 of the Act not to impose the charge or section 7 applies in respect of the request for access to the document.

Subsection (4) provides that the agency or Minister must refund the excess if the applicant pays a deposit on account of the charge and the amount of the deposit exceeds the amount of the charge.

Part 3–Application and saving provisions

Section 13 – Application and saving provisions

Subsection (1) provides that this instrument applies in relation to a request for access to a document made on or after the commencement of this instrument.

Subsection (2) provides that the *Freedom of Information (Charges) Regulations 1982*, as in force immediately before the commencement of this instrument, continue to apply on and after that commencement in relation to a request for access to a document made before that commencement. Section 2 of the proposed Regulations provides that the proposed Regulations commence on 1 April 2019.

Schedule 1 – Charges

Part 1 – Charges applicable in respect of a request for access to a document

Part 1 of Schedule 1 provides for the charges that apply in respect of a request for access to a document of an agency or an official document of a Minister under section 6 of this instrument.

Item 1 in Part 1 of the Schedule provides that a charge of \$15.00 per hour applies in respect of the time spent by the relevant agency or the relevant Minister in searching for, or retrieving, the document if the request relates to a document of an agency, or an official document of a Minister, other than a document in relation to which a charge under item 2 of this table applies.

Item 2 in Part 1 of the Schedule provides that an amount not exceeding the actual cost incurred by the relevant agency in producing the document applies in respect of the production of a document containing the information in discrete form by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or

collating stored information if the request to an agency is in respect of information that is not available in a discrete form in documents of the agency.

Item 3 in Part 1 of the Schedule provides that a charge of \$4.40 per page of the transcript applies in respect of the production of the written transcript if the request relates to a document of an agency, or an official document of a Minister, by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form; and a written transcript of the words recorded or contained in the document is produced for the purposes of making a decision on the request.

Item 4 in Part 1 of the Schedule provides that a charge of \$20 for each hour after the first 5 hours applies in respect of the time that is spent by the relevant agency or relevant Minister in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including time spent in examining the document, in consultation with any person or body, in making a copy with deletions or in notifying any interim or final decision on the request.

Part 2 – Charges applicable in respect of the provision of access to a document

Part 2 of Schedule 1 provides for the charges that apply in respect of the provision of access to a document of an agency or an official document of a Minister.

Item 1 in Part 2 of the Schedule provides that if access to a document of an agency is given:

- in the form of an opportunity for the applicant to inspect the document under the supervision of an officer—a charge of \$6.25 would apply if the period of supervision is 30 minutes or less or if the period exceeds 30 minutes, \$6.25 for each 30 minutes and any additional period not exceeding 30 minutes included in the period; or
- in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced—in the form of arrangements for the applicant to hear or view those sounds or visual images under the supervision of an officer—a charge of \$6.25 would apply if the period is 30 minutes or less or if the period exceeds 30 minutes, \$6.25 for each 30 minutes and any additional period not exceeding 30 minutes included in the period.

Item 2 in Part 2 of the Schedule provides if access to an official document of a Minister is given:

- in the form of an opportunity for the applicant to inspect the document under the supervision of an officer of an agency or of a person employed as a member of staff of the Minister under section 13 or 20 of the *Members of Parliament (Staff) Act 1984*—a charge of \$6.25 would apply if the period of supervision is 30 minutes or less or if the period exceeds 30 minutes, \$6.25 for each 30 minutes and any additional period not exceeding 30 minutes included in the period; or
- in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced—in the form of arrangements for the applicant to hear or view those sounds or visual images under the supervision of an officer of an agency or of a person employed as a member of staff of the Minister under section 13 or 20 of the *Members of Parliament (Staff) Act 1984*—a charge of \$6.25 would apply if the period is 30 minutes or less or if the period exceeds 30

minutes, \$6.25 for each 30 minutes and any additional period not exceeding 30 minutes included in the period.

Item 3 in Part 2 of the Schedule provides that a charge of \$4.40 per page for a copy (other than a photocopy) and 10 cents per page for a photocopy is applicable in respect of the number of pages of the copy provided to the applicant if the request relates to a document other than a document that:

- is produced for the purposes of the request by an agency by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
- is produced for the purposes of the request by an agency by the making of a transcript from a document held in the agency, being a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form; or
- is an article or thing from which sounds or visual images are capable of being produced.

Item 4 in Part 2 of the Schedule provides that an amount not exceeding the actual costs incurred by the relevant agency in producing a copy of the document is applicable in respect of the production by the computer or other equipment of a copy of the document with relevant deletions if:

- the request made to an agency is in respect of information that is available in discrete form in a document produced (whether for the purposes of the request or not) by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; and
- deletions are made from the document before access to it is given to the applicant; and
- it is not reasonably practicable to make those deletions otherwise than by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information.

Item 5 in Part 2 of the Schedule provides that an amount not exceeding the actual costs incurred by the relevant agency in producing a copy of the document is applicable for the production by an agency of a copy of a document in the form of a computer tape or a computer disk.

Item 6 in Part 2 of the Schedule provides that an amount not exceeding the actual costs incurred by the relevant agency or relevant Minister in respect of the arrangements is applicable in respect of the arrangements made other than any arrangements in respect of which a charge is applicable under item 1 or 2 of this table if:

- the request relates to a document that is an article or thing from which sounds or visual images are capable of being produced; and
- access to the document is given in the form of arrangements for the applicant to hear those sounds or view those images.

Item 7 in Part 2 of the Schedule provides that an amount not exceeding the actual costs incurred by the relevant agency or relevant Minister in producing the copy is applicable in respect of the production of the copy if:

- the request relates to a document that is an article or thing from which sounds or visual images are capable of being produced; and
- access is given in the form of the provision of a copy of the document.

Item 8 in Part 2 of the Schedule provides that a charge of \$4.40 per page of the transcript is applicable in respect of the production of the written transcript if:

- the request relates to a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form; and
- access is given in the form of the provision of a written transcript (with or without deletions) of the words recorded or contained in the document; and
- the applicant has not paid, or is not liable to pay, as a charge in respect of the request for access to the document, a charge in respect of the production of such a written transcript.

Item 9 in Part 2 of the Schedule provides that an amount not exceeding the actual costs incurred by the relevant agency or relevant Minister for the postage or delivery of the copy is applicable in respect of the postage or delivery of the copy if:

- access to the document to which the request relates is to be given in the form of the provision of a copy of the document; and
- the copy is, at the applicant's request, to be sent by post or delivered to the applicant.

Schedule 2 – Repeals

This Schedule repeals the current Regulations, the *Freedom of Information (Charges) Regulations 1982*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Freedom of Information (Charges) Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Freedom of Information (Charges) Regulations 2019* (the new Regulations) remake the *Freedom of Information (Charges) Regulations 1982* (the previous Regulations) with the same effect to ensure their continued operation. Minor amendments have been made to simplify the regulations to ensure fitness for purpose and to remove obsolete or unnecessary provisions.

Human rights implications

The new Regulations engage the right to information in Article 19(2) of the *International Covenant on Civil and Political Rights*. The right to information is not absolute. Relevantly, Article 19(2) provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In General Comment No. 34 on Article 19 (CCPR/C/GC/34) the Human Rights Committee noted the importance of States parties proactively putting into the public domain Government information of public interest to give effect to the right of access to information and the need to make every effort to ensure easy, prompt, effective and practical access to such information (at paragraph 19). The new Regulations are consistent with these requirements and the objects of the Act.

The new Regulations are compatible with the right to information in that it provides for ongoing practical and administrative processes associated with charges for access to documents in accordance with the Act.

These measures are not intended to prevent or limit access to information and do not disproportionately affect any particular group. The changes provided for in the Regulations are intended to fairly reflect the work involved in providing access to documents on request. They are not intended to discourage someone from exercising their right of access under freedom of information. Charges have not increased from the previous rates.

Conclusion

This Legislative Instrument engages the right to information. It is compatible with human rights because it is consistent with the right to information and, to the extent that it may limit the right to information, those limitations are reasonable, necessary and proportionate.