Freedom of or freedom from information and its cost— A balance needed

PART 2*

Other Problems — Found Through Experience

Reverse FoI

The 'Reverse FoI' procedure is an initiative designed to prevent sensitive information from being accidentally released. If a request for business information is received, then the business is notified and its views sought. As with any new initiative, there are some problems which only become apparent once it is in operation. Fortunately, there has, so far, only been one instance of information being released in error. An internal document produced from information from a number of businesses was disclosed with parts deleted. Competitors in the industry are said to have been able to use knowledge available to the industry to determine what had appeared in most of the deleted portions.

The following problems, which if not attended to may result in some further unintentional releases of sensitive information, have been encountered:

1) If an applicant seeks documents relating to the affairs of a business and the 'Reverse FoI' procedure is put into operation, then often the business only receives a list of documents supplied by the business and not a list of documents which have been derived from those documents. The Act supposedly balances the public interest in disclosure against the public interest in not causing unnecessary harm to commercial enterprises. Consequently, notice should be given of all documents which include sensitive business information, including those derived from the information supplied by businesses and documents generated internally by the agency concerned. Though the Act appears to require notice of all documents this practice has not been applied, at least initially, to a request for documents relating to BHP.

2) As part of the 'Reverse FoI' procedure, companies have to make submissions as to why documents should not be released. Provision needs to be made to ensure that, especially with documents which were not supplied by the business concerned but derived from documents supplied, sufficient information concerning the contents of those documents is supplied. A business charge in respect of procedures in processing a request is now subsumed in the $30 application fee. The $12 hourly rate in respect of searching for and retrieving documents is increased to $15 per hour and a charge of $20 per hour is levied to cover time spent on deciding whether to refuse or defer access to a document.

In determining the effect of these charges it is helpful to examine the amount of time already spent answering individual *FoI Act* requests and their costs to the agency handling them. Fortunately, the Attorney-General's Department has provided a summary of recent annual costs of FoI requests reported by agencies in its submission to the Senate Committee. It can be divided according to the number of requests an agency receives per year. Of those agencies receiving over 1,000 requests per year, the greatest average cost per request is incurred by the Department of Immigration and Ethnic Affairs at $780, and the least is incurred by the Department of Veterans Affairs at $149 per request. Of those agencies dealing with less than 1,000 but greater than 200 requests per year, the agency with the greatest average cost per request is the Department of Industry, Technology and Commerce with the average request costing $1,597, and that with the cheapest average cost per request is the ACT Health Authority with an average cost of $46 per request. Of those departments receiving less than 10 requests per year, the Australian Wool Corporation with only two requests spent an average of 151.5 staff days per request at a cost of, on average, $26,248. The department with less than 10 requests with the least expensive average cost per request was the AIRDIB, with nine requests taking an average of 46.6 staff days per request at an average cost of $4,200. Either Parkinson's Law applies to *FoI Act* requests or alternatively the departments with very few requests must receive some of the most difficult. It therefore appears that given the new charges the cost of seeking information from some agencies would be prohibitive.

The information handling systems of government agencies were presumably not designed to cater for *FoI Act* requests, so searches for information may be unnecessarily costly. If the applicant has to pay these costs, then there is no incentive on the agency concerned to improve its information handling systems. Care is therefore needed to ensure that a suitable balance is achieved between the charges, the time spent on a request and the resources of those seeking information in order to allow the Act to achieve its original goals.

Other changes

The remaining changes reduce the obligations on agencies under the legislation and include the broadening of the exemption from release of information on the basis of the amount of work involved

in answering a request. This 'broadening' goes so far as to allow access to be refused if dealing with the request would cause 'substantial delays in dealing with other requests'. Whether delays occur is dependent upon the allocation of resources by the agency concerned.

Other amendments save costs by reducing the obligation to provide detailed statistics on Freedom of Information applications, and by changing the obligation to supply information concerning the decision making processes and the operations of agencies. Lastly, the time limit for a response to a request is to remain at 45 days rather than the period being automatically shortened to 30 days as of 1st December 1986.

Conclusion

The *Freedom of Information Act* over the last four years of its operation has generally worked well. In that time a number of problems associated with its operation have been uncovered and therefore the review by the Senate Committee is a timely opportunity to make some necessary adjustments to a useful piece of administrative law reform. It will be interesting to watch the progress of the Government's amending Bill and any amendments suggested as a result of the Senate Committee's inquiries. Given the current composition of the Senate, it would not be surprising if a single Bill emerged consisting of an amalgam of the contributions of the Government and the Senate Committee. Above all, they need to achieve the optimum balance between openness, confidentiality, costs and who pays them in order for the Act to achieve its goals.

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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

GLEESON and MINISTRY OF EDUCATION
(No. 860552)
Decided: 15 January 1987 by Rowlands J (President).
Search and retrieval charge — appeal against decision to impose charge — whether charge should be weighed in the public interest.

The facts

The applicant, a journalist, had requested and received from the respondent documents relating to school building projects. The documents revealed that poor workmanship on certain buildings posed a danger to the health and safety of students and staff at those schools and a newspaper article was prepared by the applicant detailing this information. The respondent sought to charge the applicant $18-20 for search, retrieval and photocopying undertaken by it in fulfilling the request. The applicant appealed against the imposition of the charge to the Tribunal.

The decision

The Tribunal was required to determine whether the charge should be waived or reduced in the public interest. Section 22 provides:

> (i) Any charge that is, in accordance with the regulations, required to be paid by an applicant before access to a document is given, shall be calculated by an agency in accordance with the following principles, or, where those principles require, shall be waived:
> (h) A charge shall be waived or be reduced if the applicant's intended use of the document is a use of general public interest . . .

The Tribunal was satisfied on the evidence before it that the applicant's use of the documents was a case of general public interest. If found that the article had appeared in a reputable newspaper and the discussion of health and safety issues at schools was of public importance. An argument by the respondent that the charge should be upheld because it was a moderate sum and the newspaper's resources were substantial was rejected. The Tribunal took the view that once the evidence was sufficient to satisfy the public interest use requirement, the provisions of s.22(i)(h) were made out.

It also determined that, whilst a partial waiver might be appropriate in some circumstances where the s.22(i) and (h) requirement had been made out, the present case warranted a full waiver of the charge.

The Tribunal therefore set aside the respondent's decision and determined that the charges should be waived.

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

BAILEY and COMMONWEALTH TERTIARY EDUCATION COMMISSION
No. A86/75
Decided: 3 December 1986 by Dr A. P. Renouf (Senior Member), N. J. Attwood and C. G. Woodard (Members).
Application for review of decision to impose charge — documents supplied on first request misleading — second request to confirm finding — submission that documentation first obtained not complete and second request in public interest.

The background to this matter was as follows. The applicant had requested access to a copy of a report made to the Minister by the respondent. He was supplied with and paid for copies of documents including a draft news release which he found had been misleading in certain respects. After writing to the Minister in this regard and receiving no reply, he made a second request for access for further documents in order to confirm his impression that the initial documents were misleading. He subsequently paid for and was granted access to the later document. In these proceedings the applicant sought review of the respondent's decision to impose a charge for access to the later document. He argued that it was unreasonable for the respondent to levy a charge in relation to the second request when he had established that the press release was misleading and was merely seeking to confirm this. He also argued that the decision in *Re Waterford and Attorney-General's Department (No 2)* supported him and that his case was one in which he should have been granted remission because of the public interest.