



***RIGHT TO INFORMATION ACT 2009
s 49(1)(c)***

***GUIDELINE IN RELATION TO CHARGES
FOR INFORMATION***

GUIDELINE No. 1/2012

Right to Information Act 2009, s 49(1)(c)

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This Guideline is issued by the Ombudsman under s 49(1)(c) of the *Right to Information Act 2009* (the Act).

Section 16 of the Act requires the payment of a fee on an application for assessed disclosure, but also provides for the waiver of that fee under certain circumstances. This Guideline is intended to assist in the application of this section.

1. Relevant provisions

The Act provides that –

- an application for assessed disclosure must be in writing and contain the minimum information as prescribed by the regulations: ss 13(2) and (3)
- all applications for assessed disclosure must be accompanied by an application fee of 25 fee units¹: s 16(1)
- the fee may be waived in specified circumstances: s 16(2)
- before an application for assessed disclosure is accepted, the application fee must be paid, or a decision to waive the fee must be made: s 16(3)
- assessed disclosure is the method of disclosure of last resort: s 12(3).

¹ The value of a fee unit is calculated in accordance with the *Fee Units Act 1997*, which provides for annual indexation. The value of a fee unit for the 2011/12 financial year is \$1.40, with the result that the application fee payable under s 16(1) for that year is \$35. For more detail on fee units see the website of the Department of Treasury and Finance, at <http://www.treasury.tas.gov.au>. At the time of publishing this Guideline, the details can be found on that site at Home>Economic Policy Homepage>Fee Units.

2. Receipt of the application for assessed disclosure

Physical receipt of an application for disclosure is not the same as acceptance of the application for the purpose of processing it. It will usually be necessary to see the application for assessed disclosure for the purpose of deciding whether or not payment of the application fee should be waived, and receipt of the application for this purpose should not be taken as importing a decision to waive.

3. The decision on a request for the application fee to be waived

A decision on whether payment of the fee is to be waived must be made as soon as practicable.

However, before this decision is made, the agency or Minister should first consider whether to make voluntary disclosure² of the information being sought. There is no need to consider whether the application fee should be paid or waived if the information is to be freely released. It is only necessary to proceed to assessed disclosure if it is reasonable to believe that some or all of the information being sought may be exempt.

The reasons for the decision on whether the fee is to be paid or waived should be documented, and must be provided to the applicant if requested. Documenting the reasons will become important if the applicant asks for the decision to be reviewed.

Such a review could occur in various ways. It is possible that the applicant may ask for the decision to be reviewed by a more senior officer in the public authority, on an administrative basis. The decision in relation to waiver is also an administrative act, and might be the subject of complaint to the Ombudsman under the *Ombudsman Act 1978*. It is also a decision which is susceptible to review under the *Judicial Review Act 2000*.

If the decision is to refuse the request for waiver, the applicant will need to pay the fee before the application for assessed disclosure can be formally accepted, and therefore acted upon: s 16(3). If the decision is to waive the fee and the public authority or Minister still has the application for assessed disclosure in hand, the application can be taken at this point to have been

² The word “voluntary” is here used deliberately, instead of “active”. The expression “active disclosure” is defined in s 3(1) of the Act as “the disclosure of information by a public authority or a Minister in response to a request from a person made otherwise than under Division 2 of Part 2” of the Act, and that definition presupposes that an application for assessed disclosure has not been made. In the scenario under consideration, an application for assessed disclosure has been made, but consideration is being given to whether assessed disclosure is needed before a decision is made to release the information sought. The need for that to be considered arises from the principle that “assessed disclosure is the method of disclosure of last resort” (s 12(3)), allied to the statement in s 12(1) of the Act that the Act “does not prevent and is not intended to discourage a public authority or a Minister from publishing or providing information (including exempt information), otherwise than as required by the Act”.

accepted, unless negotiations are necessary under s 13(7) of the Act to refine or redirect the application: s 15(3). If such negotiations take place, the time within which the application is to be decided does not commence until the negotiations are completed or until 10 working days have elapsed since the receipt of the application, whichever first occurs: ss 15(2) and (3).

4. Waiver

4.1 The grounds upon which the application fee may be waived

Section 16 specifies three grounds on which the payment of the application fee can be waived. There are no others. In other words, unless one of these grounds applies, the fee must be paid.

This reasoning is confirmed by the use of the word “must” in each of ss 16(1) and (3).

The grounds upon which the application fee may be waived are –

- that the applicant is impecunious: s 16(2)(a)
- the applicant is a Member of Parliament acting in connection with his or her official duty: s 16(2)(b)
- the applicant is able to show that he or she intends to use the information for a purpose that is of general public interest or benefit: s 16(2)(c).

The policy purpose here is clear. The application fee should not hinder the use of the Act by those who cannot afford the fee, by MPs who seek information for use in their official duties, or by individuals who wish to obtain information to pursue a purpose that is of general public interest or benefit.

It follows that if the decision-maker accepts that the applicant falls into one of the categories of person listed in s 16(2), the application fee should be waived.

The discretion to waive the fee must be exercised so as to further the object set out in s 3(1) of the Act – of improving democratic government by increasing the accountability of the executive to the people of the State and increasing the ability of the people to participate in their governance, acknowledging that the information collected by public authorities is collected on behalf of the people. This discretion is covered directly by s 3(4) of the Act -

“It is the intention of Parliament –

- (a) *that this Act be interpreted so as to further the object set out in subsection (1); and*
- (b) *that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information."*

4.2 Evidence

Waiver involves an active decision to waive, and such a decision needs to be based on evidence that satisfies the decision maker that one of these grounds exists. In most cases, and given the relatively small amount of money at issue, it would be sufficient to obtain that evidence informally, by questioning the applicant. There may, however, be cases where it is reasonable to obtain written evidence, or a statutory declaration.

It follows from these observations that decision-maker can refuse to waive the fee if the applicant fails or unreasonably refuses to provide the evidence needed to satisfy the decision-maker that waiver is appropriate.

4.3 s 16(2)(a) – impecunious applicant

A person is "impecunious" if they do not have money, or are short of money. In this context, the word refers to the lack of sufficient money to pay the application fee, either at all or without some level of hardship.

In determining whether or not the applicant is impecunious, it is therefore necessary to consider the size of the fee and the money available to the applicant to pay it. Thought should be given in this respect to the concept of the "lowest reasonable cost", referred to in s 3(4)(b) of the Act, quoted in 4.1 above. Is it reasonable to charge the application fee in light of the evidence about the applicant's ability to pay?

The Ombudsman has previously accepted that a person was impecunious for the purpose of the equivalent provision in the *Freedom of Information Act 1991* on proof that a person was reliant on a Commonwealth disability pension : *Stott v Forestry Tasmania* (April 2009).

4.4 s 16(2)(b) – MP acting in connection with his or her official duty

The reference in this provision to a Member of Parliament is a reference to a Member of the Parliament of the State: *Acts Interpretation Act 1931*, s 44.

The major issue here will be whether, in making the application for assessed disclosure, the Member is acting in connection with his or her official duty. The official duties of a Member of the Parliament cannot be precisely

categorised, but they include such matters as participating in the work of the Parliament, and taking action as a Member by way of representing the interests of constituents.³ A distinction should of course be made with the making by a Member of an application for assessed disclosure for reasons which do not relate to their official duties, for instance because the information is sought in connection with their private affairs or because the Member is only making the application to try to save a third party from having to pay the fee.

4.5 s 16(2)(c) – intended use for a purpose that is of general public interest or benefit

The expression “public interest” in this context might be expected to mean something other than “public benefit”. Otherwise, the two expressions would not appear together; one of them would suffice.

Because of this, and because of the semantic effect of the word “of” in the phrase “of general public interest”, it seems likely that the words “a purpose ... of general public interest” refer to a purpose which is of general interest to the public, not to a purpose which is in the public interest. Hence the “public interest” in this context appears to refer to a different concept here than in s 33.

In other words, the words “for a purpose that is of general public interest or benefit” might be rephrased, “for a purpose that is of general interest or benefit to the public”.

The word “general” here emphasises that the purpose must be one which is of general interest or benefit, not for instance of interest or benefit to a narrow or special interest group only⁴. For example, the fee might therefore be waived for a journalist who proposes to use the information in writing an article on a subject which is of wide general interest within the community.⁵

In contrast, a public interest advocate who seeks information with a view to using it for the purposes of public advocacy – say a member of a human rights organisation who seeks information for the purpose of campaigning in relation to a human rights issue – might reasonably be regarded as seeking it for a purpose which is of general public benefit. It is of general public benefit that debate takes place within society about such matters.

³ A helpful discussion on the subject (but applying to Commonwealth, not State, parliamentarians) can be seen at the start of Chapter 2 of the report provided to the Australian Government by the Committee for the Review of Parliamentary Entitlements in April 2010, entitled *Review of Parliamentary Entitlements*. The report can be seen at <http://www.finance.gov.au/publications/review-of-parliamentary-entitlements-committee-report/chapter2.html>

⁴ *Sunbury Progress Association v Hume City Council* [2004] VCAT 2344, and cases there cited.

⁵ *Re Gleeson and Ministry of Education* (1987) VAR 392.

Note that it is necessary to decide on an objective basis whether the applicant's purpose is of general public interest or benefit, and that the personal views of the decision-maker are irrelevant. Further, in evaluating whether the applicant's purpose is of the necessary kind, it is important to consider the objects of the Act, as set out in s 3 – accountability, participation in governance, etc.

5. Refunding the application fee

Where the application fee has been paid, and the public authority or Minister decides that the applicant would have been entitled to the waiver of the fee, the application fee should be returned to the applicant.

The public authority may also consider it appropriate to refund the fee if early consideration of the application leads to a quick decision that voluntary disclosure should be made, or if the applicant withdraws the application for assessed disclosure before significant work has been done in relation to the application.

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