

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.

[Subscribe to Information Matters](#)



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

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 (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

A handwritten signature consisting of the letters 'J' and 'S' in a cursive, looped style.

Jackie Scolyer

Acting Director Reviews and Investigations
Freedom of Information

23 October 2023



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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.



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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 xxxxxxxxx.xxxx@xxxx.xxx.xx.

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

 OAIC

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. s22 [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.

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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: xxx@xxxxxx.xxx.xx

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 2021If 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: [@xxx](#)

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 xxxx.xxxxxxx@xxxx.xxx.xx

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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: xxx@xxxxxxxxxxx.xxx.xx

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 xxxx.xxxxxxx@xxxx.xxx.xx

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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: [@xxx](#)

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 [xxxx.xxxxxxx@xxxx.xxx.xx](#)

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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: xxx@xxxxxx.xxx.xx

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 xxxxx@xxxx.xxx.xx

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OFFICIAL: Sensitive

From: FOI <xxx@xxxxxx.xxx.xx>
Sent: Tuesday, August 29, 2023 3:35 PM
To: OAIC - FOI DR <xxxxx@xxxx.xxx.xx>; DONAGHY, Naoimh <xxxxxx.xxxxxxx@xxxx.xxx.xx>; FOI <xxx@xxxxxx.xxx.xx>
Subject: Health response - s22 - s 22 and Department of Health and Aged Care [SEC=OFFICIAL:Sensitive]

CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

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 <xxxx@xxx.xxx.xx>

Sent: Wednesday, 23 August 2023 4:03 PM

To: FOI <xx@xxxxxx.xxx.xx>

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: xxx@xxxxxx.xxx.xx

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 xxxxx@xxx.xx

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

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