



# Department of Finance and Deregulation

PROCESSING OF AN FOI APPLICATION

December 2009

Report by the Commonwealth Ombudsman,  
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **20|2009**

## Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

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## PART 1—BACKGROUND

1.1 This report deals with an investigation into a complaint from a journalist about the Department of Finance and Deregulation (Finance) and their administration of the *Freedom of Information Act 1982* (FOI Act).

1.2 Mr A, a journalist, made a Freedom of Information (FOI) request to Finance on 24 March 2009. Mr A paid his \$30 application fee, but sought remission of the application fee on public interest grounds. Finance considered first the question of remission, taking until 21 April 2009 to advise Mr A of its decision not to remit the fee. Only then did Finance deal with the substance of his FOI request.

1.3 Mr A disagreed with the approach taken by Finance in considering the question of remission before starting processing of his request, rather than doing both at the same time because the application fee had been paid. Mr A argued that Finance's approach was not supported by either the FOI Act or the FOI Guidelines (Guidelines) maintained by the Department of the Prime Minister and Cabinet. Mr A wrote to a Member of Parliament who referred the matter to this office.

1.4 The Ombudsman's office investigated Mr A's complaint, and in particular considered what should occur if an applicant both pays the application fee and seeks its remission. This office holds a different view to Finance as to what the FOI Act and Guidelines require of an agency. Because this is an important issue that affects a broader audience, the Ombudsman decided to publish this report under s 15 of the *Ombudsman Act 1976*.

## PART 2—FINANCE'S VIEW

2.1 Finance considers that the issue of the timeframes associated with whether or not an application fee accompanies an FOI request is ambiguous in the FOI Act. Finance considers the practice of determining the remission of the application fee before determining the substance of the application is consistent with the general sequential processing provided for by other timeframes prescribed in the FOI Act.

2.2 The Guidelines state:

Payment of the fee to enable work on the request to commence does not preclude a later remission of the fee, where the relevant grounds are made out. Note that applicants may attach the relevant application fee and at the same time apply for remission. In this case the application is valid once the fee has been paid, which means that 'the FOI clock' begins to run. Agencies must then make a decision as to whether the fee will be remitted within 30 days of receipt of the application.

2.3 Finance claims that the above extract does not state that a decision on access must be made within the same 30 day period as a decision on the remission of the application. Its view is that the reference to 'the FOI clock' is to the 30 days in which to provide a decision on the remission of the application fee. As such, it claims that its practice is not inconsistent with the FOI guidelines.

2.4 Finance has stated that it adopted this approach to ensure the legal effectiveness of any final decision on access to documents. In particular, its view is based on the potential consequences of dealing with the request for a remission at the same time as processing the request for access to documents.

2.5 The applicant can request internal review of a decision not to remit the application fee (s 30A(4) of the FOI Act). If unsuccessful, the applicant can appeal that decision to the Administrative Appeals Tribunal. If, in the meantime, the decision maker had made a decision in regard to the processing of the documents, this could potentially lead to the applicant being provided with a decision on access before any final decision is made in regard to the application fee.

2.6 Finance noted that Mr A acknowledged that many government agencies have adopted this practice, indicating that its practice is consistent with at least some other Commonwealth agencies. Finance asserts that its position reflects commonsense and accords with the FOI Act. In addition, Finance advised that an internal review of its administrative FOI processes had been conducted to ensure that they are as efficient as possible.

2.7 It was recognised in Finance's response that application fees will no longer be part of the FOI regime if (as noted below in 4.1) amending legislation introduced into the Parliament in November 2009 comes into effect. Nevertheless, interim clarification in the FOI guidelines would be welcomed.

## PART 3—THE OMBUDSMAN’S VIEW

3.1 The Ombudsman considers that Finance’s practice of determining the remission of the application fee before determining the substance of the application is not consistent with the FOI Act. Under s 15 of the FOI Act a request is either validly made or it is not. If the request is valid, the agency must deal with it within the time required by s 15. If the request is not valid, and its invalidity arises from the lack of a fee, the agency may decide to remit the application fee or may invite the applicant to pay the fee or seek its remission. In either of the latter cases, the request becomes valid at the point where the fee is paid or remitted.

3.2 This view is supported by s 30A of the FOI Act. When a person makes a valid request (including the application fee) one of four things may happen:

- the agency may consider remission without being asked, and decide to grant it—in which case the fee may be refunded to the applicant
- the agency may consider remission and not grant it, or not consider granting it at all—in which case the fee may be retained by the agency
- the applicant may request remission and be granted it—in which case the fee would be returned to the applicant
- the applicant may request remission and be refused—in which case the fee would be retained by the agency.

3.3 In each case, there is no obvious reason why processing should not commence and be completed on the basis of there being a valid request. There is no way in which the request could somehow become invalid because of any decision that might be made not to remit the fee. Indeed, Finance has said consistently that it never regarded Mr A’s request as invalid.

3.4 The effect is that the management of the request and the relevant time limits must run from the point when a valid request is made—this may be when the fee is paid or when a decision is made to remit the fee. The process of considering remission must occur before that if the fee is not paid, but there is no obvious reason why it may not occur in parallel with it when the fee has been paid.

3.5 In Mr A’s case the FOI request became valid when it was received by Finance and ‘the FOI clock’ should have commenced from that date. If Finance decided not to remit the fee, this would not retrospectively affect the validity of the request made or its date of effect because the request was already valid. If Finance decided to remit the application fee that would simply mean that the application fee in respect of the request would become zero, and the \$30 paid could be refunded.

3.6 Finance’s practice of taking a sequential approach is not consistent with this interpretation. The purpose of publishing this report under s 15 of the Ombudsman Act is to highlight the different interpretations of both the FOI Act and Guidelines by this office and Finance.

## PART 4—NEXT STEPS

4.1 The Government introduced the Freedom of Information Amendment (Reform) Bill 2009 into the Parliament on 26 November 2009. One of the proposed amendments provides for the abolition of application fees for requests for information made under the Act. Accordingly, the problem encountered by Mr A would not arise on the enactment of those amendments.

4.2 In the meantime it is suggested that the Department of Prime Minister and Cabinet considers amending the FOI guidelines so that there is clear guidance to ensure consistent government practice.