THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

FREEDOM OF INFORMATION ACT 1982

A REPORT ON THE OPERATION AND ADMINISTRATION OF
THE FREEDOM OF INFORMATION LEGISLATION

by the

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Canberra

* In the 34th Parliament, this Committee was designated the Standing Committee on Constitutional and Legal Affairs (see paragraphs 1.1 to 1.3 below). The 34th Parliament was dissolved on 5 June 1987.

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TERMS OF REFERENCE

That the following matter be referred to the Standing Committee on Constitutional and Legal Affairs: The operation and administration of the Freedom of Information legislation.

(Journals of the Senate, No. 69, 29 November 1985, p. 654)

...

That, in accordance with Standing Order 36AA, the following Standing Committees be appointed ... Legal and Constitutional Affairs.

(Journals of the Senate, No. 7, 22 September 1987, pp. 100-101)

...

That, unless otherwise ordered and notwithstanding anything contained in the Standing Orders, the following matters, referred to Legislative and General Purpose Committees on the days indicated during previous Sessions and not disposed of by those Committees, be referred under the same terms to the Standing Committees indicated: ... The operation and administration of the Freedom of Information legislation (29 November 1985). ... [to] the Standing Committee on Legal and Constitutional Affairs.

(Journals of the Senate, No. 7, 22 September 1987, pp. 101-102)

ABBREVIATIONS

Evidence	Official Hansard report of evidence of the public hearings conducted by the Standing Committee on Constitutional and Legal Affairs on this reference.
FOI	Freedom of Information.
FOI Act	Freedom of Information Act 1982.
FOI Annual Report 19xx-xx	Attorney-General's Annual Report on the operation of the Freedom of Information Act 1982 for the year 19xx-xx.
FOI Memorandum	One of a series of memoranda issued by the Attorney-General's Department to explain/interpret provisions in the FOI Act.
1979 Report	Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1987, and aspects of the Archives Bill 1978, `Freedom of Information', Parliamentary Paper No. 272/79.
IDC	Inter-Departmental Committee which examined the costs of the Freedom of Information legislation.

IDC Report — Report by the Inter-Departmental Committee which examined the costs of the Freedom of Information legislation, dated 15 October 1986. Provided to the Committee by the Attorney-General, Mr Lionel Bowen, M.P.

Note: The IDC established working groups to examine particular aspects of the FOI administration. The reports of these working groups were provided as attachments to the IDC Report. Any letter prefixing a page reference is a reference to a Working Group Attachment, rather than the conclusions of the IDC as such.

RECOMMENDATIONS

1 After the Government has responded to this report, the operation and administration of the Archives Act 1983 be reviewed by either the Senate or the House of Representatives Standing Committee on Legal and Constitutional Affairs from the viewpoint of congruence between the two Acts. (para. 1.25)

2 As soon as amendments have been determined and enacted, the FOI Act be reprinted. (para. 1.30)

3 If no privacy legislation is enacted, section 3 be amended to incorporate appropriate reference to the right to seek amendment of personal records. (para. 3.4)

4 Section 48 be amended by the deletion of the clause 'who is an Australian citizen, or whose continued presence in Australia is not subject to any limitations as to time imposed by law,'. (para. 3.33)*

5 The FOI Act be amended to provide that, where the consent of the person about whom the document contains personal information is necessary before the document may be released, charges should be imposed upon the applicant upon the same basis as would apply if the person about whom the document contained personal information were the FOI applicant. (para. 3.42)

* Senator Stone dissents from this recommendation.

6 Charges reflecting full cost recovery be applied in respect of applications for access to documents by a person whose presence in Australia, at the time of lodging the FOI application, is illegal by reason of the applicant's lack of possession of a relevant lawful entrance/residence permit. (para. 3.44)

7 The Government take steps to require people seeking access to personnel documents to seek access under the Guidelines contained in the Personnel Management Manual which was issued by the then Public Service Board rather than under the FOI Act. (para. 3.52)

8 Recourse to the FOI Act be available only where access requests under the Guidelines contained in the Personnel Management Manual have failed to give a result satisfactory to the applicant. (para. 3.52)

9 The costs of granting freedom of information access to personnel documents to which the Guidelines contained in the Personnel Management Manual which was issued by the then Public Service Board relate, be treated, for statistical purposes, as a cost of personnel management, not freedom of information. (para. 3.52)

10 The definition of 'document' contained in the FOI Act be deleted, with the rider that the provision that 'document' 'does not include library material maintained for reference purposes' be retained. (para. 4.8)

11 The definition of 'prescribed authority' be amended so as to avoid the exclusion of bodies from the operation of the FOI Act only because they were created by Order-in-Council. (para. 4.21)

12 The Attorney-General maintain a watching brief in respect of the inclusion in the FOI Act of appropriate references to the Australian territories and, when necessary, devise appropriate amendments. (para. 4.24)

13 The FOI Act apply to documents relating to the public functions only of bodies which discharge a mixture of functions. (para. 4.27)

14 The Attorney-General examine the agencies listed in Schedule 2 to determine whether their inclusion is appropriate. (para. 4.45)

15 Further, this examination should pay particular attention to the question of total or partial exemption. (para. 4.46)

16 The FOI Act be amended to provide a ground of exemption similar to that contained in paragraph 34(4)(b) of the Victorian FOI Act. (para. 4.56)

17 Further, this new provision should (i) not be confined to scientific or technical research; and (ii) not be confined only to the results of research. (para. 4.56)

18 An additional paragraph be inserted into the FOI Act providing that sections 91 and 92 of the FOI Act apply where agencies provide access to documents created more than 5 years before the commencement of the operation of the Act. (para. 5.4)

19 Paragraph 12(2)(a) of the Act be amended to substitute for the phrase 'to the personal affairs of that person' the phrase 'directly to that applicant's personal, business, commercial or financial affairs'. (para. 5.11)

20 The two-tier access request structure be abandoned. (para 5.14)

21 All requests for access to documents under the Act attract the time limits specified in the Act. (para. 5.14)

22 The abolition of the system of prescribed addresses. (para. 5.20)

23 Sub-section 19(2) be amended to provide that the 'appropriate address' be 'the address of any regional or central office listed in any current Australian telephone directory'. (para. 5.27)

24 Sub-section 19(4) be amended by the substitution of the period of 30 days for the period of 15 days. (para. 5.45)

25 The Act be amended to provide for access in the form of provision by the agency or Minister of a computer tape or disk containing a copy of the requested document. (para 6.9)

26 The Act be amended to provide for the transfer of parts of requests. (para. 7.4)

27 It be made clear, by amendment of the Act if necessary, that an agency to which an access request is transferred is not required to treat the request afresh, but rather to process only those individually identified documents which provided the basis of transfer. (para. 7.9)

28 The Act be amended to provide for the transfer of requests for the amendment of records. (para. 7.17)

29 Further, provision be made requiring the transferee agency to notify the transferor of the outcome of the transferred request. (para. 7.17)

30 Where a request for amendment is transferred, and the transferee agency makes and informs the transferor agency of a decision which results in the amendment or annotation of that record, the transferor agency must amend or annotate its record accordingly. (para. 7.19)

31 The Act be amended to permit agencies or Ministers to delete material that is irrelevant prior to granting access. (para. 7.22)

32 Further, decisions to make such deletions on the grounds of irrelevance be reviewable in the same way as decisions to refuse access. (para. 7.22)

33 The deletion from paragraph 22(1)(b) of the words 'and would not, by reason of the deletions, be misleading'. (para. 7.29)*

34 The Act be amended to permit decision-making to be delegated with respect to matters arising under sub-sections 9(4), 41(3) and 54(1). (para. 7.32)

35 Section 24 be amended to make clear that applicants' motives are not to be treated as relevant in applying the 'substantially and unreasonably' test in paragraph 24(1)(b). (para. 7.44)*

36 Section 24 be amended to prevent the aggregation of requests for the purposes of that section. (para. 7.55)*

37 Paragraph 24(1)(a) be deleted and a consequential amendment be made to paragraph 24(1)(b). (para. 7.59)

38 Sub-section 24(2) be amended to delete references to the concept of 'class' requests. (para 7.67)

39 The Act be amended to provide that, upon appeal from a refusal of access under sub-section 24(2), agencies be required to prove that the documents to which access was refused are exempt. (para. 7.70)*

40 Section 24 be amended to permit regard to be had to the resources likely to be spent in both consultation with third parties and in examining documents for exempt matter. (para. 7.75)

* Senator Stone dissents from this recommendation.

41 Before refusing requests under section 24, agencies be required to notify the applicant in writing of the intention to refuse to process the request, and to provide positive suggestions and information as to how the request may be narrowed, and identifying an agency officer with whom the applicant can consult with a view to narrowing the request. (para. 7.82)

42 The Act be amended to provide that an agency may formally respond to a request for access by stating that it has reason to believe it possesses the requested document, but is unable to locate the document having taken all reasonable steps to do so. (para. 7.87)

43 Further, the decision to respond in this manner be able to be reviewed in the same ways as are decisions to refuse access. (para. 7.87)

44 Sub-section 27(1) be amended to remove the requirement that, before engaging in reverse-FOI consultation with a business or person, an agency or Minister must decide that that business or person might reasonably wish to contend that a document is exempt under section 43. (para. 8.16)

45 Section 91 be amended so that the protection otherwise conferred by that section against actions for defamation and breach of copyright or confidence will not be lost if a required reverse-FOI consultation is omitted. (para. 8.20)

46 Further, the failure to consult should not, of itself, be sufficient to found an action against the Commonwealth or its officers. (para. 8.20)

47 Where, but for the fact that a document contains exempt matter, the reverse-FOI process would be mandatory prior to granting access, that process also be mandatory where it is proposed to grant access to an edited version of the document. (para. 8.24)

48 The clauses 'arrangements have been entered into between the Commonwealth and a State with regard to consultation under this section, and', and 'in accordance with these arrangements', be deleted from sub-section 26A(1). (para. 8.36)

49 Sub-section 26A(1) be amended to refer to consultation between the relevant Commonwealth and State Ministers and/or their authorised delegates. (para. 8.38)

50 The Act be amended to ensure that documents do not acquire any greater protection from disclosure as a result of the reverse-FOI process than other documents which are exempt from disclosure under Part IV of the Act. (para. 8.44)

51 Internal review be available to, and be required to be used by, parties consulted under reverse-FOI who wish to seek the review of decisions to grant access. (para. 8.47)

52 Further, the availability of internal review and the requirement that it is used be subject to the same qualifications as apply to internal review of decisions to refuse access. (para. 8.47)

53 The right to seek reverse-FOI review not be contingent upon the third party having been consulted, but instead rest upon the appellant being a party who/which should have been consulted under reverse-FOI. (para 8.52)

54 An agency have a duty to notify a business or State that the agency's decision is under review by the Tribunal. The duty should only arise where the agency would have had an obligation to notify the business or State under reverse-FOI had the agency proposed to grant access. (para. 8.61)

55 The Attorney-General should initiate whatever steps are required (including legislation if necessary) to ensure that a business or State that would be affected by a successful appeal against an agency's decision to deny access may defer its appearance before the Tribunal. The third party should be able to defer until the point where the Tribunal, after hearing the evidence of the agency, is still not satisfied that the document is exempt. (para. 8.61)

56 A State or business seeking review by the Administrative Appeals Tribunal of an agency's decision to grant access should not be restricted to reliance upon the section 33A or 43 (as the case may be) grounds of exemption (para. 8.67)

57 The Act be amended to place the onus of establishing that the Tribunal give a decision adverse to the applicant upon any party (whether or not an agency) that argues against allowing access. (para. 8.72)

58 The Act be amended to provide that:

(a) the Administrative Appeals Tribunal be empowered to award costs in favour of a reverse-FOI party appearing before the Tribunal to oppose the grant of access;

(b) such costs be payable by the Commonwealth but not the applicant;*

(c) costs recoverable be limited to costs relating to appearance, and not include costs relating to reverse-FOI consultations with an agency or internal review of an agency decision; and

(d) costs be awarded only where the party seeking costs was successful or substantially successful in opposing access, and its intervention was reasonable and necessary in the opinion of the Tribunal. (para. 8.77)

59 Further, where the reverse-FOI appellant fails to succeed in any of the contentions s/he advances, the Administrative Appeals Tribunal be empowered to award costs against the reverse-FOI appellant and in favour of both the applicant and the Commonwealth. (para. 8.78)

60 If the Privacy (Consequential Amendments) Bill 1986 is not enacted, that the FOI Act be amended in the manner contemplated by clause 5 of the Bill, modified by the Committee's recommendations with respect to reverse-FOI and business documents. (para. 8.86)

61 Further, where a person enters into reverse-FOI proceedings as a result of this amendment, that person possess the same capacities, rights and responsibilities as any other reverse-FOI party. (para 8.86)

* Senator Stone dissents from this recommendation.

62 Agencies make reasonable efforts to locate individuals; but that agencies should not be precluded from exercising their own judgment where they are unable to locate individuals about whom documents contain relevant personal information, or they have died. (para. 8.89)

63 A Minister be obliged to report to the Parliament within five sitting days whenever a conclusive certificate has been issued, regardless of whether the certificate has been signed by the Minister, an authorised delegate, or an officer for whose actions the Minister is accountable to the Parliament. (para. 9.11)*

64 Further, the report to Parliament should, at a minimum, identify the issuing agency or Minister, and the claim made in the certificate. (para. 9.13)*

65 The responsible Minister be required to table in each House of Parliament the notice of non-revocation of a conclusive certificate. (para. 9.16)

66 Section 58B be repealed. (para. 9.19)

67 Conclusive certificates remain in force for only two years from the date of issue. (para. 9.21)*

68 Section 33A be re-drafted so as to make it clear that any certificate issued under sub-section 33A(2) is conclusive of both the type of document and whether disclosure is in the public interest. (para. 9.31)

* Senator Stone dissents from this recommendation.

69 Sections 34 and 35 be re-drafted to clarify that the respective conclusive certificates be conclusive of both the type of documents and whether disclosure would be in the public interest. (para. 9.35)

70 The reference to the public interest in sub-section 33(1) be deleted, and the appropriate consequential amendment be made to sub-section 33(2). (para. 9.47)

71 Section 44 be amended so as to introduce into section 44 a public interest test of the same type as is contained in sub-section 39(2). (para. 9.49)

72 Where a ministerial council formally so requests, exemption be conferred upon that council by inclusion within Schedule 2 of the Act. (para. 10.18)

73 (i) The more specific, and arguably narrower, public interest test of whether the disclosure of the document would, 'on balance, be in the public interest' be adopted in section 36; (ii) the public interest test be imposed by a discrete sub-section (along the lines of the section 39 public interest test); and (iii) a conclusive certificate issued under section 36 be conclusive of both the type of the document (under sub-section 36(1)) and the balance of the public interest. (para. 11.26)

74 'Crime intelligence agencies' be specifically identified by express inclusion in Schedule 2 of the FOI Act, and that documents that have originated with, or have been received from, such specified 'crime intelligence agencies' be brought within the protection of sub-section 7(2A). (para. 12.25)

75 There be an exhaustive list of secrecy provisions, and that that list of secrecy provisions be contained in a schedule to the FOI Act rather than in regulations. (para. 12.31)

76 Repeal of paragraph 40(1)(d). (para. 12.47)*

77 Courts and the Administrative Appeals Tribunal (but not agencies) be empowered to release material which would be otherwise exempt under section 41, or sub-paragraph 43(1)(c)(i), in reliance upon specific undertakings as to how the documents and the information contained in these documents will be used. (para. 13.21)

78 Where internal review is available, this be a condition precedent to such review in the Administrative Appeals Tribunal of a decision under sub-section 41(3). (para. 13.23)

79 Agencies consult with the authors of medical or psychiatric reports before deciding whether to disclose these reports to the subject/applicant either directly or indirectly under sub-section 41(3). (para. 13.32)

80 Sub-section 41(3) be amended to extend the category of information to which indirect access may be granted to include para-medical reports by psychologists, marriage guidance counsellors, and social workers. (para. 13.40)

81 Further, this extension be confined to professionally-trained and registered para-medicals whose training and vocation necessarily involves providing care for people's physical and mental health and well-being. (para. 13.40)

* Senator Stone dissents from this recommendation.

82 Agencies consult with the authors of such para-medical reports before deciding whether to release these reports to the same extent as they consult with the authors of 'medical or psychiatric' reports. (para. 13.41)

83 The Act be amended to make clear that 'professional affairs' relates to the running of a professional practice, not the status of an individual as a member of a profession. (para. 14.23)

84 The Act be amended to ensure that, for agencies engaged in commercial activities, exemption is available for documents relating to non-competitive aspects of those activities where disclosure would be likely to affect adversely the future commercial interests of the agency. (para. 14.27)

85 Sub-section 45(1) be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence. (para. 14.34)

86 Provision for the amendment of records containing personal information be transferred from the FOI Act to comprehensive privacy legislation, should the latter be enacted. (para. 15.7)

87 In the absence of comprehensive privacy legislation, Part V of the Act continue to provide for review of agency decisions to refuse to make requested corrections to records, but that guidelines be inserted into Part V better to define the circumstances in which such review will be available. (para. 15.47)

88 Part V be amended to provide for two distinct types of request for amendment of a record - one for correction, and the other for notation. (para. 15.53)

89 Further, requests for notation be refused only if they are unnecessarily voluminous, irrelevant, defamatory etc., but not solely because the agency disagrees with the accuracy of the proposed notation. (para. 15.53)

90 Further, the repeal of the right to require notation notwithstanding an adverse decision upon review. (para. 15.53)

91 The Act be re-drafted so that review rights under Part V are set out in a form readily intelligible to the layperson. (para. 15.59)

92 Section 48 be amended by omitting the words 'provided to the claimant under this Act' and substituting 'lawfully provided to the claimant, whether under this Act or otherwise'. (para. 15.62)

93 Part V not be constrained by any narrow interpretation given to the phrase 'personal affairs' in the context of section 41. (para. 15.70)

94 Sub-section 49(2) be amended to specify in greater detail the information which a request for amendment must contain. (para. 15.77)

95 In addition to the present exemptions, the fee for internal review not be payable by third-parties seeking internal review to protect 'their' documents in the reverse-FOI context. (para. 16.6)

96 The Act be amended so as to require that requests for internal review be addressed with no greater specificity than is the case in respect of requests for access. (para. 16.8)

97 The time limit for requesting internal review take into account a 15 day period for the payment of charges, plus any period during which the decision to charge may be under review or appeal, and any delay by the agency in providing access. (para. 16.12)

98 The time for internal review be extended to 30 days. (para. 16.19)

99 FOI publicity and training material emphasise the role of the Ombudsman as a means of resolving disputes relating to FOI. (para. 17.9)

100 Steps be taken to ensure that information with respect to rights of review, supplied with reasons for decisions pursuant to section 26, is sufficiently comprehensive to enable an informed choice to be made between applications to the Tribunal and complaints to the Ombudsman. (para. 17.9)

101 Sub-section 52B(2) of the FOI Act be amended to remove the now redundant reference to sub-section 6(3) of the Ombudsman Act. (para. 17.14)

102 The Act be amended to make clear that it does not confer jurisdiction upon the Ombudsman with respect to bodies that are not 'prescribed authorities' for the purposes of the Ombudsman Act. (para. 17.17)

103 Section 52F be repealed. (para. 17.24)

104 Section 52D be repealed, and the Ombudsman have no special role as monitor and rapporteur of the operation of the FOI Act. (para. 17.33)

105 Section 52C be repealed. (para. 17.36)

106 Provision for complaint to the Ombudsman be integrated into Part VI of the FOI Act. (para. 17.38)

107 Section 58C be amended to require a private hearing and/or restrictions imposed upon the publication of documents lodged with or received in evidence by the Administrative Appeals Tribunal or submissions made to it, only to the extent that the agency concerned so requests. (para. 18.7)

108 Section 64 be amended to give the Tribunal the power to oblige agencies to produce documents at any stage of proceedings. (para 18.18)

109 The Administrative Appeals Tribunal be able to award costs against both the Commonwealth and applicants; but that the Tribunal not be able to award costs against an applicant unless: (a) the agency had sought an order at the earliest phase of the proceedings, that is, at the directions hearing/preliminary conference stage; and (b) at such a directions hearing/preliminary conference, the agency satisfies the Tribunal

that there is no merit to the applicant's case;+ and (c) the Tribunal at that directions hearing/preliminary conference decides that the applicant should be exposed to the risk that costs may be awarded against her/him at the conclusion of the Tribunal proceedings. (para. 18.54)

110 The Tribunal be empowered to order that applicants lodge security for costs at the earliest (directions hearing/preliminary conference) phase of proceedings. (para. 18.55)

111 Further, if, at this directions hearing/ preliminary conference stage, the Administrative Appeals Tribunal finds that the applicant's case is not without merit (ie. that the application is neither vexatious nor frivolous), there be no possibility of any award of costs being made against the applicant should the application proceed. (para. 18.56)*

112 The $30 application fee be reduced to $15. (para. 19.23)*

113 There be an upper limit upon the amount of time for search and retrieval which may be chargeable in respect of any one request. (para. 19.27)

+ Senator Stone dissents from clause (b) of recommendation 109.

* Senator Stone dissents from this recommendation.

114 There be an upper limit upon the amount of decision-making time which may be chargeable in respect of any one request. (para. 19.32)

115 The Part V interpretation of 'personal affairs' be applied for the purpose of determining whether a document is a personal document for the purposes of the charging regime. (para. 19.46)

116 The maximum charge for a request for access to (i) personal documents, be application fee plus a 2 hour search/retrieval time-fee plus a 2 hour decision-making time-fee; and (ii) other types of documents, be application fee plus a 15 hour search/retrieval time-fee plus a 15 hour decision-making time-fee. (para. 19.51)

117 Further, the fact that the cost of processing a request exceeds the maximum charges not be a relevant factor for the purposes of the section 24 workload test. (para. 19.52)

118 The grounds for remission be altered so as to make it clear that the fact that documents relate to the applicant's personal affairs is not of itself sufficient reason for granting a remission automatically. (para. 19.62)

119 The wider sub-section 30(3) formula apply also to section 30A remission of application fees. (para. 19.69)

120 The section 29 and section 30 decisions be consolidated. (para. 19.89)

121 The fee for lodging applications for review of FOI decisions with the Administrative Appeals Tribunal be less than that for filing documents to commence proceedings with the Federal Court. (para. 20.14)

122 A fee of $120 be payable for lodging with the Administrative Appeals Tribunal applications for review of FOI decisions. (para. 20.15)*

123 Further, the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal be empowered to waive the payment of filing fees on the same general criteria as is the Registrar of the Federal Court, inter alia, where payment of the fee 'would impose substantial hardship' upon the applicant. (para. 20.17)

124 Regulation 20 of the Administrative Appeals Tribunal Regulations be amended to replace the phrase 'proceeding terminates in a manner favourable to the applicant' with the same test as is applied in respect of the award of costs: where the applicant is 'successful or substantially successful' in the application for review. (para. 20.26)

125 The Administrative Appeals Tribunal (Amendment) Regulations 1987 be amended to also empower the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal to refund to the applicant the prescribed filing fee paid for the lodgment with the Tribunal of an application for review of an FOI decision where her/his application is withdrawn before the dispute is heard by the Tribunal. (para. 20.32)

* Senator Stone dissents from this recommendation.

126 Agencies not have regard to the motives of access-seekers for statistical or any other purposes. (para. 21.9)*

* Senator Stone endorses this recommendation only insofar as it precludes consideration of motives for statistical purposes.

CHAPTER 1

INTRODUCTION

Terms of reference

1.1 On 29 November 1985, the Senate resolved:

> That the following matter be referred to the Senate Standing Committee on Constitutional and Legal Affairs: the operation and administration of the Freedom of Information legislation.

1.2 Both the reference and the Committee lapsed with the dissolution of the Parliament on 5 June 1987.

1.3 On 22 September 1987, the Senate appointed the Legal and Constitutional Affairs Committee, and referred to the Committee the review of the operation and administration of the Freedom of Information legislation.

Background to inquiry

1.4 The Freedom of Information Act 1982 had a long gestation period. The Act had its origins in a 1972 policy commitment of the Australian Labor Party. The proposal for such an Act was examined by several bodies in the 1970's,[1] and in 1978 the Liberal Government introduced a Freedom of Information Bill. The Bill was referred to the Committee's Parliamentary predecessor, the Standing Committee on Constitutional and Legal Affairs, and was the subject of a detailed inquiry. The Committee reported on 6 November 1979.

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1. See FOI Annual Report 1982-83, pp. 14-24 for details.

1.5 In that report, the Committee examined the concept of freedom of information, and its implications for the Westminster style of Government. The Committee also examined the clauses of the proposed legislation. However, the Committee recognised that a theoretical analysis of the freedom of information legislation might be inadequate to quell the concerns about the impact of this legislation.

1.6 One of the recommendations of the 1979 Report was that operation of the freedom of information legislation should be the subject of a review three years after its proclamation.[2] Together with many of the Committee's other recommendations, this was accepted by the Government.[3]

1.7 A revised Bill, incorporating the accepted recommendations, was introduced into the Senate on 2 April 1981. The Bill was subjected to extensive amendment by the Senate. The amendments gave effect to a number of the Committee's 1979 recommendations which had not been accepted by the Government. The Bill was assented to on 9 March 1982 and came into operation on 1 December 1982.

1.8 The ALP Government, elected in 1983, had a commitment to expand the scope of FOI. The Government introduced a Bill to amend the Act into the Senate on 2 June 1983. The Bill gave effect to a number of the Committee's 1979 recommendations which had not been incorporated in the 1982 Act. During passage of the 1983 Bill, an amendment was successfully moved to provide for an enhanced role for the Ombudsman in dealing with complaints relating to FOI. The Freedom of Information Amendment Act 1983 commenced operation on 1 January 1984. The Government also accepted that there should be a review by the Constitutional and Legal Affairs (now Legal and Constitutional Affairs) Committee.[4]

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2. 1979 Report, para. 32.21.
3. Senate, Hansard, 11 September 1980, pp. 797-806.
4. Senate, Hansard, 7 October 1983, p. 1335.

1.9 The Freedom of Information (Charges) Regulations (Amendment) took effect on 1 July 1985. These Regulations significantly raised the charges to FOI access-requesters. The Regulations were disallowed by the Senate on 13 November 1985, with the result that the original charges Regulations revived.

1.10 Miscellaneous amendments of a minor nature were made to the FOI Act in 1984, 1985, and 1986. More significant amendments to both the Act and charges Regulations were announced as part of the 1986 Budget. The purpose of the resulting Freedom of Information Laws Amendment Bill 1986 was 'to reduce administrative costs and increase revenues'.[5] Amendments were successfully moved in the Senate to delete some of the clauses of the Bill not directly concerned with revenue. The Bill, as amended, received assent on 4 November 1986, and commenced operation on 18 November 1986.

Conduct of the inquiry

1.11 Advertisements were placed in the major national newspapers seeking submissions from interested persons. Letters were written to various individuals and organisations known to have an interest in the freedom of information legislation, such as the councils for civil liberties, academics, journalists, public interest groups, etc.

1.12 Despite written invitations, followed up by telephone solicitation, no civil liberties organisation volunteered any comments upon the operation of Freedom of Information legislation. Only two submissions were received from public interest organisations - a joint submission from the Australian

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5. Senate, Hansard, 25 September 1986, p. 803 (2nd Reading Speech).

Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group and the Welfare Rights Centre (Sydney), and a late submission from Australians for Animals.

1.13 In addition, the Committee noted that submissions from Commonwealth agencies were cleared by the Attorney-General's Department before being submitted to the Committee. The Committee was advised that 'the basis for clearance [was] factual accuracy and consistency with general Government policy'.[6] In the absence of the original submissions, the Committee is unable to comment upon this. However, the Committee noted some uniformity in the views advanced in the submissions received from Government agencies.

1.14 The Committee received 120 written submissions, of which nearly half were from agencies and Ministers. The list of individuals, organisations and agencies making submissions to the Committee is attached as Appendix I to this report.

1.15 It should be noted that, with few exceptions, these submissions were received before the 1986 amendments were proposed.

Public hearings

1.16 The Committee held six public hearings: one in Sydney; two in Melbourne; and three in Canberra. A total of 65 witnesses appeared on behalf of 31 individuals and organisations. This list of witnesses is attached as Appendix II to this report.

Unreliable statistics on costs

1.17 The Attorney-General's Department publishes an annual report on the operation of the Freedom of Information Act 1982.

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6. Letter to the secretary of the Committee from the Attorney-General's Department, dated 25 February 1986.

As is noted at various points in this report, some of the figures contained in these annual reports appear to conflict with the costs as reported by agencies.

1.18 On 20 February 1986 the Government established an inter-departmental committee, comprising representatives of the Attorney-General's Department (Chair), the Departments of Prime Minister and Cabinet, Finance, Social Security, Defence, Special Minister of State, and Industry, Technology and Commerce, and of the Commissioner of Taxation. The brief of the inter-departmental committee (the IDC) was to 'review costs and workload associated with the administration of the FOI Act' and to 'recommend improvements in administration'.[7]

1.19 A copy of the IDC Report was provided to the Committee on 15 October 1986.

Scope of inquiry

1.20 The 1979 Report contained an extensive analysis of the philosophical and political foundations of the concept of freedom of information. The wording of the terms of reference, and the history of the proposal for a review of the freedom of information legislation after three years operating experience, suggests that this inquiry should be concerned to fine-tune the FOI Act, rather than to re-examine the philosophical foundations of freedom of information.

1.21 Consequently, this inquiry has focused upon the practical administration and operation of the freedom of information legislation. The IDC was required to focus on the costs of FOI. This inquiry has adopted a broader focus. Costs and possible ways of reducing costs have been considered as an important but not dominant element within this broader focus.

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7. IDC Report, p. 8.

Archives Act 1983

1.22 The Committee has interpreted its terms of reference as requiring it to examine only the operation and administration of the Freedom of Information Act 1982, and subsequent amendments. Consequently, the Committee has not examined the operation of the Archives Act 1983.[8]

1.23 However, the Committee is conscious that the Archives Act is intended to complement the FOI Act, and some provisions are common to both Acts. Some of the recommendations contained in this report will, if implemented, undermine the congruence between these two Acts. A list of the relevant pairs of provisions is annexed as Appendix III.

1.24 The Committee is of the view that, at least from this aspect of congruence, the operation and administration of the Archives Act should be reviewed after the Government has responded to this report.

1.25 **The Committee recommends that, after the Government has responded to this report, the operation and administration of the Archives Act 1983 be reviewed by either the Senate or the House of Representatives Standing Committee on Legal and Constitutional Affairs from the viewpoint of congruence between the two Acts.**[9]

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8. 1979 Report, para. 34.30 recommended that the Archives Bill (as it then was) should be reviewed by a parliamentary committee after it had been in operation for three years.

9. In making this recommendation, the Committee is conscious that the Prime Minister foreshadowed a review of the Archives Act for 1987 - House of Representatives, Hansard, 22 May 1985, p. 2889.

Theme of report

1.26 The Committee remains committed to the concept of freedom of information. The position taken in the 1979 Report is reiterated in this report. Once again the object of the report has been

> to ensure that a maximum amount of information is made publicly available, and that the barest minimum of restriction is placed on the public disclosure of such information.[10]

1.27 Both agencies subject to the FOI Act and freedom of information users noted the complexity of the legislation. In the view of the Library Association of Australia, the Act is 'overly legalistic and not understandable by ordinary citizens'.[11] In the final paragraph of its submission, the Department of Territories commented:

> It would, however, appear to be against the spirit of the Act itself if its administration is clouded by the complexities of judgments and precedents that would be virtually unfathomable to the layman who would be competing against full resources of an agency which wishes to withhold documents. It would also be unfortunate if the administration of the Act becomes too burdensome in many instances for the general administrative staff of any agency and has therefore to be handed over to officers with appropriate legal qualifications.[12]

1.28 The Committee does not suggest that the entire Act is 'unfathomable' to laypeople (nor did the Department of Territories). However, some sections of the Act - such as section 51 which provides for the review of requests for amendment - are unlikely to be readily understood by laypeople.

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10. 1979 Report, para. 3.7.
11. Submission from the Library Association of Australia, p. 4.
12. Submission from the Department of Territories, p. 20.

Consequently, the Committee has attempted to identify and, where possible, recommend some means of simplifying excessively complex provisions in the Act.

1.29 As was noted previously, the FOI Act was amended in 1986. The FOI Act has not since been reprinted. Implementation of many of the recommendations which the Committee makes in this report will also require legislative action. In the Committee's view, it is desirable that the FOI Act should be reprinted after these amendments have been made.

1.30 Accordingly, **the Committee recommends that as soon as amendments have been determined and enacted, the FOI Act be reprinted.**

CHAPTER 2

OVERVIEW OF THE FREEDOM OF INFORMATION ACT

Context of the FOI Act

2.1 The Freedom of Information Act 1982 was the last of four enactments collectively described as constituting the 'new administrative law'. Dr John Griffiths described these enactments as being

> designed to regulate the relationship between government and individuals and to reconcile the potential conflict of interests between providing efficient and effective public administration and safeguarding rights of individual justice.[1]

2.2 At the time of writing, only one of the four enactments, the Ombudsman Act 1976, is not the subject of formal reassessment. The Administrative Decisions (Judicial Review) Act 1977 is under review by the Administrative Review Council; and the operation of the Tribunal created by the Administrative Appeals Tribunal Act 1975 is under review by the Attorney-General's Department.

2.3 The last of these reviews, like the 1986 amendments to the FOI Act, is part of what the Attorney-General's Department described as 'an important package of [1986] budget related

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1. Griffiths, J., 'Australian Administrative Law: Institutions, Reforms and Impact', (1985) 63 Public Administration 445, p. 446.

initiatives'.[2] According to the Department, these initiatives were designed, inter alia, to rationalise the availability and use of the various avenues of review and access to information.[3]

2.4 The Committee recognises that the FOI Act forms a (fourth) part of a wider administrative law scheme. In writing this report, the Committee has borne in mind this context and, where appropriate, referred to the relationship between the FOI Act and other elements of the administrative law scheme.

Attitude towards the FOI Act

2.5 The inquiry revealed that there is widespread support for the FOI Act, and little criticism of its object to make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government accountability and public participation in the process of government. However, there is some lack of agreement over the degree to which this object has been achieved. This controversy is exacerbated by the lack of agreement as to the extent to which information in the possession of the Government about its operations should, in principle, be made available to the community at large.

2.6 Only one submission, from the Queensland Government, recommended the repeal of the Act.[4] The remaining submissions and witnesses expressed varying degrees of support for the Act, although many had reservations about the wording of particular sections, and/or their application in particular circumstances.

2.7 Nothing which emerged during the Committee's inquiry caused it to doubt the overall value of the FOI Act. However,

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2. Submission (dated 13 August 1987) to the Committee from the Attorney-General's Department on the Committee's inquiry into the Administrative Decisions (Judicial Review) Amendment Bill 1986, p. 2.
3. Ibid., p. 1.
4. Submission from the Queensland Government, p. 1.

there are particular problems affecting the operation and administration of the Act. There is scope for improvement. The discussion of both the problems and possible improvements forms the major part of this report.

2.8 In writing this report, the Committee is conscious of the absence of any simple, empirical means to assess the degree to which the FOI Act's object has been achieved, and of the dangers inherent in relying upon anecdotal reports about the operation of the legislation. The Committee wishes to emphasise that it is firmly of the view that the operation of the FOI Act has proven to be a net benefit to the Australian community. In the Committee's view, much information has been released as a result of the FOI Act which would otherwise never have reached the public.

2.9 The success or otherwise of the FOI Act should not be viewed as exclusively dependent upon the contents of documents released under the Act. The mere existence of the legislation may have influenced agency attitudes towards 'governmental secrecy'. In addition, Mr Jack Waterford, a Canberra journalist with extensive experience in using the FOI Act, made the following point:

> Often, when I have obtained documents under FOI, I have found little in the documents themselves to justify a story, but have learnt a lot about the way a department works either from what the document contains, or from the process of trying to extract it.[5]

2.10 To some extent at least, the operation of the FOI Act depends upon agency attitudes towards disclosure of 'government' information. These have varied greatly. Mr Peter Timmins, Managing Director of the Political Reference Service Ltd, had this to say:

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5. Waterford, J., 'Reporting the Public Service', (1986) 13 Canberra Bulletin of Public Administration 102, p. 105.

> Attitude is what it is all about. But I would suggest that a positive attitude towards more open government has been very difficult to detect at the political level and at the senior public service level over the last couple of years.[6]

2.11 Ms Kate Harrison, representing the Public Interest Advocacy Centre at the Committee's hearings, also referred to the importance of agency attitudes, and said there was still 'an unhealthy level of disclosure phobia among bureaucrats'.[7] She suggested that 70% of the problems arising out of the operation of the FOI Act were attitudinal, rather than products of legislative defects.[8]

2.12 The Committee noted a wide range of attitudes towards freedom of information in the submissions and witnesses from the agencies. Some agencies, such as the Department of Veterans' Affairs, have embraced freedom of information enthusiastically. Mr Derek Volker, Secretary of the Department of Veterans' Affairs at the time of the Committee's third public hearing, described the FOI Act as being 'a bonus for the Department'. According to Mr Volker, the increased openness implied by the FOI Act had ameliorated many of the difficulties which the Department faced in its day to day operations.[9]

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6. Evidence, p. 998.
7. Evidence, p. 913.
8. Evidence, p. 945. For other examples of criticism of agency attitudes see Evidence, pp. 260-62, 296 ('The Age'), pp. 314-15 (Mr R. Howells), pp. 367-69 (Law Institute of Victoria), p. 446 (Confederation of Australian Industry); submission from the Privacy Committee (NSW), pp. 5-6.
9. Evidence, p. 596; see generally pp. 594-98. See also the submission from the Returned Services League of Australia, p. 1.

2.13 To some extent, this positive response may be attributable to two factors: a pre-FOI Act discretionary access policy;[10] and the absence of reliance upon non-Commonwealth sources for information.

2.14 According to several agencies, some State bodies are refusing to co-operate, or have threatened to withdraw their co-operation, if information which is provided by the State body to the Commonwealth is released under the FOI Act.[11] One agency provided the Committee with information suggesting that bodies in at least three States have threatened to withdraw their co-operation as a result of the disclosure of documents under the FOI Act.[12] At least one Ministerial Council does not keep a transcript of its proceedings, due to concern that the transcript will be released under the FOI Act.[13]

2.15 In the Committee's view, there being freedom of information legislation throughout the Commonwealth would be advantageous.

2.16 The Department of Foreign Affairs reported that it had not noticed any reluctance amongst foreign governments to deal with Australia as a result of the FOI Act.[14] Overseas law enforcement agencies have expressed concern about the effect of the FOI Act upon information supplied by them, but it does not

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10. Submission from the Department of Veterans' Affairs, para. 8 (Evidence, p. 563).
11. E.g. Evidence, p. 739 (Department of Immigration and Ethnic Affairs), pp. 1275ff. (Department of Health); submissions from the Department of Health, p. 12 (Evidence, p. 1232); the Department of Local Government and Administrative Services, p. 10; the Great Barrier Reef Marine Park Authority, p. 1; the Department of Arts, Heritage and Environment, p. 3. See also the evidence referred to in Re State of Queensland and Australian National Parks and Wildlife Service (1986) 5 AAR 328, p. 335.
12. Confidential letter to the Committee.
13. Submission from the Queensland Government, p. 5, referring to a resolution of the Ministerial Council on Drug Strategy, Canberra, 18 October 1985. See also Evidence, p. 1272 (Department of Health).
14. Submission from the Department of Foreign Affairs, p. 17 (Evidence, p. 1072).

appear that this has led to any reduction in the supply of information to the Australian Federal Police.[15]

2.17 However, the Department of Immigration and Ethnic Affairs told the Committee that, as a result of the FOI Act, at least one overseas agency has declined to supply information; and some overseas agencies will supply information only indirectly (e.g. via an exempt agency such as ASIO), whilst others have advised the Department that they will cease to supply information if any documents supplied are released under the FOI Act.[16]

2.18 The attitude of the business sector towards the FOI Act is mixed. The Act provides a means to obtain commercially useful information; but businesses also fear that commercially sensitive information relating to them may be released under the FOI Act.[17] Businesses appear to have felt the need to evaluate the information that they provide to Government in the light of the FOI Act.[18] However, on the evidence available to the Committee, it is not clear whether the FOI Act has reduced the flow of information to the Government from the business sector. If there has been any reduction, it does not appear to have been of major significance.[19]

2.19 Individuals have reacted adversely to the introduction of the FOI Act in some circumstances. For example, the Public Service Board informed the Committee:

> It is the perception of the Board that many referee reports are significantly less candid

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15. Evidence, pp. 488-89.
16. Evidence, pp. 736-40.
17. E.g. Evidence, p. 453 (Confederation of Australian Industry), pp. 794-95 (Business Council of Australia); submission from the Australian Patent, Trade Marks and Design Offices, p. 19.
18. E.g. Evidence, p. 826 (CRA Ltd); submission from the Department of Trade, pp. 2-3.
19. E.g. Evidence, pp. 137-38 (Attorney-General's Department); p. 635 (Treasury); pp. 825-26 (CRA Ltd); pp. 1032-33 (Australian Broadcasting Tribunal).

than previously. There is also a reluctance to provide reports in some instances.[20]

2.20 Similarly, the Department of Health stated that the FOI Act had led to a discernible reluctance on the part of medical practitioners to provide medical reports, or, where they do provide such reports, a tendency to provide reports with little detail.[21]

Benefits and costs of FOI - an overview

2.21 Much of the public debate about and criticism of the operation of the freedom of information legislation has focused upon the costs ascribed to it. However, many of the costs which are attached to the operation of the FOI Act would have been incurred even in the absence of the legislation.

Disclosure of 'Government' information

2.22 The introduction of the FOI Act formed part of a trend towards increasing openness in government. In turn, the Act has had an impact upon that trend. Some of the material released under the FOI Act would have been released even in the absence of the legislation. The Committee has no method of determining what proportion of FOI access requests are for such material. But the proportion, at least in the area of applicants seeking access to personal or personnel files, would appear to be high.

2.23 It is not possible to determine what access any particular agency would have allowed had the Act not been passed. Nevertheless, the cost of freedom of information would be dramatically reduced if it were to be discounted to allow for the

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20. Submission, p. 5. See also the submissions from the Department of Foreign Affairs, p. 14 (Evidence, p. 1069); the Department of Defence, p. 18.
21. Submission, p. 15 (Evidence, p. 1235). But see also Evidence, pp. 1288-89 (Department of Health).

fact that access to a significant proportion of freedom of information material would have been disclosed even in the absence of any freedom of information legislation. There is no way of estimating what should be the discount factor.

2.24 A further complication is introduced by the need to balance the value of access as a right under the FOI Act against whatever degree of access would have been allowed as a matter of discretion otherwise. For these reasons, the Committee cannot recommend that the total cost of FOI should be formally discounted by any particular amount. However, any discussion of FOI costs should be influenced by the fact that some discounting is appropriate.

2.25 In addition, the validity of the figures contained in the FOI Annual Reports for the average cost per request of allowing access is undermined by the possibility that agencies may disclose material outside of the FOI Act. At the extremes, agencies may adopt either of two approaches to granting access.

2.26 One approach may be to attempt to encourage potential FOI applicants to seek informal access outside the Act wherever possible on the basis that informal access is cheaper and more satisfactory for agencies and applicants alike. If agencies are successful in this strategy, only the most difficult cases may result in the lodgement of a formal FOI access request.

2.27 The net result may be that there would be only a small number of formal FOI requests and a low total cost of FOI. However, the average cost per FOI request will be high, both because the requests processed would be the difficult ones, and because the agency overheads of FOI (e.g. publication requirements, staff training) are spread over a relatively small number of requests. The refusal rate and average time taken to provide access would also be relatively high, because only difficult requests would enter the FOI system.

2.28 At the other extreme, agencies may discourage or refuse informal access, and channel all information seekers into making formal FOI requests. The net result would be a large number of FOI requests and a high total cost of FOI. But the average cost per FOI request would be relatively low, because many of the requests would be straightforward to process and because overheads would be spread over a larger number of requests. The refusal rate and average time taken to provide access would be relatively low because most of the requests entering the system would be straightforward.

2.29 Agencies might adopt either of these strategies (or some intermediate strategy) consistently with the overall objects of the FOI Act. For example, the Department of Veterans' Affairs appears to encourage the use of formal FOI requests for access. For agencies like this, which are faced with large numbers of applicants seeking access to their personal files, no doubt it is administratively simpler, and cheaper, to process all requests through the single (FOI) channel.

2.30 On the other hand, the Department of Education informed the Committee that the Department

> decided when the Act was introduced that, where possible, it would not force information seekers to use FOI. Thus its student assistance clients and its own staff continued to be given wide access to their files outside the Act. This made access quicker for the requester and cheaper administratively for the Department. By adopting this practice Education may have been disadvantaged. The Department has less staff than needed because its 'statistics' are not high. Yet the majority of requests processed under the Act are qualitatively more difficult than those which relate to a person's file. That is, a request, for example, for 'the reasons why X school received Government funding' is treated

> statistically the same as a request for an interview report for a clerical assistant grade 2 position.
>
> Moreover, the likelihood exists that requests for documents of some policy complexity may involve refusal at least in part. Because Education's open access policy does not provide many straight forward requests it cannot leaven the number of refusals by granting access under the Act to students' files etc. Thus the refusal rate is relatively high and gains the Department unwarranted criticism.[22]

2.31 The Committee has no evidence to suggest that agencies adopt a particular strategy on access to information with a view to influencing the total cost of FOI. However, strategies adopted on other grounds do have the effect of either increasing or decreasing the FOI component in the overall cost of information provision by the Commonwealth. This is yet another reason for treating with caution the significance of the figure for the total cost of FOI.

2.32 Submissions from a few FOI users criticised particular agencies, or suggested that the Committee should investigate the processing of FOI requests by particular agencies. In some cases, the submissions relied upon high averages for the cost of processing requests or the time to process requests. For the reasons given above,[23] the Committee does not consider that these averages should be used in any simple way to identify agencies as being inefficient or not acting in accordance with the objects of the FOI Act.

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22. Submission from the Department of Education, pp. 1-2.
23. See also the first supplementary submission of the Attorney-General's Department, pp. 7-8, for examples of the ways in which misdirected requests and transferred requests can distort the statistical picture of an individual agency's FOI performance.

Benefits

2.33 In the Committee's view, it is neither reasonable nor realistic to examine the costs of the freedom of information legislation without simultaneously considering the benefits which have flowed from the legislation.

2.34 As part of the Attorney-General's Department data collection for the 1985-86 FOI Annual Report, agencies were asked to indicate whether they had experienced particular benefits arising from FOI during the year. The range of acknowledged benefits was indicated by the following replies:[24]

Particular Benefit	Number of Agencies
. Greater awareness of the need for objectivity and accountability in dealing with the public	46
. Improved quality of decision-making	38
. Improved communications and understanding between the agency and clients	33
. Improved efficiency of records management	27
. Greater public awareness of the role of the agency	25
. Other (greater awareness of rights of access among staff)	1

2.35 Agency submissions to the Committee presented a similar picture.

2.36 In general, public awareness of how agencies operate has been to their benefit and, in some cases, has improved their public images. Many agencies have become more open about their

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24. FOI Annual Report 1985-86, p. 293. The Report also included a table of 'detriments' - see p. 293-94. These detriments are considered below in the discussion of costs.

operations and procedures as a result of the FOI Act, even where much of the additional information is provided outside the Act.[25] For example, the Australian Taxation Office informed the Committee:

> Perhaps the greatest benefit flowing from the impact of the FOI legislation on the operations of the Australian Taxation Office has been the introduction of the taxation ruling system. The benefits of this system have accrued to taxpayers and their advisers, to commercial publishing houses and to Taxation Office personnel ... [It] has led to greater efficiencies in the Taxation Office and has provided the office with a better public image.[26]

2.37 The benefit to the taxpayer of an agency avoiding even a single poor decision may be large in relation to the overall costs of FOI. This is illustrated by the events which led the Department of Defence to abandon its proposal to acquire land in the Bathurst-Orange region for army training purposes in April 1986.

2.38 The proposal was strongly opposed by local residents and was the subject of an inquiry by the Senate Standing Committee on Foreign Affairs and Defence. The report of that Committee noted:

> Throughout the inquiry, material obtained from the Department under the Freedom of Information (FOI) Act by interest groups

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25. Some agencies, however, moved to a more open approach independently of FOI: e.g. submission from the Department of Resources and Energy, p. 3.

26. Submission from the Australian Taxation Office, pp. 1-2. (Evidence, pp. 651-52) For other examples, see the submissions from the Department of Housing & Construction, pp. 4-5; the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre (Sydney), p. 18 (Evidence, p. 867); the Australian Broadcasting Tribunal, pp. 2-3 (Evidence, p. 1011-12); the Department of Education, p. 1; the Department of Health, p. 7 (Evidence, p. 1227); the Department of Community Services, p. 4.

> opposing the proposals repeatedly contradicted or undermined evidence presented to the Committee by Departmental witnesses.[27]

2.39 The material obtained under the FOI Act showed that the proposed acquisition would not have met the Army's requirements. Further, the material showed that the Department of Defence should have abandoned the proposed acquisition at a much earlier stage. Its failure to do so reflected poorly upon its management of the proposal.[28] It is a reasonable inference that the proposal might have gone ahead if groups opposing it had not gained access, through FOI, to documents with which to convincingly demonstrate the proposal's inadequacy. It is impossible to calculate reliably the loss to the Commonwealth had the proposal not been abandoned. With this campaign in mind, one submission commented:

> It is not unlikely ... that FOI pays for itself many times over, in that it prevents wrong decisions being made by agencies ...[29]

2.40 In its submission, 'The Age' identified some of the news stories which it had published based upon material obtained under the FOI Act. 'The Age' noted that

> the mere existence of FOI can lead to Government disclosing information to journalists and members of the public without the need for formal requests.
>
> FOI provides considerable benefits to journalists and their readers by supplying new information of sometimes higher quality or greater detail than previously available. But it is impossible to quantify these benefits.[30]

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27. Land Acquisition in New South Wales by the Australian Army - First Report, (Parliamentary Paper No. 180/1986) p. xviii.
28. Ibid., p. xxiii.
29. Submission from Dr A. Ardagh, p. 3.
30. Submission from 'The Age', Appendix 1, p. 1 (Evidence, p. 235).

2.41 To the end of June 1987 over 125,000 requests had been made under the FOI Act.[31] Measured by volume of requests, the FOI Act has been primarily used by individuals to obtain access to information about themselves. The Committee knows of no way to assess the benefits accruing to these individuals from the operation of the FOI Act.[32]

2.42 The reasons for lodging freedom of information requests indicate some of the benefits which applicants see as flowing from the FOI Act. A Department of Veterans' Affairs survey of its clients conducted in 1984 showed that

> while curiosity was undoubtedly a factor in prompting 21% of applicants to seek access to records concerning them, the significant reason for use of the Act for 69% of applicants was to seek information which would assist with a claim or appeal under the Repatriation Act. A further 12% made their FOI requests in order to obtain more information about their dealings with the Department and these could well also be leading to claims or applications for review of pension decisions.[33]

2.43 A number of agencies informed the Committee that it is not uncommon for FOI access requests to be dropped after applicants have been informed that (usually modest) charges are payable.[34] The Committee recognises that some applicants may

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31. Because the number of section 15 requests made in 1986-87 was not recorded, an exact total cannot be given: FOI Annual Report 1986-87, p. 7.
32. Cf. submissions from the Department of Treasury, p. 7 (Evidence, p. 621); the Department of Finance, p. 4 (Evidence, p. 1181).
33. Submission from the Department of Veterans' Affairs, para. 26 (Evidence, p. 566). Respondents were allowed to specify more than one reason, so the figures do not total 100%.
34. E.g. submissions from the Australian Wool Corporation, p. 6; the Department of the Treasury, p. 9 (Evidence, p. 623); Telecom Australia, p. 5 (Evidence, p. 753); the Department of Trade, p. 6; the Department of Finance, p. 2 (Evidence, p. 1179).

attach only a negligible value to the documents which they seek where no charges are payable. However, the Committee has no reason to believe that this is true in the majority of cases.[35]

2.44 In addition, the Committee notes that, while much of the information now provided under the FOI Act was made available prior to the introduction of the FOI Act, pre-FOI Act disclosure policies were frequently imprecise and inconsistent.[36] The statutory access regime created by the FOI Act has established 'the rules for all parties involved', and introduced a degree of certainty.[37]

Costs

2.45 The major sources of data about the costs of FOI are the annual reports on the operation of the Act compiled by the Attorney-General's Department from data supplied by agencies. Additional sources include agency annual reports, agency submissions to the Committee, and the Report of the Inter-Departmental Committee.[38]

2.46 According to the FOI Annual Reports, the total costs to the Commonwealth of FOI was $15m in 1983-84, $16.5m in 1984-85, $15.7m in 1985-86 and $13.3m in 1986-87.[39]

2.47 The data contained in the FOI Annual Reports has to be used with caution, as the Reports themselves acknowledge. The 1986-87 Report states:

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35. For statements of the benefits to requesters which flow from FOI, see e.g. the submissions from the Returned Services League of Australia, p. 1; Mr P. Frankel, p. 1; Mr B.F. Grice, p. 1; and the Australian Pensioners' Federation, p. 3.
36. Submission from the Department of Veterans' Affairs, para. 8 (Evidence, p. 563).
37. Submission from the Department of Veterans' Affairs, para. 10 (Evidence, p. 563).
38. See para. 1.18 above on this Committee.
39. FOI Annual Report 1986-87, p. 1.

> As in previous years, the costs ... [agencies] reported varied widely in nature and extent, and in the bases used to determine them. There were considerable disparities between agencies in terms of the resources available for and utilised in monitoring costs attributable to FOI. For example, agencies differed in their approach to reporting staff costs where resources were used to prepare manuals which are required to be made available under the Act. Some agencies report these costs as attributable to FOI while others take the view that this work would be done irrespective of the FOI Act and thus is not strictly attributable to FOI.[40]

2.48 There is also some double-counting of costs. A percentage of direct salary cost is added to that cost to cover overheads (often called 'on-costs'). Yet some items covered by this percentage have also been added to costs as discrete items. The FOI Annual Report 1985-86, stated:

> Recent research associated with the Inter-Departmental Committee on FOI Costs showed that there had been double-counting in a number of areas. Items which could clearly be identified as having been the subject of double-counting amounted to 11% of the 88% allowed for on-costs in previous FOI Annual Reports. Other areas also appeared likely to have been subject to double-counting but it was not possible to quantify the magnitude of the discrepancy.[41]

2.49 The data in the FOI Annual Reports about non-labour expenditure is also unsatisfactory.[42]

2.50 Increased sophistication in cost-reporting had the effect of increasing some multipliers used in compiling costs for

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40. FOI Annual Report 1986-87, p. 54. See also Evidence, pp. 110, 131-32 (Attorney-General's Department) and pp. 1197-1200 (Department of Finance).
41. FOI Annual Report 1985-86, p. 75.
42. FOI Annual Report 1986-87, pp. 57-58.

the FOI Annual Report 1985-86.[43] A comparison of the figure for total staff costs in a random sample of individual agency annual reports to Parliament for 1984-85 with the relevant agency figure in the FOI Annual Report 1984-85 revealed discrepancies.[44] Numerous discrepancies were found in the reported amounts of charges collected in 1984-85 as between Departmental annual reports and the FOI Annual Report.[45] A similar pattern of discrepancies emerged with respect to the number of FOI requests received.[46] Similar discrepancies were noted between the 1986-87 Departmental annual reports and the FOI Annual Report 1986-87.[47]

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43. E.g. in the data collection for the first, second and third Reports, the smallest unit recorded in respect of staff-costs was one-twelfth of a staff-year. For later Reports, this was altered to one-hundredth of a staff-year. In all Reports, staff input of less than the minimum figure was not included unless special circumstances existed. A second example concerns the mean average salaries used by the Attorney-General's Department to translate agency-supplied figures on staff hours into staff costs. In 1984-85, the highest of the three categories used, 'principal officers and their advisers', was assigned an average salary of $35,400: 1984-85 Report, p. 126. In 1985-86, this category was sub-divided into 'clerical administrative' with an average salary of $35,489 and 'SES' with an average salary of $52,426: 1985-86 Report, p. 76.

44. E.g. the departmental annual report figures, with the FOI Annual Report figures in brackets, are as follows: Arts, Heritage and Environment $75,500 ($189,658); Defence $1,592,888 ($1,535,859); DEIR $390,000 ($355,572), DIEA $1,098,000 ($1,038,140); Resources and Energy $82,555 ($86,510).

45. Examples from Department annual reports, rounded to the nearest dollar with the FOI Annual Report 1985-86 figure in brackets are: Communications $428 ($330); Defence $1,010 ($1,185); DEIR $208 ($169); Prime Minister and Cabinet $66 ($28); Territories $628 ($412); and Trade $366 (nil).

46. E.g. the Public Service Board's Annual Report 1984-85, p. 93, stated: 'During 1984-85 the Board received 318 FOI requests compared with 177 FOI requests in 1983-84'. Yet in the FOI Annual Reports for these periods, the figures for requests received by the Board were 239 and 158 respectively. The Australian Telcommunications Commission Annual Report for the year ended 30 June 1985 stated that in the year 'Telecom received 301 requests' under the FOI Act. The FOI Annual Report 1984-85 listed the total requests received as 245.

47. Examples from agency annual reports, with the FOI Annual Report 1986-87 figure in brackets are: Aboriginal Affairs 26 requests (33), $464 charges collected ($355), $46,205 cost of implementing FOI ($91,465); Australian Federal Police 200 requests (188); Australian Postal Commission $1356 charges collected ($1894); Department of Defence 1843 requests (1841); Health Insurance Commission 43 requests (28), 35 requests finalised (24); Primary Industry 39 requests (37), $3642 charges collected ($2107), $70,385 total costs ($81,836).

The Committee raised the issue of discrepancies with two agencies in an attempt to discover the reason for the differences. The results of these inquiries are set out in detail in Appendix IV.

2.51 In the first three FOI Annual Reports, the fixed percentage added to direct salary costs to cover overheads ('on costs') was 88%. The Inter-Departmental Committee's research led it to conclude that 88% was unjustifiably high. The IDC considered that a true figure for on-costs could only be determined as a result of detailed assessment of operating, costing and accounting procedures of agencies subject to the FOI Act.[48] The advice of the Department of Finance to the IDC was that these on-costs would probably lie between 50% and 75%. The IDC decided that the appropriate course would be for it to base its analyses on the figure of 60% on-costs. Subsequent FOI Annual Reports also adopted the figure of 60% for overheads.[49]

2.52 The Committee accepts that a figure of 60% is more realistic than 88%. The Committee notes that even 60% is apparently no more than an educated guess. The actual figure for overheads for the Department of Finance for 1984-85 was stated by the Department to be 113.5%.[50] However, the Committee accepts that the high cost of the investigation necessary to establish a precise average for use by all agencies cannot be justified. Equally, the extra cost of establishing a separate, precise, figure for each agency is unjustified.

2.53 Submissions from some users argued that the total reported cost of FOI is unnecessarily increased by some agencies' practices. These include improperly refusing access at the initial decision-making stage, thus provoking otherwise unnecessary internal reviews and Administrative Appeals Tribunal appeals; using of staff of greater seniority than the task

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48. IDC Report, p. 10.
49. FOI Annual Reports 1985-86, p. 73; 1986-87, p. 55.
50. Letter to the Committee, 9 September 1986.

requires; briefing counsel or seeking legal advice unnecessarily; and failing to maintain record systems adequate for efficient retrieval of requested documents.[51]

2.54 The Committee received no evidence that agencies, as a general rule, incur costs unnecessarily or maintain inefficient record-keeping systems from a perverse desire to frustrate FOI applicants. It follows that the Committee does not consider that the costs of FOI have been artificially inflated to any significant extent.

2.55 The Committee acknowledges that the total reported cost of FOI should be reduced to reflect (a) the fact that some of the material required to be published under the FOI Act is of benefit to the publishing agency and would, to some extent at least, have been produced even if not required by the Act; and (b) discrepancies in accounting. Further, as was noted above in paragraph 2.22, a considerable proportion of the material released in response to FOI requests would have been released even in the absence of FOI.[52]

2.56 The Committee does not consider that the cost of providing FOI access to agency personnel documents at the request of staff should be debited to FOI. This cost, which in 1984-85 was estimated to be about $1.5m,[53] should be debited to the staff management costs of the agencies concerned.

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51. E.g. see joint submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 23 (Evidence, p. 872); submission from the Law Institute of Victoria, p. 2 (Evidence, p. 375).
52. E.g. from its submission it appears that access would have been given in the absence of FOI to almost all the material to which FOI access is given by the Department of Veterans' Affairs: para. 7 (Evidence, p. 563). In 1985-86, this Department received 31.9% of the total access requests reported by agencies and its total FOI costs were $1.3m: FOI Annual Report 1985-86, pp. 12 and 114.
53. IDC Report, p. A3.

2.57 On the other hand, the Committee recognises that the reported cost of FOI should be increased to reflect, inter alia; (a) FOI-related costs that are not formally ascribed to FOI but which are incurred by agencies;[54] (b) the cost of delayed decision-making on other matters because relevant files have been required to process an FOI request;[55] (c) the cost of providing the Tribunal/court system to resolve FOI disputes;[56] (d) the cost of FOI to agencies not subject to the FOI Act,[57] whose costs are therefore not included in the FOI Annual Reports; and (e) the cost to the Commonwealth of actual or threatened reduction of information flow to it.[58]

2.58 Costs associated with the FOI Act also fall upon those who provide information to the Commonwealth. Information-providers have to consider the possibility that the information which they provide will be released under the FOI Act. The resulting costs may include learning about FOI,[59] adopting less efficient modes of operation to prevent information from entering the Commonwealth's possession, and becoming involved in the reverse-FOI process.

2.59 The Committee is not in a position to estimate with any precision the cost of FOI to information-providers. The Committee is prepared to make a very rough estimate that the FOI-related costs to business as information-providers are at least equal to the costs to agencies of handling FOI requests for business-related documents. In 1984-85 this cost was estimated as $2.4m.[60]

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54. E.g. submission from the Department of Trade, pp. 5-6.
55. E.g. submission from Department of Territories, p. 19.
56. IDC Report, p. A21.
57. E.g. IDC Report, p. D11 (FOI consultation costs of exempt agencies); Australian Audit Office, Annual Report 1985-86, p. 57 (consultations regarding FOI access to documents originating with the Audit Office).
58. IDC Report, p. C6.
59. E.g. the cost of preparing and distributing the booklet published in 1985 by the Confederation of Australian Industry, 'Disclosure of Confidential Business Information'.
60. IDC Report, p. C6.

2.60 State, Territory and foreign governments also incur costs related to the FOI Act.[61] The Committee lacks data upon which to base even a rough estimate of what these costs might be, although it recognises that they may be substantial. The Queensland Government informed the Committee:

> During 1984/85 some 65 individual matters were referred to Queensland Government Departments, with the exception of the Registrar-General's Department which received some 20 requests.
>
> The Queensland Government has been involved in two appeals before the Administrative Appeals Tribunal and a third appeal is pending which involves both a Federal Court and an AAT hearing. The cost to the State of legal representation has been substantial. In addition, air fares and other travel and accommodation costs have been incurred as both appeals have been heard in Sydney. Legal fees were also involved in another AAT case which did not proceed to finalisation as the applicant failed to appear before the AAT at a preliminary hearing.[62]

Detriments

2.61 The 1985-86 FOI Annual Report contained a chart listing agencies' indications of particular detriments arising from the operation of the FOI Act. Where appropriate, these have been noted in the body of this report.

2.62 The most common detriment, reported by 55 agencies, was that there had been a '[d]isproportionate allocation of resources in response to requests from particular individuals'.[63] This was followed by complaints that the Act was used as a 'research tool'

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61. E.g. by involvement in reverse-FOI consultation and appeals, and refraining from keeping transcripts of Commonwealth/State Ministerial Council meetings: submission from the Queensland Government, pp. 2 and 5.
62. Submission from the Queensland Government, p. 2.
63. Annual Report 1985-86, p. 293.

by journalists and others (47 agencies), or used by 'litigants in the course of other legal proceedings' (42 agencies).[64]

2.63 These detriments rest upon agencies' perceptions of requesters' identities or motives. As is discussed in chapter 3 below, the Committee considers that agencies should not have regard to applicants' motives. It follows that the Committee does not consider it proper to take into account the applicants' motives for the purpose of assessing the operation of the Act.

2.64 Nonetheless, the Committee notes that the vast majority of requests for access to documents are requests for access to personal (72.8% in 1984-1985) or personnel (a further 14.9% in 1984-85) records.[65] Only 7.6% of requests are for access to policy documents.[66]

Effect of the FOI Act upon candour

2.65 In 1979, there was concern that the introduction of freedom of information legislation would decrease the candour with which public servants expressed their views in writing.[67] Some submissions suggested that there has been some reduction in what is committed to paper as a result of the FOI Act.[68]

2.66 The Department of the Treasury included the following observation upon the effects of the operation of the freedom of information legislation in its 1984-85 Annual Report:

> In oral evidence [to the Administrative Appeals Tribunal], a senior Treasury officer

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64. Annual Report, 1985-86, pp. 293-94.
65. IDC Report, p. A3.
66. Ibid. Other categories of request are for business (4.4%) and miscellaneous (0.3%) documents.
67. 1979 Report, paras. 4.50-4.53.
68. Submissions from the Department of Foreign Affairs, p. 14 (Evidence, p. 1069); the Political Reference Service Ltd, p. 17 (Evidence, p. 967); the Queensland Government, p. 9; the Public Service Board, p. 5 (Evidence, p. 1097); the Department of Defence, pp. 14-15.

> suggested that because of a reluctance to put certain advice in writing, the Treasurer was not receiving advice he otherwise would.[69]

However, in evidence to the Committee, Mr Ted Evans, a Deputy Secretary in the Department of the Treasury, suggested that the comment in the annual report had been somewhat exaggerated.[70]

2.67 Evidence received by the Committee indicates that any reduction in the volume of information committed to paper has been outweighed by the improvement in quality.[71]

2.68 In this context, the Committee noted that Inspector Saunders of the Australian Federal Police identified as one of the benefits of the freedom of information legislation that the standard of reports had improved.[72] A similar point was made by Dr Wilenski, then Chairman of the Public Service Board, who listed as one of the benefits of the FOI Act 'a better recording of decisions'.[73] Overall, Dr Wilenski regarded FOI 'as having had a highly beneficial effect on the overall administration of the Government's policy and programs'.[74]

2.69 Dr Wilenski also commented upon the suggestion that, as a result of concern about possible release under the FOI Act, material which should be put on paper, particularly policy advice, either is not being offered or is being provided orally only. Dr Wilenski commented that

> it would be naive to say that either the Board or officials of other departments have not always preferred to discuss some matters which are particularly sensitive orally. That has always been the case in Government - well

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69. P. 21, see Evidence, p. 638.
70. Evidence, p. 638.
71. Evidence, p. 483 (Australian Federal Police); cf. 1979 Report, para. 4.56.
72. Evidence, p. 483.
73. Evidence, p. 1153.
74. Evidence, p. 1153.

> before the FOI Act. Speaking as far as the Board is concerned it has not in any way reduced the candour of our written communications and I cannot think of an instance where we have said 'Because of the FOI Act we will not write this down; we want to talk to you about it orally'.[75]

2.70 Dr Wilenski added his opinion, that as a result of the Administrative Appeals Tribunal decisions, public servants can give frank policy advice in writing, and be '99.9 per cent confident that their communications will be confidential'.[76]

2.71 It appears to the Committee that, as a result of the way courts and the Tribunal have interpreted the FOI Act, public servants have become increasingly confident that the Act provides sufficient protection to sensitive documents. It seems that only very rarely has the FOI Act adversely affected the quality and quantity of information which public servants commit to paper.

2.72 The Committee does not regard this reticence as an inevitable consequence of the FOI Act. As is discussed below in chapter 11, the Committee considers that the Act provides an appropriate level of protection to written policy advice and other types of internal working documents. This is so not withstanding the potential for the embarrassment to former ministers,[77] individual public servants, agencies or the Government resulting from the disclosure of such documents.

Conclusion

2.73 The Committee finds that the operation and administration of FOI has brought benefits to individuals,

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75. Evidence, p. 1155.
76. Evidence, p. 1157.
77. The Committee notes that the FOI Act operates to undermine what is often regarded as a convention that incoming Ministers are restricted in their access to their predecessors' documents. See Re Bartlett and Department of Prime Minister and Cabinet (31 July 1987) para. 20.

agencies and the Australian community. These benefits are significant even though they are of a kind which cannot be measured precisely.

2.74 The published information on the costs of FOI must be treated with some caution for the reasons noted earlier in this chapter. However, the effect of the noted defects in the published information is not preponderantly in one direction. The Committee is prepared to assume that, in a rough and ready way, the errors, omissions, deficiencies, etc., cancel each other out.

2.75 The Committee, therefore, accepts the overall totals of annual costs of FOI (calculated using a 60% addition for overheads)[78] are approximately correct. These reported costs include items which should not be attributed to FOI. But some items attributable to FOI are not included. The net effect of these two sets of items, again in a very approximate way, is probably to cancel each other out.

2.76 The Committee is faced with the difficult task of weighing the admittedly unquantifiable benefits of FOI against its costs, which can be measured in at least an approximate way. The Committee regards the benefits of FOI as considerable. However, the Committee leans towards the view that more attention should be paid to the costs of FOI, particularly in the current economic and budgetary circumstances.

2.77 The Committee believes that if such increased attention is paid to the costs of the operation and administration of the freedom of information legislation, the benefit/cost comparison will continue to disclose that FOI confers a net benefit.

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78. See FOI Annual Report 1985-86, p. 73, where the figures from previous years are re-calculated using 60% for overheads rather than the 88% originally used.

CHAPTER 3

USE OF THE FREEDOM OF INFORMATION ACT

Section 3

3.1 Sub-section 3(1) of the FOI Act provides that the object of the Act 'is to extend as far as possible the right of the Australian community to access' to Government information by requiring material relating to the operation of Government to be made available to the public and by giving a general right of access to documents, subject only to necessary exceptions.

3.2 Section 3 makes no reference to the object of Part V of the Act: the creation of a right to seek amendment of personal records which contain incorrect, incomplete, out of date or misleading material. As is discussed below in chapter 15, Part V is at odds with the remainder of the FOI Act. Part V, like the proposed privacy legislation, is concerned with the quality of record-keeping, rather than with access to documents as such. If (as is recommended below in paragraph 15.62) section 48 is amended to extend the right to seek amendment or annotation to documents other than those to which access has been granted under the FOI Act, the divergence between the Part V object and the general aims of the FOI Act may be exacerbated.

3.3 For the reasons discussed in chapter 15, the Committee is of the view that the Part V amendment/annotation provisions should be removed from the FOI Act and re-enacted in any privacy legislation, in the event that such legislation is enacted. However, if the right to seek amendment is to remain in the FOI Act, section 3 should include an appropriate reference. The Committee considers that omission of any reference to this right

might be construed as implying that the right to seek amendment is less significant than the object of the Act as set out in sub-section 3(1).

3.4 **If no privacy legislation is enacted, the Committee recommends that section 3 be amended to incorporate appropriate reference to the right to seek amendment of personal records.**

Presumption in favour of release

3.5 In News Corporation Limited v National Companies and Securities Commission, the question arose whether any presumptions should be made in interpreting the FOI Act. In a joint judgment, the Chief Judge of the Federal Court, Sir Nigel Bowen, and Justice Fisher said:

> It has been suggested that the form of s 3 is such that the Court when considering rights of access should lean towards a wide interpretation of the provisions of the Act but, when considering exemptions should lean towards a narrow interpretation ...
>
> [W]e do not favour the adoption of a leaning position. The rights of access and the exemptions are designed to give a correct balance of the competing public interests involved. Each is to be interpreted according to the words used, bearing in mind the stated object of the Act.[1]

3.6 The Law Institute of Victoria and the Law Society of New South Wales, in almost identical submissions, recommended that section 3 should be amended so as to reverse this view and to impose a presumption in favour of release.[2] No argument was offered in support of this recommendation.

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1. (1984) 52 ALR 277, p. 279. See also Arnold v State of Queensland (1987) 73 ALR 607.
2. Submissions from the Law Institute of Victoria, p. 3 (Evidence, p. 376); the New South Wales Law Society, p. 2.

3.7 The Committee does not accept the recommendation. It agrees with the view of Sir Nigel Bowen and Justice Fisher. Insofar as any bias in favour of release is required in the Act, it is supplied by section 61, the provision which places the onus of proof upon agencies to show why applicants should not succeed.

An overriding public interest test

3.8 'The Age' suggested that section 3 should be amended so as to provide that

> access shall not be denied unless an exemption applies and disclosure would be contrary to the public interest.[3]

3.9 A similar point was made by Mr Jim Moore of South Australia, who suggested that an overriding public interest clause should be inserted at the beginning of Part IV of the FOI Act.[4]

3.10 The Committee does not accept these proposals. Public interest tests form part of a number of exemption sections. As is noted below, the undoubted utility of public interest tests has to be balanced against the fact that these tests are difficult to apply and produce uncertainty and litigation. A blanket public interest test in the FOI Act would tip the balance too far in favour of uncertainty.

3.11 The courts and the Administrative Appeals Tribunal are the ultimate interpreters of what is or is not in the public interest where public interest tests are used. The Committee acknowledges that this is appropriate in some circumstances. But the Committee does not regard it as appropriate in any across-the-board way. For example, both the Parliament and the

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3. Submission from 'The Age', p. 7 (Evidence, p. 192) emphasis in the original.
4. Submission from Mr Jim Moore, p. 1.

Executive have roles in determining where the public interest lies in national security matters.

3.12 One other effect of a blanket public interest test would be to prevent agencies from relying on grounds of exemption which are technically available unless there was some larger justification for denying access. Current Government guidelines provide that 'agencies should not refuse access to non-contentious material simply because there are technical grounds of exemption available under the Act'.[5] No evidence has been put to the Committee to suggest that agencies ignore this guideline often enough to justify the introduction of a blanket public interest test.

Section 11: 'every person'

3.13 In section 11, the FOI Act confers, subject to the Act, a right of access upon 'every person', but does not define the expression. The Administrative Appeals Tribunal has given wide meaning to 'every person', including within it non-resident aliens,[6] and persons subject to deportation orders.[7] However, the 'object' of the FOI Act, as stated in section 3, refers to 'the right of the Australian community to access to information'.[8] Section 48 of the Act gives a right to apply for amendment of personal records, but only to Australian citizens and permanent residents.

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5. FOI Memorandum No. 77 (June 1985) para. 6.
6. Re Lordsvale Finance Ltd and Department of Treasury (1985) 9 ALD 16.
7. Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN 257.
8. FOI Act, s.3(1).

3.14 It has been put to the Committee that, at the very least, there is no reason for these differences between sections 3, 11 and 48.[9]

3.15 The Department of Immigration and Ethnic Affairs drew to the Committee's attention the fact that in 1984-85 the processing of FOI applications from persons illegally in Australia took up 39% of the Department's effort on FOI at a cost to the taxpayer of $436,000.[10] In many cases, the Department considers that the sole motive for making these applications is to delay some substantive action by the Department, such as deportation.[11] The Department also contended that Australian taxpayers should not be required to meet the cost of providing a right of FOI access to people with no legal right to be in Australia, and that the right of FOI access 'can be portrayed as rewarding unlawful actions'.[12]

3.16 A separate but related concern of the Department is that persons outside Australia enjoy FOI access rights:

> With something like one million applications for migration entry received per year, not to mention upwards of one million applications for visitor entry, the Department points out the potential cost implications should FOI be used by even a small number of overseas applicants ... The Act was not intended to have this extraterritorial application when enacted.[13]

3.17 The Department of Foreign Affairs also canvassed the right of both persons overseas and persons illegally in Australia

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9. Submissions from the Inter-Agency Consultative Committee on FOI, p. 2; the Department of Immigration and Ethnic Affairs, p. 7 (Evidence, p. 697).
10. Submission from the Department of Immigration and Ethnic Affairs, p. 4 (Evidence, p. 694).
11. Evidence, p. 728.
12. Submission from the Department of Immigration and Ethnic Affairs, p. 5 (Evidence, p. 695).
13. Submission from the Department of Immigration and Ethnic Affairs, pp. 6-7 (Evidence, pp. 696-97).

to seek FOI access.[14] With regard to the former category, the Department's concern related to the potential for large numbers of applications from unsuccessful visa applicants, though so far this has not happened.[15] Ultimately, the Department concluded that people illegally in Australia should not be excluded from FOI access.[16]

3.18 In evidence to the Committee, the Department of Foreign Affairs agreed with the position taken by the Attorney-General's Department.[17] The latter argued against any attempt to restrict the categories of persons enjoying FOI access rights on a number of grounds.[18] First, this would increase the administrative costs because it would be necessary to examine an applicant's eligibility and resolve disputes over eligibility. Secondly, any restriction could be circumvented by proxy applications by people entitled to access who could then pass the documents so obtained to a person denied the right of access. Thirdly, there are many temporary residents in Australia and aliens outside Australia who have legitimate dealings with Australia, and hence have sound reasons to use the FOI Act.

3.19 Two further arguments were raised by the Australian Law Reform Commission in the context of the present restriction in section 48 on the right to seek amendment of personal records.[19] First, restriction of the right of amendment to Australian citizens and permanent residents discriminates between citizens and non-citizens. The Commission argued that this form of

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14. Submission from the Department of Foreign Affairs, p. 3 and Attachment A, pp. 1-2 (Evidence, pp. 1058 and 1077-78). See also submission from the Reserve Bank of Australia, p. 3 on the former category.
15. Submission from the Department of Foreign Affairs, Attachment A, p. 2 (Evidence, p. 1078).
16. Evidence, p. 1083. See also submission from the Minister for Foreign Affairs, concerning applications from people outside of Australia, p. 1 (Evidence, p. 1075).
17. Evidence, p. 1083.
18. Evidence, p. 128; submission from the Attorney-General's Department, p. 81 (Evidence, p. 86).
19. Submission from the Australian Law Reform Commission p. 3.

discrimination is prohibited by article 26 of the International Covenant on Civil and Political Rights, to which Australia is a party. Secondly, this type of citizen/non-citizen 'distinction is not drawn in similar Commonwealth legislation'.[20]

3.20 The Committee (with the exception of Senator Stone) takes the view that it is undesirable to restrict the categories of people entitled to seek access to documents under the FOI Act.

3.21 In reaching this conclusion, the Committee notes that the Report of the Canadian House of Commons Standing Committee on Justice and Solicitor-General on the Review of the Access to Information Act and the Privacy Act recommended repealing the restrictions which limit the rights of access under those Acts to Canadian citizens or permanent residents. The Canadian Standing Committee recommended extending these rights of access to all natural and legal persons regardless of location.[21]

3.22 In its response to the Canadian Standing Committee's Report, the Government of Canada advised that it would extend the rights of access under the Privacy Act and the Access to Information Act to all (natural and legal) persons in Canada.[22]

3.23 Like the Canadian Government, the Committee (with the exception of Senator Stone) considers that a universal right of access to information in the possession of the Government may be desirable as an ideal.[23] But, again like the Canadian Government, the Committee is concerned about requiring (Australian) taxpayers to bear the costs of providing such a right of access.[24]

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20. Submission from the Australian Law Reform Commission p. 3. More generally on the human rights issue, see also the submission from the Federation of Ethnic Communities' Councils of Australia, p. 1.
21. Report, 'Open and Shut: Enhancing the Right to Know and the Right to Privacy', March 1987, p. 12.
22. Government of Canada, 'Access and Privacy: The Steps Ahead' [Ottawa. 1987], p. 34.
23. Ibid., p. 33.
24. Ibid.

3.24 In chapter 19 below, the Committee recommends that there should be a maximum charge upon the processing of FOI applications, and that the application fees should be less than full cost recovery (see paragraphs 19.20 to 19.24). In so doing, the Committee recognises that at least part of the cost of processing some FOI requests for access will fall upon Australian taxpayers.

3.25 However, the Committee recognises that there is no value in attempting to differentiate between categories of applicants unless the relevant distinction is formulated in a manner which is simple to apply. Formulating the distinction in terms of status as a taxpayer will either invite disputes (e.g. whether particular individuals are taxpayers notwithstanding that they have paid no taxes), or discriminate against people whose incomes fall beneath the tax threshold.

3.26 The Committee is particularly concerned to ensure that the use of the FOI Act by people whose presence in Australia is unlawful should not be subsidised by Australian taxpayers. The Committee acknowledges the difficulty of defining the category of persons to be entitled to the benefit of any such subsidy.

3.27 Consequently, the Committee considers that, for the purposes of charging for processing FOI requests, it is desirable to distinguish between persons lawfully in Australia and persons whose presence is unlawful. The Committee recognises that some people may fall on the 'illegal' side of the demarcation for reasons beyond their control.[25] However, the Committee does not consider that it is practicable to devise a distinction in terms of the bona fides of the applicant's presence.

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25. See Evidence, p. 129, where Mr L.J. Curtis of the Attorney-General's Department noted that some people may be classified as illegal immigrants despite the existence of a genuine dispute over the facts of the case. See also Evidence, p. 876 (Ms D. Muirhead); p. 728 (Mr W. McKinnon).

3.28 The Committee noted the criteria used to restrict the categories of persons entitled to seek access under the equivalent New Zealand[26] and Canadian[27] legislation, where the distinction is formulated in terms of citizenship and permanent residence (ie. those whose continued presence in the country is not subject to any limitations as to time imposed by law).

3.29 However, the Committee is conscious that, as the Canadian Privacy Commissioner argued, 'persons with non-resident status are often affected profoundly by administrative decisions of federal government institutions'.[28] The Committee recognises, of course, that excluding such people from the category of persons whose applications for access to documents under the FOI Act are subject to prescribed maximum charges will not preclude them from either seeking access to documents or invoking other administrative law remedies, such as under the Administrative Decisions (Judicial Review) Act 1977.

3.30 The Committee considers that the distinction should be formulated in terms of lawfulness of presence within Australia, and thus include persons holding temporary entrance/residence permits as well as permanent residents. The Committee considers that the legality of presence should be determined solely by whether the FOI applicant lawfully possesses (as distinct from claims entitlement to possess) a relevant permit when the application is lodged.

3.31 Section 48 of the FOI Act restricts the right to seek the amendment of records to Australian citizens and permanent residents. No problems in administering the test in this context

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26. Official Information Act 1982 (N.Z.), s.12(1).
27. Access to Information Act 1982 (Canada), s.4(1).
28. Quoted in Canada, House of Commons, Report of the Standing Committee on Justice and Solicitor-General on the Review of the Access to Information Act and the Privacy Act, 'Open and Shut: Enhancing the Right to Know and the Right to Privacy', March 1987, p. 12.

have been brought to the Committee's attention.[29] Consequently, the Committee considers that the administrative difficulties of applying this test have been over-estimated.

3.32 However, the Committee can see no reason why the right to seek the amendment or annotation to records should not be extended to all persons with the right to seek access to documents.

3.33 **The Committee recommends that section 48 be amended by the deletion of the clause 'who is an Australian citizen, or whose continued presence in Australia is not subject to any limitations as to time imposed by law,'.**

3.34 Senator Stone dissents from this recommendation.

3.35 The overwhelming proportion of requests are for access to personal documents held by agencies which can generally determine from their own records the immigration status of the applicant.[30] If particular agencies considered it to be unnecessary to verify the status of applicants who make FOI access requests, it would be open to them not to do so. Those who happened not to meet the citizenship/residence requirement would, in effect, be granted access subject to a maximum charge not required by the implementation of the Committee's recommendations as to charges under the FOI Act.

3.36 Nothing in the FOI Act precludes agencies from charging less for the grant of access to documents than is specified in the Act. However, the Committee emphasises that it does not encourage agencies to do this.

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29. The Committee does not know whether or to what extent this might reflect a failure on the part of agencies to consider the status of the applicants.

30. In 1986-87, 84.9% of all access requests were received by 5 agencies: Veterans' Affairs, Tax, Social Security, Immigration and Ethnic Affairs, and Defence. Almost all these requests were for documents relating to applicants' personal affairs.

3.37 The Committee acknowledges that it would be possible to circumvent the effect of this restriction upon the classes of persons entitled to rely upon the prescriptions as to maximum charges. This could be done by a permanent resident or citizen seeking access on behalf of a person not so described.

3.38 The Committee notes that where an agent seeks access, the agent's right of access is no greater than that of the principal.[31] Accordingly, in theory, the principal should be subject to the same charging regime as is the agent. However, in practice, this will rarely be the case.

3.39 Agencies will seldom be independently aware of the principal/agent relationship and agents are not required to disclose the existence of such a relationship when seeking access. In any event, the agent may apply for access in a personal capacity, with no more than an informal understanding that any documents obtained will be passed on to the person ineligible to seek access.[32]

3.40 Almost all the applications in respect of which the Committee would seek to impose charges without benefit of subsidy from the taxpayer (e.g. from illegal migrants, persons overstaying temporary entrance/residence permits) relate to documents concerning the personal affairs of the access-seeker. Where a person, other than the person about whom a document contains personal information, applies for access to the document, the agency will almost invariably be able to deny access on the ground that granting access 'would involve the unreasonable disclosure of information relating to the personal affairs' of the person to whom the information relates (sub-section 41(1)).

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31. Re Lordsvale Finance Ltd and Department of Treasury (1985) 9 ALD 16, p. 28.
32. Ibid., pp. 28 and 32.

3.41 The section 41 exemption is not available where the person about whom the document contains personal information has consented to the applicant gaining access to the documents.[33] Consent to disclosure by the person about whom the document contains personal information may also remove the basis of a claim for exemption under exemption provisions other than section 41 (e.g. section 43 and section 45). The Committee's intention to relieve taxpayers of the burden of subsidising the cost of processing of FOI requests from persons not meeting the citizenship/residence requirements will be achieved only if full cost recovery charges are imposed whenever access may be granted to a person other than the person/organisation to whom the information in the document relates only with the consent of that person/organisation.

3.42 Therefore, **the Committee recommends that the FOI Act be amended to provide that, where the consent of the person about whom the document contains personal information is necessary before the document may be released, charges should be imposed upon the applicant upon the same basis as would apply if the person about whom the document contained personal information were the FOI applicant.**

3.43 The Committee recognises that its proposed restrictions will affect people who, ideally, perhaps ought not be denied the benefit of taxpayer subsidy, for example, aliens resident overseas who pay taxes in Australia or have commercial or other dealings with Australian Government agencies. But the Committee does not believe that imposition of the unrestricted charges upon these groups is unjustified given the need to have a test which is easy to apply and, which, appropriately, takes as its focus, membership of the Australian community.

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33. FOI Memorandum No. 23 (December 1984), para. 30.

3.44 The Committee recommends that charges reflecting full cost recovery be applied in respect of applications for access to documents by a person whose presence in Australia, at the time of lodging the FOI application, is illegal by reason of the applicant's lack of possession of a relevant lawful entrance/residence permit.

3.45 Senator Stone dissents from paragraphs 3.30 and 3.32. Senator Stone considers that rights of access under the FOI Act should be available only to Australian citizens and permanent residents.

Commonwealth public servants - personnel documents

3.46 The Inter-Departmental Committee which examined the costs of FOI, calculated that in 1984-85 about 15% of FOI access requests were for access to personal records of current or former Commonwealth employees seeking information relating to their employment.[34]

3.47 The IDC suggested that, because the personnel requests 'can be dealt with less expensively outside FOI under guidelines such as those of the Public Service Board [now Commission] and the Merit Protection Review Agency', this would save an estimated $850,000 per year.[35]

> In October 1985 the Public Service Board issued guidelines on the release of personnel information which broadly provide access equivalent to that available under FOI. However, the PSB guidelines are less formal, in that they do not, for example, involve procedures requiring written requests,

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34. IDC Report, p. E6. For some agencies the percentage is far higher. In 1986-87, 347 of the 508 requests received by Telecom Australia were from present or past staff members seeking documents relating to their employment with Telecom: Australian Telecommunications Commission, Annual Report 1986-87, p. 43. See similarly Australian Postal Commission, Annual Report 1985-86, p. 62 (75% of requests employment-related).

35. IDC Report, p. E5, para. 4.

> acknowledgement, response deadlines, statements of reasons, or written responses. Nevertheless, they should be as effective in practice, since they provide equivalent access. They are less costly to administer because they are administered by personnel areas as part of their day-to-day activities, they provide clear instruction on what may be released, they do not provide for internal or AAT review and are not subject to the formalities of FOI.[36]

3.48 The Committee notes that the actual savings may be less, since processing personnel requests outside of FOI may simply remove some of the costs attributed to FOI and debit them to another head of costs. However, the IDC Report appeared to have taken this factor into account in arriving at its estimate of the savings involved.[37]

3.49 The Inter-Departmental Committee recommended that personnel requests be excluded from the Act.[38]

3.50 This Committee does not endorse this recommendation. It accepts that savings would be achieved with little disadvantage to applicants by dealing with personnel requests under the Guidelines issued by the (then) Public Service Board. However, the Committee considers that it is important that an avenue of access as of right (ie. the FOI Act) should be preserved to reinforce the essentially discretionary system of access provided for in the Guidelines issued by the (then) Public Service Board.[3]

3.51 The Committee regards it as a matter for the Government to devise means by which agencies encourage access-seekers to use the Guidelines, saving the FOI Act as an avenue of last resort

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36. IDC Report, p. E6.
37. IDC Report, p. E5.
38. Ibid., pp. 36-37. See also the submission from the Department of Housing and Construction, p. 2.
39. Cf. Evidence, pp. 1161-62 (Dr P. Wilenski), pp. 1171-72 (ACOA); submission from the Commonwealth Bank Officers' Association, p. 2.

only. It may be that FOI access for personnel documents should only be available where access under the Guidelines has been sought unsuccessfully.[40]

3.52 Accordingly, **the Committee recommends that:**

(a) the Government take steps to require people seeking access to personnel documents to seek access under the Guidelines contained in the Personnel Management Manual which was issued by the then Public Service Board rather than under the FOI Act;

(b) recourse to the FOI Act be available only where access requests under the Guidelines contained in the Personnel Management Manual have failed to give a result satisfactory to the applicant; and

(c) the costs of granting freedom of information access to personnel documents to which the Guidelines contained in the Personnel Management Manual which was issued by the then Public Service Board relate, be treated, for statistical purposes, as a cost of personnel management, not freedom of information.

Genuine interest in documents sought: applicants' need to know

3.53 In 1979, the Committee took the view that access to information under the freedom of information legislation should be as of right, and not dependent upon the showing of an interest or a need to know in any particular case.[41] No cogent argument was put before the present inquiry which suggested that this should be altered.

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40. As was noted above in para 2.56, the Committee does not think it appropriate that the costs of granting FOI access to personnel documents should be ascribed to FOI. These costs are more appropriately treated as part of the personnel management costs of government.
41. 1979 Report, para. 8.1.

3.54 However, once past the threshold, consideration of an applicant's motive or need to know may be relevant in a number of specific contexts. The Committee recognises, as it did in its 1979 Report,[42] that it does not follow automatically from the fact that motive and need to know are irrelevant to the threshold right of access under the FOI Act, that they are also irrelevant to the determination of specific, procedural matters or the application of particular exemptions which may turn upon the 'reasonableness' of a given disclosure.

3.55 In Re Mann and Australian Taxation Office the Tribunal was prepared to consider an applicant's need to know where to do so would benefit the applicant. The Tribunal accepted that it

> is not necessary for an applicant to establish a particular "need to know" in order to establish a right to access. Nor does it even strengthen an applicant's case, save where a question of public interest arises and an applicant is able to demonstrate that his personal involvement in the matter may cause an element of public interest in his "need to know" to arise, to demonstrate some special interest in the document sought.[43]

3.56 Mr Jack Waterford, a journalist and experienced user of FOI, also suggested that the interest of a particular applicant ought to be a relevant factor within the weighing up of 'public interest':

> The idea that disclosure under the Act is disclosure to the world, of course, is accompanied by the concept that an applicant need prove no interest, certainly no legal interest, in getting the documents. While I

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42. 1979 Report, para. 8.3.

43. (1985) 7 ALD 698, p. 700. (The Tribunal referred to Re Peters and Department of Prime Minister and Cabinet (No. 2) (1983) 5 ALN 306, and Re Burns and Australian National University (No. 2) (1985) 7 ALD 425). See also Re Boehm and Commonwealth Ombudsman (30 July 1985) p. 10; Re Brooker and Commissioner for Employees' Compensation (6 March 1986) p. 8; Re Barkhordar and ACT Schools Authority (15 April 1987) para. 16; and Department of Community Services v Jephcott (1987) 73 ALR 493, pp. 497-98.

> think, broadly, that this is fair, one of the public interest factors that should generally be considered when an exemption is claimed is the actual interest of the applicant in seeing the documents. And a genuine research or journalistic interest should be an allowable one weighing in favour of disclosure.[44]

3.57 The Committee rejects these arguments. The Committee continues to be fundamentally opposed to the introduction of any threshold requirement that applicants should demonstrate any specific reason or need for access. The Committee is equally opposed to any suggestion that particular classes of persons should, by reason of their membership of those classes, be accorded greater rights of access than other persons entitled to seek access under the FOI Act.

3.58 The circumstances in which the Committee considers that documents should be released to applicants in reliance upon undertakings as to how those documents will be used are discussed below in paragraphs 3.13 to 3.21 and paragraph 14.28.

Use of FOI: discovery

3.59 A further issue which arises out of the operation of the FOI Act is the use of the right of access created by the FOI Act to supplement or supplant the process of discovery - the pre-trial means by which courts regulate the disclosure of documents, information, facts or other things which are within the exclusive knowledge of any party. This is a flexible process: the amount of discovery which may be required in each case is determined by the facts of each case.

3.60 The FOI Act may provide a means of supplementing ordinary legal processes in some circumstances. Cramb Corporate Services illustrated this by referring to dumping inquiries,

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44. Waterford, J., 'Fighting for FOI', (1986) 6 (11) Australian Society 6, pp. 9-10.

where 'FOI can be very important in flushing out details of the case beyond that which [the Australian] Customs [Service] would normally release in its published Customs Notices'.[45]

FOI as an aid to discovery

3.61 The Commonwealth Solicitor-General, Dr Gavan Griffith, in a submission made in his private capacity, stated:

> It has become a common course for applications to be made under the FOI Act by parties to other litigation for the purpose (and often with the effect) generally to delay proceedings. I emphasise that delays do not arise from any request [sic] of the FOI legislation or procedural rules in the Court. The problem exists because the mere existence of concurrent FOI applications act in practice to inhibit the progress of the other proceedings pending resolution of the FOI matters.
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> ... My conversations with members of the Federal Court confirm me in my view that this interference with judicial processes has been found to be serious and severe.[46]

3.62 Dr Griffith was also concerned about the ability of litigants to use FOI to engage in 'wide-ranging fishing expeditions' and gain access to material providing a 'close to perfect knowledge of ... opponent's documents and material (unrestricted to relevance)'.[47]

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45. Submission from Cramb Corporate Services, p. 4. See also, with reference to litigation generally, Evidence, pp. 165-68 (Attorney-General's Department); and to the admittedly special position of Veterans' benefits, Evidence, p. 600 (Department of Veterans' Affairs).

46. Submission from Dr Gavan Griffith, pp. 2 and 4.

47. Submission from Dr Gavan Griffith, p. 4. See also Evidence, pp. 167-69 (Attorney-General's Department); submissions from the Department of Defence, p. 4; the Australian Customs Service, p. 26; the Aboriginal Development Commission, p. 4. But note that existing FOI exemption provisions may operate to prevent access to many documents sought by litigants; e.g. Re Kingston Thoroughbred Horse Stud and Australian Taxation Office (15 April 1986); Evidence, p. 686 (Australian Taxation Office), p. 1375 (Justice J.D. Davies).

3.63 Dr Griffith argued that the FOI Act should be drafted so as 'not to trespass upon the course of proceedings, including proceedings for judicial review', whether anticipated or current. In his opinion, there is no public policy reason why the FOI legislation should be available as an aid to pre-trial discovery.[48]

3.64 The Committee does not recommend that any amendment be made to the FOI Act to prevent FOI access being used to supplement the discovery process. In principle, the Committee does not regard this use of FOI as inappropriate.[49] The fact that a court or tribunal is not the exclusive arbiter of the disclosure of documents by one or other of the parties does not mean that it necessarily loses control over the litigation process. It retains complete control over the use of documents, however obtained, as well as over its time-tabling and the management of its procedures. A court or tribunal is not obliged to delay proceedings in a matter because an FOI request is outstanding.[50]

3.65 Apart from the question of principle, the Committee sees insurmountable difficulties inherent in any attempt to devise a provision to prevent litigants, or people acting on behalf of litigants, obtaining documents relevant to that litigation under the FOI Act. Among the problems which would need to be solved are:

- when the litigation could be said to be on foot (or anticipated);

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48. Submission from Dr Gavan Griffith, p. 3. See also Evidence, pp. 685-86 (Australian Taxation Office); submissions from the Australian Taxation Office, p. 21 (Evidence, p. 671); the Australian Customs Service, p. 28; the Aboriginal Development Commission, p. 5.
49. Cf. Re Bartlett and Department of the Prime Minister and Cabinet (31 July 1987) para. 23.
50. Cf. ibid., para. 5.

- what documents are relevant to the litigation (this might require examination of the applicant's motive);

- whether any bar on FOI use would cover requests to agencies other than the agency which was a party to the litigation; and

- whether all access requests for the relevant documents should be denied or only access requests by the litigant and perhaps persons (known to be?) acting on behalf of the litigant.

Section 70 of the Crimes Act

3.66 Section 70 of the Crimes Act 1914 makes it an offence for Commonwealth officers or former officers to disclose without authorisation official information. In its 1979 Report the Committee recommended that reform of this section be considered.[51]

3.67 The policy of discretionary secrecy imposed by section 70 was seen as potentially inconsistent with the presumption of openness embodied in the FOI Act.[52] The Government response to this recommendation in 1980 was to say that a review of section 70 was in progress.[53] The review has apparently not been completed and section 70 remains as it was in 1979.

3.68 The evidence suggests that section 70 has not proved to be incompatible with FOI.[54] A number of agencies have adopted or extended policies of granting access to documents independently of the terms of the FOI Act.[55] They have not reported any

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51. 1979 Report, para. 21.27.
52. 1979 Report, para. 21.25.
53. Senate, Hansard, 11 September 1980, p. 803.
54. Evidence, p. 140-141 (Attorney-General's Department).
55. E.g. submission from the Department of Education, pp. 1-2.

difficulties related to section 70 in doing so. Therefore, the Committee no longer sees any need to review section 70.

'Lowest reasonable cost' to the applicant

3.69 'The Age' suggested sub-section 3(2) should be amended so as to list as one of the aspects of the FOI Act the disclosure of information at the lowest reasonable cost to the applicant.[56] According to 'The Age', this suggested amendment would prevent agencies from interpreting section 3 as meaning at the 'lowest reasonable cost' to the Government, and imposing unnecessarily high charges upon applicants.

3.70 The Committee does not accept this suggested amendment. The Committee considers that one of the objects of the freedom of information legislation should be to further the disclosure of information at the lowest reasonable cost to the consumer (applicant) as well as to the Government (taxpayers). The Committee considers that agencies should develop and follow administrative practices designed to maximise efficiency and minimise costs.

Unreasonable use of FOI Act

3.71 Many agencies informed the Committee that unreasonable access requests were placing a strain upon their resources. (This theme was balanced by the equally common complaint by FOI users that unreasonable behaviour by bureaucrats was undermining the operation of the FOI Act.) The Committee is conscious that its rejection of motive as being relevant to applicants' access rights makes it difficult to identify criteria by which to define the reasonableness of requests.

3.72 Agency concern appears to arise at several stages. In some cases, applicants seek access to documents which are

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56. Submission from 'The Age', p. 7 (Evidence, p. 192).

relevant to matters which are otherwise the subject of litigation between the applicant and the agency. As was discussed above, the Committee has no objection to the use of the Act in this context, including in those circumstances in which FOI is effectively used to outflank court supervised discovery.

3.73 Some agencies expressed concern about applications which are lodged with the intention of merely 'seeing how the system works',[57] or as part of an attempt to influence (and pressure) agencies in respect of other non-FOI matters.[58] Similarly, some agencies noted that applicants occasionally fail to collect or examine material prepared in response to their FOI requests.[59] Concern was also expressed about requests which 'cannot reasonably be construed as having any relationship to the public interest';[60] where the costs of providing access far outweigh any possible benefit to the applicant;[61] or where applicants seek copies of documents which they once had, and have lost or mislaid.[62] Further problems arise where applicants repeatedly seek access to the same material,[63] or deluge agencies with requests.[64]

3.74 The labels most frequently attached by agencies to what they perceive as unreasonable access requests or unreasonable

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57. E.g. submissions from the Department of Housing and Construction, p. 3; the Australian Wool Corporation, p. 6.
58. E.g. submissions from the Australian Taxation Office, pp. 16-18 (Evidence, pp. 666-68); the Department of Veterans' Affairs, para. 97 (Evidence, p. 579). For discussion of 'gamesmanship' by both applicants and agencies see the submission from the Commonwealth Ombudsman, p. 9 (Evidence, p. 1316).
59. Submission from the Australian Wool Corporation, p. 6.
60. Submission from the Department of Defence, p. 13.
61. Submission from Dr Gavan Griffith, pp. 5-6.
62. E.g. see submissions from the Australian Taxation Office, pp. 21-22 (Evidence, pp. 671-72); the Australian Customs Service, p. 31.
63. E.g. submissions from the Australian Taxation Office, p. 15 (Evidence, p. 666); the Commonwealth Ombudsman, p. 9 (Evidence, p. 1316); and first supplementary submission from the Department of Local Government and Administrative Services, p. 2.
64. E.g. submissions from the Department of Employment and Industrial Relations, pp. 1-2; the Department of Communications, pp. 2-3; the Department of Finance, Attachment C, p. 5 (referring to AGRBO).

behaviour by applicants are 'vexatious' and/or 'frivolous'. (Of course not all agencies adopted this description.[65] Some merely noted that substantial burdens are placed upon their resources by particular applicants or applications.)

3.75 Few agencies attempted any rigorous definitions of these labels.[66] Rather, submissions described specific applications and applicants that had caused the agency particular concern. Irrespective of the label attached, the Committee was invited, either explicitly or implicitly, to consider providing a mechanism to enable agencies to avoid having to spend significant resources on such applications and applicants.

3.76 The Committee recognises that some applicants will abuse their rights under the FOI Act. Nonetheless, the Committee does not accept that agencies should be entitled to rely upon their assessment of applicants' bona fides to refuse to process requests.

3.77 In the Committee's view, the only grounds which it should be possible to decline to process requests are set out in section 24. In addition, the Committee considers that its recommendations in respect of charges, which are discussed below in chapter 18, will, to some degree at least, obviate the difficulties which agencies encounter in this context.

3.78 Different questions arise in respect of appeals to the Ombudsman and the Administrative Appeals Tribunal. The Ombudsman is already empowered to decline to investigate complaints in some

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65. One agency suggested that agencies should be able to apply to the AAT to have individuals declared vexatious users: submission from the Department of Transport, p. 6.

66. The Australian Taxation Office did quote a legal dictionary definition of a vexatious action as one 'in which the party bringing it is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or which is scandalous, frivolous or vexatious or may tend to prejudice, embarrass or delay the fair trial of an action, or where no reasonable cause of action is disclosed'; submission from the Australian Taxation Office, p. 15 (Evidence, p. 665).

circumstances, inter alia, where the application is frivolous, or vexatious.[67] Similarly, the Federal Court, to which appeals lie from determinations of the Administrative Appeals Tribunal, possesses an inherent jurisdiction to control (and dismiss) vexatious or frivolous applications. In the Committee's view, the Administrative Appeals Tribunal should also have this jurisdiction. The point is discussed below in chapter 18, paragraphs 18.50 to 18.61, where it is recommended that the Administrative Appeals Tribunal should be able to order that costs be awarded against applicants where their applications are so lacking in merit as to be frivolous or vexatious.

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67. S.6(1)(b)(i) of the Ombudsman Act 1976 permits the Ombudsman to refuse to investigate a complaint 'if in the opinion of the Ombudsman ... the complaint is frivolous or vexatious or was not made in good faith'. Similar provision is made in a number of other Acts including the Commonwealth Electoral Act 1981, s.116(3); the Racial Discrimination Act 1975 s.24(2)(d); the Human Rights and Equal Opportunity Commission Act 1986, s.20(2)(c)(ii); the Radiocommunications Act 1983, s.47(2)(b)(i); the Australian Broadcasting Corporation Act 1983, s.82(2)(a); the Sex Discrimination Act 1984, s.52(2)(d); and the Merit Protection (Australian Government Employees) Act 1984, s.49(1)(b)(i).

CHAPTER 4

INTERPRETATION OF AND EXEMPTION FROM THE FOI ACT

4.1 The operation of the FOI Act is restricted both by its interpretation section (s.4), and the exemption of certain agencies (s.7). The Committee received little comment on the definitions contained in section 4 of the FOI Act. Those which the Committee considers require amendment or clarification are discussed in this chapter, as are the criteria for the exemption from the operation of the Act.

'Department'

4.2 The definition in section 4 excludes the five Parliamentary departments: Senate, House, Joint House, Parliamentary Library, and Parliamentary Reporting Staff. When the Committee examined this exclusion in 1979, it concluded that, in principle, the exemption of Parliamentary departments was not justified.[1] However, the Committee was unable to agree upon a formula which would remove the total exemption while preventing disclosure of matters which might be thought to have a detrimental effect on the position of members of Parliament.[2]

4.3 Notwithstanding the difficulty inherent in devising a suitable partial exemption to operate alongside the present sub-section 46(c) (disclosures which would infringe the privileges of the Parliament), the Committee is of the view that the Parliamentary departments should be subject to the operation of the Act.

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1. 1979 Report, para. 12.31.
2. 1979 Report, para. 12.32.

4.4 However, after again considering the matter, the Committee has reached the same conclusion as was expressed in the 1979 Report. Once again, the Committee recognises difficulties in distinguishing documents the disclosure of which will be detrimental to the position and activities of members of Parliament.

Need for an express definition of 'document'

4.5 A definition of 'document' was inserted into the Acts Interpretation Act 1901 in 1984 (s.25). As is noted below in chapter 13, the Privacy Bill 1986 also contains a definition of 'document'. The Committee questions whether the definitions in the FOI Act and the proposed privacy legislation are necessary.

4.6 In the Committee's view, it is undesirable to define words in particular Acts where those words are satisfactorily defined in the Acts Interpretation Act. In the Committee's view, the Acts Interpretation Act definition should apply to the FOI Act.

4.7 The Committee notes that the definition of document contained in the FOI Act excludes a certain class of documents: 'library material maintained for reference purposes'. The Committee has no objections to this limitation. In the Committee's view, this restriction should be retained.

4.8 **The Committee recommends that the definition of 'document' contained in the FOI Act be deleted, with the rider that the provision that 'document' 'does not include library material maintained for reference purposes' be retained.**

Access to 'documents'

4.9 The FOI Act provides for access to 'documents', not for access to 'information'. The single exception to this is

contained in section 17, which provides for access to information held on computers but not available in documentary form. (This section is discussed below in chapter 6.)

4.10 In its 1979 Report, the Committee accepted,[3] and it continues to accept that, in general, it would not be appropriate to require agencies to manipulate information so as to create new documents in order to meet FOI requests. The Committee considers that, in general, the right of access created by the FOI Act should be confined to information in the form of documents in an agency's possession.

4.11 During the inquiry which preceded the 1979 Report, concern was expressed about the requirement that access requests relate to 'documents', not simply 'information'.[4] There was some fear that requests for specific information would be treated as invalid even though the agency receiving the request possessed readily identifiable documents containing that requested information.

4.12 In its 1979 Report the Committee regarded this fear as unfounded.[5] Experience has confirmed this view. It seems that, where what is being sought is clearly identified, agencies usually treat requests for 'information relating to ...' as if they had been expressed in the form 'documents relating to ...'.[6]

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3. 1979 Report, para. 7.6.
4. 1979 Report, para. 7.4.
5. 1979 Report, para. 7.5.
6. E.g. see the submission from the Department of Foreign Affairs, p. 2 (Evidence, p. 1057). See also the case involving the Australian Taxation Office referred to in the submission from the Commonwealth Ombudsman, Attachment, p. 1 (Evidence, p. 1329); and the case referred to in the attachment to the submission from the Department of Defence.

A copy is a 'document'

4.13 The then President of the Administrative Appeals Tribunal, Justice Davies, drew the attention of the Committee to one aspect of the definition of 'document':

> Section 4(1) defines "document" to include a copy. I take this to mean that each copy is a separate document. Perhaps the operation of the Act with respect to copies should be clarified.[7]

4.14 The Committee understands that Justice Davies is concerned that, applying the FOI Act literally, an agency may be obliged to grant access to the document answering the description contained in the request plus every copy of that document in the agency's possession.

4.15 The Committee is not aware that any practical problems have arisen in this regard. The question is unresolved whether a copy of a document can still be said to be a copy if marginal annotations have been made to it, or whether the effect of the additions is to create a different document. The question is best regarded as one of fact to be determined in particular cases by the extent and substance of the annotations and by clarifying with the applicant precisely what is being sought.

4.16 Nonetheless, the Committee would not wish the Act to deny access (unless a relevant exemption applied) where an applicant seeks access to all the variously annotated copies of, say, a document containing a policy proposal in order to discover what annotated comments the proposal has attracted within the agency.

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7. Submission from Justice J.D. Davies, p. 2 (Evidence, p. 1365).

4.17 Alternatively, all the copies may be identical. By furnishing a copy of any one of these copies the agency will discharge its obligation to grant access (s.20(1)(b)). Where applicants insist on inspecting each copy, the Act permits agencies to refuse to allow inspection if to do so would unreasonably interfere with their operations (s.20(3)(a)).

'Prescribed authority': public funding

4.18 A small number of bodies created under the prerogative do not fall within the definition of 'prescribed authority' and therefore are not subject to the Act.[8] In some cases, these non-statutory bodies are vested with considerable responsibility. For instance, one of them, the National Health and Medical Research Council, was largely responsible for the $55.6 million in direct Commonwealth support for medical research during 1985-86.[9]

4.19 The Committee is not satisfied that bodies should be immune from the requirements of the FOI Act because they were created by Order-in-Council, independently of any enactment.

4.20 In reaching this conclusion, the Committee expresses no view upon whether any of the bodies created by Order-In-Council should be provided with either partial or total exemption by inclusion in the Schedule 2.

4.21 **The Committee recommends that the definition of 'prescribed authority' be amended so as to avoid the exclusion of bodies from the operation of the FOI Act only because they were created by Order-in-Council.**

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8. Re Wertheim and Department of Health (1985) 7 ALD 121 p. 137.
9. Commonwealth Department of Health, Annual Report 1985-86 p. 69.

Bodies in the Territories

4.22 Sub-paragraph (a)(v) of the section 4 definition of 'prescribed authority' implies that the Act as a whole extends to Norfolk Island.[10] The Department of Territories advised the Committee that the Act does not expressly provide for its 'application to all of the external Territories' of the Commonwealth.[11] The Committee understands that the Department's concern arises out of the omission from the Act of any reference to bodies such as the Christmas Island Assembly and corporations such as the Phosphate Mining Corporation of Christmas Island.

4.23 The Committee notes that from time to time it will be necessary to amend the FOI Act to reflect the varying degrees of independence exercised by the Australian territories, both external and internal. (For instance, there is no longer any body known as the Australian Capital Territory House of Assembly - see the sub-paragraph (a)(iii) of the section 4 definition of 'prescribed authority'.)

4.24 **The Committee recommends that the Attorney-General maintain a watching brief in respect of the inclusion in the FOI Act of appropriate references to the Australian territories and, when necessary, devise appropriate amendments.**

Bodies discharging both statutory and non-statutory functions

4.25 Some difficulty arises in respect of bodies created under enactment which discharge both public, statutory functions and private functions. For instance, the Law Society of the Australian Capital Territory has been held to be a prescribed authority within the terms of the Act.[12] As yet, it has not been determined conclusively whether the Law Society 'is subject to

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10. See also FOI Act, s.4(3)(a)(iii), s.46(c).
11. Submission from the Department of Territories, p. 17.
12. Re Brennan and the Law Society of the Australian Capital Territory (1984) 6 ALD 428.

the Act in relation to all of its functions, both public and private.'[13]

4.26 In the Committee's view, it is unreasonable to apply the FOI Act to the private functions of such bodies as the ACT Law Society. Nonetheless, the Committee is firmly of the view that the Act should apply to the documents relating to the public functions of such bodies.

4.27 Accordingly, **the Committee recommends that the FOI Act apply to documents relating to the public functions only of bodies which discharge a mixture of functions.**

Section 7: exemption of certain bodies

4.28 A number of bodies which would otherwise be subject to the FOI Act are exempted by section 7 either in entirity or in relation to certain categories of documents. Bodies wholly exempt are listed in Schedule 2, Part I. This includes security agencies such as ASIO and ASIS. Bodies partially exempt and the relevant categories of documents are listed in Part II of that Schedule. In almost all cases, the body is given exemption only 'in relation to documents in respect of its competitive commercial activities'.

4.29 In this inquiry, as during its 1979 review of the freedom of information legislation, the Committee received submissions from bodies which considered that they should be exempt from the operation of the legislation either in whole or in part.

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13. Submission from the Law Society of the Australian Capital Territory p. 6.

4.30 As in 1979, the Committee has not sought to resolve all of these claims but has chosen to focus upon the principles which should govern the exemption of bodies in whole or in part.[14]

4.31 The Committee was conscious that some of the bodies which petitioned the Committee to recommend exemption were, as Mr Lindsay Curtis of the Attorney-General's Department described them, 'persistent triers'.[15] The Committee considers that any decision upon these claims should bear in mind the principles expressed in this report and in the Committee's 1979 Report.

4.32 'The Age' urged the Committee to recommend the repeal of the exemption of all wholly exempt bodies. In support of this, 'The Age' informed the Committee that United States courts have 'never in 20 years' forced the Central Intelligence Agency or Federal Bureau of Investigation 'to disclose documents under FOI which revealed the source of confidential information'.[16] 'The Age' further suggested that:

> If the Australian intelligence community accepts the inevitability and desirability of the scrutiny which FOI brings, acknowledges the strength of safeguards and does not sensationalise imagined disasters for the country's security and all who deal with the agencies, there is no evidence to suggest that FOI will harm them. In fact, there is some evidence that it will help to improve intelligence agencies and their image.[17]

4.33 However, the Committee is conscious that the disclosure of ostensibly innocuous information by an intelligence body may have the potential to jeopardise national security or undermine international relations. The Committee discusses the difficulty presented by the so-called 'mosaic' or 'jigsaw' effect below in the context of the section 37 exemption.

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14. See also 1979 Report, para. 12.15.
15. Evidence, p. 170 (Attorney-General's Department).
16. Submission from 'The Age', p. 10 (Evidence, p. 195).
17. Ibid.

4.34 In 1979 the Committee was not unanimous as to the extent, if at all, that ASIO should be exempt from the freedom of information legislation.[18] The Committee recognises that otherwise innocuous information held by security agencies may be so integrally associated with legitimate security considerations that it is impossible to unscramble confidential information from routine information. For example, the disclosure of information about the recruitment, identity, training, salaries and locations of employees of a security organisation may significantly undermine the operation of a security agency.[19]

4.35 In this report, the Committee accepts the necessity of exempting intelligence agencies from the operation of the freedom of information legislation. The Committee further notes that the Inspector-General of Intelligence and Security is exempted from the operation of the FOI Act by the Intelligence and Security (Consequential Amendments) Act 1986, sections 16 and 17.

Means of exempting agencies

4.36 The Attorney-General's Department drew the Committee's attention to a technical difficulty relating to partial exemptions.[20] It is possible to declare a body to be a 'prescribed authority' by regulation pursuant to sub-paragraph (b) of the definition of 'prescribed authority' contained in sub-section 4(1) of the Act. However, if this is done, the agency is necessarily completely subject to the Act.

4.37 It is not possible to provide a prescribed authority with a partial exemption at the time of subjecting the agency to the Act by regulation. According to the Attorney-General's Department:

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18. 1979 Report, para. 12.22.
19. Evidence, p. 267-68 (Senator Puplick).
20. Submission from the Attorney-General's Department, p. 92 (Evidence, p. 97).

> Confronted with this 'all or nothing' choice it will sometimes be necessary not to make the body a prescribed authority even though it would be in accordance with policy for some of its documents to be subject to the FOI Act.[21]

4.38 Over a dozen bodies have been declared 'prescribed authorities' by regulation.[22]

4.39 The Committee recognises, as it did in 1979, that there are occasionally difficulties in finding time in the legislative timetable for amendments to legislation.[23] However the Committee does not consider that the power to make regulations should be expanded. Where bodies are subject to the Act by the 'prescribed authority' definition, they may be partially exempted (through the operation of sub-section 7(2)) by inclusion in Part II of Schedule 2 of the Act.

4.40 Bodies may be added to or deleted from Schedule 2 or their partial exemption may be varied by amending the Act. The Attorney-General's Department's proposal would provide for the de facto amendment of Schedule 2 of the Act by regulation in respect of bodies which are 'prescribed authorities' by virtue of having been prescribed by regulation. The Committee takes the view that it would be undesirable if some bodies are listed in Schedule 2 by statute, whilst others achieve the equivalent status by regulation.

4.41 In the Committee's view, no additional regulation-making power is necessary or desirable with regard to partial exemption of agencies. When required, the necessary amendment can be made to Schedule 2, Part II by statute. The Statute Law (Miscellaneous

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21. Submission from the Attorney-General's Department, p. 92 (Evidence, p. 97).
22. Freedom of Information (Miscellaneous Provisions) Regulations, Schedule 1.
23. 1979 Report, para. 12.5.

Provisions) Act which is normally passed in each session of Parliament could be used for this purpose if specific legislation were inappropriate or inconvenient.[24]

Criteria determining the exemption of agencies

4.42 One submission to the Committee described the list of agencies exempted under Schedule 2 as being 'something of a mystery'.[25] There is no readily ascertainable characteristic common to the agencies which enjoy total exemption under Schedule 2, Part I.

4.43 Mr Lindsay Curtis of the Attorney-General's Department provided his understanding of the criteria by which agencies were granted total or partial exemption:

> Agencies wholly engaged in commercial enterprises in competition with the private sector were included in Part I. If an agency was not wholly engaged in such a commercial enterprise but had other functions (for example, regulatory functions), the agency was generally included in Part II and protected only to the extent of documents in respect of its competitive commercial activities. The effect of inclusion of an agency in Part I of Schedule 2 was to ensure that it was not subject to the Act in the same way as its private sector competitors were not subject to the Act. The intention of including, in Part II of Schedule 2, an agency engaged only partially in commercial enterprises was to ensure that it would be subject to the Act in respect of 'public' activities (e.g. the

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24. But note the Proposed New Guidelines for Statute Law (Miscellaneous Provisions) Bills as incorporated into Hansard by Senator Evans in 1985 (Senate, Hansard, 30 May 1985, pp. 2784-85) which provide inter alia, that '(b) No matter that is contentious, or is closely related to a contentious matter, may be included', and '(d) Matters that involve substantial policy issues (including legal policy issues) must not be included'.

25. Submission from Mr Anton Hermann, p. 3 (Evidence, p. 330).

> regulatory functions of the primary industry marketing bodies), but otherwise not disadvantaged in relation to its private sector competitors.[26]

4.44 In principle, the Committee considers that these are appropriate criteria. However, the Committee has some doubts as to whether they have been applied consistently. For instance, there is no obvious reason why the Commonwealth Banking Corporation should receive total exemption, whilst the Australian Telecommunications Commission is exempt only 'in relation to documents in respect of its competitive commercial activities'.[27]

4.45 **The Committee recommends that the Attorney-General examine the agencies listed in Schedule 2 to determine whether their inclusion is appropriate.**

Total or partial exemption

4.46 **The Committee further recommends that this examination should pay particular attention to the question of total or partial exemption.**

4.47 The Committee considers that the Government response to the report should include a review of exempt agencies and the reasons why any of the bodies totally or partially exempted from the operation of the FOI Act should retain their exemption.

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26. Supplementary submission from the Attorney-General's Department, pp. 6-7.
27. FOI Act, Schedule 2, Part II. Cf. submission from the Commonwealth Bank Officers' Association, pp. 1-2.

Tertiary institutions

4.48 Mr Graham Greenleaf offered the following description of the position of higher education institutions which are subject to the FOI Act:

> Universities and colleges have many functions common to other agencies subject to FOI: management of property; recruitment and supervision of administrative staff; health and safety concerns; financial matters etc. All of these functions may result in the creation of documents which are subject to FOI requests. The problems that such requests raise will be little different from those faced by any large instrumentality, and just as various.
>
> However, there are certain functions of universities and colleges which, while certainly not unique, are unusual enough to deserve special consideration. These include the maintenance of student educational records, student assessment methods, the promotion system for academic staff, the organs of academic government at all levels, and research activities (both applications and work in progress).[28]

4.49 The problem posed for tertiary institutions by the operation of the FOI Act revolves around four issues: the possibility of frivolous or vexatious requests, raw data of student assessment, confidentiality of referees' reports, and the confidentiality of research material.

4.50 As was noted in chapter 3, the Committee does not accept that agencies should rely upon their assessment of applicants' bona fides to refuse to process requests. In the Committee's

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28. Greenleaf, G., 'Freedom of Information and Universities - in the Courts', (1987) 30 Australian Universities' Review 16, pp. 16-17. Cf. the submission from Dr A. Ardagh, pp. 7-8.

view, it would be contrary to the object of the FOI Act to permit agencies to rely upon their assessments of the motives of applicants in seeking exclusion from the operation of the Act.

4.51 The Committee recognises that requests for access to the raw data of student assessments may pose some difficulties. These difficulties may be particularly acute where 'provisional assessments' constitute the 'raw marks' and these may be modified during the final assessment, which considers whether the totality of the marks 'fairly assess a student's performance'.[29] However, the Committee considers that the problem posed by these requests is analogous to that encountered by any other agency which receives a request for internal working papers and should be resolved under the appropriate specific exemption, such as section 36.

4.52 The possibility that requests for access may jeopardise the confidentiality of referees' reports was noted in the Committee's 1979 Report.[30] This concern is not restricted to tertiary education institutions, although, in the case of these institutions, it may be complicated by the circumstances surrounding the status of the reports - whether they are provided in a personal capacity or on behalf of the institution. However, the FOI Act makes specific provision for the exemption of confidential material (s.45). This section is discussed below in chapter 15.

4.53 The Australian National University informed the Committee that '[o]ne major area which is as yet untested from the point of view of FOI is confidentiality of research material'.[31] The Committee is aware that the premature disclosure of research proposals may be very damaging to its authors and may destroy an academic's research advantage. However, the absence of

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29. Evidence, p. 1301 (Professor I. Ross, ANU).
30. 1979 Report, paras. 3.41 and 25.13.
31. Submission from the Australian National University, p. 6 (Evidence, p. 1297).

any evidence of such damage having occurred after almost five years of operation of the FOI Act may indicate that the Act provides adequate protection.

4.54 It is not certain whether the FOI Act applies to research material such as academics' research notes. Such research notes may not be 'documents in the possession of an agency' for the purpose of the FOI Act, and may therefore not be subject to the operation of the Act.

4.55 The Commonwealth FOI Act differs from its Victorian counterpart in one significant respect in this context. The Victorian Act specifically exempts from disclosure some documents containing the results of scientific or technical research.[32] The provision has been criticised as being too narrow, and because it applies only to research results, and not to research proposals. As Renn Wortley commented:

> Research proposals often contain details of new ideas in projects about to be started. Whilst the release of the results of some scientific and technical research would be reasonably likely to expose ... [a university] or some of its officers to unreasonable disadvantage, the same is very often true of proposals for research which may exist in documentary form and be held by the university.[33]

The Committee recognises the force of this criticism.

4.56 **The Committee recommends that the FOI Act be amended to provide a ground of exemption similar to that contained in paragraph 34(4)(b) of the Victorian FOI Act. The Committee further recommends that this new provision should (i) not be**

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32. FOI Act, s.34(4)(b).
33. Wortley, R., 'Behind the FoI Desk at Monash', (1986) 3 FOI Review 30, p. 32 (author's emphasis).

confined to scientific or technical research; and (ii) not be confined only to the results of research.

4.57 In the Committee's view, the premature disclosure of proposals for research into non-scientific matters, such as literature may, in some circumstances, unfairly abrogate an academic research advantage.

4.58 As was stated earlier, the Committee is opposed to the wholesale exemption of bodies from the freedom of information legislation. In general, the Committee endorses Mr Graham Greenleaf's conclusions in respect of tertiary institutions:

> If universities have to expose their long-standing practices to external review, this may be very valuable. The test should be more whether the reviewing bodies (the AAT and the Courts) are proving themselves unsuited to the task by repeated bad decisions. There is no evidence of this, and ANU itself claims that the Tribunal has substantially upheld almost all of its claims for exemption. Besides, such disputed cases are only the tip of an iceberg of requests which are granted (or if refused, not contested). Unprompted by freedom of information legislation, universities and colleges would not have voluntarily adopted open access policies in relation to much of the information to which uncontested access is now given, any more than most other government agencies would have.
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> If there is evidence, as opposed to assertion, that disclosure of raw scores or referees' reports is <u>always</u> against the public interest, then there is little reason to believe that academic institutions will not get a fair hearing. The problem concerning research material is still only a possibility, but surely it would be more sensible to propose a specific exemption for the types of material that should not be disclosed.[34]

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34. Supra n. 28, p. 27 (author's emphasis). See also the submissions from Dr A. Ardagh, pp. 7-8; and Professor C. Manwell, p. 1.

CHAPTER 5

REQUESTS FOR ACCESS TO DOCUMENTS

5.1 In 1979, the Committee recommended that the FOI Act should be amended so as progressively to close the gap between documents subject to operations of the FOI Act and those subject to the Archives Act.[1] The Committee notes that, as a matter of policy, few agencies now refuse access to documents falling within the gap.[2] The Committee remains of the view that the Government should work towards the elimination of this gap.[3]

5.2 One submission asked the Committee to consider adopting the Victorian Public Service Board's recommendation in respect of the Victorian FOI Act,[4] that access to prior documents should be granted when the documents are at hand or readily retrievable, but not otherwise.[5]

5.3 To the extent that amending the FOI Act to enable agencies to release documents under the protection of sections 91 and 92 of the Act may overcome agency apprehensions about granting access to documents, such an amendment is desirable. (The Committee recognises that amendment in this way will not provide right of access to documents falling into the gap between the FOI Act and the Archives Act. It will merely reduce agencies'

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1. 1979 Report, para. 14.19(b).
2. FOI Annual Report 1986-87, p. 30.
3. 1979 Report, para. 14.18. Submission from 'The Age', pp. 39-40 (Evidence, pp. 224-25). See also submissions from the New South Wales Law Society p. 2; the Law Institute of Victoria, p. 3 (Evidence, p. 376).
4. Victoria, Public Service Board, Report to the Attorney-General on the Administration of the Freedom of Information Act for the Year Ending 30 June, 1984, October 1985, p. 25-31.
5. Submission from the Political Reference Service Ltd, pp. 19-20 (Evidence, pp. 969-70). The Committee notes that some agencies may have difficulty in locating older records: submissions from the Australian Federal Police, p. 3 (Evidence, p. 460); and the Department of Foreign Affairs, p. 14 (Evidence, p. 1069).

concerns about the consequences of releasing documents outside of the FOI Act.)

5.4 **The Committee recommends that an additional paragraph be inserted into the FOI Act providing that sections 91 and 92 of the FOI Act apply where agencies provide access to documents created more than 5 years before the commencement of the operation of the Act.**

'Personal affairs'

5.5 Paragraph 12(2)(a) reflects the Committee's recommendation in the 1979 Report that the then Bill 'specifically provide individuals with a right of access to prior documents affecting themselves'.[6]

5.6 In News Corporation Limited v National Companies and Securities Commission, the Federal Court interpreted the phrase 'personal affairs' in paragraph 12(2)(a) to apply only to the affairs of natural persons, not to the affairs of corporations.[7] In that case, the Chief Judge, Sir Nigel Bowen and Justice Fisher commented that it was uncertain whether paragraph 12(2)(a) was intended to indicate that a corporation may have personal as distinct from business affairs. They decided that it was not.[8]

5.7 In part, the reasoning in News Corporation rested upon an analysis of the meaning of the phrase 'personal affairs' as it appears in sections 41 and 48 as contrasted with the phrase 'business, commercial or financial affairs' of an organisation or undertaking as contained in section 43.

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6. 1979 Report, para. 14.12.
7. News Corporation Limited v National Companies and Securities Commission (1984) 52 ALR 277.
8. Ibid., pp. 283-6 per Bowen C.J. and Fisher J. See also St John J., pp. 292-93.

5.8 As is discussed below, section 41 and 48 are generally perceived as privacy protective. In particular, Part V of the FOI Act confers special rights upon natural persons in respect of the amendment or annotation of documents containing information about them. This right will be extended to documents to which access has been obtained otherwise than under the FOI Act if, or when, either the privacy legislation enters into force or the Committee's recommendation in paragraph 15.62 below is implemented.

5.9 It is consistent with this scheme that natural persons should have rights of access to documents which they would be denied if they were merely legal persons. However, in the Committee's view, it is not necessary that this be so. The case for access to prior documents equally rests upon questions of fairness.

5.10 In the Committee's view, it is desirable that the legal persons also should be entitled to seek access to prior documents containing information relating to themselves.

5.11 **Accordingly, the Committee recommends that paragraph 12(2)(a) of the Act be amended to substitute for the phrase 'to the personal affairs of that person' the phrase 'directly to that applicant's personal, business, commercial or financial affairs'.**

Requests for access to documents - sections 15, 18 and 19

5.12 The FOI Act creates two access options: people seeking access to documents may elect to have their requests dealt with 'formally' under the FOI Act within the time limits specified in section 19 , or 'informally' under the Act. In the latter case, processing their requests is not subject to specific time limits other than the general requirement which derives from the ordinary principles of statutory interpretation that responses should be provided within a reasonable time.

5.13 According to submissions from agencies, this two-tiered system is unwieldy, and largely disregarded in practice.[9] All requests are treated as 'formal' requests, subject to specific time limits. This being so, it is questionable whether there is any point in retaining the two-tiered system. The Committee notes that three agencies expressly urged the abandonment of this system.[10]

5.14 **The Committee recommends that the two-tier access request structure be abandoned. The Committee recommends that all requests for access to documents under the Act attract the time limits specified in the Act.**

Prescribed address

5.15 Sub-section 19(2) of the Act provides that 'the appropriate address' for receipt of a formal request for access of documents under section 19 shall be:

> (a) specified in a notice (being a notice that is in force at the time of the request) published in the Gazette ... as an address to which requests made in pursuance of this Act may be sent or delivered in accordance with this section; or
>
> (b) if, in respect of the agency or Minister, there is no notice in force specifying such an address-
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> (i) in the case of an agency - the address of the office or principal office of the agency that was last specified in the Commonwealth Government Directory; and

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9. E.g. submission from the Inter-Agency Consultative Committee on FOI, p. 3.
10. Submissions from the Department of Arts, Heritage & Environment, pp. 8-9; the Department of Territories, pp. 11-12; the Australian Customs Service, p. 15.

(ii) in the case of a Minister - the address of the office or principal office of the Department of State administered by the Minister that was last specified in the Commonwealth Government Directory.

5.16 The objects of specifying addresses in this manner were to ensure the accurate identification of addresses of agencies and Ministers because addresses listed in telephone directories were not always up to date, and to ensure that all requests were channelled through central reference points so as to facilitate effective administration of the Act.[11]

5.17 In practice, agencies do not refuse to process requests on the ground that they were not lodged at a prescribed address.[12] Further, as one user pointed out, the Victorian FOI Act does not impose a requirement that the requests be directed to an 'appropriate address'.[13]

5.18 One agency recommended that the system of prescribing addresses should be retained because it is 'desirable for evidentiary purposes'.[14] However, if there is a dispute whether a application has been received by an agency there is a simple solution: the applicant may lodge the application again. It is not essential that the fact of the original application having been made be proven, since only time turns upon the date of receipt - not the right of access.

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11. Senate, Hansard, 7 October 1983, p. 1338 (Senator Gareth Evans).
12. Submissions from the Australian Taxation Office, p. 21 (Evidence, p. 671); the Inter-Agency Consultative Committee on FOI, p. 4; the Department of Local Government and Administrative Services, p. 15; and the Department of Territories, p. 12. Contrast the experience referred to in the submission from the Australian Pensioners' Federation, p. 2.
13. Submission from 'The Age', p. 14 (Evidence, p. 199).
14. Submission from the Department of Local Government and Administrative Services, p. 15.

5.19 Further, as one agency noted, it is difficult and costly for agencies which have a large network of offices to keep the list of prescribed addresses up to date.[15]

5.20 **The Committee recommends the abolition of the system of prescribed addresses.**

5.21 One group of users urged the Committee to recommend that it should be possible to send requests to regional offices, not just main, capital city, offices.[16] This appears to be a reasonable suggestion.

5.22 The Committee recognises that this may lead to disputes as to what constitutes an 'office' for this purpose. This may be so particularly in respect of agencies which post 'outrider' officers to discharge particular functions without formally establishing agency offices for these officers. (For example, some agencies locate liaison officers in other agencies' offices.) Consequently, it is desirable to nominate some readily accessible means of identifying agency offices.

5.23 'The Age' noted that telephone directory addresses are more accessible than the lists contained in the Government Gazette.[17] The Committee agrees.

5.24 Telephone directories are readily accessible, and updated annually. Although the listed addresses may occasionally be no longer current, it is unlikely that this will cause applicants excessive difficulty. If the request is not re-directed by postal authorities, it is likely to be returned to the applicant. In these circumstances, the applicant may have to

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15. Submission from the Australian Taxation Office, p. 21 (Evidence, p. 671).
16. Submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 3 (Evidence, p. 852).
17. Submission from 'The Age', p. 14 (Evidence, p. 199).

resort to some other means to locate the agency, but this is unlikely to be beyond the wit of applicants.

5.25 If the application is neither received nor returned, this is likely to be communicated to applicants if they follow up their requests in an attempt to ascertain the reason for the lack of response or complain to the Ombudsman or Administrative Appeals Tribunal about an agency's (or Minister's) failure to decide upon the request within the statutory time limit upon the basis that this should be treated as a deemed refusal under section 56. (As is discussed below, in these circumstances the Tribunal is empowered to make any decision which 'could have been or could be decided by an agency or Minister' including that the application has not been received.)[18] In these circumstances, an applicant may simply lodge the application at the current address.

5.26 The Committee considers that the category of appropriate addresses should be limited to those appearing in Australian telephone directories.

5.27 **The Committee recommends that sub-section 19(2) be amended to provide that the 'appropriate address' be 'the address of any regional or central office listed in any current Australian telephone directory'.**

Time limits

5.28 Sub-section 19(3) reflects the Committee's 1979 recommendation for a time limit upon the processing of FOI requests. It provides as follows:

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18. FOI Act, s.58(1).

(3) In sub-section (1), "the relevant period", in relation to a request made to an agency or to a Minister for access to a document, means, subject to sub-section (4)-

(a) in a case where the request is received before 1 December 1984 - 60 days;

(b) in a case where a request is received on or after 1 December 1984 but before 1 December 1986 - 45 days; and

(c) in any other case - 30 days.

5.29 The Act provides for the extension of the time period by 15 days where agencies consult third parties under the reverse-FOI procedures.

5.30 Users urged the Committee to support the 30 day time limit. Agencies recommended that the time period should return to the earlier 45 day period. The Committee notes that one of the unsuccessful amendments proposed by the Government in 1986 was intended to retain the 45 days limit after 1 December 1986.[19]

5.31 The amendment was rejected in the Senate in October 1986 and the 30 days limit has applied since 1 December 1986. The Government contended that it would be necessary to allocate additional staff in order to meet the 30 day time limits, and it would be difficult to meet the burden of the additional costs. Consequently, the Government argued that the introduction of the 30 day deadline would sharply increase applications for review by the Administrative Appeals Tribunal. It was contended that this would occur because a failure to comply with the statutory time limits gives an automatic right to seek review.[20]

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19. Freedom of Information Laws Amendment Bill 1986, cl.10.
20. Senate, Hansard, 15 October 1986 (Senator Gareth Evans), p. 1358.

5.32 This contention does not appear to have been borne out by experience. For example, almost none of the large number of applicants whose requests were not determined within the statutory time-limits during 1985-1987 elected to treat the delay as a deemed refusal and apply for review by the Administrative Appeals Tribunal or Ombudsman.[21]

5.33 The Committee concludes that it is unlikely that the reduction in the time limits will increase the number of applications to the Administrative Appeals Tribunal for review, even if agencies continue to process requests at the 1986 pace and consequently fail to meet the 30 day deadline (as many failed to meet the 45 day deadline).

5.34 Many agencies informed the Committee that they would be able to deal with routine requests for access to documents within 30 days. Presumably, there will always be a number of requests

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21. Time limits apply where requests comply with section 19. Of the 29,440 section 19 requests determined in 1985-86, 7752 took longer than 45 days to determine (FOI Annual Report 1985-86, Appendix F5). Only 287 applications for review were lodged with the AAT during the year. A subset of the 287 is listed in Appendix H2 'AAT Review - Applications based on delay' which shows a total of 160 applications for review by the AAT. Of these, 5 were due to delay at the primary decision-making level. A further 6 were due to delay at the internal review stage. The Committee understands that the 160 applications categorised in the Appendix H2 were roughly representative of the total 287. Presumably, therefore, approximately 20 of the total 287 applications were based upon delay. A further 91 complaints were made to the Ombudsman. No statistics are available on the grounds of these complaints, but delay is one of the six common grounds identified. But even if all 91 complaints concerned delay and are added to the 20 AAT applications, the resulting total is small in comparison to the number of requests not determined within time-limits. A similar situation is shown by the 1986-87 statistics (FOI Annual Report 1986-87, Appendix H and p. 42).

which cannot be processed within 45 days, or even within the 60 days which were allowed before 1 December 1984.[22]

5.35 Some agencies attributed their slowness in processing requests to the lack of resources available for or allocated to FOI. Alternatively, some agencies commented upon the complex vetting required in order to determine whether to release some documents, and the necessity for consultation with third parties, such as foreign governments, businesses etc.[23]

5.36 In 1985-86, 26.3% of all requests subject to section 19 time-limits were not resolved within 45 days. Among major agencies the percentage ranged from a low of 1.8% of total requests received by the Department of Social Security, to a high of 46% by the Attorney-General's Department.[24]

5.37 In 1986-87, average response time by agencies to all requests subject to time limits was approximately 32.5 days, with 37.2% of requests remaining unresolved after 30 days and 14.7% remaining unresolved after 60 days. Among major agencies the percentage unresolved within 30 days ranged from a low of 13.2% by the Department of Social Security to a high of 86.3% by the Department of Defence.[25]

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22. For statements on the difficulty of meeting the 45 day limit, see submissions from the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Veterans' Affairs, para. 65 (Evidence, p. 574); the Department of Housing & Construction, p. 3; Telecom Australia, p. 4 (Evidence, p. 752); the Department of Defence, pp. 11-12; the Department of Trade, p. 10; the Department of Territories, pp. 8-9; the Department of Local Government and Administrative Services, pp. 5-6; the Department of Transport, pp. 4-5; and the Department of Immigration and Ethnic Affairs, pp. 8-11 (Evidence, p. 698-701).

23. E.g. see submission from the Department of Foreign Affairs, pp. 8-10 (Evidence, pp. 1063-65).

24. See FOI Annual Report, 1985-86, p. 20.

25. FOI Annual Report 1986-87, pp. 18-19. Note that the 30 day time limit applied to only 7 months of the year to which the figures in this paragraph relate.

5.38 Users were very critical of the time taken by agencies in responding to requests. One frequent FOI user suggested that some agencies, as a matter of policy, delay responding to politically sensitive requests until the last possible moment.[26] Other users suggested that delay is a deliberate bureaucratic tactic used to frustrate either particular requests or freedom of information in general.[27]

5.39 The Committee is conscious that the processing of FOI requests may be time-consuming, and expensive in terms of staff resources. Consequently, the Committee has considered carefully the case for the restoration of the 45 day period. The Committee has also considered the suggestions contained, or implied, in agency submissions for the extension of the normal time-limits in some circumstances, perhaps subject to supervision by the Ombudsman.

5.40 Agencies were particularly concerned about the processing of certain categories of requests, generally defined by the volume or nature of the material sought, for example, classified documents, documents containing policy rather than personal information and documents held overseas, and the necessity for consultation with applicants, or with third parties including other agencies.

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26. Submission from Cramb Corporate Services, p. 7.

27. Submissions from Mr John Doohan, p. 1; Mr D.R. Simpson, p. 2; Mr B.F. Grice, p. 2; the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, pp. 12-15 (Evidence, pp. 861-64); the Political Reference Service Ltd, pp. 11-12 (Evidence, pp. 961-62); and Mr Robin F. Howells, pp. 1-3 (Evidence, pp. 303-5); Cramb Corporate Services, p. 5. See also the submission from the Commonwealth Ombudsman, pp. 6 and 19 (Evidence, pp. 1313 and 1326): delay is often the central element in complaints made to his office concerning FOI.

5.41 The Committee does not accept that there should be different time limits applicable to different classes of documents. In the Committee's view this would be unwieldy in practice, and likely to generate dispute over the designation of requests.

5.42 Similarly, the Committee rejects the suggestion offered by 'The Age' that access should be expedited where requests are made by journalists or public interest groups.[28] In practice, the establishment of a 'fast track' for access would invite an examination of applicants' motives for requesting access to information whilst simultaneously delaying the processing of requests from persons not entitled to expedited access.[29]

5.43 Several agencies informed the Committee that the additional 15 days allowed by sub-section 19(4) where agencies engage in reverse-FOI consultation is insufficient.[30] The Department of Local Government and Administrative Services suggested that sub-section 19(4) should be amended so as to permit agencies which consult with States under section 26A to defer any decisions upon the requests until the States' views have been received and considered.[31]

5.44 The Committee considers that the time for reverse-FOI consultation should not be open-ended. However, the Committee

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28. Submission from 'The Age', pp. 14-16 (Evidence, pp. 199-201).
29. See Evidence, pp. 278 and 281-83. As was noted earlier the Committee is opposed to any suggestion that applicants' motives should determine their access to documents. (As is discussed below, this proposition is subject to some qualification in respect of these documents where the question of whether the document should be disclosed turns upon a balancing of the applicant's interest in obtaining access as against the privacy or business, commercial, or financial interests of a third party).
30. Submissions from the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Resources & Energy, p. 4; the Department of Health, p. 23 (Evidence, p. 1243); the Department of Trade, p. 10. See also the submission from the Queensland Government, p. 7.
31. Submission from the Department of Local Government and Administrative Services, p. 10.

does accept the 15 day consultation period may be inadequate in practice. The Committee considers that the time allowed for reverse-FOI consultation should be increased to 30 days.

5.45 Accordingly, **the Committee recommends that sub-section 19(4) be amended by the substitution of the period of 30 days for the period of 15 days.**

5.46 According to the Inter-Departmental Committee, in 1984/85 the average time taken to process freedom of information requests (ie. search, retrieval and decision-making) was as follows:[32]

Request category	Average time (hours)
Personal	9
Personnel	13
Business	34
Policy	58
All Requests	15

5.47 In view of these averages, the Committee considers that it should be possible for agencies to comply with the 30 days limit.[33]

5.48 The Committee considers that the 30 day deadline should be retained.[34] Having regard to the average time for processing

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32. IDC Report, p. A4.
33. The proportion of requests dealt with within 30 days increased from 52.2% in 1985-86 to 62.8% in 1986-87: FOI Annual Report 1986-87, p. 17. Note that the requirement to respond within 30 days applied only from 1 December 1986.
34. The Committee recognises that the introduction of the 30 day deadline may raise applicants' expectations unrealistically. If agencies continue to process requests at the same pace as they did in 1985-86, notwithstanding the reduction in time allowed, the result may be an increase in user dissatisfaction with the operation of the freedom of information legislation.

requests identified by the IDC, the Committee sees no reason why agencies should not be able to meet this deadline.

5.49 Senator Stone dissents from this conclusion in respect of policy documents.

CHAPTER 6

ACCESS TO DOCUMENTS

Form of access

6.1 Section 20 of the FOI Act governs the form in which access may be given to documents. 'The Age' suggested that paragraph 20(1)(b) should be amended to include the requirement of the provision of 'legible' copies of documents.[1]

6.2 The Committee considers this amendment to be unnecessary. In the Committee's view an illegible version of a legible original would not constitute a 'copy' in the sense required by paragraph 20(1)(b).

6.3 As the Department of Veterans' Affairs noted, not all documents contained in agency or Ministerial records are legible.[2] It may be impossible to provide a legible copy without re-typing. The Committee does not consider that it is reasonable to require that agencies improve upon the quality of illegible originals.

Computer-stored data

6.4 Commonwealth Government record-keeping is increasingly reliant upon the use of computers. Consequently, section 17, which applies to requests involving use of computers, is likely to become increasingly important to the operation of the FOI Act.

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1. Submission from 'The Age', p. 16 (Evidence, p. 201).
2. Department of Veterans' Affairs, Report on 1986 Freedom of Information (FOI) Client Survey, para. 8.

6.5 The Committee received little evidence that practical problems have arisen in the operation of section 17. Only one submission, from Mr Graham Greenleaf of the University of New South Wales Law School, examined section 17 in any detail. Consequently, the Committee has thought it necessary to make only brief reference to two, at present largely theoretical, issues concerning access to computer-stored data.

6.6 The first issue relates to whether applicants should be able to obtain access to computer-stored information in computer-readable form, rather than written form. Secondly, it is not certain to what extent agencies may be required to manipulate computer-stored information in order to satisfy access requests.

Access to tapes and disks

6.7 The Act makes no express provision for an applicant to obtain access to a disk or tape. It can be argued that the definition of 'document' in the Act is sufficiently broad to include a computer disk or tape.[3] The Attorney-General's Department, however, takes the view that the definition 'does not include computer tapes or discs used for the storage of information in the usual way'.[4] Hence these items cannot be made available as documents.

6.8 In some cases, it will be both cheaper for agencies and more useful for applicants if access is given to the document requested by providing access to a tape or disk containing a copy of the document (information) rather than to that information in printed form. The Committee considers that the Act should provide for such access.

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3. The point is canvassed in the submission from Mr Graham Greenleaf, pp. 6-11. See also Bayne, P.J., Freedom of Information [Law Book Co. Sydney. 1984] pp. 42-48.

4. FOI Memorandum No. 19 (September 1982) para. 9. See also submission from the Department of the Special Minister of State, attached correspondence between Australian Electoral Commission and Attorney-General's Department.

6.9 **Accordingly, the Committee recommends that the Act be amended to provide for access in the form of provision by the agency or Minister of a computer tape or disk containing a copy of the requested document.**

Requirement that agencies process data

6.10 Broadly, the FOI Act operates by reference to documents, not information. The Commonwealth Ombudsman has commented that, apart from section 17, the Act

> reflects a 'hard copy' approach to data and it gives little guidance on how far applicants may expect agencies to manipulate data stored on computers.[5]

For example, an agency may hold on computer a name and address list arranged in alphabetical order. The agency only requires printed copies of the list in that order. An applicant requests access to the list arranged in postcode sequence. Is the agency required to sort the list?[6]

6.11 Section 17 applies where the requested information is not available in discrete form in documents of the agency. The agency is required to produce a written document containing the information if it can do so by using computer equipment ordinarily available to it, unless compliance would substantially and unreasonably divert the resources of the agency from its other operations.

6.12 The Committee considers that this test is appropriate in its present form. In the absence of widespread difficulties in applying the test, the Committee does not consider that it would

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5. Commonwealth Ombudsman, Annual Report 1984-85, pp. 175-76.
6. Cf. Evidence, p. 760 (Telecom Australia). Submission from the Commonwealth Ombudsman, p. 7 (Evidence, p. 1335).

be useful to amend the Act so as to attempt to provide more detailed guidance.[7]

Information Access Offices

6.13 Under section 28 of the FOI Act, applicants may request that they be granted access to documents at the Information Access Office closest to their normal places of residence. The FOI Amendment Act 1986 conferred a further function upon these Offices. Documents to be made available for inspection and purchase under sub-section 9(2) must be listed in an up to date statement. Copies of this statement must be available for inspection and purchase at each Information Access Office. Offices have been designated in each State capital city, and in Canberra, Darwin and Townsville. The Offices make use of existing facilities in Australian Archives offices.

6.14 It is not certain what use will be made of Information Access Offices by people seeking section 9 statements. Almost no use has been made of them for access to requested documents.[8] It appears that agencies, when requested, routinely make documents available for inspection at one of their regional offices, which is generally as close to the applicant, if not closer, than the nearest Information Access Office.

6.15 It was put to the Committee that the Offices appeared to be unnecessary[9] or, on the other hand, that the role of the Offices should be expanded.[10] The Committee does not think that there is much benefit in maintaining the Offices in their present form.

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7. Cf. the guidance provided in FOI Memorandum No. 19 (September 1982) paras. 75-77.
8. Submission from the Inter-Agency Consultative Committee on FOI, p. 5; FOI Annual Report 1983-84, p. 110.
9. Submission from the Inter-Agency Consultative Committee on FOI, p. 5.
10. Submissions from the Library Association of Australia, p. 6; the Department of Housing & Construction, p. 7.

6.16 The Offices could be useful if their functions were enhanced so as to make them the first recourse for those seeking information of all kinds relating to the Commonwealth. This enhancement would involve integrating the present Offices (including their Archives function) with the information delivery functions of the Commonwealth Government Bookshops, Promotion Australia, and individual Departments and agencies. This proposal has not been examined. It extends beyond the Committee's terms of reference.

6.17 The Committee merely notes that it appears that Information Access Offices either should have their functions greatly enhanced so as to make them useful, or consideration should be given to eliminating the Offices.

CHAPTER 7

AGENCY RESPONSES TO REQUESTS

Transfers of requests - section 16

7.1 Section 16 provides for the transfer of requests. Sub-section 16(1) states:

> Where a request is made to an agency for access to a document and-
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> (a) the document is not in the possession of that agency but is, to the knowledge of that agency, in the possession of another agency; or
>
> (b) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made,
>
> the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.

Partial transfer

7.2 No provision is made for partial transfers. An agency may, for example, receive a request for several documents, some of which it holds and others which it knows are held by another agency. It cannot formally transfer the request in so far as it relates to the latter documents. As a matter of practice, agencies informally transfer parts of requests.[1]

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1. Submissions from the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Veterans' Affairs, para. 38 (Evidence p. 569); and the Department of Local Government and Administrative Services, p. 7. In 1986-87, 159 requests were transferred in part: FOI Annual Report 1986-87, p. 90.

7.3 The Committee considers that formal transfer of parts of requests should be possible, and the Act should be amended to permit this.

7.4 Accordingly, **the Committee recommends that the Act be amended to provide for the transfer of parts of requests.**

Ambit of transferred requests

7.5 Sub-section 16(1) contemplates that only requests for individually identified documents will be transferred. The request, however, may be for a category of documents - for example, 'all documents relating to ...'. Where such requests are transferred, transferee agencies are uncertain whether they should treat the requests in their terms, or treat them as relating only to the documents identified by the transferors as the basis of the transfer. In practice, the former, wider view is taken.[2]

7.6 Adopting this wider view creates difficulties for agencies, as the Department of Foreign Affairs pointed out:

> As each agency sorts through its files, it may turn up documents of another agency and transfer the request, until several departments may be handling it, and even processing duplicated material that is common to them all.[3]

7.7 From the perspective of applicants, adopting the wider view will often result in more documents being identified. Against this, processing times and charges will often be greater,

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2. Submissions from the Department of Foreign Affairs, p. 15 (Evidence, p. 1070); the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Local Government and Administrative Services, p. 7; and the Attorney-General's Department, p. 86 (Evidence, p. 91).
3. Submission from the Department of Foreign Affairs, p. 15 (Evidence, p. 1070).

and the extra documents identified may not be ones which the applicant actually wishes to see.

7.8 The Committee considers that adopting the wider view imposes potential burdens on applicants and agencies which together outweigh the potential benefits to applicants.

7.9 **Therefore, the Committee recommends that it be made clear, by amendment of the Act if necessary, that an agency to which an access request is transferred is not required to treat the request afresh, but rather to process only those individually identified documents which provided the basis of transfer.**

7.10 In making this recommendation the Committee relies upon agencies having due regard to sub-section 15(4). This provides that:

> Where a person has directed to an agency a request that should have been directed to another agency or to a Minister, it is the duty of the first-mentioned agency to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister.

7.11 It may be that some requests for categories of documents which are currently dealt with by transfer could be better dealt with by assisting applicants to re-direct their requests.

Transfer where document closely connected with another agency

7.12 In evidence to the Committee, representatives of 'The Age' advocated that an agency should not be able to transfer a request relating to a document in its possession.[4] A request by 'The Age' to the Australian Federal Police for a report written by them was transferred to the Department of the Special Minister of State on the ground that the report was more closely connected

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4. Evidence, pp. 263-64.

with the Department than the Police. 'The Age' suggested that the transfer had more to do with controlling information than assisting the requester.[5]

7.13 The Committee does not accept this proposal. No doubt there are occasions when agencies fail to observe the spirit of the Act. But even where this occurs the Committee regards it as preferable that a request is transferred so that the applicant is placed in direct contact with the agency which is really making the decisions. There is no merit in the requester having to negotiate with, or challenge the decision to refuse access of, an agency which is, in reality, only acting on the instructions of a second agency.

Transfer without consent of transferee

7.14 In its submission, 'The Age' recommended that the words in sub-section 16(1) 'may, with the agreement of the other agency' should be omitted and replaced by 'shall'.[6] The aim of introducing a requirement to transfer was to overcome a situation experienced by 'The Age' of agencies neither transferring under section 16 nor assisting applicants to re-direct their requests under sub-section 15(4). Instead the agencies simply did nothing.

7.15 The Committee does not consider that implementation of the recommendation would resolve the problem. If an agency is prepared to ignore its obligation to deal with a request, it would equally be prepared to ignore an obligation to transfer the request.

Transfer of requests for amendment

7.16 Responsibility for the accuracy of a document held by an agency may lie with a second agency. Several agencies suggested

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5. Evidence, p. 263.
6. Submission from 'The Age', p. 13 (Evidence, p. 198).

to the Committee that a request for amendment of a personal record made pursuant to section 48 should be able to be transferred to the agency responsible for the accuracy of that record.[7] The Committee agrees.

7.17 **The Committee recommends that the Act be amended to provide for the transfer of requests for the amendment of records. The Committee further recommends that provision be made requiring the transferee agency to notify the transferor of the outcome of the transferred request.**

7.18 To the extent that this recommendation rests upon the assumption that the transferee agency is responsible for the accuracy of the record, it follows that the transferor agency must defer to the former's decision as to amendment or annotation.

7.19 Accordingly, **the Committee also recommends that where a request for amendment is transferred, and the transferee agency makes and informs the transferor agency of a decision which results in the amendment or annotation of that record, the transferor agency must amend or annotate its record accordingly.**

Section 22: deletion of irrelevant material

7.20 In its submission, the Attorney-General's Department stated:

> It is not uncommon that only a portion of a document is relevant to a request for documents containing specified information. If the irrelevant balance contains sensitive material, exemptions must be claimed, and defended on any appeal. This tends to cause unnecessary concern to the applicant, who has

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7. Submissions from the Department of Veterans' Affairs, paras. 109-10 (Evidence, p. 580); the Department of Defence, p. 16; the Department of Local Government and Administrative Services, p. 15; and the Commonwealth Ombudsman, p. 12 (Evidence, p. 1319).

> no way of knowing whether the material is relevant. It also causes expense to the agency, and ultimately wastes time and money for all concerned with no benefit to the applicant.[8]

7.21 It is uncertain whether the Act permits the deletion of irrelevant material.[9]

7.22 **The Committee recommends that the Act be amended to permit agencies or Ministers to delete material that is irrelevant prior to granting access. The Committee further recommends that decisions to make such deletions on the grounds of irrelevance be reviewable in the same way as decisions to refuse access.**

Paragraph 22(1)(b): edited document not to be 'misleading'

7.23 Deletions may only be made if the resulting document 'would not by reason of the deletions, be misleading' (s.22(1)(b)). This test was criticised as being unnecessary and too favourable to agencies when the legislation was before the Senate in 1981.[10] The then Government agreed that it might be reconsidered when the operation of the legislation was reviewed by the Constitutional and Legal Affairs Committee.[11]

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8. Submission from the Attorney-General's Department, pp. 92-93, (Evidence, pp. 97-98). See also submissions from the Inter-Agency Consultative Committee on FOI, p. 4; the Australian Taxation Office, p. 10 (Evidence, p. 660); the Department of Defence, p. 14; and the Department of Territories, p. 15.
9. Contrast Re Swiss Alumunium Australia Ltd and Department of Trade (1985) 9 ALD 243, p. 245 with Re Anderson and Australian Federal Police (1986) 4 AAR 414, pp. 419-20 and Re Lordsvale Finance Ltd and Department of Treasury (No. 3) (30 June 1986) para. 20. See also submission from the Commonwealth Ombudsman, attachment pp. 3-4 (Evidence, pp. 1331-32).
10. Senate, Hansard, 29 May 1981, pp. 2370-71 (Senator Missen).
11. Ibid., p. 2371 (Senator Durack).

7.24 Users have argued that the imprecision of the test allows agencies too much discretion to withhold access,[12] although no actual cases have been drawn to the Committee's attention of agency abuse of the test. Agencies, however, do find the test difficult to apply:

> It is ... not clear whether it is intended that the document after deletions should be not misleading as to the whole of the original document or just in respect of what remains.[13]

7.25 In a passing reference, the Administrative Appeals Tribunal implied that an edited document had to be 'misleading when compared with the original' for section 22 to apply.[14] But the Tribunal and Federal Court have not yet had to give detailed consideration to the meaning of 'misleading'in this context.[15]

7.26 In the Committee's view the test should be repealed. It is inherently unclear, and it is unnecessary. The use of a concept such as 'misleading' is difficult because it requires the decision-maker to make assumptions about the reader. A casual or inexpert or hostile reader may be 'misled' by a document that would not mislead a careful or expert or sympathetic reader. An objective test - whether the reasonable reader would be misled - may be unhelpful where the agency is aware that the particular applicant is anything but reasonable.

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12. Submissions from Mr Anton Hermann, p. 2 (Evidence, p. 329); 'The Age', pp. 18-19 (Evidence, p. 203-4).
13. Submission from the Inter-Agency Consultative Committee on FOI, p. 4.
14. Re Dillon and Department of Treasury (No. 2) (1986) 10 ALD 66, p. 68.
15. Cf. Harris v Australian Broadcasting Corporation (No. 2) (1983) 5 ALD 560, p. 562; Re Waterford and Treasurer of Commonwealth of Australia (No. 2) (1985) 8 ALN 37, p. 47.

7.27 Propensity to mislead is not, in general, a ground of exemption for complete documents.[16] It should not be for parts of documents. For example, in 1985, the Tribunal considered a document containing statistics and an explanation of how the statistics were derived. The explanation was exempt. The Tribunal said it would be misleading to release the (non-exempt) statistics alone.[17] Yet there would have been no ground for refusing access to the statistics had they been contained in a document on their own, even if the explanation had been in a separate folio in the same file. It is notorious that statistics should not be relied upon unless the method of derivation of the statistics is understood. The Committee finds it difficult to understand how someone could claim to have been misled by the document containing the statistics when put on notice that an explanation of the basis for the statistics has been deleted from that document.

7.28 The Committee takes the view that a document from which deletions have been made can be misleading only where the reader makes assumptions about the deleted material. The assumptions, not the text of the edited document, will be the source of any misleading impression. This being so, the Committee regards the pre-condition for release that an edited document not be misleading as unnecessary. The Committee is encouraged in reaching this conclusion by the absence of any equivalent pre-condition in section 38 of the Archives Act 1983, or in the

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16. However, the Committee notes the line of decisions under section 36 in which it has been said that it tends not to be in the public interest to permit access to an internal working document where disclosure will lead 'to confusion and unnecessary debate': Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626, p. 635. See discussion below in paras. 11.6 to 11.13.

17. Re Waterford and Treasurer of Commonwealth of Australia (No. 2) (1985) 8 ALN 37, p. 47.

FOI legislation of Victoria,[18] Canada,[19] New Zealand,[20] and the United States.[21]

7.29 **The Committee recommends the deletion from paragraph 22(1)(b) of the words 'and would not, by reason of the deletions, be misleading'.**

7.30 Senator Stone dissents from this recommendation and paragraphs 7.26 to 7.28.

Section 23: delegation of decision-making

7.31 Concern has been expressed that section 23 does not authorise the delegation of decision-making powers in three situations where delegation ought to be possible.[22] At present, only principal officers may cause to be prepared an edited version of an otherwise exempt document for release pursuant to section 9 (s.9(4)), or may grant extensions of time for lodging requests for internal review (s.54(1)). Only principal officers or Ministers may decide to grant indirect access to medical information (s.41(3)). The Committee agrees that the power to

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18. Freedom of Information Act 1982 (Vic), s.25.
19. Access to Information Act 1982 (Canada), s.25 requires only that the non-exempt material 'can reasonably be severed' from the exempt.
20. Official Information Act 1982 (N.Z.), s.17(1): but note that this provides that a document 'may be made available by making a copy of that document with such deletions or alterations as are necessary' (emphasis added).
21. 5 USC 552(b) provides: 'Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.' This has been interpreted to mean that exemption is permitted only if exempt and non-exempt information are inextricably intertwined so that deletion of exempt information would impose significant costs on the agency and result in an edited document with little informational value. Mead Data Central Inc. v United States Department of the Air Force 566 F. 2d 242 (D.C. Cir. 1977); Wilkinson v FBI 633 F. Supp 336 (C.D. Cal. 1986).
22. Submissions from the Inter-Agency Consultative Committee on FOI, p. 4; the Department of Veterans' Affairs, para. 122, (Evidence, pp. 582-83), the Department of Health, pp. 18, 20 (Evidence, pp. 1238 and 1240); the Australian Taxation Office, p. 8 (Evidence, p. 658); the Department of Territories, p. 14; and the Australian Customs Service, p. 16.

make decisions on these three matters should be able to be delegated.

7.32 **The Committee recommends that the Act be amended to permit decision-making to be delegated with respect to matters arising under sub-sections 9(4), 41(3) and 54(1).**

Section 24: refusing requests on workload grounds

7.33 Sub-section 24(1) provides:

> Where-
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> (a) a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to specified subject-matter; and
>
> (b) the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or of the office of the Minister,
>
> the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken.

7.34 Sub-section 24(2) reduces agency obligations with respect to paragraph 24(1)(a) requests. If it is apparent from the nature of the documents as described in the request that all

would be exempt, the agency may refuse access without having to identify each document falling within the scope of the request.

7.35 The Attorney-General's Department informed the Committee that in its view there had been comparatively modest use of section 24.[23] In June 1985, the Government issued directions to agencies on the administration of the Act. One of these instructed agencies to rely on section 24 in appropriate cases.[24] Reliance on section 24 has more than doubled since then.

Unsuccessful attempt to amend section 24 in 1986

7.36 Clause 11 of the Freedom of Information Laws Amendment Bill 1986 was successfully opposed in the Senate.[25] The clause expanded the definition of a request which would fall within section 24 by including a request that related to a number of documents specified in the request or a request that was one of a series of 'related requests'. The expression 'related requests' was defined to include requests made by persons whom an agency believed on reasonable grounds to be acting in concert.

7.37 The clause also would have reduced the workload test of 'substantially and unreasonably' diverting agency resources to one of 'substantially' diverting those resources. The clause would have allowed the work involved in screening documents for exempt matter and consulting third parties to be considered in estimating the overall work involved in meeting the request. A 1986 decision of the Administrative Appeals Tribunal had not

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23. Submission from the Attorney-General's Department, p. 87 (Evidence, p. 92). The section was invoked 5 times in the 7 months to 30 June 1983, 28 times in 1983-84, 91 times in 1984-85 and 227 times in 1985-86. For illustrations of the reluctance of agencies to invoke section 24, see the submission of the Department of Local Government and Administrative Services, p. 3; and Evidence, pp. 486-87 (Australian Federal Police).
24. FOI Annual Report 1984-85, p. 181. For details about one agency's response to this direction by increasing its reliance on section 24, see Evidence, pp. 722-25 (Department of Immigration and Ethnic Affairs).
25. See Senate, Hansard, 15 October 1986, pp. 1359-64 for the debate.

permitted these items to be included in calculating the workload created by a request.[26] Finally, the clause would have amended section 24 with retrospective effect insofar as requests made prior to the amendment could have been linked to subsequent requests in order to determine what was a 'related request'.

Need for section 24

7.38 As in 1979,[27] the Committee accepts that there is a need for some provision under which an agency may refuse to process requests if doing so would impose an excessive burden upon its operations.[28] This remains true, even though the Committee would expect the increased charges applicable since November 1986 to play a significant role in reducing the incidence of extravagantly framed requests.[29] There is considerable disquiet, however, amongst both agencies and users over the operation of section 24 in its present form. The remainder of this chapter discusses the particular issues raised.

'Unreasonable' diversion of resources

7.39 One issue with any workload test is whether it should operate solely by reference to the cost to the agency of processing the request. In other words, should agencies be able to refuse all requests whose processing would cost more than a specified amount, or should they be required, once this threshold

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26. Re Timmins and National Media Liaison Service (1986) 9 ALN 196.
27. 1979 Report, para. 13.3.
28. The Committee notes that the Victorian FOI Act contains no equivalent to section 24. The Committee also notes the observation in Penhalluriack v Department of Labour and Industry (Vic. Cty. Ct., 19 December 1983) that the charging scheme acts as a check on extravagent requests: 'The less readily definable check is either some ultimate concept of impossibility or impracticality as a ground of refusal, or, if it be different, some residual discretion in the court to refuse an absurdly extensive request' (p. 4). See also Re Borthwick and University of Melbourne [1985] 1 VAR 33, pp. 35-36.
29. E.g. FOI Annual Report 1986-87, p. 115 (referring to Telecom).

is crossed, to take into account other factors, such as the resources available to it, the likely public benefit in the requested material being made available, etc?

7.40 The Committee takes the view that the wider test is more appropriate, although it acknowledges that the narrower test would be easier to apply.[30] For example, it seems clear that FOI requests to the Department of Defence relating to its land acquisition plans in New South Wales were burdensome to process.[31] Had the Department refused, or been able to refuse, access on workload grounds it would have been difficult to challenge the specific acquisition plans and a Senate Committee would have been misled.[32]

7.41 Requests should not be able to be refused solely on workload grounds, without regard being paid to the public interest in the documents being made public. The present test of 'substantially and unreasonably' diverting agency resources in paragraph 24(1)(b) seeks to achieve this. The Committee would oppose the removal of the words 'and unreasonably' from this test, unless other words were inserted in section 24 to achieve the same effect.

7.42 If factors additional to workload are to be treated as relevant by decision-makers, the question arises whether the Act should attempt to spell out what these factors are. The Administrative Appeals Tribunal has treated an applicant's motive as relevant.[33]

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30. Cf. submission from the Commonwealth Ombudsman, Attachment, p. 5 (Evidence, p. 1333).
31. Submission from the Department of Defence, p. 11.
32. Senate Standing Committee on Foreign Affairs and Defence, Land Acquisition in New South Wales by the Australian Army - First Report (Parliamentary Paper No. 180/1986) p. xviii. See also Senate, Hansard, 25 October 1986, p. 1359 (Senator Puplick).
33. Re Shewcroft and Australian Broadcasting Corporation (1985) 7 ALN 307, pp. 310-11; Re Swiss Aluminium Australia Ltd and Department of Trade (1986) 10 ALD 96, p. 101.

7.43 The Committee does not agree that the motive of an applicant ought to be a relevant factor in deciding if a request is 'unreasonably' burdensome.[34] The Committee appreciates that inability to rely upon triviality of motive may, in a few cases, leave agencies with no alternative but to process large requests. On balance, the Committee regards this as a lesser evil than allowing FOI decision-makers to pass judgment on the worthiness of particular applicants' motives.

7.44 **The Committee recommends that section 24 be amended to make clear that applicants' motives are not to be treated as relevant in applying the 'substantially and unreasonably' test in paragraph 24(1)(b).**

7.45 Senator Stone dissents from this recommendation and paragraph 7.43.

7.46 The Committee does not object to decision-makers considering the public interest in access being granted, independently of the motive of the actual requester. If there is no possible public interest in granting access to outweigh the burden of doing so, it would, in the Committee's view, be unreasonable to undertake the burden.

7.47 However, if there is a public interest in granting access, this should be considered without inquiry as to whether the particular applicant claims to be acting in that interest.[35] Subject to the above recommendation, the Committee does not regard it as necessary to include in section 24 any guidelines as to factors to be considered in deciding if processing a request would be 'unreasonably' burdensome.

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34. Cf. Evidence, pp. 153-55 (Attorney-General's Department); pp. 401-3 (Law Institute of Victoria).

35. Compare Minnis v United States Department of Agriculture 737 F. 2d 784 (9th Cir. 1984) (mailing list useful for both commercial purposes and to verify fairness of agency allocation of permits: both purposes treated as relevant although Minnis only interested in commercial use of list).

Types of requests falling within section 24

7.48 Section 24 operates with respect to requests 'expressed to relate to all documents, or to all documents of a specified class ...' (s.24(1)(a)). The effect of this is to focus upon the form in which the request is expressed, not the number of documents falling within it. This is an invitation to unnecessary legalism. Users complain that agencies treat as 'class' requests applications which, for example, are limited by dates and therefore arguably do not refer to all documents in the class.[36] Agencies complain that the astute applicant can avoid section 24 by wording the request to apply to all documents in a class plus or minus one document.[37]

Aggregation of requests

7.49 One method of avoiding refusal under section 24 is to break a large request into a series of smaller requests. The Administrative Appeals Tribunal has blocked this method by saying that in applying section 24 'the spirit of the Act' calls for related requests to be treated as a single request.[38]

7.50 There are a number of difficulties inherent in attempting to prevent the disaggregation of large requests. Some mechanism has to be devised to stop an applicant using friends or

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36. Submission from Political Reference Service Ltd, p. 13 (Evidence, p. 963). See also submission from 'The Age', pp. 21-24 (Evidence, pp. 206-09).
37. E.g. submissions from the Australian Taxation Office, pp. 11-12 (Evidence, p. 661-62); the Department of Territories, pp. 12-13.
38. Re Shewcroft and Australian Broadcasting Corporation (1985) 7 ALN 307, p. 308. One submission noted that s.24 could assist in dealing with vexatious FOI users if the agency were permitted to take into account not only the instant request but all previous requests made by that applicant in deciding what was an unreasonable diversion of resources: submission from Justice J.D. Davies, p. 2 (Evidence, p. 1365).

colleagues to each make one of the related requests.[39] It is difficult to devise an effective test that does not also catch people, such as journalists, who work for the same organisation but are making their requests independently.[40] Should, for example, the various groups and individuals who campaigned against army land acquisition in New South Wales be regarded as related for FOI purposes? If so, access by one will be determined by reference to the scope of applications lodged by others.

7.51 There are difficulties of definition in identifying how closely related the subject matter needs to be in order to be 'related'. In addition, it would need to be indicated how far apart in time a series of requests would have to be made to avoid being 'related'.

7.52 Further, it is questionable whether, in principle, agencies should be able to aggregate requests where applicants have paid separate application fees for each application, as is the case under section 15.

7.53 Rather than attempting to resolve these difficulties, the Committee takes the pragmatic view that the potential problems of disaggregation of large requests are largely met by the imposition of charges. Where a large request is broken into a series of smaller ones, application fees and charges will be payable in respect of each of the smaller requests. (The types of requests which do not attract fees and charges are typically not those which are most burdensome to process.)

7.54 The Committee is prepared to accept that, in general, application charges will discourage applicants from attempting to

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39. Cf. FOI Amendment Bill 1986, cl. 11: '... made by the same person or by persons whom the agency or Minister believes on reasonable grounds to have acted in concert in making the requests'. See also the submission of the Aboriginal Development Board, pp. 2-3 (a company, its manager and its solicitor making separate requests for documents relating to a particular matter).

40. Submission from Mr Paul Chadwick, p. 3.

lodge groups of requests for access to documents to which a single access request would otherwise be refused as too burdensome to process. Alternatively, the payment of multiple application and processing charges will go some way towards compensating agencies for the burdensome processing involved.

7.55 **The Committee recommends that section 24 be amended to prevent the aggregation of requests for the purposes of that section.**

7.56 Senator Stone dissents from this recommendation and paragraphs 7.49 to 7.54.

'Class' requests

7.57 As section 24 stands, it is difficult (if not impossible) to specify with any precision what constitutes a 'class' request. Further, the Committee can see no justification for treating the form of requests as critical. What matters is whether a request, however expressed, will be burdensome to process.

7.58 Prima facie, deleting paragraph 24(1)(a) will deprive section 24 of any objective limitation. However, in the Committee's view, this will not undermine the operation of the FOI Act. In the Committee's view, the workload test should operate by reference to the difficulty in processing particular requests, not the form in which they are expressed.

7.59 **The Committee recommends that paragraph 24(1)(a) be deleted and a consequential amendment be made to paragraph 24(1)(b).**

7.60 In recommending the deleting of paragraph 24(1)(a), the Committee emphasises that the workload test should operate by reference to the substantial and unreasonable diversion of

resources. In chapter 19 below, the Committee discusses the FOI charges, and records its view that the mere fact that the work involved in processing any request will exceed the maximum number of chargeable hours must not be taken into account for the purposes of section 24. (Senator Stone records his dissent from this last proposition.)

7.61 The Committee considers that what constitutes a substantial and unreasonable diversion of resources must be determined on the facts of each case.

Refusing requests without providing detailed reasons

7.62 The implementation of the above recommendation will have a consequential effect on the operation of sub-section 24(2). This sub-section permits 'class' requests, as defined in paragraph 24(1)(a), to be refused in specified circumstances without having either to identify all the documents falling within the terms of the request or to specify for each document the provision(s) under which exemption is claimed.

7.63 Two issues arise in this context. First, whether section 24 should empower agencies or ministers to refuse to grant access requests without actually inspecting the documents. Secondly, if so, to which types of requests should such a provision apply.

7.64 In its submission, 'The Age' argued that this provision should be removed: '[i]t is not reasonable to say anyone could apply the many and technical provisions of Part IV to a document he or she has not seen, or decide that all of it is exempt'.[41] The Committee disagrees.

7.65 The Committee agrees with the Australian Taxation Office that some 'requests relate to documents which by their very

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41. Submission from 'The Age', p. 20 (Evidence, p. 205).

nature appear to be exempt'.[42] A request for, say, Cabinet submissions on tax reform within a given period may cover only a category of documents which, as a category, is entirely exempt. No useful purpose is served by having to identify all the documents.

7.66 However, if paragraph 24(1)(a) is deleted, it will be necessary to amend sub-section 24(2). In the Committee's view, this sub-section should be available in respect of any request, however expressed.

7.67 Accordingly, **the Committee recommends that sub-section 24(2) be amended to delete references to the concept of 'class' requests.**

Appeals against sub-section 24(2)

7.68 The Australian Taxation Office noted that, in the event of review, the burden upon agencies in respect of a sub-section 24(2) refusal would be less onerous were agencies required to prove that it was 'apparent' that the documents would be exempt, rather than that the documents were actually exempt.[43]

7.69 In the Committee's view this less onerous interpretation is undesirable. Where an agency decides to refuse an application under sub-section 24(2) as amended in the manner recommended above, and the decision is then subject to review or appeal, the onus should be upon the agency to prove that the document or documents in question are exempt.

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42. Submission from the Australian Taxation Office, p. 11 (Evidence, p. 661).
43. Submission from the Australian Taxation Office, p. 12 (Evidence, p. 662).

7.70 The Committee recommends that the Act be amended to provide that, upon appeal from a refusal of access under sub-section 24(2), agencies be required to prove that the documents to which access was refused are exempt.

7.71 Senator Stone dissents from this recommendation and paragraphs 7.68 and 7.69.

Tasks to be included in assessing workload

7.72 The time spent by agencies in examining documents to determine if they are exempt, and in third-party consultation cannot be included in the estimate of workload for section 24 purposes.[44] A number of agencies criticised this, pointing out that the excluded tasks are frequently more onerous and time-consuming than the tasks of identifying, collating, copying etc. which form the basis for applying section 24.[45]

7.73 Users are opposed to allowing decision-making and consultation time to be counted. In part, this is because these items are regarded as too susceptible to inflation by agencies.[46] In part, including these items is seen as rewarding agencies for their inefficiency in the same way that a provision which operates by reference to volume of documents rewards agencies that unnecessarily generate excessive volumes of paper.[47] In part, no doubt, users are opposed because the net effect of including decision-making and consultation time will be to increase the number of requests to which section 24 can be successfully applied.

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44. Re Timmins and National Media Liaison Service (1986) 9 ALN 196.
45. E.g. submissions from the Inter-Agency Consultative Committee on FOI, p. 4; the Department of Health, p. 36 (Evidence, p. 1256); the Department of Primary Industry, p. 2; the Department of Defence, p. 11; the Department of Aviation, p. 3; and the Australian Customs Service, p. 17.
46. Submission from Mr Paul Chadwick, p. 3.
47. Submission from 'The Age', p. 21 (Evidence, p. 206).

7.74 The Committee does not accept that agencies regularly engage in unnecessary consultations or maintain inefficient filing systems to disadvantage FOI applicants. Consistent with its views on the items for which charges should be payable, the Committee considers that decision-making and consultation time should be able to be included in calculating the burden of processing a request.

7.75 **The Committee recommends that section 24 be amended to permit regard to be had to the resources likely to be spent in both consultation with third parties and in examining documents for exempt matter.**

Consultation with applicants

7.76 A number of users told the Committee that agencies frequently neglected to engage in consultation, with a view to narrowing the scope of requests.[48] Sub-section 24(3) provides that a request cannot be refused under section 24 'without first giving the applicant a reasonable opportunity of consultation with a view to the making of the request in a form that would remove the ground for refusal'.

7.77 Inducing a recalcitrant agency to consult with an applicant in a positive, co-operative spirit is not something readily achieved by amending the Act. The Committee considers, however, that the obligation to consult at present contained in sub-section 24(3) can be made more precise. The Committee would not wish to discourage oral consultation with applicants.

7.78 In this context, the Committee notes that the Report of the Sub-Committee on Efficiency established by the Inter-Agency Consultative Committee on FOI expressed the Sub-Committee's view

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48. Submissions from the Political Reference Service Ltd, p. 14 (Evidence, p. 964); the Law Institute of Victoria, p. 4 (Evidence, p. 377).

that

> the key to efficient handling of requests is early consultation with the applicant to define and narrow wide-ranging requests, and consultation within the agency as well as with other agencies.[49]

7.79 The Committee considers, however, that ultimately formal notification in writing should be required before an agency is permitted to refuse an application on section 24 grounds.

7.80 The Committee considers that the written notification should be drafted with an eye to the sub-section 15(3) obligation to assist people to make requests in compliance with sub-section 15(2), and the sub-section 24(3) obligation to provide applicants with a reasonable opportunity of consultation with a view to making the request in a form that would remove the grounds of refusal. Where practicable, the notification should: state that it is proposed to refuse access on section 24 grounds; explain why the request is too broad; offer positive suggestions as to how the request might be narrowed so as to remove from the basis for refusal; and/or provide sufficient information on the structure of the agency's file holdings to enable the applicant to re-formulate the request; and invite the applicant to contact a named person within the agency for assistance in narrowing the request if required.

7.81 The Committee accepts that the issuing notification along these lines will impose a burden on agencies. The Committee expects, however, that the prospect of this burden will give agencies an incentive to engage in prior, informal consultations. The Committee would expect that the formal procedure would seldom need to be used. The formal notification should be required only once for each matter. Where a narrower request is substituted in

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49. Report of the Inter-Agency Consultative Committee's Sub-Committee on Efficiency, dated February 1987, para. 3.

response to a formal notification it should be open to the agency to refuse that request without having to issue a further formal notification.[50]

7.82 **The Committee recommends that, before refusing requests under section 24, agencies be required to notify the applicant in writing of the intention to refuse to process the request, and to provide positive suggestions and information as to how the request may be narrowed, and identifying an agency officer with whom the applicant can consult with a view to narrowing the request.**

Role for Ombudsman or Tribunal

7.83 Suggestions were made to the Committee that what was seen as abuse by agencies of section 24 could be overcome if agencies had to seek leave of the Administrative Appeals Tribunal or the Ombudsman before invoking section 24.[51] The Committee does not think that section 24 is improperly invoked often enough to justify the extra cost of involving an independent arbitrator in all cases involving section 24. Insofar as the perceived abuse of section 24 is its use to delay access,[52] involving either the Tribunal or the Ombudsman is unlikely to expedite matters. Both lack the resources to respond quickly unless either FOI is given priority over other matters or extra resources are provided. The Committee does not regard the former as appropriate. The latter is not practical in the present economic climate.

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50. Cf. Re Swiss Aluminium Australia Ltd and Department of Trade (1986) 10 ALD 96, p. 102.
51. Submissions from the New South Wales Law Society, p. 3; 'The Age', p. 24 (Evidence, p. 209); and the Law Institute of Victoria, p. 4 (Evidence, 377).
52. E.g. submission from 'The Age', p. 25 (Evidence, p. 210).

Resource shortages

7.84 Because section 24 operates by reference to impact upon agency operations or Ministerial functions, the ability of an agency or Minister to rely upon section 24 depends in part on the resources available. It was put to the Committee that section 24 is open to abuse by agencies in that they could use their ability to allocate resources internally to starve FOI tasks. They would then be better placed to invoke section 24.[53] The Committee is not aware of any evidence that indicates that agencies have in fact allocated their staff so as to avoid responsibilities under the FOI Act.

Documents unable to be located

7.85 An agency may have good reason to believe that it has a particular document in its possession, although the document cannot be located. The Act makes no specific provision for the way in which an agency should respond to an access request for the document. In default, the agency has to be treated as having decided to refuse access.[54]

7.86 The Department of Health told the Committee:

> It is somewhat nonsensical for an official to have to make a formal decision refusing access to a document which cannot be located. There is, of course, no statutory guidance as to what efforts the agency should take to locate documents. The current framework in which the FOI Act operates makes it difficult to explain the situation to members of the public. The Department considers that it would be preferable to all concerned, and far more practical, to include a provision in the Act allowing an agency, after reasonable steps have been taken to locate the document, to

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53. Submission from the Political Reference Service Ltd, p. 13 (Evidence, p. 963).
54. E.g. Re Hancock and Department of Resources and Energy (2 June 1986) pp. 4-5.

> find that the particular document cannot be located, giving reasons for that finding. The finding could then be subject to review by the AAT.[55]

The Committee agrees.

7.87 **Accordingly, the Committee recommends that the Act be amended to provide that an agency may formally respond to a request for access by stating that it has reason to believe it possesses the requested document, but is unable to locate the document having taken all reasonable steps to do so. The Committee further recommends that the decision to respond in this manner be able to be reviewed in the same ways as are decisions to refuse access.**

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55. Submission from the Department of Health, pp. 32-33 (Evidence, pp. 1252-53). See also submissions from the Department of Territories, p. 17; the Attorney-General's Department, p. 95 (Evidence, p. 100).

CHAPTER 8

REVERSE-FOI

8.1 Applicants may request an agency to provide access to documents created by, or containing information relating to, a third party. In some cases, the third party's interests will be adversely affected if access is granted. The primary means of protecting third party interests is the availability of suitably worded exemption provisions in Part IV of the Act, under which access may be refused. (These provisions are discussed below in chapters 10, 13 and 14).

8.2 The Act provides a supplementary means of protection, often called 'reverse-FOI', linked to two of these provisions, section 33A (documents affecting relations with States) and section 43 (documents relating to business affairs, etc). Reverse-FOI involves the agency consulting with the third party affected before deciding whether to grant access.

8.3 If the agency decides to grant access, the third party has the right to apply to the Administrative Appeals Tribunal for review of the decision. The reverse-FOI process attempts to strike a balance by ensuring that the views of an affected third party are considered in arriving at a decision to grant access without, however, giving the third party any right to veto access.

8.4 The Committee continues to support the general concept of reverse-FOI as it applies to documents relating to States and business. Reverse-FOI provides a safeguard against the possibility that agencies will fail to give due weight to all relevant interests when deciding to grant access. However, the Committee is conscious that reverse-FOI has proved to be one of

the more expensive and time-consuming aspects of the operation of the Act.[1]

8.5 The Committee is aware of the need to preserve the voluntary flow of information to the Commonwealth. It is therefore important that the confidentiality of sensitive information which is supplied be not only preserved but that information-suppliers have confidence that this will be the case.

Mandatory consultation for business documents

8.6 Three conditions must be fulfilled before an agency is required to initiate reverse-FOI consultations in respect of documents for which exemption may be claimed under section 43 (documents relating to business affairs, etc.).

8.7 First, consultation is required only where the agency proposes to grant access. The practical problems arising out of the review processes are discussed below.

8.8 Secondly, agencies are only required to consult 'where it is reasonably practicable to do so having regard to all the circumstances, including the application of section 19'.[2] The Committee has not been informed that any agency has justified its failure to consult on the basis that the requirement to respond to the access request within the time limits imposed by section 19 left insufficient time to consult.[3]

8.9 In the light of this, the Committee considers that this qualification on the requirement to consult should remain. There

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1. E.g. IDC Report, p. C2, estimated that in 1984-85 the salary cost to the Commonwealth of reverse-FOI consultation with business was about $400,000. Reverse-FOI costs are also incurred by the Commonwealth in respect of consultation with States and non-salary costs. Business and the States also incur costs.
2. FOI Act, s.27(1).
3. Contrast the theoretical concern raised in the submission from the Confederation of Australian Industry, p. 3 (Evidence, p. 418).

will be exceptional situations when the absence of this qualification would result in permanent denial of access (e.g. where a sole trader has ceased trading and emigrated).

8.10 Thirdly, consultation is required only where 'it appears to the officer or Minister dealing with the request' that the third party 'might reasonably wish to contend that the document is an exempt document under section 43'.[4] This qualification on the requirement to consult attracted considerable criticism.[5]

8.11 There are two elements to the criticism. First, the officer may not have been aware that the document was of a type referred to in section 27. This is unlikely to happen (in the absence of negligence) in respect of documents which originated with a business. But it may occur where documents derive from other sources and it is not self-evident that they contain sensitive business information. Secondly, the agency may be aware of the nature of the document and address the issue of the impact of disclosure. However, the agency decision-maker may assume that the business or person affected would not reasonably wish to contend that the document is exempt under section 43.

8.12 In both cases, failure to consult arises because of the FOI decision-maker's lack of awareness of the impact of granting access:

> Information which on the face of it may appear to be innocuous to a government official may bear significance in a particular commercial environment which is unfamiliar to an agency. What is equally threatening is the 'mosaic'

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4. FOI Act, s.27(1)(b).
5. Submissions from the Business Council of Australia, p. 4 (Evidence, p. 774), the Confederation of Australian Industry, p. 3 (Evidence, p. 418); (endorsed by the Agricultural & Veterinary Chemicals Association, p. 1); and Alcoa of Australia Ltd, p. 6 (Evidence, p. 835). See also the submission from the Institute of Patent Attorneys of Australia, p. 3, which states that although the practice has now altered, in 1983 'there were instances of access being granted to documents believed by the supplier to be of a sensitive business nature without invoking Section 27 of the Act'.

> effect when small pieces of information, if disclosed, serve to complete the picture in the hands of a competitor who can place the selective release of information into context.[6]

But the remedies differ.

8.13 Lack of awareness at the threshold cannot be cured by amending the Act: it is the very lack of awareness which results in the failure to consider the reverse-FOI provisions at present in the Act. Education of FOI decision-makers is the only effective remedy.[7] On the evidence to date, the training of decision-makers has been adequate in this regard. The Committee expects that agencies will continue to take steps to ensure that their FOI decision-makers are alert to the potential impact upon business of granting access.

8.14 A legislative remedy is possible in the second situation. The decision-makers' awareness of the possibility of a section 43 exemption applying to the requested documents may activate the need for them to make assumptions about the attitude of a business or person to whom the documents relate. Consultation can be made mandatory in this situation.[8] To do so would increase the occasions for consultation and hence the cost to both the Commonwealth and to business.

8.15 The Committee is not in a position to estimate the size of the increase. However, it would appear to be very small. It seems there are very few requests for business-related documents in respect of which agencies advert to the question of

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6. Submission from Alcoa of Australia Ltd, p. 5 (Evidence, p. 834). See also, for example, the submission from the Institute of Patent Attorneys of Australia, p. 2.
7. Cf. Evidence p. 452 (Confederation of Australian Industry).
8. E.g. Freedom of Information Act 1982 (Vic), s.34.

reverse-FOI but do not initiate consultation.[9] All business representatives who appeared before the Committee expressed a preference for mandatory consultation rather than the present position.[10]

8.16 In view of this, and the apparently small extra costs involved, **the Committee recommends that sub-section 27(1) be amended to remove the requirement that, before engaging in reverse-FOI consultation with a business or person, an agency or Minister must decide that that business or person might reasonably wish to contend that a document is exempt under section 43.**

8.17 Consultation is to be required irrespective of whether it appears that the business or person would wish to object to access being granted.

8.18 One effect of this recommendation will be to increase the exposure of agencies and Ministers to actions for breach of statutory duty if they omit mandatory reverse-FOI consultation prior to granting access. In addition, the grant of access in these circumstances would not attract the protection against actions for defamation or breach of copyright given to the Commonwealth and its officers by section 91.

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9. The IDC Report states that, in 1984-85, 1372 'business' requests were received (p. A7) by agencies which together received nearly 95% of all requests made during that year. Not all requests are determined in the year of receipt. But in 1984-85 consultation with business occurred in respect of 1423 initial decisions to grant access and a further 12 decisions at the internal review stage (p. C20). It should be noted that mandatory consultation may increase scope of consultation even where it does not increase the occasions on which some consultation is required. A requested document may relate directly to one business but also refer in a peripheral way to others. At present only the one business may be consulted. Under mandatory consultation all would have to be contacted.

10. Submissions from the Business Council of Australia, p. 4 (Evidence, p. 774); the Confederation of Australian Industry, p. 4 (Evidence, p. 419); CRA Services Ltd, p. 7 (Evidence, p. 805); and Alcoa of Australia Ltd, p. 6 (Evidence, p. 835). For arguments against requiring mandatory consultation, see for example the submission from Dr A. Ardagh, pp. 8-9.

8.19 The Committee is of the view that this increased exposure is unacceptable.

8.20 Therefore, **the Committee recommends that section 91 be amended so that the protection otherwise conferred by that section against actions for defamation and breach of copyright or confidence will not be lost if a required reverse-FOI consultation is omitted. Further, the failure to consult should not, of itself, be sufficient to found an action against the Commonwealth or its officers.**

Access to edited documents

8.21 Agencies may grant access to documents after editing out matter the presence of which would have made the original document exempt. (It was recommended in paragraph 7.22 above that irrelevant matter should also be able to be edited out.) The original document may contain business information such that under paragraph 27(1)(a) reverse-FOI consultation would be required before access could be granted.

8.22 It has been put to the Committee that consultation should also be required in respect of the edited document.[11] Agencies may be unable to make an appropriate judgment about the commercial sensitivity of what remains after editing.[12]

8.23 Consistently with its view on the need for mandatory consultation, the Committee accepts that mandatory consultation is appropriate in respect of edited documents.

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11. Submissions from the Business Council of Australia, p. 6 (Evidence, p. 776); Alcoa of Australia Ltd, p. 7 (Evidence, p. 836).
12. E.g. the Commissioner of Taxation granted FOI access to a document containing commercially sensitive data on sales by alumina proceudres, after editing out the names of the companies. Industry experts, however, were still able to deduce from the data which figures applied to which company. See Evidence, pp. 838-41 (Alcoa of Australia Ltd); supplementary submission from the Attorney-General's Department, pp. 2-4.

8.24 The Committee recommends that where, but for the fact that a document contains exempt matter, the reverse-FOI process would be mandatory prior to granting access, that process also be mandatory where it is proposed to grant access to an edited version of the document.

Documents not supplied by the business

8.25 The reverse-FOI process in section 27 applies to all documents containing the relevant type of information, not only those supplied by the party to whom the information relates. The Business Council of Australia relied upon a single instance to suggest that this aspect of section 27 was not clear to all public servants.[13] The Council suggested that either FOI procedures must be improved or the legislation could be made more specific.

8.26 The Committee considers that the wording in the Act is sufficiently clear. The Committee has no reason to conclude that the instance cited by the Business Council was anything but an isolated case. However, the Committee draws the Council's point to the attention of the Attorney-General's Department as a point which should be stressed in any publicity or training material which is prepared on FOI.

8.27 The Business Council of Australia also pointed to the need to ensure that, where the document which it is proposed to release was not supplied by the party being consulted, sufficient information concerning the contents of the document is provided to enable that party to determine its attitude and make any necessary submissions.[14] The Department of Trade informed the

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13. Submission from the Business Council of Australia, p. 3 (Evidence, p. 773).
14. Ibid.

Committee that it was not always possible to separate information relevant to one reverse-FOI party from that relevant to others within the existing time constraints.[15]

8.28 The Committee considers that the extension of time that it recommended above (paragraph 5.45) should be available to respond to requests involving reverse-FOI will alleviate the problem identified by the Department of Trade and result in improved information being given to the reverse-FOI party. The Committee does not think any other amendment to the Act would be useful in this context.

8.29 The Committee has no reason to consider that agencies unnecessarily withhold relevant information when engaged in reverse-FOI consultation. If, in particular cases, the party consulted considers that it requires further information on the content of the document relating to it the matter is best resolved by negotiation with the agency.

Confidentiality of involvement

8.30 The Business Council of Australia informed the Committee that, in some cases, companies are reluctant to contest the release of information because the mere public knowledge that a company wishes to prevent access can be sufficient to disclose all that is sought to be kept confidential.[16] No examples were referred to, and the Committee is not aware of any specific cases where companies have declined to oppose release for this reason.

8.31 As far as the Committee is aware, agencies do not disclose to applicants the identity of parties consulted in the reverse-FOI process, although, of course, frequently the applicants would be able to guess the identity from the nature of

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15. Submission from the Department of Trade, p. 3.
16. Submission from the Business Council of Australia, p. 6 (Evidence, p. 776).

the request. If the matter reaches the Administrative Appeals Tribunal, the confidentiality of the identity of parties is a matter for the Tribunal.[17]

8.32 Accordingly, the Committee does not endorse the Business Council's suggestion that the FOI Act should be amended to provide that, where the identity of applicants or reverse-FOI parties is requested, the request should be treated as a separate application under the Act.[18]

Improving reverse-FOI with States

8.33 The Committee does not accept that States should be given the power to veto the release of documents under the FOI Act.[19] The Committee considers that a version of reverse-FOI is adequate to ensure that State interests are brought to the attention of FOI decision-makers.[20] Section 26A of the FOI Act makes reverse-FOI consultation with a State conditional upon arrangements having been entered into between the Commonwealth and a State with regard to such consultation.[21]

8.34 The Committee agrees that details of how consultations are to be conducted should be settled by agreement between the Commonwealth and the State. However, the Committee is concerned that sub-section 26A(1) might provide the means to evade the requirement of consultation under section 33A.

8.35 The Committee also notes that the section 26A requirement that consultation be in accordance with arrangements entered into between the Commonwealth and State may invite disputes as to whether the consultation does so conform.

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17. Administrative Appeals Tribunal Act 1976, s.35.
18. Submission from the Business Council of Australia, p. 6 (Evidence, p. 776).
19. See the discussion below, paras. 10.8 and 10.9.
20. Cf. 1979 Report, para. 17.18.
21. FOI Act, s.26A(1).

8.36 **The Committee recommends that the clauses 'arrangements have been entered into between the Commonwealth and a State with regard to consultation under this section, and', and 'in accordance with these arrangements', be deleted from sub-section 26A(1).**

8.37 The Committee recognises that this may raise definitional or mechanical problems as to between whom (ie. what officers) consultation should occur. If this is so, the Committee considers that the Act should be amended to provide to the establishment of an appropriate mechanism.

8.38 **The Committee recommends that sub-section 26A(1) be amended to refer to consultation between the relevant Commonwealth and State Ministers and/or their authorised delegates.**

8.39 Senator Stone records his view that, while third-party authors of documents and third parties to whom documents relate should not have the right to veto the release of documents under the FOI Act, all such third-parties should have full reverse-FOI rights, at present conferred only on businesses and the States. In accordance with this view, Senator Stone considers that the recommendations contained in paragraphs 13.32 and 13.41 below do not go far enough. (See also paragraphs 13.34 and 13.42 below.)

Reverse-FOI and release outside the FOI Act

8.40 The Act protects the position of a reverse-FOI party by preventing an agency giving effect to a post-consultation decision to release until the party has had an opportunity to seek review of that decision. With respect to business documents, paragraph 27(2)(b) provides that:

> access shall not be given to the document ... unless -
>
> (i) the time for an application to the Tribunal ... has expired and such an application has not been made; or
>
> (ii) such an application has been made and the Tribunal has confirmed the decision.

(Paragraph 26A(2)(b) makes similar provision with respect to documents relating to States.)

8.41 Concern has been expressed that sub-paragraph (ii) has the effect of creating a permanent bar to granting access outside the scope of FOI.[22] It may be desirable to grant such access in the future if circumstances have changed. The permanent bar would arise where an application has been made to the Tribunal and either is not pursued because the access-seeker has lost interest in obtaining access or the Tribunal does not confirm the decision to release. In the former case, the agency may feel obliged to contest the review application solely to preserve its ability to release the document in the future.[23]

8.42 The Committee is aware of concern by business that access can be given to sensitive business documents outside the FOI Act.[24] However, the Committee considers that it is anomalous to create a permanent bar upon access in this way. Such a permanent bar may serve to provide greater protection from disclosure to business and State documents than to, say, documents affecting law enforcement which are exempt under section 37.

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22. Submissions from Justice J.D. Davies, p. 1 (Evidence, p. 1364); the Attorney-General's Department, p. 94 (Evidence, p. 99).
23. Submission from the Attorney-General's Department, p. 94 (Evidence, p. 99).
24. Submission from the Confederation of Australian Industry, p. 2 (Evidence, p. 417).

8.43 The Committee considers that the FOI Act should be amended to demonstrate that this anomalous result is not intended, and that such documents receive no greater protection than documents exempted under provisions which do not require reverse-FOI consultation.

8.44 **The Committee recommends that the Act should be amended to ensure that documents do not acquire any greater protection from disclosure as a result of the reverse-FOI process than other documents which are exempt from disclosure under Part IV of the Act.**

Internal review - review of reverse-FOI decisions

8.45 Where a decision is made to refuse access, the access-seeker may, subject to some qualifications, seek internal review of the decision and must seek internal review before applying to the Administrative Appeals Tribunal for review.[25] Internal review is not available to a person consulted under reverse-FOI who wishes to contest an agency decision to grant access. Such a person has a right to apply direct to the Tribunal for review of the decision.[26]

8.46. The Committee considers that internal review should be used where practicable because it is cheaper and less time-consuming than Tribunal review.[27]

8.47 Therefore, **the Committee recommends that internal review be available to, and be required to be used by, parties consulted under reverse-FOI who wish to seek the review of decisions to grant access. The Committee further recommends that the availability of internal review and the requirement that it is**

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25. FOI Act, s.54.
26. FOI Act, ss.58F, 59.
27. Submission from the Confederation of Australian Industry, p. 5 (Evidence, p. 420), endorsed on this point by the Business Council of Australia (Evidence, p. 778).

used be subject to the same qualifications as apply to internal review of decisions to refuse access.

Reverse-FOI - review by the Administrative Appeals Tribunal

8.48 Provision of adequate review rights to a party with a right to be consulted under reverse-FOI has to cater for two broad situations. The agency may decide to grant access, in which case the party requires an opportunity to apply to the Tribunal for review of the decision. Alternatively, the agency may decide to refuse access. If the access-seeker seeks Tribunal review of this decision, the reverse-FOI party may wish to appear before the Tribunal to ensure that its views are considered.[28]

Review of decisions to grant access

8.49 Under the FOI Act, a State or business has a right to seek review of an agency decision to grant access only if it has been consulted under the reverse-FOI process.[29] This restriction has been criticised.[30] The Committee considers that its recommendation at paragraph 8.16 above to increase the range of situations in which consultation is required will remove much of the force of this criticism. However, a gap remains.

8.50 As noted above there are still some circumstances in which an interested third party will not be consulted. Due to failure to consult, the third party will be unlikely to be aware that a decision to grant access has been made. In general, therefore, such third parties will be unable to seek review in time to prevent access even if a right of review were available.

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28. It should be noted that independently of the review rights conferred by the FOI Act, review can be sought in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977, subject to that Court's discretion to decline to hear the matter because an adequate alternative avenue of review is available: AD(JR) Act s.10(2)(b)(ii).
29. FOI Act, s.58F(1) and s.59(1).
30. Submission from the Confederation of Australian Industry, p. 5 (Evidence, p. 420).

8.51 In some circumstances, such third parties may learn of a decision to grant access in sufficient time to seek the review of this decision. In the Committee's view, such third parties should have a right to initiate proceedings for either or both internal review and review by the Administrative Appeals Tribunal.

8.52 **The Committee recommends that the right to seek reverse-FOI review not be contingent upon the third party having been consulted, but instead rest upon the appellant being a party who/which should have been consulted under reverse-FOI.**

Review of decisions to refuse access

8.53 An agency can avoid the reverse-FOI process, where it would otherwise apply, by refusing to grant access. The access-seeker can then (ultimately) seek review of that decision in the Administrative Appeals Tribunal.

8.54 A State or business which would have been consulted had reverse-FOI applied may wish to become a party before the Tribunal in order to argue, together with the agency, that access should not be granted. Sub-section 30(1A) of the Administrative Appeals Tribunal Act 1975 provides that the Tribunal may, in its discretion, allow any 'person whose interests are affected by the decision' under review to become a party.

8.55 The Committee regards this provision as satisfactory, as long as the person affected is aware that the review has been sought. At present, there is no mechanism to ensure that this will happen,[31] though the Tribunal will itself, in some circumstances, notify a person who is clearly affected.

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31. Submission from Alcoa of Australia Ltd, p. 4 (Evidence, p. 833.

8.56 The Committee takes the view that the agency whose decision is under review is in the best position to determine who will be affected if the Tribunal overturns that decision.

8.57 Therefore, **the Committee recommends that an agency have a duty to notify a business or State that the agency's decision is under review by the Tribunal. The duty should only arise where the agency would have had an obligation to notify the business or State under reverse-FOI had the agency proposed to grant access.**

8.58 The Attorney-General's Department pointed out that there would be some reduction in costs to a business or State if it was not required to join at the outset of the proceeding before the Tribunal.[32] Instead the business or State could defer participation and join only where the Tribunal was not satisfied after hearing the evidence of the agency that the document was exempt.

8.59 The Committee accepts that there might be value in some cases in allowing deferred participation in this way. The Committee notes, however, that the savings to third parties may in some cases be outweighed by the extra costs imposed on the other parties by a two-stage proceeding. In addition, the third party might wish to be present at the first stage in order to cross-examine witnesses called by other parties.

8.60 The Committee has no objection to the Tribunal having a discretion to allow a third party to defer participation. The Committee is uncertain whether legislation is required to permit this, given the flexibility of Tribunal procedures, or, if legislation is required, whether the FOI Act or the Administrative Appeals Tribunal Act is the more appropriate Act to amend.

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32. Submission from the Attorney-General's Department, p. 88 (Evidence, p. 93). The point was supported by the Confederation of Australian Industry (Evidence, p. 445) and the Business Council of Australia (Evidence, p. 779).

8.61 Therefore, the Committee recommends that the **Attorney-General should initiate whatever steps are required (including legislation if necessary) to ensure that a business or State that would be affected by a successful appeal against an agency's decision to deny access may defer its appearance before the Tribunal. The third party should be able to defer until the point where the Tribunal, after hearing the evidence of the agency, is still not satisfied that the document is exempt.**

8.62 Implicit in this recommendation is the rejection of a suggestion made by the Department of Aviation.[33] The Department characterised reverse-FOI proceedings as involving essentially only the interests of the access-seeker and the third party. Both should be required to be parties before the Tribunal. In most circumstances, the agency should be allowed to withdraw, achieving a saving to it.

8.63 The Committee does not accept this characterisation of reverse-FOI proceedings. It is an agency decision that is under review. It would not be appropriate to leave it to others to defend that decision, even though, in a sense, they are beneficiaries of it.

Exemptions able to be claimed by a business or a State

8.64 A business or State which has been consulted under reverse-FOI can seek review of a decision by the agency to grant access. However, in doing so, it may only raise (and the Tribunal may only consider) the exemption provision with which its right to be consulted is linked (ie. s.33A for States, s.43 for

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33. Submission from the Department of Aviation, p. 3.

business).[34] It has been questioned whether this restriction is appropriate.[35]

8.65 Apart from the issue of fairness to the business or State, the restriction leads to an anomaly. There is no restriction upon the grounds of exemption which the Tribunal may consider in appeals other than reverse-FOI appeals brought under section 58F or section 59; grounds not relied upon by the agency may be considered.[36] It appears that a business or State joined with an agency in opposing access can raise exemption provisions other than section 43 or 33A respectively, even if the agency does not wish to do so.[37] If this is the case, the business or State is better placed when opposing access in an appeal brought by the access-seeker than when it brings the appeal itself under section 59 or section 58F respectively.[38]

8.66 The Committee accepts that the present restriction is anomalous. It also has the undesirable potential to increase litigation. The business or State denied the opportunity to raise other exemptions may seek review of the agency decision to grant access in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. In this action it would not be restricted to the FOI Act exemption provisions upon which it could seek to rely.

8.67 **The Committee recommends that a State or business seeking review by the Administrative Appeals Tribunal of an agency's decision to grant access should not be restricted to**

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34. Mitsubishi Motors Australia Ltd v Department of Transport (1986) 68 ALR 626.
35. Submission from the Confederation of Australian Industry, p. 5 (Evidence, p. 420); [1987] Admin Review 10-11.
36. Austin v Deputy-Secretary, Attorney-General's Department (1986) 67 ALR 585; Re Bartlett and Department of Prime Minister and Cabinet (31 July 1987), para. 21.
37. Re Actors' Equity Association and Australian Broadcasting Tribunal (1984) 7 ALD 584, p. 595.
38. Submission from the Australian Broadcasting Tribunal, pp. 6-7 (Evidence, pp. 1016-17).

reliance upon the section 33A or 43 (as the case may be) grounds of exemption.

Onus of proof

8.68 Section 61 places upon the agency the onus of establishing that a decision adverse to the applicant should be given by the Tribunal. (Section 61 does not apply in reverse-FOI proceedings brought under sections 58F or 59.) It is not clear what effect this has where a party joins with the agency to oppose an applicant seeking review of the agency's decision to refuse access and the party joined raises a ground of exemption not relied upon by the agency.

8.69 Read literally, section 61 suggests that the arguments raised by the party joined would fail if they were not supported by the agency. The Committee regards this result as undesirable.

8.70 The result is not easily avoided. Placing the onus upon the third party will bring that third party into direct competition with access-seekers in some circumstances. Arguably, this is not appropriate. An alternative would be not to place an onus upon any third party in respect of arguments not raised or supported by an agency. However, the effect of this is to invite an agency to leave it to the third party to raise all arguments opposed to access and to raise none itself. This will increase the prospect that the case against access will succeed in those (very few) appeals where the onus of proof is of any practical consequence and where a third party joins with the agency.

8.71 On balance, the Committee prefers that the onus should rest upon the third party. That party is best placed to argue the effects that access would have on it.

8.72 **Therefore, the Committee recommends that the Act be amended to place the onus of establishing that the Tribunal give**

a decision adverse to the applicant upon any party (whether or not an agency) that argues against allowing access.

8.73 Senator Stone dissents from paragraph 8.71 and the recommendation contained in paragraph 8.72.

Costs

8.74 Representatives of business suggested to the Committee that a business should be able to recover at least some part of the cost to it of being drawn into reverse-FOI proceedings.[39] The Committee accepts that there should be some mechanism for cost-recovery by both business and States. Recovery should be from the Commonwealth rather than from the party seeking access to the documents. It would be unreasonable to expose applicants to the risk of having to bear the costs of the business as a result of having sought access. (Senator Stone dissents from this last proposition.)

8.75 Several restrictions appear to be necessary. First, recovery should be possible only in respect of costs incurred in appearing before the Administrative Appeals Tribunal, and should be awarded by the Tribunal. This reflects the ordinary rules applying in litigation. It will deny cost-recovery in respect of the consultation phase of reverse-FOI, thereby avoiding a large number of mostly small claims arising out of straightforward consultations. Costs related to internal review will not be recoverable.

8.76 Secondly, in line with the present provision on costs in section 66 of the FOI Act, costs should only be recoverable where the reverse-FOI party 'is successful, or substantially

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39. Submissions from the Confederation of Australian Industry, p. 5 (Evidence, p. 420); the Business Council of Australia, p. 5 (Evidence, p. 775); and Alcoa of Australia Ltd, p. 7 (Evidence, p. 836). See also Evidence, p. 810 (CRA Ltd).

successful' in the Tribunal.[40] Further, no costs should be recovered if in the opinion of the Tribunal intervention, though successful, was unnecessary or unreasonable. Where the agency opposes access and is arguing all relevant grounds there is no reason to reward a party joined with the agency by allowing that party to recover costs.

8.77 In summary, the Committee recommends that the Act be amended to provide that:

(a) the Administrative Appeals Tribunal be empowered to award costs in favour of a reverse-FOI party appearing before the Tribunal to oppose the grant of access;

(b) such costs be payable by the Commonwealth but not the applicant;

(c) costs recoverable be limited to costs relating to appearance, and not include costs relating to reverse-FOI consultations with an agency or internal review of an agency decision; and

(d) costs be awarded only where the party seeking costs was successful or substantially successful in opposing access, and its intervention was reasonable and necessary in the opinion of the Tribunal.

8.78 The Committee further recommends that where the reverse-FOI appellant fails to succeed in any of the contentions s/he advances, the Administrative Appeals Tribunal be empowered to award costs against the reverse-FOI appellant and in favour of both the applicant and the Commonwealth.

8.79 Senator Stone dissents from the recommendation contained in paragraph 8.77(b).

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40. FOI Act, s.66(1)(b).

8.80 The Committee is aware that the effect of the recommendation that the Administrative Appeals Tribunal be empowered to award costs against the Commonwealth will be to increase the expense of FOI to the Commonwealth. The Committee is unable to estimate with any precision the size of the increase.

8.81 It is possible that the recommendation may also have some effect on agencies' decisions, creating a reluctance to grant access in borderline cases. Faced with a certain reverse-FOI appeal if access is granted and an assessment that an applicant would not contest a decision to refuse access, an agency may opt for the latter in order to reduce the risk that the reverse-FOI appeal might succeed and costs be awarded against the agency. The Committee considers that, in practice, agencies are unlikely to be influenced by this reasoning.

Documents affecting personal privacy (section 41)

8.82 Frequently, agencies have regard to the wishes of people whose privacy would be interfered with were access granted to documents relating to them.[41] The Administrative Appeals Tribunal also takes steps, in some circumstances, to notify such people where applicants request access to relevant documents.[42] In neither case is either consultation or notification obligatory.[43]

8.83 The Committee agrees with the Law Institute of Victoria that reverse-FOI should be extended to documents containing information about the 'personal affairs' of individuals.[44] The

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41. Re Dyrenfurth and Department of Social Security (15 April 1987) para. 7.
42. E.g. Re Z and Australian Taxation Office (1984) 6 ALD 673, p. 677.
43. Re Dunn and Australian Federal Police (1986) 11 ALN 185, p. 187.
44. Submission from the Law Institute of Victoria, p. 5 (Evidence, p. 378). See also submission of Commonwealth Ombudsman, p. 11 (Evidence, p. 1318).

Committee notes that the Privacy (Consequential Amendments) Bill 1986 was intended to amend the FOI Act by applying reverse-FOI procedures to documents falling within section 41 of the FOI Act.[45]

8.84 The proposed section 27A is cast in terms similar to sections 26A and 27. Like those sections, it is complemented by a provision providing for the review of a decision to release a document which has been the subject of reverse-FOI consultation.[46]

8.85 The Committee supports the extension of reverse-FOI in this way, subject to the recommendations already made with respect to reverse-FOI and business documents.

8.86 If the Privacy (Consequential Amendments) Bill 1986 is not enacted, the Committee recommends that the FOI Act be amended in the manner contemplated by clause 5 of the Bill, modified by the Committee's recommendations with respect to reverse-FOI and business documents. The Committee further recommends that where a person enters into reverse-FOI proceedings as a result of this amendment, that person possess the same capacities, rights and responsibilities as any other reverse-FOI party.

8.87 The application of reverse-FOI to 'personal affairs' will increase the costs of FOI. The Committee is not in a position to give even an approximate estimate of the size of the increase.

8.88 In practice, it may be extremely difficult to locate individuals. In the Committee's view, the inability of locate an individual to whom a document relates should not of itself suffice to bar access to that document.

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45. Privacy (Consequential Amendments) Bill 1986, cl. 5, (proposed s.27A).
46. Privacy (Consequential Amendments) Bill 1986, cl. 8 (proposed s.59A).

8.89 The Committee recommends that agencies make reasonable efforts to locate individuals; but that agencies should not be precluded from exercising their own judgment where they are unable to locate individuals about whom documents contain relevant personal information, or they have died.

Breach of confidence

8.90 In some cases, information is provided to Commonwealth agencies upon the understanding that either the information or its source will not be disclosed. The Ombudsman noted that there is some question whether the informant's views should determine whether information of this type should be released.[47]

8.91 To the extent that section 45 operates by reference to the general law relating to breach of confidence, suppliers' interests are adequately protected by that law. A right of reverse-FOI consultation would be superfluous.[48]

8.92 The Committee considers that sections 33A, 41, and 43 provide an adequate list of the types of information about the disclosure of which agencies should necessarily be required to notify the interested third parties, and in respect of which third parties should be entitled to initiate proceedings. In practice, it is desirable that an agency should consult with the suppliers of information which, in the agency's view may have been supplied in confidence. However, if the agency disregards the suppliers' views, or elects to release the information without having consulted with the suppliers, it does so at its own peril: the suppliers may institute proceedings for breach of confidence.

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47. Submission from the Commonwealth Ombudsman, pp. 9-11 (Evidence, pp. 1316-18).
48. Where documents are disclosed which should have been exempted under section 45, there may be grounds for an action for breach of confidence.

CHAPTER 9

PART IV: EXEMPTIONS - GENERAL ISSUES

Conclusive certificates

9.1 Some submissions to this inquiry suggested that provision for the issue of certificates should be abolished,[1] or at least critically examined with a view to abolition.[2] By contrast, the IDC supported extension. It recommended the amendment of section 37 to provide for the issue of a conclusive certificate where disclosure could reasonably be expected to endanger the life or prejudice the physical safety of a person.[3]

9.2 Only 55 conclusive certificates were issued between 1 December 1982 and 30 June 1986. Of these, 23 were issued by the Treasurer or the Treasury. In October 1984, the Treasury revised its internal procedures for responding to FOI requests.[4] Since then it has issued only 2 certificates.

9.3 Up until 30 June 1987, it appears that less than 20 applications relating to conclusive certificates had come before the Administrative Appeals Tribunal. In only five of these did the Tribunal find that reasonable grounds did not exist to support fully the claim made in the certificate. Only one

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1. Submissions from the Library Association of Australia, p. 9; 'The Age', p. 32 (Evidence, p. 217).
2. Submissions from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 25, (Evidence, p. 874); the New South Wales Law Society, p. 5; the Law Institute of Victoria, p. 6, (Evidence, p. 379). See also Re Association of Mouth and Foot Painting Artists Pty Ltd and Commissioner of Taxation (29 July 1987) para. 53, where two members of the Administrative Appeals Tribunal, B.J. McMahon and C.J. Stevens, said there appeared to be little if any need for a conclusive certificate provision in section 33. The third member of the Tribunal, G.P. Nicholls, agreed: paras. 1 and 9.
3. IDC Report, p. 46 (Option B14).
4. Evidence, pp. 631-32.

Minister, the Treasurer, has elected not to revoke a certificate in the face of an adverse finding by the Tribunal.[5]

9.4 In general, the Committee has been favourably impressed by the restraint with which conclusive certificates have been issued. The position was summarised by Mr Lindsay Curtis of the Attorney-General's Department:

> Perhaps if one sets aside one department which has contributed almost 50 per cent of the total number of conclusive certificates there has on our view been a very restrained use of conclusive certificates.[6]

9.5 The submission from the Attorney-General's Department reviewed the types of documents to which conclusive certificates related. It concluded:

> On balance, it would seem that the relatively small number of conclusive certificates issued have been to protect documents containing what appears to be undoubtedly sensitive information ...[7]

9.6 The Committee shares this view. The Act, as amended in 1983, strikes an appropriate balance between the executive, and the courts and tribunals.

9.7 The Committee is aware of the potential for abuse implicit in a system in which the executive is judge in its own cause.[8] Nonetheless, the Committee considers it appropriate that

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5. Notice under FOI Act, s.58A tabled in the Senate on 22 August 1986; Senate, Hansard, p. 409.
6. Evidence, p. 144.
7. Submission from the Attorney-General's Department, p. 41 (Evidence, p. 46). For a contrary view see Evidence, pp. 548-50 (Mr H. Selby).
8. In 1983, the then Minister for Trade, the Hon. Lionel Bowen, commented 'the Government has not abandoned the idea of phasing out the system of conclusive certificates, if possible, ... the question of conclusive certificates should be considered in the context of the three-year review to be conducted by the Senate Standing Committee on Constitutional and Legal Affairs': House of Representatives, Hansard, 20 October 1983 p. 2000.

a Minister should have the final word in some circumstances. Whenever a Minister elects not to abide by a decision of the Administrative Appeals Tribunal in respect of the issue of a conclusive certificate, the Minister is required to report to the Parliament.

9.8 The Committee takes the view, supported by experience to date, that this reporting requirement is sufficient to ensure that the ability to issue conclusive certificates is unlikely to be abused. The Committee considers that it is preferable to run the small risk of ministerial abuse rather than to confer greater review powers upon tribunals at the expense of Ministers and ministerial responsibility to Parliament.

9.9 While the Committee regards the general tenor of the conclusive certificate provisions as satisfactory, there are a number of matters of detail which require attention.

Parliamentary accountability for the issue of certificates

9.10 The Committee's acceptance of the existence of conclusive certificates rests upon the accountability of Ministers to the Parliament. However, there is no requirement that Ministers inform the Parliament of the issue of conclusive certificates. The Committee does not consider that this is satisfactory, particularly as one effect of the 1986 Amendments is that statistics on the use of conclusive certificates are no longer issued.

9.11 **The Committee recommends that a Minister be obliged to report to the Parliament within five sitting days whenever a conclusive certificate has been issued, regardless of whether the certificate has been signed by the Minister, an authorised delegate, or an officer for whose actions the Minister is accountable to the Parliament.**

9.12 The five day period is chosen to parallel the requirement for reporting Ministerial decisions not to revoke certificates provided in paragraph 58A(3)(b) of the FOI Act.

9.13 **The Committee further recommends that the report to Parliament should, at a minimum, identify the issuing agency or Minister, and the claim made in the certificate.**

9.14 Senator Stone dissents from the recommendations contained in paragraphs 9.11 and 9.13, and the views expressed in the final sentence of paragraph 9.10.

Notice of non-compliance with AAT decision

9.15 Paragraph 58A(3)(b) does not require that the Minister table the reasons for the non-revocation of a conclusive certificate. It requires that the Minister shall 'cause a copy of the notice to be laid before each House'.

9.16 In place of this obligation, **the Committee recommends that the responsible Minister be required to table in each House of Parliament the notice of non-revocation of a conclusive certificate.**

Multiple exemptions

9.17 Occasionally, agencies refuse to grant access to documents under the FOI Act on the basis of a multiplicity of exemptions, one of which is supported by a conclusive certificate. In these circumstances, the Administrative Appeals Tribunal's ability to request the production of the documents is complicated by the fact that different provisions govern production, according to whether the claim of exemption is supported by a conclusive certificate. This is discussed in chapter 18 below.

9.18 Additionally, the composition of the Tribunal may vary. The Tribunal must be specially constituted in order to deal with matters relating to conclusive certificates.[9] The Committee does not consider that there is any reason why the Tribunal should be differently constituted for the purposes of reviewing conclusive certificates from the way in which it is constituted for the purpose of exercising its jurisdiction in respect of other freedom of information matters.

9.19 Accordingly, **the Committee recommends that section 58B be repealed.**

Duration of conclusive certificates

9.20 The FOI Act makes no provision for the expiry of certificates.[10] The Committee is of the view that it is unreasonable for a conclusive certificate to remain in force indefinitely. One submission suggested that 'an applicant should be able to apply for a review of a conclusive certificate after a period of time, say three years after the decision' to issue it.[11] Another suggestion was that a certificate should remain in force for only two years, or perhaps until there was a change of Minister.[12]

9.21 **The Committee recommends that conclusive certificates remain in force for only two years from the date of issue.** However, the Committee does not consider that documents should be released automatically upon the lapse of a conclusive certificate.

9.22 The lapse of a conclusive certificate should merely entitle the FOI applicant (or any other person) to lodge a fresh application for access to that document. That application should

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9. FOI Act, s.58B.
10. Re Peters and Public Service Board (1986) 11 ALN 33, p. 36.
11. Submission from Dr Frank Peters, p. 5 (Evidence, p. 502).
12. Evidence, p. 550 (Mr H. Selby).

be considered as a fresh application for all purposes, including the ability to issue a new conclusive certificate.

9.23 Senator Stone dissents from the recommendation in paragraph 9.21 and the views in paragraphs 9.20 and 9.22.

Revocation of conclusive certificates

9.24 There are no express provisions for the revocation of conclusive certificates in the FOI Act. However, the Committee is of the view that section 33 of the Acts Interpretation Act 1901 may be relied upon to provide any person who has the authority to issue a conclusive certificate with the power to revoke that certificate. Sub-section 33(3) provides that:

> Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

9.25 If the Attorney-General's Department does not agree with this view, or is of the opinion that the law on the point is unclear, the Committee considers that the FOI Act should be amended so as clearly to provide a power to revoke.

9.26 There is, therefore, no reason why a freedom of information applicant may not approach the officer or Minister who has issued a conclusive certificate and request the revocation of that certificate.[13] The Committee wishes to emphasise that the automatic expiry of conclusive certificates

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13. Evidence, p. 633 (Department of the Treasury - such approaches would be considered on their merits).

after two years (recommended above) should not be viewed as exclusive of any informal review during the life of the certificate.

Conclusive certificates and the public interest

9.27 In its 1979 Report, the Committee opposed the availability of conclusive certificates in the area of Commonwealth-State relations (now section 33A). Rather, the Committee favoured a test of whether the disclosure of the document (a) would be prejudicial to Commonwealth-State relations; and (b) would be contrary to the public interest.[14]

9.28 Sub-section 33A(1) establishes the criteria according to which conclusive certificates may be issued under sub-section 33A(2). Sub-section 33A(5) provides that section 33A

> does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

9.29 In its submission to the Committee, the Attorney-General's Department noted the drafting deficiency with respect to these provisions that

> emerges from the Tribunal's decision in Re Rae and Department of Prime Minister and Cabinet (4 March 1986). There, the Tribunal decided that a s.33A(2) conclusive certificate establishes conclusively that the document in issue is a document of a kind referred to in s.33A(1), but does not conclusively determine that disclosure would be contrary to the public interest, unlike a s.36(2) certificate. Thus an applicant may be able to defeat a certificate by making a positive case under s.33A(5). Indeed the Minister's power to issue a certificate under s.33A(2) may itself be negated.

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14. 1979 Report, para. 17.09.

> The result is that a s.33A(2) conclusive certificate may be of very limited effect. The public interest issue is not conclusively determined as it is with a s.36(2) certificate. This unintended effect appears to result from the Commonwealth/State relations exemption being moved from s.33 by the 1983 Amendment Act, with the draftsman simply duplicating the wording of s.33(2) in s.33A(2) without regard to the implications of the introduction of the public interest test in s.33A(5). Similar unintended effects may also have resulted from the insertion of s.34(1A) and s.35(1A) by the 1983 Amendment Act, without consequential amendments to s.34(2) and s.35(2).[15]

9.30 The Committee accepts that these effects were not intended.

9.31 **The Committee recommends that section 33A be re-drafted so as to make it clear that any certificate issued under sub-section 33A(2) is conclusive of both the type of document and whether disclosure is in the public interest.**

9.32 This will go some way to meeting agency concerns that the public interest test prevents them from giving an assurance to a State in appropriate circumstances that documents will not be disclosed.[16]

9.33 Analogous drafting problems also arise in sections 34 and 35 of the FOI Act as a result of the deficient drafting of sub-sections 34(1A) and 35(1A). Sections 34 and 35 are substantially similar, exempting respectively Cabinet and

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15. Submission from the Attorney-General's Department, pp. 42-43 (Evidence, pp. 47-48). In addition to the decision in Re Rae, see Arnold v State of Queensland (1987) 73 ALR 607, and the alternative interpretation adopted in Re Fewster and Department of Prime Minister and Cabinet (No. 2) (31 July 1987).
16. E.g. Evidence, p. 1273 (Department of Health).

Executive Council documents. In both cases, the scope of matters which may be the subject of a conclusive certificate is narrower than had been intended.[17]

9.34 The Committee is not aware that practical problems have ensued. However, the Committee considers that sections 34 and 35 should be amended to remove the unintended results.

9.35 **The Committee recommends that sections 34 and 35 be re-drafted to clarify that the respective conclusive certificates be conclusive of both the type of documents and whether disclosure would be in the public interest.**

Public interest

9.36 A number of exemption provisions contain as an independent element the requirement that the public interest be considered before access can be denied under the provision. The Commonwealth Ombudsman informed the Committee that there are many cases in which

> there is no evidence that agencies have considered the countervailing public interest that would be served by release and, consequently, no evidence of any proper assessment of the balance of public interest.[18]

9.37 Both the Department of Local Government and Administrative Services (DOLGAS) and the Department of Territories commented upon the difficulties which agencies face in applying the public interest tests.[19] DOLGAS said that

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17. See the quotation from the submission of the Attorney-General's Department set out at para. 9.29 above.
18. Submission from the Commonwealth Ombudsman, p. 11 (Evidence, p. 1318).
19. Submissions from the Department of Local Government and Administrative Services, p. 14; the Department of Territories, p. 13.

interpretation of 'public interest' has proved to be 'arguably the most difficult aspect of FOI decision-making'.[20]

9.38 The concept of the public interest is, as the Committee recognised in 1979, somewhat amorphous.[21] The Committee then said it favoured using the public interest concept because by so doing it would be possible to

> require both an agency and the Tribunal to consider many factors favouring disclosure that might otherwise be ignored. This opinion has been strengthened by the decision in the Sankey case in which their Honours individually identified aspects of the public interest that supported the case for non-disclosure on the one hand and disclosure on the other.[22]

9.39 The Committee notes that the IDC canvassed the option of removing all public interest tests from the Act.[23] The IDC noted that removal would provide considerable savings by simplifying the decision-making process. But the IDC did not recommend this option. The IDC observed that removal of public interest tests would result in a major limitation of existing access rights and would constitute a fundamental change in the policy balance of the Act.[24] Rather the IDC recommended providing a '"check list" of some of the considerations relevant to a finding of public interest'.[25]

9.40 The Committee remains of the view that the public interest is a convenient and useful concept by which to aggregate a number of issues which may bear upon a decision whether to release a document under the FOI Act. However, the Committee

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20. Submission from the Department of Local Government and Administrative Services, p. 14.
21. 1979 Report, para. 5.21-22.
22. 1979 Report, para. 5.23.
23. IDC Report, pp. F11-12.
24. IDC Report, pp. F11-12.
25. IDC Report, para. 6.2.2.

recognises that there is one disadvantage which may flow from the adoption of this balancing criterion.

9.41 This disadvantage was noted by the Committee in its 1979 Report:

> 'Public interest' ... is a test that must be weighed by an adjudicator who has no interest in the outcome of the proceeding and who is skilled by professional experience in weighing factors one against another.[26]

9.42 It is thus of more assistance to the reviewing Tribunal or court as a measure by which to assess the effects of the disclosure of a document than it is to the agency which is required to decide upon the release of a document in the first instance.

9.43 According to the Administrative Appeals Tribunal, the balance of public interest is determined by examining the effects of the disclosure of a document:

> Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be 'misunderstood or misapplied by all ill-informed public'; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the

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26. 1979 Report, para. 5.29.

> extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned.[27]

9.44 The Committee recognises the difficulties inherent in determining where the balance of public interest lies. At the very least, this involves a careful balancing of the public interest in citizens being informed of the processes of the government against the public interest in the proper functioning of government.[28] This is not an easy process, and it is not susceptible to clear rules or simple formulae. Rather, each document must be carefully scrutinised and a decision made upon the merits of each individual case. Consequently, the Committee rejects the IDC's recommendation, which was noted above at paragraph 9.39, for the inclusion of a 'check list' of public interest considerations.

Prescriptive public interest provisions

9.45 Although sections 33 and 44 refer to the public interest, these sections do not impose public interest tests as such.[29] In 1979, the Committee noted that this type of reference to the public interest was superfluous.[30] The Committee recommended that the references to the public interest should be deleted from the international relations, security or defence exemption - now section 33.[31] (It did not make a similar recommendation in respect of what is now section 44. The Committee recommended that the original exemption should be deleted in entirety.[32])

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27. Re Lianos and Secretary to Department of Social Security (1985) 7 ALD 475, p. 497.
28. Harris v Australian Broadcasting Corporation (1983) 50 ALR 551, p. 561 (Beaumont J).
29. E.g. see Re Mann and Australian Taxation Office (1984) 7 ALD 698, p. 710.
30. 1979 Report, para. 15.23.
31. 1979 Report, para. 16.32.
32. 1979 Report, para. 26.13.

9.46 The Committee recognises that deleting the superfluous public interest test in section 33 will not change the exemption provision, and such an amendment is itself superfluous. Nonetheless, the Committee reiterates its 1979 recommendation in respect of section 33. In the interests of legislative clarity, the redundant public interest reference should be deleted.

9.47 **The Committee recommends that the reference to the public interest in sub-section 33(1) be deleted, and the appropriate consequential amendment be made to sub-section 33(2).**

9.48 The public interest test in section 44, however, is in a different position. It is, as it stands, redundant. However, the Committee is not convinced that the public interest should be superfluous in respect of the disclosure of documents affecting the national economy.

9.49 **For the reasons discussed below, the Committee recommends that section 44 be amended so as to introduce into section 44 a public interest test of the same type as is contained in sub-section 39(2).**

CHAPTER 10

INTER-GOVERNMENTAL RELATIONS

Section 33

10.1 The Committee accepts that there must continue to be an exemption protecting the security, defence or international relations of the Commonwealth. According to the Attorney-General's Department, '[e]xperience indicates that the Act is working well in this area'.[1] The Department of Foreign Affairs said in its submission that '[s]o far, the provisions of the Act have provided adequate protection for documents which the Department has needed to withhold from release'.[2]

10.2 The Committee's recommendations in respect of the public interest clause in section 33 (documents affecting national security, defence or international relations), were included in chapter 9.

Security classification of documents

10.3 The Committee received no evidence that the classification system in the present Protective Security Manual has had any adverse effect on the granting of FOI access.[3] It

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1. Submission from the Attorney-General's Department, p. 43 (Evidence, p. 48).
2. Submission from Department of Foreign Affairs, Attachment B, p. 1 (Evidence, p. 1079).
3. The Protective Security Handbook, which was discussed in the Committee's 1979 Report, has been replaced by the Protective Security Manual. See 1979 Report, paras. 16.8-16.29.

appears to be clearly understood by FOI decision-makers that the fact that a document bears a security classification does not establish conclusively that it is exempt under FOI.[4]

10.4 The Committee regards it as important that this relationship between security classifications and FOI access should be stressed during the training of FOI decision-makers. Provided that this is done, the Committee sees no need to pursue in this report those of its 1979 recommendations relating to security classifications which have not been implemented.

Section 33A: Commonwealth/State relations

10.5 In practice, section 33A has proved to be more controversial than section 33. Agencies which rely upon section 33A - for example the Department of Local Government and Administrative Services (DOLGAS) and the Department of Health - expressed doubts whether section 33A provided sufficient protection for 'State' documents.

10.6 There is evidence of some general concern amongst agencies having dealings with States that States see the Act as according them insufficient protection from disclosure of 'their' documents.[5] DOLGAS informed the Committee that

> DOLGAS officers are reasonably certain that the existence of the FOI Act is inhibiting full information being made available officially by [one particular] State.[6]

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4. Submissions from the Department of Defence, p. 17; and the Department of Foreign Affairs, p. 13 (Evidence, p. 1068).
5. Submissions from the Australian National Parks & Wildlife Service, p. 2; the Great Barrier Reef Marine Park Authority, p. 1; the Department of Arts, Heritage & Environment, p. 4; the Department of Health, p. 11 (Evidence, p. 1231); the Department of Local Government and Administrative Services, p. 10; the Department of Transport p. 3; the Department of Resources and Energy, p. 3; and supplementary submission from the Commonwealth Ombudsman, p. 3; (Evidence, p. 1343).
6. Submission, p. 10.

10.7 By and large, it is the States' apprehensions that documents may be released by the Administrative Appeals Tribunal that generates the concern, not the result in decided cases.

10.8 Nonetheless, the Committee notes that the Tribunal in its recent decisions has interpreted section 33A as giving a State a de facto veto over the release of documents.[7] A more recent interpretation by the Full Court of the Federal Court, however, suggests that the view of the State should be given considerable weight but should not be treated as determinative.[8]

10.9 The Committee considers that this latter, more authoritative interpretation strikes the appropriate balance between the interests of FOI applicants, the States and the Commonwealth.

10.10 In view of this, the Committee considers that section 33A is adequate, subject to the amendments recommended above in chapter 9 and below in paragraph 10.18. Further amendments to give greater protection to State interests are not warranted. In particular, the Committee does not accept that a State government should be automatically entitled to veto the release of documents in the custody of the Commonwealth.

Local government

10.11 DOLGAS advised the Committee that the success of many Commonwealth schemes in which the Department engages to provide for financial assistance to local government authorities depend upon the provision of full and frank information by the local governmental authorities to the Department.[9] DOLGAS suggested

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7. E.g. Re Rae and Department of Prime Minister and Cabinet (4 March 1986); Re State of Queensland and Department of Aviation (1986) 11 ALN 28; Re Guy and Department of Transport (8 May 1987).
8. Arnold v State of Queensland (1987) 73 ALR 607.
9. Submission from the Department of Local Government and Administrative Services, p. 11.

that

> the role of local government as the third sphere of Australian government be recognised within the context of the FOI Act by the inclusion of provisions similar to sections 26A, 33A and 58F. The effect would be to require an agency to consult the relevant local government authority before disclosing a document which that authority might reasonably wish to contend is exempt and to permit that authority to be joined in proceedings before the Administrative Appeals Tribunal in support of exemption.[10]

10.12 In a separate letter, the Minister for Local Government and Administrative Services also pressed this view upon the Committee.[11]

10.13 The Committee, with the exception of Senator Stone, does not accept this suggestion. For historical, political and legal reasons, the status of local government in Australia is significantly different from that of the States.

Ministerial councils

10.14 The Ministerial Council for Companies and Securities enjoys special protection under the FOI Act. Section 47 specifically exempts documents prepared for, furnished to, or in the possession of the Council or the National Companies and Securities Commission or which would disclose the deliberations of the Ministerial Council. However, this is the only Ministerial Council to receive particular protection.[12]

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10. Submission from the Department of Local Government and Administrative Services, p. 11.
11. Submission from the Hon. Tom Uren, then Minister for Local Government and Administrative Services, pp. 1-2.
12. The Committee notes that the Report of the Senate Standing Committee on Constitutional and Legal Affairs, The Role of Parliament in Relation to the National Companies Scheme, (Parliamentary Paper No. 113/1987) recommended that the Commonwealth Parliament should enact comprehensive companies legislation.

10.15 The Department of Transport, which provides secretariat service to several ministerial councils, such as the Australian Transport Advisory Council, informed the Committee that the possibility of the release of the ministerial council documents is of concern to the States. According to the Department of Transport, this concern 'could well lead to a situation where State Government Ministers are unwilling to provide documents for these Councils or to canvass unpopular options at meetings of the Councils'.[13] Consequently, the Department of Transport submission suggested that, for the purposes of the FOI Act, all documents originating from, or prepared for, Federal/State ministerial councils should be placed in the same category as Cabinet or Executive Council documents.[14]

10.16 The Committee accepts that concern exists over the possibility of release, although it is not aware of any case in which identifiable harm has resulted from the release under FOI of any ministerial council document under the FOI Act. The Committee agrees that some increased protection against release is warranted. The Committee regards the type of protection given by section 47 as appropriate.

10.17 Any attempt to increase the protection against disclosure of ministerial council documents raises problems of definition. The expression 'ministerial council' is not a term of art. It is used to refer to a variety of bodies established by various means with differing classes of membership and differing classes of powers and functions.[15] For this reason, the Committee does not regard it as practicable to adapt section 47 to deal with all ministerial councils. In addition, such an adaptation

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13. Submission from the Department of Transport, p. 3.
14. Submission from the Department of Transport, p. 3. See also submission from the Queensland Government, pp. 5-6.
15. See generally, Advisory Council for Inter-Governmental Relations, Ministerial Councils: Information Paper [ACIR. Hobart. 1986] chapter 3.

may result in conferral of a greater degree of protection than a particular council regards as necessary.

10.18 **The Committee recommends that, where a ministerial council formally so requests, exemption be conferred upon that council by inclusion within Schedule 2 of the Act.**

10.19 The effect of this should be to confer a degree of exemption upon the council's documents, irrespective of which agency has possession of those documents. The degree of exemption should be no greater than is provided in section 47. By appropriate specification in the schedule, it could be less.

CHAPTER 11

INTERNAL WORKING DOCUMENTS

11.1 In 1979, the Committee approved of the internal working documents exemption 'reluctantly'.[1] The Committee commented that '[s]ome reform to the wording' would be desirable, but that it was difficult to postulate a precise suggestion.[2]

11.2 Section 36 is intended to balance the public interest in disclosure against the protection and promotion of frank policy advice and criticism. In 1979, several witnesses warned the Committee of the dangers of disclosing internal working documents. Essentially, these dangers were that advice papers may be written more slowly, contain less critical comment and be couched in the guarded language which characterises public reports; that individual public servants could become identified with particular points of view; that the position of public servants vis-a-vis their Ministers might be improperly enhanced by placing upon the public record the views of public servants and perhaps disclosing the fact that the Minister had acted contrary to advice; and that the likelihood that sensitive matters would be discussed orally rather than in writing would be increased.[3]

11.3 The question whether these results have eventuated was discussed in chapter 2 (paragraphs 2.65 to 2.72) above. The conclusion was that, by and large, they have not. It follows that both the Act in general and section 36 is particular are adequate to protect agencies in respect of the concerns voiced in 1979.

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1. 1979 Report, para. 19.16.
2. 1979 Report, para. 19.18.
3. 1979 Report, para. 19.4-19.7.

11.4 The converse concern was also voiced in 1979: that the wording of what is now section 36 would give agencies too great an opportunity to withhold documents.[4] Similar criticism was received during this inquiry.[5]

11.5 In general, the criticism is not justified in the Committee's view because of the inclusion of a public interest test in section 36 and the way in which that test has been applied by the Administrative Appeals Tribunal. For example, the Tribunal has rejected claims of exemption under section 36 made on the basis of unsubstantiated assertions that release would inhibit candour.[6]

11.6 In general, the Committee is satisfied by the way the public interest test has been applied. However, the Committee regards one aspect with concern. In Re Howard and Treasurer of Commonwealth of Australia, Justice Davies extracted from earlier cases a number of guidelines as to when disclosure will not be in the public interest.[7] One of these was that 'disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest'.[8]

11.7 In commenting upon this guideline, the Committee does not seek to second guess the Tribunal's decision. The Committee recognises that selecting one of a list of five factors to which the Tribunal adverted in its decision may distort the significance attributed by the the Tribunal to that factor.

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4. See generally 1979 Report paras. 19.10 ff.
5. Evidence, p. 915 (Public Interest Advocacy Centre).
6. E.g. Re Murtagh and Commissioner of Taxation (1984) 6 ALD 112; Re Bartlett and Department of Prime Minister and Cabinet (31 July 1987); and Re Fewster and Department of Prime Minister and Cabinet (No. 2) (31 July 1987) para. 12.
7. (1985) 7 ALD 626, pp. 634-35.
8. Ibid., p. 635.

11.8 However, this guideline has been adopted in subsequent cases,[9] and appears to be gaining currency amongst decision-makers. The Committee is concerned that, under this guideline, FOI decision-makers may take it upon themselves to decide what will and will not confuse the public and what is an 'unnecessary debate' in a democratic society.

11.9 In one case in which the guideline was applied, access was sought to a document prepared for a senior policy advising committee. The Tribunal (composed of B.J. McMahon (Senior Member), H.C. Trenick and G. Brewer (Members)) said on this point:

> If it were possible to put together all the written and oral submissions made to the committee, the discussions of those submissions and any other element that led to the making of the final decision, and to make all that material available to one who was qualified to understand it and debate it, perhaps confusion could be avoided. That is not however the situation with which we are confronted at the moment. We have only one ingredient in the debate the disclosure of which could possibly distort the validity of the final decision that was made.[10]

11.10 The Committee regards with some concern the implication that access to material would be given to 'one who was qualified to understand it and debate it', but not to a member of the general public or, as in this case, a journalist.[11]

11.11 In Re Howard, the documents concerned possible taxation options. With respect to the particular guideline, the Tribunal said: 'disclosure of the documents could lead to confusion and debate about taxation proposals which were not in fact adopted by

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9. E.g. Re Sunderland and Department of Defence (1986) 11 ALD 258; and Re Doohan and Australian Telecommunications Commission (2 May 1986).
10. Re Sunderland, (1986) 11 ALD 258, p. 266.
11. Ibid., p. 266.

the Government'.[12] The implication is that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. Debate after the event on an option that was not adopted is presumably 'unnecessary debate'.

11.12 The Committee regard the Australian community as more sophisticated and robust than the guideline assumes. The Committee acknowledges that documents relating to policy proposals considered but not adopted can be used to attempt to confuse and mislead the public.[13] But the Committee considers that such attempts, if made, will be exposed. The process of doing so will lead to a better public understanding of the policy formation process.[14]

11.13 Consistent with its attitude to the basis on which deletions should be able to be made,[15] the Committee records its conclusion that possible confusion and unnecessary debate not be factors to be considered in calculating where the public interest lies.

11.14 The IDC recommended provision of an exemption for 'draft documents', that is documents which have not been brought into final form for the purpose for which they are intended.[16] The IDC considered that such an exemption would result in savings which 'are not quantifiable but are likely to be substantial'.[17] The

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12. (1985) 7 ALD 626, p. 635. The Committee emphasises that in discussing this case and Re Sunderland it is only concerned with the particular guideline. It makes no comment on the availability and use of other grounds for withholding the documents.
13. E.g. see the submission from the Great Barrier Reef Marine Park Authority, p. 1.
14. Cf Evidence, pp. 914-19 (Public Interest Advocacy Centre).
15. See above para. 7.29.
16. IDC Report, p. 37 (Option B2).
17. Ibid., p. F12.

integrity of freedom of information would not be affected, in the IDC's view, because the proposed exemption would not prevent access to documents on which decisions were based.[18]

11.15 The Committee does not support this recommendation. The Committee regards access to drafts as valuable in assisting public understanding of agencies' policy development and 'thinking' processes. In addition, the Committee considers that the need to distinguish draft from other documents would prove expensive in many cases.

11.16 As the IDC acknowledges,[19] it would not be appropriate to grant exemption to a document simply on the basis that it was marked 'draft'. It would be necessary to have regard to all the circumstances in order to determine if a document was genuinely a draft. Difficulties would arise in determining the status of documents relating to proposals in the course of development or proposals which have been abandoned. Only where a decision is made is it possible to determine upon which documents the decision rested.

Paragraph 36(1)(b) disclosure 'contrary to the public interest'

11.17 It is the Committee's view, as in 1979, that the section 36 exemption should contain an appealable public interest test so as to permit a gradual change (and ideally development) in the ideas about the way in which the government should relate to the community at large.[20] In the Committee's view, this is possible only where an external body, such as the Administrative Appeals Tribunal, is able to determine whether the public interest is better served by the disclosure or exemption of a document.

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18. Ibid., p. F13.
19. Ibid.
20. 1979 Report, para. 19.27.

11.18 The Committee does have some reservations about the structure of section 36. The conjunctive nature of the public interest test in sub-section 36(1) poses problems for some agencies.[21]

11.19 The Department of Local Government and Administrative Services (DOLGAS) suggested that paragraph 36(1)(b) should be repealed and a new public interest test be substituted along the lines of the section 39 public interest test. The resulting text would be:

> 36(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -
>
> (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth.
>
> (b) ...
>
> (1A) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest. [Committee Draft]

11.20 Amending section 36 in this manner may change the effect of the exemption. The existing text casts upon the agency the onus to demonstrate that the disclosure would be 'contrary to the public interest'. However, the DOLGAS suggestion would place upon the agency the onus to rebut the suggestion that disclosure of the document would, on balance, be in the public interest. This may be a more difficult task. Alternatively, it is possible, at least in theory, that it would not be 'contrary to the public

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21. Submission from the Department of Local Government and Administrative Services, pp. 14-15.

interest' to disclose a document without its disclosure being, 'on balance, in the public interest'.

11.21 If the Department of Local Government and Administrative Services' suggestion were to be adopted, it would be necessary to amend sub-section 36(3) which provides that the fact of issue of a conclusive certificate 'establishes conclusively that the disclosure of ... [a] document would be contrary to the public interest'.

11.22 Amending sub-section 36(3) so as to make the certificate conclusive only of the nature of the document would introduce into section 36 the uncertainty which presently affects section 33A. In the Committee's view, this is undesirable.

11.23 Consequently, the Committee considers that if sub-section 36(1) is amended in the manner suggested above in paragraph 11.19, sub-section 36(3) should also be amended so as to ensure that the certificate is conclusive of both the type of the document under sub-section 36(1) and the balance of the public interest under proposed sub-section 36(1A).

Factual material

11.24 Sub-sections 36(5) and 36(6) provide respectively:

> (5) This section does not apply to a document by reason only of purely factual material contained in the document.
>
> (6) This section does not apply to -
>
> (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a prescribed body or organisation established within an agency; or

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

11.25 This creates something of a catch-22 if a conclusive certificate is in fact issued in respect of a document to which either sub-section 36(5) or sub-section 36(6) might apply. Once a certificate has been issued, the ability of either the applicant or the Administrative Appeals Tribunal to determine whether sub-section 36(5) or 36(6) applies is constrained by the limitations on the review of conclusive certificate decisions.[22] However, in practice, this does not appear to present great difficulty.

11.26 **The Committee recommends: (i) that the more specific, and arguably narrower, public interest test of whether the disclosure of the document would, 'on balance, be in the public interest' be adopted in section 36; (ii) the public interest test be imposed by a discrete sub-section (along the lines of the section 39 public interest test); and (iii) a conclusive certificate issued under section 36 be conclusive of both the type of the document (under sub-section 36(1)) and the balance of the public interest.**

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22. Submissions from Dr Frank Peters, p. 4 (Evidence, p. 501); the the Administrative Review Council, p. 45.

CHAPTER 12

LAW ENFORCEMENT, SECRECY PROVISIONS AND AGENCY OPERATIONS

Section 37

12.1 Section 37 was the exemption second most commonly relied upon in 1985-86. Nearly 23% of all of the claims for exemption relied upon section 37 - in contrast to 32.7% in 1984-85. Of those claims for exemption made in 1985-86 under section 37, 44.9% relied upon paragraph 37(2)(b) - disclosing the lawful methods/procedures for dealing with breaches or evasions of the law -; and 43.3% relied upon paragraph 37(1)(a) - prejudicing the enforcement/proper administration of the law in a particular instance.[1]

12.2 Section 37, like section 33 and 33A, adopts the 'would, or could reasonably be expected to' standard. Section 37 is not available when there is only the mere risk of prejudice.[2] However, it is available if there is some reasonable expectation of the occurrence of one of the nominated events.[3]

Paragraph 37(1)(a): enforcement or proper administration of the law

12.3 Difficulties may arise when people seek access to documents which may be relevant to an investigation into a possible breach of law but prior to the initiation of any investigation. In the Committee's view, it would be improper to

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1. FOI Annual Report 1985-86, pp. 32 and 41.
2. News Corporation Ltd v National Companies and Securities Commission (1984) 57 ALR 550.
3. Attorney-General's Department v Cockcroft (1986) 64 ALR 97. Re A.B. and Australian Taxation Office (1986) 10 ALN 249, p. 250.

pressure an FOI applicant into making a statement relating to the possible breach as a condition of releasing documents under the FOI Act.[4]

12.4 The Committee does not object to agencies inviting applicants to volunteer statements where this might suffice to overcome the possibility of prejudice to the conduct of an investigation. However, the Committee emphasises that any such invitation should be accompanied by clear advice that applicants are not obliged to provide the agency with a statement.[5]

Paragraph 37(1)(c): protecting life and physical safety

12.5 Australians for Racial Equality expressed concern that the FOI Act permits the disclosure of the identities and addresses of its leading members, thereby exposing them to verbal and physical attack by extremist opponents.[6] A similar concern was reported in the 'Sydney Morning Herald', relating to members of the Sydney Muslim community.[7]

12.6 The Department of Immigration and Ethnic Affairs also addressed this problem in its submission to the Committee. The Department was particularly concerned that paragraph 37(1)(c) might be available only when there is a real possibility of danger.[8] Consequently, the Department of Immigration and Ethnic Affairs suggested that there should be a lower standard of proof applied in respect of this exemption. The Department suggested that a test along the following lines might be appropriate:

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4. It was alleged that this has occured once - Evidence pp. 896-99 (Welfare Rights Centre). However, this allegation was denied in a letter from the Department of Social Security to the Welfare Rights Centre, dated 21 May 1986.
5. See also letter from the Welfare Rights Centre to the secretary of the Committee dated 1 September 1986, p. 3.
6. Submission from Australians for Racial Equity, p. 1.
7. 'Sydney Morning Herald', 3 December 1985.
8. Submission from the Department of Immigration and Ethnic Affairs, p. 19 (Evidence, p. 707).

> a reasonable suspicion or belief based on cogent assertions or evaluations.[9]

12.7 The Committee notes this concern. However, the Committee does not accept the suggestion. In the Committee's view, the test 'would, or could reasonably be expected to ... endanger the life or physical safety of any person' is adequate to deal with the potentiality for danger to persons resulting from the disclosure of documents under the FOI Act.

12.8 In some cases, where the release of documents may have resulted in a risk of danger to the life or physical safety of persons, the release is attributable less to deficiencies in the FOI Act than it is to administrative errors.[10] As is noted in paragraph 12.18 below, the representative of the Australian Federal Police at the Committee's hearings suggested to the Committee that the occasional release of a document which should have been withheld was a result of the Australian Federal Police's 'own administrative complexity rather than any application of the Act itself'.[11]

Mosaic or jigsaw factor

12.9 Agencies drew the Committee's attention to the problem posed by what was described as the 'mosaic' effect. Mosaic factors may colour otherwise innocuous information. Agencies may be ignorant of the applicants' background knowledge. For instance, what might otherwise be an innocuous item of

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9. Submission from the Department of Immigration and Ethnic Affairs, p. 20 (Evidence, p. 708).
10. The Committee notes that on 3 December 1985 the 'Sydney Morning Herald' reported Mr McKinnon, then Secretary of the Department of Immigration and Ethnic Affairs, as having: 'agreed that documents might have been withheld if the department had known their contents were going to be used as part of an attack on individuals'.
11. Evidence, p. 487.

information may be just the piece of information necessary to complete an applicant's knowledge on a subject.[12]

12.10 According to the Australian Federal Police:

> It has been the experience of the FBI in America that several requests made by different members of a group can result in the group being able to piece together quite substantial portions of FBI intelligence holdings in respect to that group.[13]

12.11 The Australian Federal Police informed the Committee that there is evidence that mosaic requests are being lodged in Australia.[14]

12.12 Although the Committee acknowledges the difficulties which may be presented by mosaic requests, the Committee remains of the view that access should not be refused because of applicants' motives.

12.13 This is so for several reasons. In practice, the categories of documents which may form part of a mosaic in this sense are not susceptible to precise definition. Consequently, it would be necessary to entitle agencies to consider the motives of applicants who seek access to a whole range of documents. As was discussed previously, the Committee does not consider that applicants' motives should be taken into account for the purpose of determining whether access should be granted. Further, were agencies to consider applicants' motives, this would only reduce,

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12. Evidence, p. 492 (Australian Federal Police). See also IDC Report, p. D13 (mosaic factor in release put informant's life at risk - had to be moved interstate).
13. Submission from the Australian Federal Police, p. 9 (Evidence, p. 466). See also submission from the Attorney-General's Department, pp. 37-38 (Evidence, pp. 42-43). The submission from the Australian Customs Service, pp. 24 and 31, notes that mosaic factors may arise in contexts other than law enforcement, such as business.
14. Submission from the Australian Federal Police, p. 9 (Evidence, p. 466).

but not eliminate in entirety, mosaic requests since such requests would be filtered through a series of, as it were, 'innocent' agents.

12.14 Senator Stone dissents from paragraphs 12.12 and 12.13.

12.15 The Inter-Departmental Committee identified as an option the amendment of the Act so as to exclude the section 22 obligation to make deletions, where exemption is claimed under paragraph 33(1)(a) or section 37.

> This would help minimise disclosure of sensitive information as a result of ignorance or oversight because the decision-maker failed to adequately address the 'mosaic' or 'jig-saw' problem ... or where deletion of a finite number of printed characters still enabled deleted information to be deduced by an applicant.[15]

12.16 The Committee does not recommend adopting this option. The Committee recognises that this option would assist in overcoming the mosaic problem, at least marginally. However, the price would be a drastic reduction in access rights. In 1985-86, section 37 was relied on to make deletions in 4789 cases, but to refuse access in only 417 cases.[16]

12.17 The Committee recognises that it may be necessary to bear in mind the possibility of mosaic or jigsaw requests. In the Committee's view, the problems posed by such requests are better resolved by administrative action (and vigilance) than by legislative amendment.

12.18 In reaching this conclusion, the Committee notes the comments by Inspector Saunders of the Australian Federal Police at the Committee's hearings. Discussing the question of mosaic

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15. IDC Report, p. D8.
16. FOI Annual Report 1985-86, pp. 216-19.

(or, as he termed it, 'jigsaw') requests, Inspector Saunders commented:

> [T]his is a problem. Of course, the difficulty is in being able to identify it as a problem at the time. We have experienced similar requests coming from different directions, or from different applicants. It is not always possible to say that they are related, and indeed there is a difficulty again in the consistency in what is released. We are looking at the human error, which is our main problem in this, I believe.[17]

12.19 The Committee has no recommendations for legislative amendment in this respect. However, the problem is noted especially for the attention of freedom of information officers in agencies which have not yet encountered it.

Crime intelligence information

12.20 The IDC recommended amending sub-section 7(2A) to extend the present exemption of documents received from security agencies to documents received from 'crime intelligence agencies'. Regulations would identify the relevant crime intelligence agencies.[18] The IDC offered no detailed argument in support of this recommendation.

12.21 The IDC's aim appeared to be to avoid the cost of line-by-line scrutiny of documents that turn out to be exempt. If it is the case that all, or almost all, of documents received by agencies from 'crime intelligence agencies' prove on examination to be exempt, the Committee would accept the blanket exemption of documents from such sources by sub-section 7(2A) exemption of such documents.

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17. Evidence, p. 490. See also p. 491 (Inspector Saunders).
18. IDC Report, p. 47 (Option B15). See also the submission from the Australian Customs Service, p. 27.

12.22 The Committee is not convinced, however, that there is a clearly identifiable category of documents received from 'crime intelligence agencies'. This is so for two reasons. First, in Australia and overseas, many such agencies are merely sections, divisions or offices within police forces. The Committee is conscious of the difficulty of providing a precise definition of 'crime intelligence agencies'. Secondly, exempting documents 'received from' crime intelligence agencies may invite other agencies to attempt to evade the Act by filtering their documents through such 'crime intelligence agencies'.

12.23 The Committee would not want to create a mechanism by which blanket exemption could be given for documents with police forces simply by routing them through the forces' crime intelligence units. This possibility is largely avoided at present since the Commonwealth controls the structure and activities of all the organisations presently listed in sub-section 7(2A). Overseas or State organisations would not be subject to this check.

12.24 The Committee considers that documents created by or in the possession of 'crime intelligence agencies' properly so called should receive specific protection.

12.25 **The Committee recommends that 'crime intelligence agencies' be specifically identified by express inclusion in Schedule 2 of the FOI Act, and that documents that have originated with, or have been received from, such specified 'crime intelligence agencies' be brought within the protection of sub-section 7(2A).**

12.26 The IDC also recommended amendment of the Act 'to exempt (e.g. for 5 years) documents containing crime intelligence information'.[19] Again, no detailed argument was provided in support of the recommendation. In the absence of such argument,

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19. IDC Report, p. 47 (Option B16).

the Committee regards the recommended amendment as unnecessary, even unhelpful. There would be considerable uncertainty and scope for argument over what was or was not 'crime intelligence information'.[20]

Section 38: secrecy

12.27 Section 38 of the FOI Act provides that:

> A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exemptions or qualifications.

12.28 There is some uncertainty over the meaning of this section. The Law Institute of Victoria described the judicial interpretation of section 38 as 'confusing and contradictory'.[21] However, in the five years that the FOI Act has been in force, judicial interpretation of section 38 has settled some of the initial uncertainty about the ambit of the exemption.[22] According to the Attorney-General's Department, the Administrative Appeals Tribunal and the Federal Court have developed a

> line on the interpretation of section 38 of the FOI Act which has made it clear that the more general secrecy provisions [in other Acts] do not operate to provide an exemption.[23]

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20. Cf. Re Anderson and Australian Federal Police (1986) 4 AAR 414, p. 423.
21. Submission from the Law Institute of Victoria, p. 4. (Evidence, p. 377). See also, for example, submissions from the New South Wales Law Society, p. 3; the Australian Patents, Trade Marks and Designs Offices, pp. 20-21.
22. For a summary of Federal Court decisions on Section 38 see Harrigan v Department of Health (1986) 72 ALR 293, pp. 294-95.
23. Evidence, p. 177.

12.29 The Committee noted the suggestion that the FOI Act should be amended by the inclusion of a formal listing of the secrecy provisions contemplated by section 38 so as to remove the residual uncertainty as to the application of the section.[24] This could be done by listing in a schedule of the Act, or by listing in regulations.

12.30 In 1979, the Committee recommended that the secrecy provision should be supplemented by a scheduled list of secrecy provisions.[25] That recommendation was not accepted by the then Government.[26] Nonetheless, the Committee repeats that recommendation here.

12.31 **The Committee recommends that there be an exhaustive list of secrecy provisions, and that that list of secrecy provisions be contained in a schedule to the FOI Act rather than in regulations.**

12.32 In the Committee's view, any provision which restricts the application of the FOI Act should be apparent on the face of the FOI Act. This should be true of both existing provisions and provisions contained in any future legislation.

12.33 The Committee is concerned that there has not yet been any comprehensive review of the secrecy provisions for their compatibility in the FOI Act, despite the Government having stated in its response to the Committee's 1979 Report that a review of existing secrecy provisions was in progress.[27] In 1986-87, the Attorney-General's Department resumed its work on the review of secrecy provisions, but the review has yet to be

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24. E.g. Evidence 494 (Australian Federal Police); submissions from 'The Age' pp. 33-34 (Evidence, p. 218-19); the Australian Taxation Office, p. 8 (Evidence, pp. 658 and 679-80); Political Reference Service Ltd, pp. 17-18 (Evidence, pp. 967-68).
25. 1979 Report, para. 21.13(a).
26. Senate, Hansard 11 September 1980, p. 803 (Senator Durack).
27. Ibid.

finalised.[28] According to Mr Lindsay Curtis, if the Department

> had proceeded immediately to a review of secrecy provisions we may very well have ended up with a less satisfactory situation from the point of view of openness than we now have. If we had reviewed secrecy provisions very quickly after the Act came into force we would have been under pressure to retain a lot of secrecy provisions because agencies would feel that they needed the protection that those provisions gave.[29]

12.34 The Committee urges the Attorney-General's Department to undertake a complete review of the secrecy provisions for their compatibility with the FOI Act[30] and, that, as soon as possible after that review has been completed, the Government present a report upon the review of secrecy provisions.

12.35 In expressing this view, the Committee notes the advice of the Attorney-General's Department that:

> The change in scope of the review of secrecy provisions to include a review of their impact on the detection of fraud and other abuses will add to the work involved in completing the review [of secrecy provisions]. It is not possible to estimate how much of the review will be taken up by this new aspect but it will clearly form a significant part. No date has been set by the Government for completion of the review. This Department hopes to be in a position to issue a discussion paper in the near future.[31]

12.36 'The Age' suggested that the Committee should examine each secrecy provision nominated for future inclusion in the list

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28. FOI Annual Report 1986-87, pp. 30 and 73.
29. Evidence, p. 177.
30. See also the joint submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 25 (Evidence, p. 874).
31. Third supplementary submission from the Attorney-General's Department, p. 4 (para. 12.).

for the compatibility of that provision with the FOI Act.[32] The Committee does not regard this suggestion as practical. It would introduce unnecessary delays into the legislative process if every alteration to the list of secrecy provisions had to be referred to the Committee

12.37 It is proposed to amend section 38 by the Privacy (Consequential Amendments) Bill, cl. 6. The following sub-section is to be added:

> (2) Where a person requests access to a document, this section does not apply in relation to the document so far as it contains information that relates to the personal affairs of the person.

12.38 The Committee endorses this amendment. However, the Committee notes that this amendment may pose problems in respect of some secrecy provisions - such as section 87 of the Complaints (Australian Federal Police) Act 1981 which precludes people from gaining access to information held about themselves by the Investigation Division of the Australian Federal Police.[33]

12.39 In practice, these difficulties may be more apparent than real. Where an applicant requests access to documents falling within a secrecy provision the application of which is precluded by sub-section 38(2), the document may be exempt under one of the other exemptions. For instance, when a person applies for access to documents relating to a Australian Federal Police internal investigation into the applicant's conduct (the substance of the documents covered by section 87 of the Complaints (AFP) Act), the request may be denied under section 37 of the FOI Act.

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32. Submission from 'The Age', p. 34 (Evidence, p. 219).
33. The Administrative Appeals Tribunal has held that section 87 is a relevant secrecy provision: Re Corbett and the Australian Federal Police, (1986) 9 ALN 194. For expression of doubt whether this decision is consistent with Federal Court interpretation of section 38, see Evidence, p. 494 (Australian Federal Police).

12.40 There is one minor aspect of this amendment to which the Committee draws attention. Section 41 of the FOI Act uses the phrases 'personal affairs of any person' and 'matters relating to that person'. The proposed sub-section 38(2), which was presumably drafted with an eye to section 41, refers to 'the personal affairs of the person'.

Section 39

12.41 The Committee makes no recommendations in respect of section 39.

Section 40

12.42 Section 40 is designed to exempt from disclosure documents concerning certain operations of agencies. It is becoming increasingly popular as a ground of exemption, accounting for 52% of all exemption claims in 1985-86 as compared to 30.2% in the previous year,[34] and 13.1% in 1983-84.[35] The Commissioner of Taxation was the agency responsible for 93% of the total exemptions claimed under section 40 in 1985-86, using it on 11,018 occasions to make deletions and on 35 occasions to refuse access entirely.[36]

12.43 Paragraph 40(1)(d) provides for exemption where a grant of access might 'have a substantial adverse effect on the proper and efficient conduct of the operations of an agency'. There were 3097 claims for exemption under this paragraph in 1985-86.[37] The Commissioner of Taxation used the paragraph on 2894 occasions to make deletions from the requested document and on a further 11 occasions to refuse access altogether.[38]

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34. FOI Annual Report 1985-86, p. 32.
35. FOI Annual Report 1983-84, p. 64.
36. FOI Annual Report 1985-86, pp. 44, 237 and 239.
37. FOI Annual Report 1985-86, p. 44.
38. Ibid., pp. 247-48.

12.44 Inspector Saunders of the Australian Federal Police suggested that this paragraph

> has become a sort of stand-by clause where frankly you are having trouble finding anything else to use and you feel that it should be exempted.[39]

12.45 The Law Institute of Victoria suggested that paragraph 40(1)(d) has been used by agencies which lack the confidence to invoke section 36.[40] The Law Institute recommended that paragraph 40(1)(d) should be repealed since it is available in respect of few documents which would not also fall within section 36. However, the Committee notes that the Administrative Appeals Tribunal, having given the provisions separate meanings, has treated the sections as having distinct roles.[41]

12.46 The Committee considers that there is no real need for this exemption. Section 24 and other exemption provisions provide sufficient basis to ensure that an agency is not required to disclose a document the disclosure of which would cause substantial damage to the operations of the agency.[42]

12.47 **Accordingly, the Committee recommends the repeal of paragraph 40(1)(d).**

12.48 Senator Stone dissents from this recommendation.

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39. Evidence, p. 490.
40. Submission from the Law Institute of Victoria, p. 5 (Evidence, p. 378).
41. E.g. Re Brennan and Law Society of the Australian Capital Territory (No. 2) (1985) 8 ALD 10, p. 17; Re Mr and Mrs AD and Department of Territories (1985) 9 ALN 156, p. 156.
42. Submission from 'The Age', p. 35 (Evidence, p. 220).

CHAPTER 13

SECTION 41: PRIVACY

'Personal affairs'

13.1 The Act does not define the phrase 'personal affairs', which is used in sections 12 and 48 as well as section 41. Deputy President A.N. Hall of the Administrative Appeals Tribunal observed that the phrase is one

> that is inherently incapable of precise or exhaustive definition. Its meaning and application are, I think, best left to be worked out as fact situations arise, bearing in mind the dichotomy which the Act establishes between 'business and professional affairs', on the one hand, and 'personal affairs' on the other.[1]

13.2 The Committee shares this view. There is no merit in defining the phrase in the Act, although the Committee acknowledges that the imprecision of the phrase does sometimes cause difficulty in applying the sections in which it occurs.

13.3 As the Committee recognised in 1979, it is desirable to safeguard private information about individuals; but it is not necessary to prevent the circulation of all information about identifiable persons. Consequently, the Committee rejects the Queensland Government's suggestion that documents which 'relate to an individual should not be released to or access be given to a third party without the consent of the individual concerned'.[2] Treating all information about individuals as potentially

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1. Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414, p. 430.
2. Supplementary submission from the Queensland Government, p. 2.

privacy-intrusive would undermine the operation of the freedom of information legislation.

13.4 In this context, the Committee notes that the definition of 'personal information' adopted in the proposed privacy legislation differs from the definition of information relating to 'personal affairs'.[3] Clause 6 of the Privacy Bill 1986 defined 'personal information' as

> information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

13.5 To the extent that the category of personal information is wider than is the FOI category of information relating to 'personal affairs', the Information Privacy Principles, particularly Information Principle 7 (alteration of records containing personal information), listed in the Privacy Bill are at variance with sections 41 and 48 of the FOI Act.

'Unreasonable disclosure'

13.6 In order to determine whether the disclosure of the document is 'unreasonable', the agency or Minister must decide whether it would be unreasonable to disclose the information generally, rather than whether it would be unreasonable to disclose it to the particular applicant.[4] This has the effect that information may be withheld from persons whose limited use of it would not constitute an 'unreasonable disclosure' of personal affairs.

13.7 The Administrative Appeals Tribunal has said that the 'reasonableness' of a given disclosure must be determined by

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3. E.g. see Young v Wicks (1986) 11 ALN 176.
4. Re Williams and Registrar of the Federal Court of Australia (1985) 8 ALD 219, p. 224.

reference to an objective evaluation of all the circumstances surrounding the application, and the weighing of the various interests, both personal and public involved. Accordingly, it is necessary to consider matters such as the nature of the information contained in the document; the circumstances in which it was obtained; the current relevance of the information; the wishes (or probable wishes) of the individual to whom the information relates; and the private or public status of that person.[5]

13.8 The Commonwealth Ombudsman has drawn attention to a need to balance the right of access to 'non-sensitive data' about identifiable individuals, such as mailing lists held by agencies, against the individuals' privacy interests.[6] The Committee recognises that this may present difficulties in practice, particularly in view of the imprecise nature of the personal information exemption in section 41: the 'unreasonable disclosure of information relating to the personal affairs of any person'.

13.9 In paragraph 8.86 above, the Committee recommended that agencies be required to consult with individuals to whose 'personal affairs' documents relate. From consulting with people to whom information relates, it is a short step to attempting to balance the use of requested documents FOI against information-subject's privacy concerns.

13.10 In Re Shewcroft and Australian Broadcasting Corporation, Sir William Prentice commented:

> in deciding whether disclosure of information relating to the personal affairs of another person would be 'unreasonable' (s 41(1)), one could envisage the necessity of setting the motivation or need of an applicant against the

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5. Re Williams and Registrar of Federal Court of Australia (1985) 8 ALD 219; Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN 257; Re Anderson and Australian Federal Police, (1986) 4 AAR 414; Re Brooker and Commissioner for Employees' Compensation (6 March 1986).
6. Commonwealth Ombudsman, Annual Report 1984-85, p. 171.

> right to privacy of the person whose 'personal affairs' were cited, in the attempt to weigh the 'reasonableness' or 'unreasonableness' of a requested disclosure. Indeed, the concept of 'unreasonableness' of an action, would seem to involve the requirement of a weighing of factors.[7]

13.11 Under the United States' Freedom of Information Act, the weight given to an applicant's need to know has been crucial in some cases. For example, courts have held that an applicant's interest in seeking a list of names and addresses from agency files for use in commercial direct mail advertising will not prevail over the privacy interest of those on the list.[8] However, where the applicant has sought such a list for the purpose of academic research, access has been granted.[9] Access has also been permitted where the applicant is a non-profit organisation seeking to serve the interests of those on the lists.[10]

13.12 In applying the Victorian FOI Act, section 33 (documents affecting personal privacy) the Victorian Administrative Appeals Tribunal has considered how applicants intend to use documents. In Re Simons and Victorian Egg Marketing Board, the Victorian Tribunal granted a journalist access to certain personal information in reliance upon the applicant's statement in evidence as to her intended use of the information.[11] In arriving at its decision, the Tribunal expressly relied upon United States case law, in particular upon Getman v National Labor Relations Board.[12] The Tribunal commented that disclosure of the documents

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7. AAT (1985) 7 ALN 307, pp. 310-11. See also Re Brooker and Commissioner for Employees' Compensation (6 March 1986).
8. E.g. Minnis v United States Department of Agriculture 737 F.2d 784 (9th Cir. 1984).
9. E.g. Getman v National Labor Relations Board 450 F.2d 670 (D.C. Cir. 1971).
10. Disabled Officers Association v Rumsfeld 428 F.Supp. 454 (D.D.C. 1977).
11. (1985) 1 VAR 54.
12. 450 F. 2d 670 (1971).

carried with it 'an implicit limitation that the information, once disclosed, be used only by the requesting party and for the public interest purpose upon which the balancing is based'.[13]

13.13 The Commonwealth FOI Act confers no power to exact any undertaking or impose any condition concerning the use which can be made of a document obtained under the Act.[14]

13.14 In some cases, the release of documents conditional upon undertakings as to the way in which the applicant will use the information will be sufficient to overcome the objections to the release of the information by the person to the information relates.

13.15 The introduction of a provision permitting the conditional release of documents by the Tribunal will only serve to increase the disclosure of documents. Before an applicant's proposal may be considered by the Tribunal, the agency must have decided the document should not be released to the world at large.

13.16 The Committee does not consider that there should be a general discretion to release otherwise exempt documents subject to undertakings by applicants. However, section 41 and paragraph 43(1)(c)(i) have as their controlling criterion the 'reasonableness' of the (ex hypothesi adverse) consequences of disclosure.[15] In many cases, this will turn upon the way the applicant will use the documents.

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13. (1985) 1 VAR 54, p. 58, quoting from Getman, ibid., p. 677 fn. 24.

14. Corrs Pavey Whiting & Byrne v Collector of Customs (Fed. Ct., 13 August 1987) p. 4 (Jenkinson J).

15. The 'reasonableness' criterion in these provisions differs from the use of 'reasonably' in a number of other exemption provisions (e.g. s.33A(1)(a) s.37(1), s.40(1)). In the latter, FOI decision-makers are required to assess whether it is reasonably likely that disclosure will affect a nominated interest. In the former case, it is assumed that disclosure will have some adverse impact on the person the subject of the record: the issue is whether this adverse impact is unreasonable in all the circumstances.

13.17 The Committee is of the view that only the courts and the Administrative Appeals Tribunal should be empowered to release to FOI applicants documents subject to undertakings as to how the applicants will use the documents and the information contained therein. The Committee considers that agencies should be precluded from granting access to documents in this way for three reasons.

13.18 First, if agencies were able to grant conditional access to documents they might do so in circumstances in which unrestricted access should be granted to documents. The Committee is of the view that a decision that a document is an exempt document should be a condition precedent to the grant of conditional access. This may be provided by requiring that agencies decide that documents are exempt and be prepared to defend this decision in courts or the Administrative Appeals Tribunal.

13.19 Secondly, agencies would only be able to enforce undertakings against applicants by actions for breach of contract. On the other hand, courts and the Administrative Appeals Tribunal are able to enforce undertakings by proceedings for contempt.

13.20 Thirdly, courts and the Administrative Appeals Tribunal are better equipped to balance applicants' interests against those of the people about whom records contain information.[16]

13.21 Consequently, **the Committee recommends that courts and the Administrative Appeals Tribunal (but not agencies) be empowered to release material which would be otherwise exempt**

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16. McCamus, J.D. 'The Delicate Balance: Reconciling Privacy Protection with the Freedom of Information Principle', (1986) 3(1) Government Information Quarterly 49, p. 53. See also Sonderegger v United States Department of the Interior, 424 F. Supp. 847 (1976).

under section 41, or sub-paragraph 43(1)(c)(i), in reliance upon specific undertakings as to how the documents and the information contained in these documents will be used.

Delegation of authority under sub-section 41(3)

13.22 The Committee's recommendation that the authority to make decisions under sub-section 41(3) should be able to be delegated, was discussed in paragraphs 7.31 and 7.32 above. If sub-section 41(3) is amended in this way, it will be possible for applicants to seek internal review of decisions to grant access to documents only through a nominated medical practitioner.

13.23 **The Committee recommends that, where internal review is available, this be a condition precedent to review in the Administrative Appeals Tribunal of a decision under sub-section 41(3).**

Qualifications of decision-maker under sub-section 41(3)

13.24 The Department of Health criticised sub-section 41(3), stating that it is 'unsatisfactory' to require non-medically qualified decision-makers to determine the likely effect upon the health of a person of the release of a particular document.[17] However, the Department of Veterans' Affairs advised the Committee that the availability of medical officers had rendered the assessment of the likelihood of prejudice to the applicant-patient's health no more difficult than was the assessment of what was an 'unreasonable disclosure' under sub-section 41(1).[18] Presumably, the Department of Health is at least as well served by medical practitioners.

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17. Submission from the Department of Health, p. 17 (Evidence, p. 1237).
18. Submission from the Department of Veterans' Affairs, para. 121 (Evidence, p. 582). See also the submission from the Department of Community Services, p. 2.

13.25 There is no reason why decision-makers under sub-section 41(3) may not seek the assistance from a medically qualified adviser, just as decisions-makers under section 43 may seek the advice of commercially skilled persons. However, the Committee rejects the suggestion that only medically qualified persons should be entitled to take decisions under sub-section 41(3).

Criteria for decision-making

13.26 In some cases, the disclosure of medical reports to the subjects of those reports has resulted in the harassment of the author of the report, and/or the author's family.[19] This does not appear to have occurred where the applicant has been granted only indirect access under sub-section 41(3). However, the only criterion for providing indirect access under sub-section 41(3) is the possibility that direct disclosure to the applicant may have a prejudicial effect upon the health or well-being of the subject/applicant.

13.27 The Department of Health objected to this, and suggested that decision-makers should be entitled to take into account 'any reasonable contention' by the author of a medical report that direct access should not be provided and the likelihood of substantial prejudice to the Commonwealth of the future supply of medical information.[20] The Committee does not accept this suggestion. In the Committee's view, the possibility of prejudice to the applicant's physical or mental health and well-being is the appropriate criterion.

13.28 The Committee considers that release to a nominated doctor provides a reasonable balance between the rights of the

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19. Submission from the Department of Health, p. 16 (Evidence, p. 1236).
20. Submission from the Department of Health, p. 17 (Evidence, p. 1237).

individual and the protection of the authors of the reports.[21] (In addition, the Committee notes that agencies may rely upon the exemption contained in paragraph 37(1)(c), to refuse any access where release would endanger the life or physical safety of any person, including the author of the document.)

13.29 The Department of Health informed the Committee that some medical practitioners have assumed that there is a 'relationship of confidentiality with the Commonwealth Medical Officer that would prohibit disclosure'.[22]

13.30 According to a representative of the Department of Health, medical practitioners are now 'made aware of the fact that any reports provided ... are subject to release under the Act, even in the face of complaint from them that they do not want them released'.[23] However, it appears that one of the result of this has been that certain doctors are not prepared to co-operate with the Department of Health.[24] (The Department conceded that this may not be as a result of the operations of the FOI Act only.)

13.31 In Chapter 8, the Committee expressed the view that the suppliers of information should not be entitled to veto the disclosure of that information. Although the Committee recognises that difficulty may arise where information is disclosed against its suppliers' wishes, the Committee does not accept this as a reason to amend sub-section 41(3). However, the Committee does recognise that this is a reason to consult with the author of such reports.

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21. See also submission from the Department of Health, p. 16 (Evidence p. 1236).
22. Ibid. Cf. submission from the Australian Medical Association, pp. 22-24.
23. Evidence, p. 1288.
24. Ibid.

13.32 **The Committee recommends that agencies consult with the authors of medical or psychiatric reports before deciding whether to disclose these reports to the subject/applicant either directly or indirectly under sub-section 41(3).**

13.33 In the Committee's view, this consultation should be 'first instance' only. Full scale reverse-FOI consultation rights should not be extended to the authors of such documents.

13.34 By analogy to the views noted in paragraph 8.39 above, Senator Stone has reservations about some of the views expressed in paragraph 13.31. Senator Stone dissents from paragraph 13.33 for the reasons noted in paragraph 13.42 below.

Non-medical records

13.35 There is some criticism of the restriction of sub-section 41(3) to 'medical or psychiatric' records.[25] Some applicants seek access to documents which are not directly classified as 'medical or psychiatric' reports but which contain highly sensitive information about the applicant, to which direct access might be prejudicial to the applicant's physical or mental health.

13.36 Thus far, agencies appear to have resolved any difficulties arising in these circumstances by applying a liberal interpretation of sub-section 41(3). According the Mr Lindsay Curtis of the Attorney-General's Department, agencies such as the Departments of Social Security, Community Services, Veterans' Affairs, and Health have been encouraged in training programs to take a wide view of what constitutes 'medical or psychiatric' information.[26] However, he said that the Administrative Appeals Tribunal may not take a similar view.

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25. First supplementary submission from the Attorney-General's Department, pp. 8-9.
26. First supplementary submission from the Attorney-General's Department, p. 9.

13.37 In the Committee's view it is desirable to provide only indirect access to some reports prepared by some para-medical workers such as psychologists, marriage guidance counsellors, social workers, and adoption agency staff where direct access to such reports might be prejudicial to the applicant's physical or mental health.

13.38 The Committee considers that sub-section 41(3) should be extended to apply to reports prepared by such para-medical workers. However, the Committee agrees with Mr Curtis about the difficulties inherent in any such extension:

> It would be necessary to confine the extension to information provided by professionals, that is to say, those whose vocation and training includes providing care for the mental health or well-being of a person. Otherwise, s. 41(3) would extend to ill-informed opinions by those unqualified to form them. The main difficulty with this approach is that the mere disclosure to an applicant of a s. 41(3) decision tends to induce the very mischief the sub-section is intended to prevent.[27]

13.39 The Committee is unable to provide any precise formula by which to extend the category of 'medical or psychiatric' information. In the Committee's view, any such formulation must take into account the statutory descriptions of reports such as those generated in respect of matrimonial disputes, child custody cases, probation and parole and the like.

13.40 **The Committee recommends that sub-section 41(3) be amended to extend the category of information to which indirect access may be granted to include para-medical reports by psychologists, marriage guidance counsellors, and social workers. The Committee further recommends that this extension be confined**

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27. First supplementary submission from the Attorney General's pp. 9-10.

to a professionally-trained and registered para-medicals whose training and vocation necessarily involves providing care for people's physical and mental health and well-being.

13.41 In addition, **the Committee recommends that agencies consult with the authors of such para-medical reports before deciding whether to release these reports to the same extent as they consult with the authors of 'medical or psychiatric' reports.**

13.42 Senator Stone records his view that all third parties consulted under reverse-FOI should have the right to appeal against decisions to grant access to documents in respect of the disclosure of which they have been consulted.

CHAPTER 14

PRIVILEGE, BUSINESS INFORMATION, CONFIDENCE AND CONTEMPT

Section 42: legal professional privilege

14.1 Section 42 provides for exemption by reference to the general law rules governing legal professional privilege. The Australian Taxation Office drew the Committee's attention to the possibility that these rules would not extend to documents prepared in the context of litigation where the author was a non-lawyer employed by the agency.[1]

14.2 The Committee takes the view that, if there is any deficiency in the law in this regard, it lies in the scope of the rules governing legal professional privilege. It would not be appropriate for these rules to be varied only in the context of the FOI Act. To do so would lead to an undesirable divergence in the meaning of legal professional privilege as between the FOI Act and the general law.

Section 43: business information

14.3 The Committee received considerable evidence from the commercial sector that it lacks confidence in the various protections afforded by the FOI Act against the disclosure of

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1. Evidence, pp. 672-73 and 686-87.

commercially sensitive information.[2] This concern was echoed in some agency submissions.[3]

14.4 Requests for business-related documents have proven particularly expensive to process. The IDC estimates the salary and legal costs to the Commonwealth of administering the Act in relation to access to business information was about $2.8m in 1984-85.[4] Making broad assumptions, the IDC estimates that just over $1.0m of this amount could be saved if section 7 was amended to exempt an agency in relation to documents concerning the competitive commercial activities of a business, insofar as the documents contain information which originated with or was received from the business.[5] Savings to business would also result.

14.5 In addition to the costs of processing requests for business documents, some cost falls upon the Commonwealth as a result of actual or threatened reduction in information flow to it because of business concern that information supplied will be disclosed. The IDC found it impossible to estimate this cost.[6]

14.6 The Committee does not regard it as desirable to deal with this lack of confidence by recommending complete exemption for documents supplied by business and documents relating to

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2. Submissions from Mr Paul Martin, p. 1 and attachment, p. 15; the Business Council of Australia, p. 1 (Evidence, p. 771); the Confederation of Australian Industry, p. 1 (Evidence, p. 416); the Australian Chemical Industry Council, p. 1; the Agricultural & Veterinary Chemicals Association, p. 1; CRA Ltd, pp. 1-2 (Evidence, pp. 799-800); the Institute of Patent Attorneys of Australia, p. 2; the Australian British Chamber of Commerce, pp. 1-2; and Alcoa of Australia, Ltd, p. 5 (Evidence, p. 834).
3. Submissions from the Prices Surveillance Authority, p. 1; The Department of the Treasury, p. 10 (Evidence, p. 624); the Australian Taxation Office, p. 5 (Evidence, p. 655); the Australian Broadcasting Tribunal, pp. 3-4 (Evidence, pp. 1012-13); the Department of Trade, pp. 1-2; the Department of Local Government and Administrative Services, pp. 8-9; the Australian Customs Service, p. 34; and the Australian Patent, Trade Marks and Designs Offices, p. 22.
4. IDC Report, p. C1.
5. Ibid., p. 38 (Option B3).
6. Ibid., p. C6.

business. Such an exemption would be too broad. It would, for example, deny access to documents which disclosed failure by a business to comply with product safety or testing procedures.[7] However, some degree of protection is warranted.

14.7 No cases have been brought to the Committee's notice in which sections 43 and 45 have proven ineffective.[8] The Attorney-General's Department advised the Committee that the Administrative Appeals Tribunal and the Federal Court have interpreted sections 43 and 45 of the FOI Act so as to give adequate weight to business concerns.[9]

14.8 Mr Robert Gardini of the Confederation of Australian Industry stated to the Committee that:

> CAI notes that the courts have provided adequate protection for sensitive commercial information but such protection has been at a cost to industry.[10]

14.9 The Committee considers that implementation of the recommendations in respect of reverse-FOI procedures made in chapter 8 above will go some way to reducing the burden upon industry.

14.10 The cost was in part attributed to what was said to be the uncertain operation of the criteria contained in sections 43 and 45.[11] The IDC noted that the need to apply these criteria

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7. Cf. Submission from the Attorney-General's Department, p. 30 (Evidence, p. 35); second supplementary submission from the Department of Local Government and Administrative Services, p. 4.
8. Evidence, p. 450 (Confederation of Australian Industry), p. 777 (Business Council of Australia).
9. Submission from the Attorney-General's Department, p. 25 (Evidence, p. 30).
10. Evidence, p. 445. See also submissions from Political Reference Service, p. 15 (Evidence, p. 965); the Department of Health, p. 22 (Evidence, p. 1242); and the Australian Customs Service, p. 34.
11. Submissions from the Confederation of Australian Industry, p. 1 (Evidence, p. 416); the Business Council of Australia, p. 2 (Evidence, p. 772); CRA Ltd, p. 6 (Evidence, p. 804).

tended to increase the cost of agency decision-making time and to render decisions prone to costly challenge.[12]

Shifting the onus

14.11 The Business Council of Australia put to the Committee that one way of overcoming the alleged uncertainty was to give prima facie effect to an assertion by a business that it would be unreasonably affected in the relevant sense by disclosure.[13] The IDC canvassed a similar proposal in relation to section 45.[14] The IDC estimated savings of almost $1.0m would result from implementation of the proposal. This suggestion was canvassed at a public hearing.[15] The suggestion, if implemented, would place the onus upon the applicant to rebut the assertion by the business. Accordingly, the Committee does not endorse the suggestion.

Exempting specific classes of documents

14.12 Another approach to increasing the effectiveness of the protection given business-related documents is to extend the classes of documents in respect of which agencies are exempt.[16] A number of submissions identified classes which might be added to those presently listed in Schedule 2, Part II of the Act.[17]

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12. IDC Report, p. C7.
13. Submission from the Business Council of Australia, p. 2 (Evidence, p. 772). See also submission from CRA Ltd, p. 7 (Evidence, p. 805).
14. IDC Report, pp. C9-C11.
15. Evidence, pp. 779-90.
16. Compare IDC Report, p. 42 (Option B9): 'Exemption of specified categories of documents (e.g. of confidential Royal Commissions) by regulation for a period of years'.
17. E.g. submissions from the Department of Trade, p. 10 (documents submitted to the Minister and/or the Department of Trade in regard to export control matters); the Department of Local Government and Administrative Services, p. 9 (all tenders received and contracts executed by or on behalf of an agency); Alcoa of Australia Ltd, p. 5 (Evidence, p. 834) (documents submitted to Department of Trade in respect of the Customs (Prohibited Exports) Regulations); and the Institute of Patent Attorneys in Australia, p. 3 documents provided by parties to proceedings under the Trade Marks Act).

14.13 The Committee has not examined any of the specific classes proposed. However, the Committee does not object to the general approach provided it is adopted in such a way as not to increase significantly the range of documents exempt. For example, a line-by-line examination of documents within a particular class may regularly result in, say, 99% of the documents being found to be exempt. Exemption of the class would increase the exemption to 100%. But it would eliminate the cost of line-by-line examination to the agency (and to the applicant to the extent that access charges enable cost-recovery). It would also give assurance to business that documents in that class would not be accessible under freedom of information. The 1% increase in exemption is a small price to pay for these advantages.

14.14 The Committee would only endorse this approach if its operation were to be subjected to a further proviso: total exemption should not attach to a class of documents longer than necessary. This reflects the fact that much business-related information loses its commercial sensitivity quickly. In addition, the Committee notes that it is difficult in many areas to define a class of documents with precision. Failure to do so will result in the creation of a fresh area of uncertainty and so defeat the object of the approach.

14.15 The Committee makes no formal recommendation in respect of this approach. Agencies and businesses are free to propose to the Attorney-General's Department particular classes of documents which meet the conditions identified above. The Committee expects that difficulties of definition and in meeting the provisos will result in this approach making no more than a modest contribution to easing agency workloads and business concerns about uncertainty.

Ambit of 'business or professional affairs'

14.16 In a supplementary submission, the Queensland Government drew the Committee's attention to the 1986 Federal Court decision of Justice Beaumont in Young v Wicks.[18] The plaintiff in the case was the senior pilot of the Ministerial Air Unit of the Queensland Government. Freedom of information access was sought to Department of Aviation records in relation to the plaintiff's pilot licence and flying career. One of the grounds on which the plaintiff sought to prevent access was that the documents related to her 'professional affairs' and were therefore exempt by virtue of paragraph 43(1)(c).

14.17 Justice Beaumont referred to the dictionary definition of 'profession' as 'a vocation requiring knowledge of some department of learning or science, esp. one of the three vocations of theology, law and medicine ...'.[19] He recognised that the word 'profession' is not rigid or static in its signification, and concluded that it should be accorded the ordinary meaning applied in 'community usage'.[20]

14.18 The Queensland Government submitted that the Act should be amended, first to give an extended meaning to the types of occupation falling within the term 'profession' and, secondly to ensure that professionals who are salaried employees (e.g. doctors) are within the scope of section 43.[21] Because it was unnecessary to do so, Justice Beaumont did not clarify whether the claim failed because the occupation of pilot was not a 'profession' or because an employee was not carrying on a 'profession' in the context of section 43.[22]

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18. (1986) 11 ALN 176.
19. Ibid., p. 178.
20. Ibid.
21. Supplementary submission from the Queensland Government, p. 2.
22. The latter point arose but did not need to be resolved in Harris v Australian Broadcasting Corporation (1983) 5 ALD 545, p. 557.

14.19 The Committee does not consider any amendment is required with regard to self-employed persons because the precise limits of 'profession' are not significant. For example, the work-related affairs of a self-employed real estate agent would fall within the scope of 'business' in the phrase 'business or professional affairs'. It would be unnecessary to decide if the occupation of real estate agent was a 'profession'.

14.20 The issue with respect to employed professionals is less easily resolved because matters relating to their status as professionals may be closely entwined with their status as employees. For example, documents relating to the work of a salaried doctor may relate both to the employer's affairs and to whether the doctor is a fit person to retain a right to practice (and hence arguably to the employee's professional affairs).

14.21 The Committee takes the view that the expression 'professional affairs' should be confined to activities analogous to business. The emphasis should be on the running of a medical, legal etc. practice, not an individual's membership of a professional body or entitlement to practise as a member of the profession.

14.22 In reaching this conclusion, the Committee notes the wording of sub-paragraph 43(1)(c)(i): disclosure which might '<u>unreasonably</u> affect that person <u>adversely</u> in respect of his <u>lawful</u> business or professional affairs ...' (emphasis added). It is difficult to contemplate situations in which documents contain information which adversely affect the continuing professional status of an individual yet reveal only lawful conduct or conduct which it would be unreasonable to disclose.

14.23 To avoid possible doubts, **the Committee recommends that the Act be amended to make clear that 'professional affairs' relates to the running of a professional practice, not the status of an individual as a member of a profession.**

'Business affairs' of agencies

14.24 In Harris v Australian Broadcasting Corporation, Beaumont J. held that section 43 was not available to protect the business affairs of the agency receiving the freedom of information request: section 43 applies to protect the business affairs of third parties only.[23] Telecom argued that this interpretation of section 43, combined with what Telecom considered to be deficiencies in other exemption provisions, resulted in an unacceptable gap in the protection afforded to it by the Act.[24]

14.25 Under the Act, the Australian Telecommunications Commission is given a Schedule 2, Part II, exemption 'in relation to documents in respect of its competitive commercial activities'. However, legal advice to Telecom was that this only exempts from disclosure those documents which relate to commercial activities carried out on a competitive basis at the time the access request is made.[25] In the current deregulatory climate, Telecom is concerned that a party could obtain Telecom business plans relating to what is presently a monopoly activity of Telecom and use those plans to assist it to set up in competition with Telecom.

14.26 The Committee agrees that this gap in protection is undesirable.

14.27 **The Committee recommends that the Act be amended to ensure that, for agencies engaged in commercial activities, exemption is available for documents relating to non-competitive aspects of those activities where disclosure would be likely to affect adversely the future commercial interests of the agency.**

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23. (1983) 5 ALD 545, p. 557.
24. Evidence, p. 754.
25. Submission from Telecom Australia, p. 1 (Evidence, p. 749).

Conditional access

14.28 As was noted earlier in the context of section 41, the reason why FOI applicants seek access to information is, in some circumstances, sufficient to render an otherwise 'unreasonable' disclosure reasonable. Accordingly, it may be that the disclosure of a document will not 'unreasonably affect' adversely business or professional affairs if the applicant is simultaneously subjected to restrictions, by way of undertakings, as to the use to which that information may be put. Again, for the reasons which were discussed in the context of section 41, the capacity under section 43 to disclose documents subject to undertakings should be reserved to the Administrative Appeals Tribunal and courts, and be dependent upon the agency having decided to refuse access on the basis of sub-paragraph 43(1)(c)(i).

Section 45: breach of confidence

14.29 Sub-section 45(1) provides that 'a document is an exempt document if its disclosure under this Act would constitute a breach of confidence'. Sub-section 45(2) provides that sub-section 45(1) does not apply to internal working documents of agencies unless the duty of confidence is owed to someone other than the Commonwealth or its employees. The section 45 exemption overlaps with a number of other exemptions. It does, however, provide the sole source of protection for some categories of document.[26] Section 45 was relied upon to refuse access in whole 156 times and in part 248 times in 1985-86.[27]

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26. E.g. Re Baueris and Commonwealth Schools Commission (1986) 10 ALD 77 (documents containing financial data relating to a church school and parishes that support it).
27. FOI Annual Report 1985-86, pp. 282-84.

14.30 The uncertainty said to surround the scope of section 45 was criticised in submissions.[28] The uncertainty arises in part because section 45 operates by reference to the difficult and developing general law relating to the protection of confidential information.[29] More significantly, interpretations by the Tribunal have expanded the ambit of section 45 so as to protect some confidences that the general law does not protect.[30] The extent of the expansion is uncertain,[31] and the question whether the Act permits such expansion is not beyond doubt.[32] Further uncertainty has arisen on whether it is permissible to apply public interest considerations so as to deny, on the facts of a particular case, the protection which would otherwise be conferred by the expanded interpretation given to section 45.[33]

14.31 In its 1979 Report, the Committee recommended that what has since become section 45 should be deleted.[34] This recommendation was rejected. The then Government considered that it would not be proper for an agency to be required to disclose a document under the FOI Act where that disclosure would breach a confidence protected by the general law.[35]

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28. Submissions from the New South Wales Law Society, p. 4; 'The Age', p. 35 (Evidence, p. 220); CRA Ltd, p. 7 (Evidence, p. 805); the Law Institute Victoria, p. 5 (Evidence, p. 378); and Alcoa of Australia Ltd, p. 7 (Evidence, p. 836).
29. On this general law see Gurry, F., 'Breach of Confidence' in Finn, P.D. (ed), Essays in Equity [Law Book Co. Sydney. 1984] Chapter 6, especially pp. 110-11; Meagher, R.P., and others, Equity: Doctrine and Remedies [2nd edn. Law Book Co. Sydney. 1984] Chapter 41, especially pp. 820-21.
30. The relevant cases are surveyed in Re Baueris and Commonwealth Schools Commission (1986) 10 ALD 77, pp. 83-84.
31. Corrs Pavey Whiting & Byrne v Collector of Customs (13 August 1987) p. 27 (Gummow J).
32. Compare for example both the comment of Beaumont J in Baueris v Commonwealth of Australia (9 June 1987) p. 4, and the decision of the majority in Corrs Pavey Whiting & Byrne v Collector of Customs (13 August 1987) pp. 2-3 (Sweeny J) and p. 6 (Jenkinson J), with the cogent dissent in the latter case, pp. 25-29 (Gummow J).
33. E.g. see Re Baueris and Commonwealth Schools Commission (1986) 10 ALD 77, pp. 83-87.
34. 1979 Report, para. 25.19.
35. Senate, Hansard, 11 September 1980, p. 804.

14.32 The Committee accepts this view. The Committee recognises that the general law is undergoing judicial development, and is, in some respects, uncertain. Therefore the only practical way to ensure that FOI Act protection is at least as wide as the protection given by the general law is by means of an exemption provision that operates by incorporating that general law.

14.33 The Committee does not consider, however, that any wider protection should be conferred by section 45.[36]

14.34 Accordingly, **the Committee recommends that sub-section 45(1) be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence.**

Section 46: contempt of parliament and contempt of court

14.35 'The Age' urged the Committee to recommend the abolition of section 46 because it operates by reference to 'the highly uncertain doctrines of contempt of court and contempt of parliament'.[37] The Committee notes that the section is rarely relied upon to refuse access,[38] and apparently causes no problem in practice.

14.36 The Committee notes that the Parliamentary Privileges Act 1987 clarifies the law on contempt of the Parliament. Further, the Law Reform Commission has completed its review of the law on contempt of court.[39] Implementation of its report can

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36. Cf. Corrs Pavey Whiting & Byrne v Collector of Customs (13 August 1987) p. 24 (Gummow J): general law is adequate to protect confidences reposed by citizens in government.
37. Submission from 'The Age', p. 36 (Evidence, p. 221).
38. FOI Annual Report 1985-86, p. 32: the section was relied upon six times in 1984-85 and 11 times in 1985-86.
39. Australian Law Reform Commission, Contempt [ALRC35. AGPS. Canberra. 1987].

be expected to clarify the law on contempt of court. In view of this, the Committee does not recommend that section 46 should be amended or repealed.[40]

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40. See also 1979 Report, para. 23.12.

CHAPTER 15

AMENDMENT OF PERSONAL RECORDS

Introduction

15.1 Part V, entitled the 'Amendment of Personal Records', was inserted by a Government amendment during passage of the original Bill through the Senate.[1] The drafting was not as carefully thought through as other parts of the Act.[2] Also, Part V has been viewed as a stop-gap measure until comprehensive privacy legislation is enacted.[3] The Part V 'usage rate remains substantially below expectations'.[4]

15.2 The Department of Veterans' Affairs informed the Committee:

> Problems associated with Part V of the FOI Act are creating confusion and uncertainty in the most difficult area of the Act to administer.[5]

15.3 Other agencies[6] and the Administrative Appeals Tribunal have also found Part V difficult to apply.[7]

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1. Senate, Hansard, 29 May 1981, p. 2364.
2. Evidence, p. 157 (Attorney-General's Department).
3. Australian Law Reform Commission, Privacy [ALRC22. AGPS. Canberra. 1983], para. 1003. (Hereafter ALRC, Privacy).
4. FOI Annual Report 1986-87, p. 22. In 1986-87, 127 requests for amendment were received by 20 agencies.
5. Submission from the Department of Veterans' Affairs, para. 104 (Evidence, p. 579).
6. E.g. Submissions from the Department of Health, pp. 31-32 (Evidence, pp. 1251-52); the Public Service Board, p. 7 (Evidence, p. 1099); and the Attorney-General's Department, p. 48 (Evidence, p. 53).
7. Evidence, p. 1160 (Public Service Board). See for example Re Corbett and Australian Federal Police (1986) 5 AAR 291, p. 300.

15.4 The Committee has set out its views on amendment of records at greater length than it would otherwise have done because it is apparent that the full implications of amendment have not been carefully thought through in the privacy context. This is the case with both the privacy legislation which was introduced in the Senate in 1986 and lapsed on the dissolution of the Parliament on 5 June 1987, and the Law Reform Commission Report, Privacy,[8] on which the legislation was to some extent based. The difficulties with Part V which have been brought to the Committee's attention have implications for any comprehensive privacy legislation which is enacted.

15.5 The Committee notes that the draft privacy legislation included in the Law Reform Commission's Report on Privacy provided for the repeal of Part V. Instead, provision for amendment of records was to be contained in the proposed Privacy Act.[9] The Committee also notes that the comprehensive privacy legislation first introduced into the Senate in 1986 did not follow this model. Part V was to remain, amended only in minor respects.[10]

15.6 The Committee takes the view that amendment of records is more closely related to other elements of comprehensive privacy legislation than it is to freedom of information.[11] In particular, it relates to the privacy principles which govern the quality and types of information governments may keep and the purposes for which information may be used.[12] The 1986 Privacy Bill conferred additional power upon the Data Protection Authority (which was to have been established by section 87 of the Australia Card Bill 1986), such as the power to investigate

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8. See the unhelpful discussion at paras. 1278-81.
9. ALRC, Privacy, Appendix A: Draft Privacy (Consequential Amendments) Bill, cl. 13; Draft Privacy Bill, cl. 68.
10. Privacy (Consequential Amendments) Bill 1986, cl. 7.
11. Cf. submission from the Privacy Committee (NSW), pp. 1-2.
12. E.g. see Information Privacy Principles 7 and 8 in the Privacy Bill 1986, cl. 13. Cf. 1979 Report, para. 24.17(c).

complaints that agency records are inaccurate,[13] and in some cases, to direct agencies to add annotations to documents.[14]

15.7 Therefore, **the Committee recommends that provision for the amendment of records containing personal information be transferred from the FOI Act to comprehensive privacy legislation, should the latter be enacted.**

15.8 The remainder of this chapter is written on the assumption that any provision for amendment is to remain in the FOI Act, at least for the immediate future.

Role of Part V

15.9 Some of the difficulty experienced with Part V relates to matters of detail considered later in this chapter. But the core problem is a lack of clarity about what can be amended, and what Part V is intended to achieve. At its narrowest, amendment under Part V could be limited to simple factual information such as dates of birth, periods of employment, addresses and the like, that have been inaccurately recorded due to clerical error. At its broadest, Part V could be interpreted to permit the Administrative Appeals Tribunal to hear evidence and determine the correctness of any fact, opinion, determination or decision relating to personal affairs recorded in a document of any agency or Minister.

15.10 The narrow interpretation appears to be too narrow. There is no need for elaborate statutory provision merely to correct clerical errors. Agencies have no interest in refusing to correct these errors. The broadest interpretation of Part V, however, is clearly too broad. Chaos would result if Part V could be used to re-litigate before the Tribunal disputes resolved by

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13. Cl. 19. See also the first supplementary submission from the Attorney-General's Department, p. 4.
14. Cl. 23(1).

other tribunals, courts, boards of inquiry etc. The problem is to define in workable fashion an appropriate role for Part V between the two extremes.

15.11 In illustrating this problem, it is assumed that the person seeking amendment wishes to alter a record by making a correction (as opposed to a notation) and the agency refuses to make the requested change. Part V is unnecessary where an agency agrees to make requested alterations to records. Having illustrated the problem in this way, consideration is given to whether a solution, in whole or in part, is to provide for notation only.[15] The person would be permitted to attach to the record a statement setting out her or his view why the record requires alteration. The record would not itself be altered.

Fact/opinion distinction

15.12 The Administrative Appeals Tribunal has not confined Part V to the amendment of factual information. The Tribunal has considered records of professional judgments, opinions, or subjective evaluations of personnel,[16] and information conveyed by innuendo[17] to be within the scope of Part V.

15.13 The Committee notes the view that Part V amendment should be limited to factual information, to the exclusion of

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15. Both correction and notation may result in material being added to the original document. But additions in the form of notations would be made in such a way as to leave it clear that the added material did not constitute part of the original document and was not necessarily by the same author.
16. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380, p. 385.
17. Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 92.

expressions of opinion.[18] However, the Committee does not think that any easily applicable distinction between fact and opinion can be made.[19] Further, the Committee would not regard it as appropriate to deny the opportunity to correct all records of opinions, even if a workable fact/opinion distinction could be drawn. 'The right of amendment is particularly valuable when the information consists of opinions and evaluations'.[20] In addition, the facility to amend facts but not opinions can produce illogical results:

> It would defy common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based solely on these assertions must remain unaltered in the individual's official file.[21]

Collateral attack on determinations

15.14 A second possible limitation identified in submissions is that Part V should not be able to be used to mount a

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18. Submission from the Department of Health, pp. 31-32 (Evidence, pp. 1251-52); first supplementary submission from the Attorney-General's Department, p. 4; second supplementary submission from the Department of Local Government and Administrative Services, p. 2 (adopting IDC Report recommendation A10). See also the discussion in the submission and Evidence from the Department of Veterans' Affairs, para. 111 (Evidence, p. 581) and Evidence, pp. 605-6.

19. Evidence, pp. 158-59 (Attorney-General's Department); pp. 1158-59 (Public Service Board). For example difficulties would arise even within the limited area of medical records. A report kept by a doctor that a patient has a broken leg would usually be regarded as factual. But a report that the patient is suffering from a particular nervous disorder or even a specific back complaint may be an expression of opinion over which specialists disagree. Cf. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380. See also Evidence, pp. 604-5 (Department of Veterans' Affairs); pp. 1157-58 (Public Service Board).

20. ALRC Privacy, para. 1278. The subjective opinion of a supervisor as to an employee's attitude would presumably be classed as opinion. It is difficult to see why the record of this opinion should not be open to Part V amendment, at least if it can be shown to be based on, say, misunderstanding, inaccurate observation or malice.

21. R.R. v Department of the Army 482 F. Supp. 770, p. 774 (D.D.C. 1980) quoted in Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380, p. 388.

collateral attack on a determination made pursuant to statute.[22] The Administrative Appeals Tribunal has refused in specific cases to amend records where amendment would in effect be an over-ruling of a determination.[23] But the Tribunal has not found it necessary to articulate general guidelines on the relationship between Part V amendment and statutory determinations.

15.15 The Committee is strongly of the view that amendment under Part V should not be available for records of statutory determinations where the only argument for amendment is that the determination is wrong in substance, as opposed to incorrectly recorded. Other avenues of review are generally available for the review of determinations. Where no other avenue is available (either because it never existed or it has become time-barred), it must be assumed that, as a matter of policy, there is to be no review: Part V is not to become a catch-all.

15.16 A more difficult issue arises where the amendment request relates to the facts or opinions upon which the determination rests rather than the record of the determination itself.[24] The accuracy of the record may have been the only issue in the original litigation. Part V review will therefore result in the same issue being re-litigated.

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22. Submissions from the Department of Health, p. 32 (Evidence, p. 1252), the Public Service Board, p. 8 (Evidence, p. 1100), second supplementary submission from the Department of Local Government and Administrative Services, p. 2 (adopting IDC Report recommendation A10).

23. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380 (Repatriation Commission determination); Re Olsson and Australian Bureau of Statistics (18 April 1986) (declaration made pursuant to s.9 of Commonwealth Employees (Redeployment and Retirement) Act 1979); and Re Olsson and Public Service Board (18 April 1986) (certificate issued pursuant to s.14 of the same Act).

24. A pension claimant, for example, may seek to amend her/his medical history record rather than the decision of the review board based on that record. E.g. Re Resch, ibid. See Evidence pp. 604-5 (Department of Veterans' Affairs).

15.17 United States courts have consistently refused to permit the amendment of records provision in the Privacy Act[25] to be used to attack agency determinations collaterally.[26] The courts have said that the provision is not intended to permit the alteration of evidence presented in the course of judicial, quasi-judicial, or quasi-legislative proceedings.[27]

15.18 Giving effect to this intent will represent a significant limitation on the ability to obtain amendment in some cases. Even where the motive for seeking amendment is unrelated to the determination, amendment will not be available. If it were, the agency would have two versions of the record, an unamended one as used in evidence leading to the determination and an amended version, available for other purposes. This is plainly undesirable. The Committee takes the view that the evidence upon which a determination relies should not be open to amendment under Part V.

Jurisdiction of other tribunals

15.19 A further issue arises out of the relationship between Part V review and other review bodies. For example, a claimant may wish to alter an agency record of her/his marital status from 'single' to 'married'. An inquiry to determine marital status may involve, for example, the validity under Australian law of a marriage entered into overseas under foreign law. It might be questioned whether the Administrative Appeals Tribunal is the appropriate body to make such a determination, bearing in mind the jurisdiction of the Family Court of Australia. As a further example, should a contract of employment dispute be able (in effect[28]) to be litigated under Part V on the basis that the

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25. 5 USC 552a.
26. Pellerin v Veterans Administration 790 F.2d 1553, 1555 (11th Cir. 1986).
27. Rogers v United States Department of Labor 607 F. Supp. 697, (D.C. Cal. 1985), pp. 699-700.
28. In a formal sense, the AAT does not exercise the judicial power of the Commonwealth and hence cannot make judicial decisions.

written document does not accurately contain the terms of the contract?

15.20 In a case arising under the Victorian FOI Act's equivalent to Part V, amendment of the minutes of a council meeting of an Institute of Technology Council was sought on the grounds that they were misleading. The amendment would have had the effect of altering the record of a resolution to dismiss a staff member so as to show that the resolution was not valid. The Victorian Administrative Appeals Tribunal held the Act should not be interpreted to require this amendment:

> This is because what the applicant is seeking to do by her application is to challenge the legal competence of the governing body of the respondent Institute in carrying out its task of governing the Institute. In my view these are matters properly to be determined by declaratory proceedings in the Supreme Court.[29]

The Tribunal reasoned that the amendment provision could only deal with whether the minutes accurately reflected what the council purported to do. It could not be used to raise the issue of the legal effectiveness of the council's resolution.

15.21 As a commentator on the Tribunal's reasoning pointed out, the distinction relied upon by the Tribunal between factual accuracy and legal consequences is not always able to be drawn neatly.[30]

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29. Re Setterfield and Chisholm Institute of Technology (No. 2) (1986) 1 VAR 202, pp. 208-9. The position was complicated because a Supreme Court action had previously been commenced by Setterfield, who then tried to achieve by amendment what she had failed to achieve in the consent settlement of that action.

30. Kyrou, E.J., Victorian Administrative Law [Law Book Co. Sydney. 1985], loose-leaf, para. 2416/1. E.g. amendment of a factually inaccurate statement that a quorum was present has legal implications for the validity of resolutions recorded elsewhere in the minutes.

15.22 The Committee acknowledges that it is difficult to devise an effective rule to prevent matters being litigated under Part V on the ground that they are more appropriately dealt with by other tribunals or courts. Most, if not all, matters which could be litigated under Part V could also be resolved either directly or indirectly by proceedings before another body. Therefore, the test cannot be that Part V review is excluded where some other avenue of redress is available, else Part V review will seldom, if ever, be available.

15.23 On the other hand, if a line is not drawn somewhere, the amendment process will trespass on the jurisdiction properly given to other courts and tribunals. One option would be to identify particular areas into which the Part V review is not to enter.[31]

15.24 The identification of all such areas would be difficult, of course, and some general rules would be preferable.

Scope of Tribunal inquiry

15.25 The proper relationship between review rights under Part V and the jurisdiction of other (specialist or general) courts and tribunals overlaps with a further issue: what are the limits on the inquiry to determine whether information should be amended?[32] An example illustrates the difficulty. An employee evaluation report includes an assessment of conduct as 'unsatisfactory'. Amendment to 'satisfactory' is sought. It can be argued that inquiry should be limited to whether the report accurately records the unbiased view of a competent and appropriately qualified evaluator. Alternatively, it can be

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31. E.g. the United States Internal Revenue Code provides that the amendment provisions of the Privacy Act: 'shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this ... [Code] apply'. (26 USC 7852(e)).

32. E.g. Evidence, p. 1160 (Public Service Board).

argued that the inquiry should hear evidence as to the employee's conduct, reach its own conclusion on whether the conduct is satisfactory, and determine the question of amendment accordingly.

15.26 The Administrative Appeals Tribunal has indicated a preference for the narrower inquiry.[33] United States courts interpreting the amendment of records provision in the Privacy Act[34] have indicated a similar preference:

> Although the Privacy Act directs the district court to make a de novo determination of requests to amend individual records, ... the act does not contemplate that a court will constitute itself as a personnel rating authority to substitute its judgment for the evaluation of performance conducted by a government employee's superiors ... A court should be very hesitant to second-guess subjective evaluations and observations by an employee's superiors where such matters are within the competence and experience of those superiors. The trial court should, however, carefully review the record to eliminate clear mistakes of fact, inaccurate opinions based solely upon such erroneous facts, and plainly irresponsible judgments of performance or character.[35]

15.27 The effect of refusing the wider inquiry is to leave intact the impugned opinion, though the Tribunal may order a notation to be appended which indicates that the applicant challenges the accuracy of the opinion. The question whether this is appropriate raises the larger issue of correction versus annotation of records. In practice, the distinction between second-guessing the opinion and testing the basis on which the opinion was formed is likely to become blurred. By showing that other unbiased, qualified, properly informed people would not

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33. Re Corbett and Australian Federal Police (1986) 5 AAR 291, pp. 298-99.
34. 5 USC 552a.
35. Hewitt v Grabicki 794 F.2d 1373, 1378 (9th Cir. 1986).

have reached the same opinion as that claimed to be incorrect, a presumption can be raised that the initial opinion maker was biased, insufficiently or incorrectly informed etc.[36]

Correction or notation?

15.28 An amendment of records provision could provide for notation only. This would resolve disputes over the accuracy of records by allowing the competing views to be attached to the record by notation. Such a provision would not attempt to resolve the substantive dispute. The dispute would only be resolved if a decision was made in reliance upon a disputed record, for example, failure to promote an employee or to grant a pension or a benefit. The forum for resolving the dispute would be that provided for challenging the decision.

15.29 Alternatively, the amendment process could itself provide for resolving substantive disputes and adjusting records accordingly. Only where the dispute was incapable of resolution due to, say, records having been lost or the death of relevant witnesses would notation to reflect the opposing views, rather than correction, be done.

15.30 Confining the amendment process to the first of these alternatives, notation, has several advantages. It would avoid the problems identified above. Because no attempt would be made to resolve substantive disputes, the amendment process would not be able to become an avenue for either direct or collateral challenge to statutory determinations. The problem of dispute resolution under the amendment process trespassing on matters more appropriately resolved by other tribunals or courts would not arise. There would be no need to attempt any fact/opinion

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36. Cf. Re Corbett and Australian Federal Police (1986) 5 AAR 291, p. 299.

distinction. Where the disputed record is that of an opinion or subjective judgment, it would be possible to avoid the problem of when, if at all, the body resolving the amendment dispute should hear evidence to enable it to substitute its opinion or judgment.

15.31 The 'notation only' option would also avoid the need to consider how corrections should be made, that is whether the original should be obliterated or just scored through so as to leave it legible while indicating it is no longer applicable.[37] The latter ensures that the file remains a coherent record of events where, for example, the agency acted in the past on the basis of the information which the person to whom the information relates now seeks to have obliterated. But scored through material remaining on file may be disadvantageous to the person to whom the information refers. It may, for example, call attention to events which the person to whom the record relates prefers should be forgotten.[38]

15.32 The 'notation-only' option also has disadvantages. It confines the applicant to an after-the-event remedy. Only after a decision has been made based on the disputed record will it be possible to resolve the dispute. Even if the dispute is ultimately resolved in favour of the applicant, s/he may have been disadvantaged in the period between the time of decision and the ultimate resolution of the dispute. A related disadvantage is that postponing resolution of a dispute until the disputed record is relied upon by a decision-maker may make it more difficult to resolve. In some cases, the passage of time will make evidence more difficult to obtain.

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37. Cf. Evidence, p. 608 (Department of Veterans' Affairs); submissions from the Attorney-General's Department, p. 48 (Evidence, p. 53) and the Department of Territories, p. 14; Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 85. See also Re Leverett and Australian Telecommunications Commission (2 September 1985) (Correction had effect of adding words to a report which were not those of its author).

38. Joint submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 8 (Evidence, p. 857).

15.33 A further disadvantage is that the disputed record (even as annotated) may be used without the knowledge of the person about whom it contains personal information. Additionally, or alternatively, the record may be relied upon to the subject's detriment in ways that do not result in anything that would qualify as a 'decision' in the administrative law sense.[39]

15.34 The Committee has no means of estimating how serious all these disadvantages are likely to be in practice. It may be that few disputes about correction of records arise other than in the context of a dispute about substantive decisions based on those records.[40]

15.35 A separate disadvantage of the 'notation-only' option is that it can be seen as encouraging bad record-keeping by agencies. When a complaint is received about the accuracy of an agency record, the agency can take the easy option of annotating the record rather than the perhaps more difficult one of deciding if the complaint is justified. The retention of disputed records without attempting to resolve the dispute arguably conflicts with privacy principles.[41] In the absence of evidence, however, the Committee is not prepared to assume that agencies would degrade the accuracy of their files by merely recording conflicting views in cases where investigation would readily resolve the conflict.

15.36 In summary, the Committee considers that there are definite advantages to a scheme in which no right of review arises under Part V of agency decisions not to make requested corrections. However, the Committee agrees that some people will be disadvantaged by this absence of a review right. The issue is

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39. Cf. Evidence, p. 544 (Dr F. Peters - attempt to have amended an answer to a Parliamentary Question).
40. But see Re Corbett and Australian Federal Police (1986) 5 AAR 291 where the applicant was concerned about possible future use of the record.
41. See the obligation as to accuracy, completeness, etc which arises under Information Privacy Principle 7(1) in the Privacy Bill 1986, cl. 13.

whether the occasions when people about whom information is recorded are disadvantaged will be frequent and serious enough to outweigh the benefits of operational simplicity and certainty of application which removal of the review right would bring.

Repeal of Part V

15.37 Repealing Part V would achieve all the advantages identified above as flowing from the 'notation only' option. It can be argued that, if review of correction decisions is removed, and thus all Part V is able to achieve is notation, it can be dispensed with altogether. (If a person disputes the accuracy of an agency record, the evidence of the dispute is likely to be recorded in the agency's files even in the absence of any formal requirement to annotate the disputed record).

15.38 Review rights would be unnecessary on this analysis. People have no interest in seeking review because they are obtaining the maximum possible: their version of events is being recorded. Agencies might wish to seek review where the requester's version is too voluminous, or is irrelevant, defamatory etc. But, in practice, agencies would find it cheaper to place the version on file rather than contest the point.

15.39 Basically, the argument for repeal of Part V rests on the view that amendment rights are unnecessary. It is critical that access rights exist in order to enable the accuracy of records to be assessed by the people to whom they relate. But where inaccuracies are found, amendment will be made either voluntarily or as a consequence of litigation or review undertaken independently of Part V.

15.40 The Committee considers that it is useful to retain Part V, with the provision for review rights confined to agency decisions to refuse to make notations. This will formally establish an agency's obligation to note the views reported by

people who dispute a record containing information about them. It will also ensure that this view is noted on or attached to the relevant record rather than stored in such a way that a subsequent user of the record might not be made aware of it, and that where the record is disclosed outside the agency the complainant's view is also disclosed.[42]

Retaining Part V in present form

15.41 The main argument for leaving the basic structure of Part V in its present form is that the Administrative Appeals Tribunal has, to date, shown itself able to resolve the major issues relating to Part V. In particular, some major uncertainties have been clarified by a number of decisions made in 1986.[43]

15.42 The Committee considers that the great variety of factors which may be present in relation to a request for correction preclude the resolution of all uncertainties by comprehensive rules contained in legislation. Flexible guidelines will be necessary. The Tribunal, rather than the legislature, is arguably the body suited to develop these guidelines. The Attorney-General's FOI Memoranda provide a mechanism by which the results of Tribunal decisions can be disseminated to agency decision-makers and others.

Add rules and guidelines to Part V

15.43 The Department of Veterans' Affairs acknowledged to the Committee that Tribunal decisions assist in interpreting Part V. It considered, however, 'that the enunciated principles should be

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42. Cf. FOI Act s.51(4)(b)(ii).
43. E.g. Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380; Re Olsson and Public Service Board (18 April 1986); and Re Corbett and Australian Federal Police (1985) 5 AAR 291.

embodied in the Act'.[44] On balance, the Committee is of the view that guidelines should be stated in the Act.

15.44 The Committee acknowledges that guidelines will be difficult to draft and would not cover all possible situations that might arise. But guidelines in the Act will be more authoritative and accessible than guidelines developed on a case-by-case basis by the Tribunal.

15.45 Without purporting to draft the guidelines, the Committee would wish to see the following points reflected to constrain any review of decisions relating to correction of records:

- review of a correction decision should not be available as a means of direct or collateral challenge to a statutory determination or a decision of a court or Tribunal. Guidelines on the meaning of 'collateral' in this context should be provided, together with a definition of 'statutory determination'.

- review should not generally be available as a means of resolving questions of law more appropriately resolved by other specialist tribunals or by courts.

- opinions should not be open to review solely because it can be shown that another qualified person would have reached a different opinion. Review should be available where the original opinion rests on a clear mistake of fact, or the opinion-maker was biased, unqualified or can be shown to have acted improperly in inquiries leading to the formation of the opinion.

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44. Submission from the Department of Veterans' Affairs, para. 111 (Evidence, p. 581).

- correction, when decided upon, should be made by a means that does not obliterate the original, unless it can be shown that obliteration would not leave past administrative actions unexplained.

Conclusions

15.46 The Committee considers that inserting guidelines into Part V would reduce, although not eliminate, the uncertainty created by the present text. (In reaching this conclusion, the Committee recognises that guidelines cannot cover all possible situations which may arise.) Allowing review of correction decisions will provide a means of resolving disputes in those (probably few) cases where no other method of resolving a genuine dispute exists. A modest amount of uncertainty in the operation of Part V is regarded by the Committee as a reasonable price to pay for this benefit.

15.47 **Accordingly, the Committee recommends that, in the absence of comprehensive privacy legislation, Part V of the Act continue to provide for review of agency decisions to refuse to make requested corrections to records, but that guidelines be inserted into Part V better to define the circumstances in which such review will be available.**

Notation without seeking Tribunal review

15.48 Where an agency refuses to accept a request that a record be annotated, the requester seeks review of the refusal, and the Tribunal affirms the agency's decision, the requester may nonetheless still require the agency to add the requested notation to its record (s.51 (3)). The applicant has no <u>right</u> to require notation without first obtaining the Tribunal's decision. Agencies are reluctant to <u>add</u> a notation to a record voluntarily

(ie. in the absence of a Tribunal decision) lest it be seen as an admission that their record is incorrect.[45]

15.49 The submission from the Attorney-General's Department was that this whole situation 'has proven to be very costly for little benefit'.[46] The Department suggested that

> [t]he right to addition of a notation could be made a separate right in the expectation (based on experience) that such notation would often be acceptable to the applicant as an alternative to amendment and would avoid the need for AAT proceedings. Alternatively, a provision similar to s.14 could make it clear that voluntary notation did not constitute an admission by the agency that the record was wrong.[47]

Either alternative will lead to broadly similar results in practice.

15.50 The Committee has a preference for creation of a separate right. This will facilitate the distinction made above between requesting a correction and requesting a notation of a record, with distinct conditions attaching to each type of request.

15.51 The Committee takes the view that the right to have a notation added should be subject to few conditions. In particular, a notation should not be able to be refused only because the agency disagrees with the accuracy of its content, even if the agency has good ground for disagreeing. A notation should be able to be refused, however, if it is unnecessarily voluminous, irrelevant, or defamatory. Also, there should be no bar to an agency in turn adding its comment to a notation.

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45. Submission from the Attorney-General's Department, p. 48 (Evidence, p. 53.
46. Ibid.
47. Ibid. See also the submission of the Privacy Committee (NSW), p. 2.

15.52 If applicants want to obtain review of agency decisions to refuse notations, they should be bound by the results of the review. The present right to require notation notwithstanding an adverse decision on review should be removed. There should be no right to make a fresh request to annotate a record following an adverse decision on a previous request where the two requests are, in substance, the same.

15.53 **The Committee recommends that Part V be amended to provide for two distinct types of request for amendment of a record - one for correction, and the other for notation. The Committee further recommends that requests for notation be refused only if they are unnecessarily voluminous, irrelevant, defamatory etc., but not solely because the agency disagrees with the accuracy of the proposed notation. The Committee further recommends the repeal of the right to require notation notwithstanding an adverse decision upon review.**

Onus of proof

15.54 The Department of Immigration and Ethnic Affairs informed the Committee of what it saw as a problem in the way in which the onus of proof is placed on agencies in respect of Part V decisions.[48] Section 61, which applies to Part V decisions by virtue of sub-section 51(1), places upon an agency the onus of establishing that its decision was justified or that the Administrative Appeals Tribunal should give a decision adverse to the person seeking amendment. In essence, the perceived problem is that the best evidence of the correctness of the impugned record may be in the possession of the amendment-seeker, and

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48. Submission from the Department of Immigration and Ethnic Affairs, pp. 20-21 (Evidence, p. 710).

there is no obligation on that person to give the agency access to the evidence.

15.55 The Committee interprets the onus provision as requiring the agency to justify its decision, not to prove that its record is accurate:

> Unless a claimant, when requested to do so, produces evidence in support of his contention, or the record is, on its face, incomplete, incorrect, out of date or misleading, an agency would be justified in refusing to amend the record.[49]

15.56 The Committee is not aware of any decisions of the Administrative Appeals Tribunal that are inconsistent with this view.[50]

15.57 Accordingly, the Committee is not convinced that it is necessary to clarify the onus of proof provision in its application to Part V. However, the Committee would not object if, in the process of redrafting section 51 (see below), the matter were to be clarified. In addition, a recommendation is made below that sub-section 49(2) be redrafted to specify in more detail the information which a person requesting amendment is required to provide. This will clarify the obligation on requesters to provide information to support their requests.

The form of section 51

15.58 Section 51 (review of requests for amendments) has been drafted to operate by the substitution of words in other sections

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49. FOI Memorandum No. 28, para. 25 (13 September 1982).

50. A statement in Re Leverett and Australian Communications Commission (2 September 1985), para. 17 repeated in paraphrase in Re Resch and Department of Veterans' Affairs (1986) 9 ALD 380, p. 387 is capable of being interpreted as meaning that the onus lies on an agency to prove the accuracy of its record. However the better interpretation is that an agency may elect to justify its decision to refuse amendment by asserting the accuracy of its record and, if it does so, bears the resulting onus.

of the Act. Several submissions suggested that as a result the section is too confusing for applicants.[51] The Committee agrees.

15.59 **The Committee recommends that the Act be re-drafted so that review rights under Part V are set out in a form readily intelligible to the layperson.**

Amendment of non-FOI-accessed documents

15.60 The Committee notes that cl. 7(b) of the Privacy (Consequential Amendments) Bill 1986, would amend section 48 of the FOI Act to permit amendment requests in respect of all documents lawfully provided to the claimant, whether under the FOI Act or otherwise. (At present, this right is confined to documents obtained under the FOI Act.)

15.61 The Committee favours this extension, independently of whether comprehensive privacy legislation is enacted. Where applicants have been lawfully supplied with (allegedly inaccurate) records, there is no point in requiring them to seek access to the records again under FOI as a prerequisite to requesting amendment.

15.62 **Accordingly, the Committee recommends that section 48 be amended by omitting the words 'provided to the claimant under this Act' and substituting 'lawfully provided to the claimant, whether under this Act or otherwise'.**

Ambit of 'personal affairs'

15.63 The heading to Part V reads 'Amendment of Personal Records'. The operative section, section 48, however, refers to a wider category, documents containing information relating to the

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51. Submissions from the Inter-Agency Consultative Committee on FOI, p. 7; the Department of Veterans' Affairs, para. 115 (Evidence, p. 581); and the Department of Local Government and Administrative Services, p. 16.

personal affairs of the person seeking amendment. Also, differences have emerged in decisions of the Administrative Appeals Tribunal on whether 'personal affairs' bears a wider meaning in section 48 than it does in the other sections of the Act in which it is used, sections 12 and 41.[52] In addition to this issue, the Ombudsman suggested that Part V could be extended to 'records of business affairs'.[53]

15.64 Amendment is generally perceived as privacy related. It is a vexed and complex issue whether non-natural legal persons - bodies corporate - should enjoy privacy rights accorded to natural persons.[54] The general trend in other countries is that they should not, and the privacy legislation introduced into the Senate in 1986 reflected this trend.[55] Exclusion of corporations, however, raises a difficult demarcation problem where an individual operates through a 'one-person company' and individual and company affairs are entwined.[56]

15.65 Amendment of records could be detached from privacy. Instead (or additionally) it could be justified for the contribution it makes to accurate government record-keeping. On this justification, amendment should be available for all categories of government records lawfully obtained by the person seeking amendment. A question would arise whether the person requesting amendment would need to show some special interest in the correctness of the record not held by the members of the community generally (ie. a standing or locus standi test). If the categories of documents open to request for amendment are limited

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52. Compare Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 91; Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414, p. 430.
53. Submission from the Commonwealth Ombudsman, p. 12 (Evidence, p. 1319).
54. ALRC, Privacy, paras. 27-28.
55. See Privacy Bill 1986, cl. 16(1).
56. ALRC, Privacy, para. 29.

to those relating to the personal or business affairs of the requester the need for a separate test of standing does not arise.

15.66 The absence of any perceived need and, to a lesser extent, the difficulty of resolving the matter of a standing test, lead the Committee to reject any provision for amendment not limited to specific categories of documents.

15.67 On balance, the Committee does not support extension beyond the present category of 'personal affairs' so as to include documents containing information relating to 'business affairs'. Again there is an absence of perceived need: no business representation to the Committee requested such an extension. More importantly, the Committee is reluctant to make a recommendation which, though ostensibly based on improving accurate record-keeping, has implications for the complex issue of whether corporations have rights of privacy in the same way as individuals.

15.68 The phrase 'personal affairs' is used in sections 12, 41 and 48 of the Act with no clear indication that the meaning is intended to differ between uses. Section 41 provides exemption for documents if disclosure 'would involve the unreasonable disclosure of information relating to the personal affairs of any person'. Put simply, in a borderline case in which the Tribunal or court wishes to grant access, the decision can rest on either of two grounds. The phrase 'personal affairs' can be given a narrow reading and the requested document found not to relate to personal affairs. Alternatively, the word 'unreasonable' can be made to bear the burden: the information may be found to fall within the scope of 'personal affairs' but its disclosure held not to be 'unreasonable'.

15.69 As far as section 41 is concerned, it will often not matter which alternative is used. But any narrowing of the

meaning given to 'personal affairs' in section 41 will carry across into section 48 where it will limit the right to seek amendment.[57] This broadly is what has occurred. Matters relating to work performance have been held in some cases not to relate to 'personal affairs' for the purposes of section 41.[58] However it has appeared to the Tribunal that documents relating to work evaluation ought to be open to Part V amendment.[59]

15.70 **The Committee recommends that Part V not be constrained by any narrow interpretation given to the phrase 'personal affairs' in the context of section 41.**

15.71 It may be that implementation of this recommendation is best achieved by replacing the phrase 'personal affairs' in either section 41 or section 48.[60] The Committee leaves the method of implementation to the draftsperson.

Form and content of requests

15.72 The Department of Veterans' Affairs informed the Committee that many administrative difficulties arise because persons requesting amendment are confused about the format of their request and the type of information they are required to provide.[61] The Department proposed that 'the Act be amended to prescribe the format and content of an application for amendment of record'.[62]

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57. Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414, p. 432.
58. E.g. Re Williams and Registrar of the Federal Court of Aust. (1985) 8 ALD 219; Re Dyrenfurth and Dept of Social Security (15 April 1987).
59. Re Wiseman and Department of Transport (1985) 4 AAR 83, p. 91 referring to earlier cases.
60. Cf. Privacy Bill 1986, in which the operative phrase is 'personal information'.
61. Submission from the Department of Veterans' Affairs, para. 105 (Evidence, p. 580). See also Re Telfer and Australian Telecommunications Commission (13 October 1986) para. 7.
62. Submission from the Department of Veterans' Affairs, para. 108 (Evidence, p. 580).

15.73 The Committee does not accept this proposal insofar as it relates to format. However, the Committee takes the view that neither requesters nor the vast majority of agencies (which seldom receive Part V requests) will be unduly inconvenienced if requests have to be made containing prescribed details.

15.74 The Committee agrees that sub-section 49(2) should be more specific. At present sub-section 49(2) requires that an amendment request

> shall give particulars of the matters in respect of which the claimant believes the record of information kept by the agency or Minister is incomplete, incorrect, out of date or misleading and shall specify the amendments that the claimant wishes to be made.

15.75 The Department of Veterans' Affairs identified the following as being needed from the applicant in order to determine amendment requests:

- identification of the documents containing the information claimed to require amendment;
- description of the information and a statement on whether it is incomplete, incorrect, out of date or misleading;
- reasons why the information is considered to be incomplete, incorrect, out of date or misleading;
- evidence to support the contention that the information is incomplete, incorrect, out of date or misleading; and
- description of the way in which the record should be amended.[63]

15.76 The Committee supports the re-drafting of sub-section 49(2) so as to specify that requesters must supply such particulars. With respect to evidence, however, the provision

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63. Submission from the Department of Veterans' Affairs, para. 106 (Evidence, p. 580).

should make it clear that requesters are only required to supply whatever evidence is in their possession. No implication should arise that the onus of proof in all respects lies on the requester.

15.77 **The Committee recommends that sub-section 49(2) be amended to specify in greater detail the information which a request for amendment must contain.**

A workload test?

15.78 The Department of Defence observed that Part V contains no equivalent to section 24, which permits refusal of access requests in some circumstances where providing access would involve excessive work.[64] It would be unacceptable if agencies were able to refuse bona fide requests for appropriate amendments on workload grounds. The Committee considers that recommendations made elsewhere in this chapter will assist in eliminating misconceived requests and simplifying the processing of requests.

Computer-stored records

15.79 Notation of records held in computer format may be difficult. If the format is such that no annotation is possible, the only solution may be to alter the programs that create and access the record so as to expand the record format or otherwise to accommodate the required annotation.[65] This solution will be expensive and require time to implement in most cases.

15.80 The Committee has not received any information that suggests problems of this type have arisen under Part V.

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64. Submission from the Department of Defence, p. 15.
65. E.g. see Canada, Privacy Commissioner, Annual Report 1984-85, p. 35.

CHAPTER 16

INTERNAL REVIEW

16.1 The Committee supported the concept of internal review in its 1979 Report.[1] Nothing in the submissions or evidence to the present inquiry has caused the Committee to resile from this view.

16.2 It has been suggested that internal review is ineffective in those agencies where authority to deny access has been restricted to a very senior level. The seniority of the original decision-maker may preclude the making of a fresh examination of the decision.[2] The available statistics make it difficult to verify this criticism.

16.3 The Freedom of Information (Charges) Regulations as amended by the Freedom of Information Laws Amendment Act 1986 require that a $40 fee shall accompany applications for internal review (reg. 5). No fee is required, however, where the documents to which access is sought relate to the applicants' income support payments and the applicants have not had access to those documents in the previous three months (reg. 6(3)).

16.4 The $40 fee for internal review will not represent anything near the recovery of the total costs to the Commonwealth of providing the review. However, the fee may provide some compensating revenue, and may act as a modest deterrent to applicants who seek internal review on the basis that they have

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1. 1979 Report, paras. 28.2-28.8.
2. Submission from the Political Reference Service Ltd, p. 18 (Evidence, p. 968).

everything to gain and nothing to lose by so doing.[3] The Committee does not regard the proposed fee as unreasonable.

16.5 Third parties are frequently unwilling participants in the FOI process, having become involved only as a result of a perceived need to prevent the disclosure of information relating to their personal or business affairs. It would be unfair to further penalise these third parties by requiring the payment of a $40 fee.

16.6 **The Committee recommends that, in addition to the present exemptions, the fee for internal review not be payable by third-parties seeking internal review to protect 'their' documents in the reverse-FOI context.**[4]

16.7 Several matters of detail were bought to the Committee's attention. The Department of Territories pointed out that many applications for internal review are technically defective because they are not directed to 'the principal officer of the agency' as is required by sub-section 54(1).[5] The Committee understands that agencies do not refuse applications on the basis of this deficiency.

16.8 **The Committee recommends that the Act should be amended so as to require that requests for internal review be addressed with no greater specificity than is the case in respect of requests for access** (on which see above paragraph 5.27).

16.9 The submission from the Attorney-General's Department identified a problem arising from the requirement that

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3. The FOI Annual Report 1986-87 provides no data from which to assess the impact of the fee upon the volume of requests for internal review.
4. See above para. 8.47, where it was recommended that third-parties have a right to seek internal review.
5. Submission from the Department of Territories, p. 14.

applications for internal review must be lodged within 28 days of notification of the primary decision:

> For obvious practical reasons it is common for agencies to notify any charge payable at the same time as the access decision is notified. Under s. 18, the granting of access may then be deferred until the charges have been paid and, once charges have been paid, more time may elapse before inspection can be arranged or copies provided.
>
> The applicant may then encounter the difficulty that his time for seeking internal review has largely or completely passed before he has had access to the documents, yet it may only be access which enables him to decide whether he is satisfied with the initial decision or wants it reviewed. Such a situation can only encourage applicants to seek internal review at an early stage, without knowing whether it is really wanted, as a safeguard against running out of time. The result must be a proportion of unnecessary internal reviews.[6]

16.10 The Committee endorses the suggestion by the Attorney-General's Department.[7]

16.11 The Committee recognises that it is not practical to frame an appropriate recommendation in terms of specified numbers of days because the time taken by the agency to provide access or for any review or appeal cannot be specified. Nominating a specific number of days will unduly favour applicants where the access is provided, or review conducted, promptly. Conversely, nominating a specific number of days will disadvantage applicants where, through no fault of the applicant, access is delayed for, or review is conducted over, a lengthy period of time.

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6. Submission from the Attorney-General's Department, p. 89 (Evidence, p. 94).
7. Submission from the Attorney-General's Department, p. 90 (Evidence, p. 95).

16.12 The Committee recommends that the time limit for requesting internal review take into account a 15 day period for the payment of charges, plus any period during which the decision to charge may be under review or appeal, and any delay by the agency in providing access.

16.13 This recommendation may go some way to overcoming one of the problems experienced by the Australian Taxation Office: applicants who have been granted partial access occasionally request the internal review of the decision without having inspected those parts of documents to which access has been granted.[8]

16.14 However, the Committee does not endorse the Australian Taxation Office's suggestion that, in such cases, the right to seek internal review should be conditional upon the exercise of a right of access. In some cases, applicants may be able to deduce from the section 26 statement of reasons that they require access to documents which have been withheld, without having inspected the released documents. The requirement that a $40 fee shall accompany a request for internal review may deter some applicants who might otherwise have sought internal review frivolously.

16.15 The Act does not impose any express time limit upon internal review. However, a failure to notify the result of an internal review within 14 days of the receipt of application authorises applicants to seek the review of the primary decision by the Administrative Appeals Tribunal.[9]

16.16 Several agencies stated that the 14 day period is inadequate. In 1984-85, the Department of Territories, for example, took an average of 23.5 days to conduct its internal reviews.[10] The Department of Veterans' Affairs submission stated:

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8. Submission from the Australian Taxation Office, p. 14 (Evidence, p. 664).
9. FOI Act, s.55(3).
10. Submission from the Department of Territories, p. 9.

'Almost invariably DVA has so far been unable to deal with internal review cases within this 14 day deadline'.[11]

16.17 The Department of Veterans' Affairs, as did other agencies, suggested that agencies should be allowed 30 days to respond.[12] The Department of Immigration and Ethnic Affairs suggested 28 days.[13] The Inter-Agency Consultative Committee on FOI regarded 21 days as 'more realistic' than the present 14 days.[14]

16.18 Earlier, the Committee recommended that the period for reverse-FOI consultation should be extended to 30 days. The time for internal review should be extended similarly.

16.19 **The Committee recommends that the time for internal review be extended to 30 days.**

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11. Submission from the Department of Veterans' Affairs, para. 75 (Evidence, p. 575). See also submission from the Department of Health, p. 33 (Evidence, p. 1253); first supplementary submission from the Department of Local Government and Administrative Services, pp. 2-3.
12. Submission from the Department of Veterans' Affairs, para. 78 (Evidence, p. 576). See also the submissions from the Department of Primary Industry, Attachment, p. 1; the Australian Taxation Office, p. 9 (Evidence, p. 659).
13. Submission from the Department of Immigration and Ethnic Affairs p. 10 (Evidence, p. 700). See also the submission from the Department of Arts, Heritage and Environment, p. 8.
14. Submission from Inter-Agency Consultative Committee on FOI, p. 7.

CHAPTER 17

THE ROLES OF THE OMBUDSMAN

17.1 The Ombudsman is an 'agency' for the purposes of the FOI Act, and, as such, is subject to the operation of the Act. As a result of the combination of the FOI Act and Ombudsman Act, the Ombudsman plays three additional roles in respect of freedom of information matters. First, the Ombudsman may investigate the actions of agencies in dealing with FOI requests as part of his ordinary investigatory role.[1] Secondly, the FOI Act confers upon the Ombudsman specific power to act as advocate on behalf of FOI applicants before the Administrative Appeals Tribunal.[2] Thirdly, the Ombudsman is given the role of monitor and rapporteur in respect of the operation and administration of the FOI Act.[3]

Ombudsman's investigatory role

17.2 The FOI Act expressly permits the Ombudsman to investigate FOI matters, notwithstanding that the complainant has a right to seek review by the Administrative Appeals Tribunal of the agency decision giving rise to the complaint.[4] In 1986-87 the Ombudsman received 67 formal complaints relating to agencies' actions on FOI matters.[5] The Committee has considered whether there would be cost-savings or other benefits if the FOI jurisdictions of the Tribunal and Ombudsman were altered to reduce or eliminate the present overlap.[6]

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1. FOI Act, s.52B(1) which confirms the jurisdiction arising under s.5(1)(a) of the Ombudsman Act.
2. FOI Act, s.52F.
3. FOI Act, s.52D(3)(b).
4. FOI Act, s.52B(2).
5. FOI Annual Report 1986-87, p. 42.
6. E.g. see Evidence, pp. 1361-62 and 1372-73.

17.3 The Committee recognises that Tribunal review and Ombudsman investigation each have unique characteristics.[7] For this reason, each has a continuing role with respect to FOI matters.

17.4 The Committee considered whether these roles could with advantage be re-organised into a hierarchical or tiered system.[8] The first tier would consist of investigation by the Ombudsman. Investigation is cheaper for complainants and agencies, less formal, and more oriented to conciliation than adjudication. A number of detailed schemes could be devised but the basic aim would be to use the Ombudsman to filter out types of cases which at present go directly to the Tribunal. There is some evidence that matters are being taken to the Tribunal that could be better resolved by the Ombudsman.[9]

17.5 The Committee notes that no submission advocated that Tribunal review be made a second tier above investigation by the Ombudsman. The Committee also notes the possible reluctance of the Ombudsman to act as arbiter over who may seek review by the Tribunal.[10] The Ombudsman, the Administrative Review Council, and the President of the Administrative Appeals Tribunal, all favoured retaining the present system in which Tribunal review and Ombudsman investigation are available as alternatives.[11]

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7. See generally Administrative Review Council, The Relationship between the Ombudsman and the Administrative Appeals Tribunal [Report No. 22, AGPS, Canberra, 1985], especially pp. 21-23. See also Evidence, pp. 1372-73 (Justice J.D. Davies), and submissions from the Administrative Review Council, pp. 17-24; the Commonwealth Ombudsman p. 20 (Evidence, p. 1327); and the Attorney-General's Department, pp. 49-50, (Evidence pp. 54-55).
8. E.g. see Evidence, pp. 1361-62 (Commonwealth Ombudsman). Compare the role of the Information Commissioner (in effect a specialist Ombudsman) under Canada's Access to Information Act 1982.
9. Evidence, p. 162 (Attorney-General's Department). But see the supplementary submission from the Commonwealth Ombudsman p. 1 (Evidence, p. 1341).
10. Evidence, p. 1361 (Commonwealth Ombudsman).
11. Submissions from the Commonwealth Ombudsman, p. 20 (Evidence, p. 1327); the Administrative Review Council, p. 23. Evidence, pp. 1372-73 (Justice J.D. Davies).

17.6 In view of this, the Committee rejects any two-tier approach. This rejection influences the position taken in the remainder of this chapter. The present special relationship of the Ombudsman to FOI can be seen as something of a half-way house on the way to creation of a fully-fledged information commissioner. In effect, by rejecting the option of making the Ombudsman the first tier in a hierarchical system for review of FOI decision-making, the Committee is also rejecting the creation of a fully-fledged information commissioner.

17.7 This, in turn, raises the issue of whether the Ombudsman should have any special roles or powers with respect to FOI. In general, the Committee believes that he should not. In the remainder of this chapter the Committee examines, first, the means of ensuring that aggrieved persons are given sufficient information to make an informed choice between complaint to the Ombudsman and seeking review by the Tribunal and, secondly, the various special roles of the Ombudsman in relation to FOI.

17.8 Publicity relating to FOI has tended to favour Tribunal review over investigation by the Ombudsman.[12] The Committee agrees with the suggestions made by the Administrative Review Council[13] for improving the information available to aggrieved persons so as to enable them to make a fully-informed choice between the Ombudsman and the Tribunal.

17.9 **The Committee recommends that FOI publicity and training material emphasise the role of the Ombudsman as a means of resolving disputes relating to FOI. In particular, the Committee recommends that steps be taken to ensure that information with respect to rights of review, supplied with reasons for decisions**

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12. Evidence, p. 162 (Attorney-General's Department); submission from the Administrative Review Council p. 27. See also, for example, Harrison, K., Documents, Dossiers and the Inside Dope [Public Interest Advocacy Centre. Sydney. 1984], p. 83.
13. Submission from the Administrative Review Council, pp. 26-27.

pursuant to section 26, is sufficiently comprehensive to enable an informed choice to be made between applications to the Tribunal and complaints to the Ombudsman.

17.10 The Administrative Review Council drew the Committee's attention to a recommendation of the Council made in 1985. This was that both the Ombudsman and the Tribunal should be empowered to refer complaints or remit applications to the other body, with the consent of the complainant/applicant, where that is appropriate.[14] The recommendation related to all types of matters, not just those relating to FOI.

17.11 The Committee has no firm view on the merit of this proposal. For example, the Committee is not convinced that any formal conferral of power to transfer matters is required. Where the Tribunal indicates at any stage of its review that the Ombudsman would be the more appropriate body to resolve the matter, it is always open to the applicant to abandon the review application and lodge a complaint with the Ombudsman. Equally, a complaint can be abandoned and Tribunal review sought. As a matter of detail, it is not evident to the Committee why an aggrieved person should be able to recommence in the Tribunal where the original Tribunal proceeding was transferred to the Ombudsman by the Tribunal, and the Ombudsman declined to investigate on the ground that the person was frivolous, vexatious or not acting in good faith in respect of the matter.[15]

Drafting matters relating to provisions on investigatory role

17.12 Four drafting matters concerning section 52B were brought to the Committee's attention by the Ombudsman. The first arises out of sub-section 52B(1), which gives the Ombudsman

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14. Submission from the Administrative Review Council, pp. 1-2 referring to ARC Report No. 22, supra n. 7, Recommendations 2 and 3.
15. Contrast ARC Report No. 22, supra n. 7 pp. 26-27.

jurisdiction over agencies in respect of freedom of information matters. This grant of jurisdiction is

> probably unnecessary, since FOI actions would come within the ambit of the general jurisdictional provisions of the Ombudsman Act (i.e. such actions are 'action that relates to a matter of administration' within the meaning of s.5 of the latter Act). However, this double-conferring of jurisdiction presents no practical problems, and does serve to underscore the Ombudsman's FOI role.[16]

The Committee agrees.

17.13 The second matter also arises out of a legislative duplication. To quote from the Ombudsman's submission again:

> [T]he need for specific reference to section 6(3) of the Ombudsman Act in section 52B(2) of the FOI Act has been largely overtaken by amendments which have broadened the Ombudsman's discretions under s.6(3).[17]

17.14 **The Committee recommends that sub-section 52B(2) of the FOI Act be amended to remove the now redundant reference to sub-section 6(3) of the Ombudsman Act.**

17.15 A third drafting matter is that

> since sub-section 52B(1) talks of action taken by an 'agency', it is unclear whether it was intended that the Ombudsman should have jurisdiction over the FOI actions of bodies that are 'agencies' for the purposes of the FOI Act but not 'prescribed authorities' for

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16. Submission from the Commonwealth Ombudsman, p. 13 (Evidence, p. 1320).
17. Submission from the Commonwealth Ombudsman, p. 14 (Evidence, p. 1321). See also submission from the Administrative Review Council, pp. 24-26.

> the purposes of the Ombudsman Act (the Human Rights Commission and National Crime Authority come to mind).[18]

17.16 The Committee takes the view that the FOI Act should not provide the Ombudsman with 'back-door' jurisdiction over agencies which are not 'prescribed authorities' for the purposes of the Ombudsman Act.

17.17 **The Committee recommends that the Act be amended to make clear that it does not confer jurisdiction upon the Ombudsman with respect to bodies that are not 'prescribed authorities' for the purposes of the Ombudsman Act.**

17.18 A fourth drafting matter is that

> it is unclear whether FOI complaints against the Australian Federal Police are intended to be investigated under the Ombudsman Act or under the Complaints (Australian Federal Police) Act.[19]

17.19 The Ombudsman did not indicate his preferred solution. The Committee agrees that this uncertainty should be removed. However, the Committee lacks sufficient information to determine in which way the uncertainty should be resolved.

Ombudsman as advocate

17.20 Sub-section 52F(1) provides that, if the Ombudsman thinks it reasonable, he may represent, or arrange representation

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18. Supplementary submission from the Commonwealth Ombudsman, p. 2. (Evidence, p. 1342).
19. Ibid.

for, any FOI applicant before the AAT. Sub-section 52F(2) provides:

> Without limiting the generality of the matters to which the Ombudsman may have regard in deciding whether to represent an applicant in proceedings before the Tribunal under section 55, the Ombudsman shall have regard to -
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> (a) the importance of the principle involved in the matter under review;
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> (b) the likelihood that the proceedings will establish a precedent in future proceedings;
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> (c) the financial means of the applicant;
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> (d) the applicant's prospect of success; and
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> (e) the reasonableness of the decision under review.

17.21 Section 52F follows a recommendation contained in the Committee's 1979 Report.[20] In line with another of the 1979 recommendations, section 52F representation is not available to third parties involved as a result of reverse-FOI.[21]

17.22 The Ombudsman does not raise with complainants the possibility that he may act on their behalf because resource constraints generally preclude him from acting.[22] For the same reason, all but one formal request that the Ombudsman act under section 52F have been declined.

17.23 The Committee no longer considers that what is, in effect, an attempt to give priority to FOI matters in the allocation of scarce legal aid funds can be justified.[23] In the

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20. 1979 Report, para. 29.23.
21. 1979 Report, para. 29.25.
22. Submission from the Commonwealth Ombudsman, p. 17 (Evidence, p. 1324); supplementary submission from the Commonwealth Ombudsman, p. 6. (Evidence, p. 1346).
23. Cf. Evidence, pp. 1358-60 (Commonwealth Ombudsman).

Committee's view, the ordinary processes of review and litigation have proved to be adequate independently of section 52F.

17.24 **The Committee recommends that section 52F be repealed.**

Ombudsman as monitor and rapporteur

17.25 The Committee does not believe that the Ombudsman should continue to have the role of monitor and rapporteur with respect to the FOI Act. The various aspects of this role appear to the Committee to be unnecessary.

17.26 Paragraph 52D(3)(b) permits, but does not require, the Ombudsman to include in his annual and periodic reports:

> (i) such observations as the Ombudsman sees fit to make concerning the operation of this Act during the year, or the part of a year, to which the report relates; and
>
> (ii) such recommendations as the Ombudsman sees fit to make concerning ways in which public access to documents of agencies or to official documents of Ministers might be better secured.

17.27 This provision reflects a recommendation in the Committee's 1979 Report.[24] That recommendation was premised upon the Ombudsman playing a greater role in respect of freedom of information matters than has been the case in practice. In particular, the Committee had anticipated that the Ombudsman would have general advisory and critical functions with respect to agencies' handling of FOI matters.[25]

17.28 In fact, the Ombudsman has not performed these functions to any significant degree, largely because of a lack of

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24. 1979 Report, para. 29.28.
25. 1979 Report, paras. 29.2, 29.27, 31.7 and 31.16-17.

resources.[26] Other means have developed to fill any resulting gap.[27] For example, the FOI Inter-Agency Consultative Committee has largely assumed the role envisaged for the Ombudsman of gathering experiences of individual agencies and considering freedom of information issues of wider interest. The Attorney-General's Department, which chairs this Committee, disseminates advice and conclusions upon points of general interest to all agencies.

17.29 The Committee considers that paragraph 52D(3)(b) is unnecessary.

17.30 Sub-section 52D(1) requires the Ombudsman to provide the Public Service Board with a copy of any evidence which shows that a public servant has been guilty of a breach of duty or of misconduct relating to the FOI Act.[28] Sub-section 52D(2) requires the Ombudsman to provide a copy of a report made to an agency under s.15(2) of the Ombudsman Act in respect of agency action under the FOI Act to the Public Service Board.[29]

17.31 The Committee notes that the Ombudsman questioned whether these provisions served any practical purpose,[30] and the Public Service Board no longer exists. The Committee considers that sub-sections 52D(1) and (2) should be removed from the Act on the understanding that the Ombudsman will continue to have available, and to use in appropriate cases, the methods of dealing with administrative recalcitrance presently available to him in the Ombudsman Act.

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26. Submission from the Commonwealth Ombudsman, p. 16 (Evidence, p. 1323).
27. Submission from the Attorney-General's Department, p. 74. (Evidence, p. 79).
28. FOI Act, s.52D(1) read with Ombudsman Act 1976, s.8(10).
29. FOI Act, s.52D(2).
30. Submission from the Commonwealth Ombudsman, p. 16 (Evidence, p. 1323).

17.32 Paragraph 52D(3)(a) requires the Ombudsman to include in his general annual report a report on his investigations of FOI-related complaints. The Committee regards this provision as unnecessary. The Committee would expect statistics and comment on these investigations to be included in annual reports in the same way as information relating to investigations of other matters. FOI matters should not be accorded special treatment.

17.33 **The Committee recommends that section 52D be repealed, and the Ombudsman have no special role as monitor and rapporteur of the operation of the FOI Act.**

17.34 In making this recommendation the Committee does not wish to discourage the Ombudsman from including in his annual reports anything arising from his operations relating to the FOI Act which he regards as appropriate to draw to the attention of the Parliament.

Deputy Ombudsman for FOI

17.35 Section 52C requires the Ombudsman to designate a Deputy Ombudsman as the Deputy Ombudsman for freedom of information matters. The requirement is symbolic only. The person designated possesses no powers not also possessed by the Ombudsman. Recommendations made in this chapter are intended to eliminate any special role for the Ombudsman with respect to FOI. Consistent with this approach the Committee sees no need for a designated Deputy Ombudsman for freedom of information matters.

17.36 **The Committee recommends that section 52C be repealed.**

Need for Part VA

17.37 It has been suggested that one reason for the majority of aggrieved FOI applicants seeking Tribunal review rather than lodging a complaint with the Ombudsman is the structure of the

Act.[31] The Act provides for review of decisions in Part VI. Provision for complaint to the Ombudsman, however, is made separately in Part VA, which consists of sections 52A-52F. Recommendations have been made above that sections 52C, 52D and 52F be repealed. The Committee considers that the remaining elements of Part VA should be integrated into Part VI. The Committee believes this would be a modest contribution towards enabling an informed choice of the avenue of seeking to redress to be made.

17.38 **The Committee recommends that provision for complaint to the Ombudsman be integrated into Part VI of the FOI Act.**

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31. Submissions from the Administrative Review Council, p. 26; and the Attorney-General's Department, p. 49, (Evidence, p. 54).

CHAPTER 18

PROCEDURES IN THE ADMINISTRATIVE APPEALS TRIBUNAL

18.1 The Committee is aware that, in December 1986, the Attorney-General established a Task Force to review the procedure of the Administrative Appeals Tribunal. The Task Force, whose members comprise the President of the Administrative Appeals Tribunal, the Chairman of the Administrative Review Council, and a Deputy-Secretary from each of the Attorney-General's Department and the Department of Finance, has not yet reported.

18.2 In this chapter, the Committee has considered only those aspects of the procedure of the Administrative Appeals Tribunal which are regulated by the FOI Act.

Conclusive certificate cases: section 58C

18.3 The President of the Administrative Appeals Tribunal, the Law Institute of Victoria, and the Administrative Review Council all suggested that section 58C, which establishes an elaborate procedure by which the Tribunal hears appeals against exemptions claimed by conclusive certificates, should be repealed.[1] This would leave the Tribunal free to exercise its general discretionary powers under the Administrative Appeals Tribunal Act 1975, (ss.35(2)) to make confidentiality orders if and when necessary.

18.4 The Administrative Review Council explained the background to the proposal as follows:

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1. Submissions from Justice J.D. Davies, p. 1 (Evidence, p. 1364); the Law Institute of Victoria, p. 6 (Evidence, p. 379); the Administrative Review Council, p. 42. See also Re Waterford and Treasurer of Commonwealth of Australia (No. 2) (Deputy President Todd) (1985) 8 ALN 37, p. 48.

> In some cases, the agency or Minister does not desire that the hearing should be in private and would be satisfied with the making by the AAT of a confidentiality order under section 35 of the Administrative Appeals Tribunal Act 1975. In other cases, there is only a part of the evidence or submissions that the agency or Minister desires to be given in private. Moreover, it is only in the minority of cases that the agency or Minister desires that the applicant be excluded while evidence is given and submissions are made on behalf of the agency or Minister. Indeed, rarely does an agency or Minister seek to have the applicant excluded from the hearing for more than a short time. In the Council's view, it is desirable that the hearing of the AAT and the reasons for decision of the AAT should be public unless there are good reasons to the contrary in a particular case.
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> These problems arise in every case involving a conclusive certificate. At present the result is that, ordinarily, the reasons for decision of the AAT in conclusive certificate cases are distributed in full to the respondent and either in full or in part to the applicant but only in part or not at all to the public. In particular, the private reasons for decision are not distributed to members of the AAT who do not constitute the AAT for the particular case. If no change to the law is made, a useful body of precedent will be built up of which probably only the Attorney-General's Department will be aware.[2]

18.5 The Committee recognises that section 58C is unnecessarily restrictive. The Committee considered whether section 58C should be repealed, or merely amended to require a private hearing and/or restrictions upon the publication of evidence and reasons only where the agency so requests. The latter is consistent with the overall rationale for retaining conclusive certificates, in that it leaves control over the documents in the hands of the executive rather than the Tribunal.

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2. Submission from the Administrative Review Council, p. 42.

18.6 The Committee has not received any submissions or evidence from agencies on this point. The Committee does not know whether agencies would agree to the Administrative Appeals Tribunal controlling confidentiality when reviewing conclusive certificates. Consequently, the Committee prefers to adopt the more cautious approach of leaving control with agencies.

18.7 **Accordingly, the Committee recommends that section 58C be amended to require a private hearing and/or restrictions imposed upon the publication of documents lodged with or received in evidence by the Administrative Appeals Tribunal or submissions made to it, only to the extent that the agency concerned so requests.**

Conclusive certificate cases: paragraph 58C(3)(b)

18.8 Where agencies claim exemption upon a variety of certificate and non-certificate grounds, the restrictions upon publicity attached to the hearing of the application for review of the conclusive certificate may spill over into the hearing of the non-certificate grounds. This may mean that paragraph 58C(3)(b) requires the Administrative Appeals Tribunal to make a confidentiality order in terms wider than it would have done otherwise.[3]

18.9 The difficulties which may be created thereby appear to be an inescapable consequence of having a system of conclusive certificates. The Committee considered whether the procedural complexity could be reduced if questions involving a conclusive certificate were to be resolved in a separate hearing conducted before the consideration of other exemption provisions. The

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3. E.g. see Re Lordsvale Finance and Department of Treasury (No. 4) (22 August 1986), paras. 7-8.

latter hearing would be necessary only if the conclusive certificate was withdrawn, in which case the restrictions imposed by section 58C would no longer operate.[4]

18.10 However, the Committee considers that section 33 of the Administrative Appeals Tribunal Act 1975 gives the Administrative Appeals Tribunal ample discretionary power to hold separate hearings on different categories of exemption claims. Further, the Tribunal is best placed to decide case-by-case, at a directions hearings or preliminary conference, whether the advantage of assigning different issues to different hearings outweigh the disadvantages of so doing.[5]

Production of documents to the AAT in conclusive certificate cases: section 58E

18.11 Section 58E governs the production to the Administrative Appeals Tribunal of documents in relation to which a certificate has been issued. Section 64 governs the production of documents otherwise claimed to be exempt. Under sub-section 58E(2), the Tribunal may require production of the documents only if the Tribunal is not satisfied by the evidence already adduced that there are reasonable grounds for the issue of the conclusive certificate.[6]

18.12 The Administrative Review Council noted that 'particularly difficult procedural questions have arisen' in the Tribunal as a result of section 58E.[7] One witness argued that the

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4. Cf. Re Bracken and Minister of State for Education and Youth Affairs (No. 3) (1985) 7 ALD 243, p. 269.
5. See Re Dillon and Department of Treasury (No. 1) (1986) 10 ALD 366, pp. 372-73, for a survey of some of the cases in which this has happened.
6. By contrast, sub-section 56(1) of the Victorian FOI Act gives the Victorian Administrative Appeals Tribunal an unqualified power to inspect documents claimed to be exempt.
7. Submission from the Administrative Review Council, p. 44, and pp. 45-46.

Tribunal should be able to inspect the documents prior to the preliminary conference stage in all cases.[8]

18.13 To some extent, the procedural difficulties are independent of section 58E. They arise out of the existence of both ordinary and conclusive certificate exemption claims in respect of the same documents.[9] As was noted above, the Administrative Appeals Tribunal has the power to order that conclusive certificate exemption claims should be dealt with in a separate hearing. This may alleviate some of the potential difficulties arising out of section 58E.

18.14 The Committee notes the criticism that the relationship between section 61 and section 36 conclusive certificate claims makes it difficult to decide whether the contents of the documents are 'purely factual' without being able to require production of the documents. However, the Committee does not consider that this provides sufficient reason to alter section 58E. Agencies may voluntarily produce documents to the Administrative Appeals Tribunal.[10]

Production of documents to the AAT in non-conclusive certificate cases: section 64

18.15 Section 64 governs the production of documents in appeals against non-conclusive certificate exemption claims. Under sub-section 64(1), the Tribunal may require documents to be produced only if the Tribunal is not satisfied, by evidence upon affidavit or otherwise, that the document is an exempt document. As was noted above,[11] the Victorian Administrative Appeals

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8. Evidence, p. 547 (Mr H. Selby).
9. Cf. Re Dillon and Department of Treasury (No. 1) (1986) 10 ALD 366, pp. 373-75.
10. Re Lordsvale Finance Ltd and Department of Treasury (No. 2) (7 February 1986) para. 3.
11. See footnote 6 on p. 258 above.

Tribunal has an unqualified power to examine documents claimed to be exempt.

18.16 The Committee received information suggesting that agencies occasionally delay the production of documents unnecessarily.[12] To the extent that, in the early days of FOI, agencies simply misunderstood their obligations regarding the production of documents, the developing case-law can be relied upon to clarify the position.[13]

18.17 Fairly applied, section 64 need not lead agencies to withholding from the Administrative Appeals Tribunal documents which the Tribunal otherwise might require to be produced. This is so particularly where the Tribunal has indicated its view upon the production of documents, perhaps informally, during the preliminary conference or directions hearing. However, in the Committee's view, it is desirable to amend section 64 so as to preclude the agencies from withholding documents unnecessarily.

18.18 **The Committee recommends section 64 be amended to give the Tribunal the power to oblige agencies to produce documents at any stage of proceedings.**

Production of documents to applicant's legal representative in non-conclusive certificate cases

18.19 The Committee accepts that applicants' ability to argue for disclosure of documents in the Administrative Appeals Tribunal may be impaired by the lack of an opportunity to inspect the documents in dispute. It has been suggested this disadvantage might be reduced if the FOI Act were to be amended to give the Tribunal power to permit applicants' counsel to inspect the

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12. Submission from Justice J.D. Davies, p. 2 (Evidence, p. 1365), and submission from the Administrative Review Council, p. 44. See also Evidence, pp. 547 and 551 (Mr H. Selby); p. 1376 (Justice J.D. Davies).
13. Cf. Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626, p. 639 (Davies J).

documents at the hearing: the counsel would be required to give an undertaking not to reveal the documents or their contents to the applicant or anyone else.[14]

18.20 An agency may voluntarily grant access to documents outside of the FOI Act (s.14). However, where the documents are voluntarily disclosed to the Administrative Appeals Tribunal by agencies, the Tribunal has taken the view that, first, it has no power to direct the respondent to grant access to the applicant's counsel[15] and, secondly, the Tribunal ought not itself to make the documents available to the applicants' counsel.[16]

18.21 The Administrative Review Council concluded that it was undesirable to give the Tribunal a discretion to permit applicants' legal representatives to gain access to documents to which applicants are not permitted access but which the Tribunal has required to be produced to it or which have voluntarily been produced to the Tribunal. According to the Council, once the Administrative Appeals Tribunal has itself inspected the documents, the Tribunal

> will usually be able to elicit from the applicant's representative appropriate argument concerning the matters which should guide the AAT in making its decision.[17]

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14. E.g. see Evidence, pp. 385-95 (Law Institute of Victoria); submissions from the New South Wales Law Society, p. 5; and the Law Institute of Victoria, p. 6 (Evidence, p. 379). The Victorian Administrative Appeals Tribunal already possess this power: FOI Act (Vic), s.56(3).
15. Re Kim Yee Chan and Department of Immigration and Ethnic Affairs (1985) 8 ALN 48, p. 50.
16. Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN 257, pp. 260-61; Re Dunn and Australian Federal Police (1986) 11 ALN 185, p. 186.
17. Submission from the Administrative Review Council, p. 48. Cf. Re Edelsten and Australian Federal Police (1985) 9 ALN 65, p. 70, where the AAT commended the counsel for the applicant for having sought to elaborate a number of general propositions of a positive kind which the Tribunal was invited to invoke in the course of the inspection of the documents.

18.22 The Administrative Review Council also advised the Committee that

> an applicant's legal representative who had had access to the subject documents would be placed in an invidious position vis-a-vis the applicant, even when the latter had given specific instructions for the representative to inspect the documents without disclosing them to the client. Difficulties could also arise in later proceedings in relation to the representative's knowledge of the documents. Again, to permit only legal representatives in the strict sense to have access to documents would discriminate against applicants represented by some other person or without representation at all.[18]

18.23 The Committee supports both the Administrative Review Council's reasoning and its conclusion.

18.24 Senator Alston dissents from paragraph 18.23 in the light of the successful operation of such arrangements under the Victorian Freedom of Information Act.

Powers of the AAT to ensure non-disclosure of certain matters

18.25 Section 63 of the FOI gives the Administrative Appeals Tribunal specific powers to regulate its procedures and the content of its reasons for decisions in order to ensure that confidentiality of exempt matter is preserved. The section provides that:

> 63. (1) In proceedings under this Part, the Tribunal shall make such order or orders under sub-section 35 (2) of the Administrative Appeals Tribunal Act 1975 as it thinks necessary having regard to the nature of the

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18. Submission from the Administrative Review Council, p. 48. See also Evidence, pp. 1376-77 (Justice J.D. Davies); News Corporation Ltd v National Companies and Securities Commission (1984) 57 ALR 550, p. 556 (Fox J), pp. 563-64 (Woodward J); and Re Robinson and Australian Federal Police (29 August 1986) para. 4.

> proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant of -
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> (a) exempt matter contained in a document to which the proceedings relate; or
>
> (b) information of the kind referred to in sub-section 25 (1).
>
> (2) Notwithstanding anything contained in the Administrative Appeals Tribunal Act 1975 -
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> (a) the Tribunal shall not, in its decision, or reasons for a decision, in a matter arising under this Act, include any matter or information of a kind referred to in sub-section (1); and
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> (b) the Tribunal may receive evidence, or hear argument, in the absence of the applicant or his representative where it is necessary to do so in order to prevent the disclosure to the applicant of matter or information of a kind referred to in sub-section (1).

18.26 The Committee's attention has been directed to the relationship between these powers in the FOI Act and more general powers contained in the Administrative Appeals Tribunal Act. In his submission, Justice Davies, the then President of the Tribunal, recommended that

> [t]he provisions of sub-s. 63(2) should be widened. Paragraph 63(2)(a) should include all confidential information communicated to the Tribunal in documentary or oral evidence which has been subject to a confidentiality order and which has not been communicated to the applicant.[19]

18.27 A further problem arises in respect of paragraph 63(2)(b). According to the Administrative Review Council, it may be necessary to exclude applicants from parts of

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19. Submission from Justice J.D. Davies, p. 1 (Evidence, p. 1364).

a hearing in circumstances which do not fall within those specified in paragraph 63(2)(b).[20] Justice Davies submitted that:

> Paragraph 63(2)(b) should comprehend all cases in which evidence is given in confidence to the Tribunal. Frequently, confidential evidence is given to the Tribunal as to the circumstances which may make a particular document exempt. It is frequently necessary to exclude the applicant and his representative while that evidence is given. No purpose is served by requiring the Tribunal to refer to that evidence in its decision, as s.43(2) of the Administrative Appeals Tribunal Act 1975 (Cth) may require, and then to place a confidentiality order upon that part of the reasons for decision, with the result that the reasons expressed are not available to the applicant or the public.[21]

18.28 The Administrative Review Council submission reached a similar conclusion. The Council's submission expressed

> the Council's view that paragraph 63(2)(b) may be seen as unduly limiting and that an amendment is required to make it clear that the paragraph does not derogate from the ordinary powers of the AAT under section 35 of the Administrative Appeals Tribunal Act 1975 to make orders concerning the hearing of proceedings.[22]

18.29 The Committee notes that, in a decision made since these submissions were received, the Administrative Appeals Tribunal observed

> that paragraph 63(2)(b) elaborates, rather than delimits, the circumstances in which a s.35 order may be appropriate in proceedings under the FOI Act.[23]

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20. Submission from the Administrative Review Council, p. 43.
21. Submission from Justice J.D Davies, p. 1 (Evidence, p. 1364).
22. Submission from the Administrative Review Council, p. 44.
23. Re Dunn and Australian Federal Police (1986) 11 ALN 185, p. 186.

18.30 However, to the extent that this decision fails to clarify the position, the Committee supports the amendment of section 63 along the lines recommended by the Administrative Review Council and the then President of the Administrative Appeals Tribunal.

Powers to deal with application not made in good faith

18.31 The Commonwealth Administrative Appeals Tribunal, unlike superior courts, the Commonwealth Ombudsman and the Victorian Administrative Appeals Tribunal, has no power summarily to dismiss applications for review made in bad faith. Justice Davies noted that such applicants have been few and, apart from one example given, have not posed a major problem for the Administrative Appeals Tribunal.[24]

18.32 There has not been any suggestion in other evidence or in submissions that the Tribunal should be empowered to deal with applicants seeking review in bad faith. Agencies argued that applicants should be dealt with at the agency level. The implication was that if the problem is tackled at that level successfully, there is little need for any mechanism at the Tribunal level.

18.33 The Committee agrees with this approach. The Committee would not oppose the grant of power to the Administrative Appeals Tribunal to enable it to deal with mala fide applicants. If a case is made out for such a power generally, it should apply to the Tribunal's freedom of information jurisdiction.

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24. '[A] case in Melbourne, where the applicant had something like 50 applications before the Tribunal, basically dealing with one matter. We had no means of stopping him from putting in the applications. Once the application was in, the Registrar was under a statutory duty to give notice to the respondent and the respondent was under a statutory duty to produce the section 37 statements, and all that gave rise to a good deal of work on the part of the agencies': Evidence, p. 1370.

Sanctions against recalcitrant bureaucrats

18.34 A few submissions called for the establishment of mechanisms by which to discipline agency staff found to be flouting their obligations under the FOI Act.[25] The Law Institute of Victoria recommended that the

> ability of the Tribunal to make disciplinary orders of some kind when officers have flouted the purpose and provisions of the Act should be strengthened.[26]

18.35 The Administrative Appeals Tribunal lacks any power to make orders of this type, except where the conduct constitutes contempt of, or otherwise relates to, the Tribunal.[27] The Ombudsman's role in reporting upon officers who fail to carry out their duties was noted above in chapter 17.

18.36 The Victorian FOI Act makes specific provision for disciplinary action by the Administrative Appeals Tribunal. Section 61 provides:

> where the Tribunal, at the completion of a proceedings under this Act, is of [the] opinion that there is evidence that a person, being an officer of an agency, has been guilty of a breach of duty or of misconduct in the administration of this Act and that the evidence is, in all the circumstances, of sufficient force to justify it in doing so, the Tribunal shall bring the evidence to the notice of -
>
> (a) if the person is the principal officer of an agency - the responsible Minister of that agency; or
>
> (b) if the person is an officer of an

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25. Submissions from Mr B.F. Grice, p. 2; Mr Jim Moore, p. 1; 'The Age', p. 41 (Evidence, p. 226).
26. Submission from the Law Institute of Victoria, p. 7 (Evidence, p. 380).
27. Administrative Appeals Tribunal Act 1975, ss.61-63.

> agency but not the principal officer of that agency - the principal officer of that agency.

18.37 Without wishing to suggest that such misconduct is common, the Committee agrees that instances of misconduct by agency staff which are exposed in the course of Administrative Appeals Tribunal hearings should be brought to the attention of their superiors. However, the Committee does not consider that it is necessary to confer upon the Tribunal any formal power or obligation to do this. As was noted above, a broadly equivalent power possessed by the Ombudsman is not used; instead recourse is had to less formal methods of achieving the desired end.

18.38 As presently informed, the Committee takes the view that it is sufficient that the Administrative Appeals Tribunal may refer evidence of individual misconduct to Ministers or agency heads informally. On the same basis, the Committee would not regard it as appropriate to give the Administrative Appeals Tribunal a general power to fine, dismiss or otherwise discipline agency staff found to be in breach of their duties under the FOI Act. Should such action be necessary, it should be undertaken as part of the general public service disciplinary procedures.

18.39 In evidence to the Committee, Justice Davies, noted that one situation in which it would be useful if the Tribunal could refer a matter to the Ombudsman formally would be where, as a result of disclosure of documents under FOI, the Tribunal has encountered a question of maladministration.[28] Justice Davies did not refer specifically to the question of disciplining agency staff.

18.40 The Committee recognises that a power to refer questions of this sort would enable prompt investigation of the scope of, and responsibility for, an apparent maladministration which had

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28. Evidence, p. 1375.

come to light in the course of an Administrative Appeals Tribunal hearing.

18.41 In the Committee's view, permitting the Tribunal to inquire into, or refer to other bodies (such as the Ombudsman), the merits of agency conduct or actions which are revealed during FOI disputes would unduly expand FOI jurisdiction. Where questions of maladministration or illegality are revealed, whether by disclosure under FOI or otherwise, these should be the subject of specific inquiry and investigation by an appropriate authority (e.g. the Ombudsman, or police) uninfluenced by the means by which they were discovered.

Powers to award costs

18.42 Section 66 of the FOI Act empowers the Administrative Appeals Tribunal to deal with questions of costs arising from proceedings in the exercise of its jurisdiction in FOI matters. Sub-section (1) provides that :

> Where -
>
> (a) a person makes application to the Tribunal under section 55 for review of a decision constituting the action to which the complaint relates; and
>
> (b) the person is successful, or substantially successful, in his application for review,
>
> the Tribunal may, in its discretion, recommend to the Attorney-General that the costs of the applicant in relation to the proceedings be paid by the Commonwealth.

18.43 Sub-section 66(2) sets out a non-exhaustive list of the criteria to which the Administrative Appeals Tribunal shall have regard in deciding whether to make a recommendation under sub-section 66(1).

18.44 The awards of costs in reverse-FOI applications was considered above. The issues considered here are whether the Administrative Appeals Tribunal should be empowered to award, as opposed to recommend the award of, costs; whether parties other than the Commonwealth should be liable to pay costs; and, if so, under what circumstances.

Awards, not recommendations

18.45 The Administrative Appeals Tribunal does not have any general power to order that the costs incurred by a successful party should be paid by the losing party. The reason for this appears to be one of policy rather than a result of any limitations arising out of the nature of the Administrative Appeals Tribunal itself.

18.46 Although the point is not beyond doubt, it appears that empowering the Administrative Appeals Tribunal to order a party to pay costs would not be a constitutionally impermissible vesting of judicial power upon a body not being a court.[29] In its submission, the Attorney-General's Department said that

> [a] mechanism could be provided for recovery by applicants and agencies of costs of AAT proceedings ...
>
> The AAT's determination could not itself be binding or conclusive between any of the parties, nor could it be given power to enforce costs, but the costs order could be enforced by a Court (Cf. s.174 Copyright Act 1968; ss.81, 82 Sex Discrimination Act 1984). The usual types of recovery problems could arise and the AAT might need to be given power to require security for costs in appropriate cases.[30]

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29. Australian Law Reform Commission, Lands Acquisition and Compensation [ALRC14. AGPS. Canberra. 1980] para. 125.
30. Submission from the Attorney-General's Department, pp. 83-84 (Evidence, pp. 88-89).

18.47 One policy reason for not empowering the Administrative Appeals Tribunal to award costs is to discourage the parties from seeking legal representation.[31] The Administrative Review Council has recommended that the Administrative Appeals Tribunal should not have a general power to make awards of costs, but that provision could be made for the award of costs in particular Tribunal jurisdictions.[32]

18.48 The Committee has not received any information which suggests that the distinction between the award of costs and a recommendation that the Attorney-General pay costs has any practical significance. As at December 1986, the Attorney-General had refused payment in only one of the three cases in which the Tribunal recommended an award of costs.[33]

18.49 However, if costs are to be payable by parties other than the Commonwealth, they would, for practical purposes, have to be payable at the order, as opposed to the recommendation, of the Administrative Appeals Tribunal. In turn, if the Tribunal is to have the power to order other parties to pay costs, it seems reasonable that it should also have the power to order costs against the Commonwealth.

Awards of costs against parties other than the Commonwealth

18.50 A number of agency submissions recommended that the Tribunal should be able to award costs against unsuccessful FOI

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31. See submission from the Attorney-General's Department, p. 83 (Evidence, p. 88), referring to the policy that 'the AAT should be an inexpensive forum open to all parties, whatever their means, undeterred by the fear of having to pay another party's costs.' See also Administrative Review Council, Annual Report 1986-87, pp. 80-87.
32. Administrative Review Council, Annual Report 1978-79, para. 97, Annual Report 1979-80, para. 88.
33. First supplementary submission from the Attorney-General's Department, p. 2.

applicants.[34] The objective would be to deter applicants who might otherwise frivolously or vexatiously put agencies to considerable expense in preparing their cases and appearing in the Tribunal.

18.51 It appears that many of the small number of FOI applicants who abuse the system act without legal representation and lack the means to pay any significant award of costs made against them. It is probable that very few of these will be able to afford the fees for lodging applications in the Tribunal for review. (These fees are discussed below in chapter 20).

18.52 It is possible to target frivolous and vexatious applications by the award of costs. This may be done, in part, by developing criteria to ensure that applicants have to do something more than simply lose the case before being liable to pay costs. In its submission, the Department of Immigration and Ethnic Affairs proposed

> guidelines to be taken into account, e.g. the reasonableness of the applicant's actions; whether any or adequate notice was given to the agency; whether the applicant's actions involved either abuse of the AAT's procedures or were frivolous or vexatious; costs borne by the agency, etc.[35]

18.53 The Committee considers the Administrative Appeals Tribunal should have the ability to order that applicants pay costs. The conditions for making such an order should be defined as precisely as possible so as to preclude applicants acting responsibly and in good faith from being subject to an order for costs, even where they fail before the Tribunal. To ensure that

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34. E.g. submissions from the Department of Resources & Energy, p. 4; the Department of Health, p. 34 (Evidence, p. 1254); the Department of Housing & Construction, p. 6; the Department of Immigration and Ethnic Affairs, p. 23 (Evidence, p. 713); the Australian Customs Service, p. 40; and the Department of the Special Minister of State, p. 3.

35. Submission from the Department of Immigration and Ethnic Affairs, p. 23 (Evidence, p. 713).

applicants are aware of their liability for costs, and to avoid agencies having to defend frivolous, vexatious, etc matters with no realistic prospect of recovering costs, the Committee proposes the following mechanism.

18.54 **The Committee recommends that the Administrative Appeals Tribunal be able to award costs against both the Commonwealth and applicants; but that the Tribunal not be able to award costs against an applicant unless: (a) the agency had sought an order at the earliest phase of the proceedings, that is, at the directions hearing/preliminary conference stage; and (b) at such a directions hearing/preliminary conference, the agency satisfies the Tribunal that there is no merit to the applicant's case; and (c) the Tribunal at that directions hearing/preliminary conference decides that the applicant should be exposed to the risk that costs may be awarded against her/him at the conclusion of the Tribunal proceedings.** The Committee notes that the decision of the Tribunal at this stage should be whether to expose the applicant to the <u>risk</u> of an award of costs being made against her/him. The decision should not pre-empt the Tribunal's eventual decision whether to award costs.

18.55 Senator Stone dissents from clause (b) of the recommendation contained in paragraph 18.54.

18.56 **The Committee also recommends that the Tribunal be empowered to order that applicants lodge security for costs at the earliest (directions hearing/preliminary conference) phase of proceedings.** In many cases, this may ensure the early resolution of any question whether the application is frivolous, vexatious, etc.

18.57 **The Committee further recommends that if, at this directions hearing/preliminary conference stage, the Administrative Appeals Tribunal finds that the applicant's case is not without merit (ie. that the application is neither**

vexatious nor frivolous), there be no possibility of any award of costs being made against the applicant should the application proceed.

18.58 Senator Stone dissents from the recommendation contained in paragraph 18.57.

18.59 The Committee notes the suggestion by the Department of Housing and Construction that the FOI Act should be amended to permit the award of costs against applicants who 'withdraw from AAT proceedings at the "eleventh" hour'.[36]

18.60 However, in the Committee's view, it will be counter-productive to expose applicants to liability for costs in these circumstances. In the Committee's view, it is preferable to encourage applicants to settle.

18.61 There is no scale of costs applicable to Administrative Appeals Tribunal applications. In awards of costs under its Compensation (Commonwealth Government Employees) Act 1971 jurisdiction, the Tribunal makes reference to the scales of costs applicable in other equivalent courts and tribunals if the parties are unable to agree upon the amounts.[37] This practice could apply equally in FOI matters.

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36. Submission from the Department of Housing and Construction, p. 6.

37. E.g. for matters heard in Victoria reference is made to the Victorian County Court scale of costs, and for matters in NSW the scale of costs set out in the NSW Workers Compensation Rules have been used.

CHAPTER 19

ACCESS CHARGES

19.1 Since the FOI Act came into force in 1982, there have been three regimes for charging for FOI access. The original regime applied from 1 December 1982 until 30 June 1985. The Freedom of Information (Charges) Regulations (Amendment) introduced a revised scheme which applied from 1 July 1985 until the Regulations were disallowed by the Senate on 13 November 1985. The original regime then revived and continued until 18 November 1986, when the revisions introduced by the Freedom of Information (Amendment) Act 1986 took effect. The table indicates the key features of the three regimes.

Comparison of Charging Regimes

Item	Original	Disallowed	Current
Administration	$8	$20	Nil
Application fee	Nil	Nil	$30
Search & Retrieval	$12 ph	$30 ph	$15 ph
Decision-making time	Nil	Nil	$20 ph
Supervision of Inspection	$12.50 ph	$16 ph	$12.50 ph
Photocopying	10c pp	10c pp	10c pp
Transcription & copies other than photocopies	$4.40 pp	$5 pp	$4.40 pp
Other services costs (eg. computer-time, replaying tapes etc)	actual cost	actual cost	actual cost
Applications for which above charges do not apply	documents where search time <2hrs and access given by provision of photocopy (special charges apply)	income support documents (no charge)	income support documents (no charge)
	personal affairs where inspection <2hrs or copying <100 pages (no charges)		

19.2 All three schemes require applicants to pay access charges (other than application fees) only where agencies or Ministers decide that the applicants should do so. There is thus discretion whether a charge which may be levied is in fact levied. The Government guidelines discussed below indicate how the discretion is to be exercised.

19.3 Where an agency has decided that an applicant is liable to pay a charge, the applicant may seek review of that decision,[1] or apply to have the charge wholly or partly remitted.[2] Remission of application fees, which were introduced in 1986, may also be sought.[3] Financial hardship if payment is required, whether the requested documents relate to the applicant's 'personal affairs', and whether granting of access is in the general public interest are all relevant to remission of charges or fees.[4]

19.4 The combined effect of exemptions from charges, exercises of discretion not to levy charges, and successful applications for the remission of charges have meant that few charges and little revenue has been collected from FOI applicants. In addition, agencies were reluctant to calculate charges in complex cases under the original charging regime because of the complexity of the charging structure, or to initiate recovery where it would be costly.[5]

General principles

19.5 The Committee (with the exception of Senator Stone) is concerned that in determining the appropriate level of charges to be imposed upon FOI applications and appeals, too much emphasis has been placed upon economic factors (such as cost recovery) at

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1. FOI Act, ss.54(1)(b) and 55(1)(c).
2. FOI Act, s.30(1).
3. FOI Act, s.30A(1).
4. FOI Act, ss.30(3) and 30A(1)(b).
5. IDC Report, p. G3.

the expense of the admittedly unquantifiable social (and political) benefits derived from the right of access to documents conferred by the FOI Act.

19.6 Whilst Senator Powell would prefer that no charges were imposed upon applications for, and provision of, access to documents under the FOI Act, she has joined with the remainder of the Committee in the recommendations made in the remainder of this chapter and chapter 20.

19.7 The Committee acknowledges the difficulty of formulating an appropriate regime for charging for FOI requests. In its 1979 Report, the Committee accepted that some charges should be paid, both as a reflection of the 'user pays' principle and as a deterrent to trivial, over-broad, or poorly framed requests.[6] On the other hand, it is necessary to ensure that the charging regime does not limit the range of people able to afford to use the legislation. Further, the reconciliation of these competing aims must be relatively simple.

19.8 A scheme which is complex or uncertain in its application may deter bona fide applicants, be excessively costly to administer, or preclude the levying and collection of charges properly payable. The Committee received a number of submissions which argued that the original charging regime was excessively complex.[7]

19.9 Any charges will deter some potential FOI applicants. Some people will decide that the information is worth less than the cost of obtaining it. However, there is no firm basis upon which to calculate the degree of the deterrent effect of any

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6. 1979 Report, para. 11.3. E.g. the submission of the Department of the Special Minister of State, p. 2 (during the period in 1985 when higher charges applied, 'the Department's experience was that applicants were more eager than before to define their requests more carefully').
7. E.g. submissions from the Inter-Agency Consultative Committee on FOI, p. 5; the Department of Community Services, p. 1; the Department of Health, p. 35 (Evidence, p. 1255); and the Department of Defence, p. 13.

given charging regime, as the IDC Report pointed out.[8] This, in turn, means that it is not possible to make any precise estimate of the revenue which may be raised or the cost-saving which may be achieved under any revised charging regime.

19.10 The application fee and increased charges introduced by the 1986 amendments applied only for 7 1/2 months of the 1986-87 financial year. Because of this, because the most common types of requests were not affected by the change, and because of the effect of extraneous factors, the statistics for the full year are of limited value in assessing the impact of the amendments. The statistics indicate that the number of section 19 access requests fell by 8.6% to 29,880, while the amount of fees and charges collected rose by 114% to $161,490.[9] On a quarterly basis, formal requests fell from about 8000 per quarter before the changes to about 6500 after.[10]

19.11 Some agencies have reported that a marked reduction in requests occurred after the introduction of the application fee and increased charges.[11] Others reported that there had been little impact, or a slight decline in the number of requests received.[12] One lobby group informed the Committee that it had restricted its use of FOI as a result of the change.[13]

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8. IDC Report, p. G6. See also the first supplementary submission from the Attorney-General's Department, p. 5.
9. FOI Annual Report 1986-87, pp. 8 and 26.
10. Figures derived from graph in the FOI Annual Report 1986-87, p. 9, after making allowance for the fact that the pre-September 1986 figures included section 15 requests. More detailed quarterly figures are not provided in the Report.
11. E.g. FOI Annual Report 1986-87, p. 116 (Department of Employment and Industrial Relations). According to the Commissioner of Taxation, Annual Report 1986-87, p. 100 (Appendix 5), the number of access requests received during 1986-87 represented a 41% reduction in the number of requests received in the previous year (5742 reduced from 9658) - a result which the Commissioner described as a 'direct effect of the increased charging scale introduced by the' 1986 amendments.
12. E.g. FOI Annual Report 1986-87, p. 117 (Australian Federal Police).
13. Submission from Australians for Animals, pp. 4 and 5.

19.12 From an administrative point of view, the simplest charging regime would be one which imposed a small, flat fee upon all applicants. The fee would be non-refundable and there would be no scope for exemption, waiver or remission. Some agencies proposed the introduction of this type of regime.[14]

19.13 However, the Committee does not consider that this would reflect the 'user pays' principle adequately. Nor would it deter over-broad or poorly framed requests. At the same time, a small fee might deter people with limited means from lodging proper requests. The Committee considers that some of the benefits of administrative simplicity should be surrendered in order to achieve these other objectives.

Specific charges

19.14 Users drew the Committee's attention to specific aspects of charging, such as photo-copying charges, transcription charges and charges for computer time.[15] However, in general, these comments related to allegations of overcharging or misinterpreting the regulations in particular cases, rather than issues of principle. Matters of this type are most appropriately resolved by Administrative Appeals Tribunal or the Ombudsman in particular instances.

19.15 The present charge for photocopying is 10 cents per page. This has remained unchanged since the commencement of FOI.

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14. E.g. submission from the Department of Arts, Heritage & Environment, p. 7.

15. For example, it appears from material presented to the Committee that the Department of Trade determines 'actual cost' usage in providing FOI access to records held on computer by reference to an amount of 20 cents per record processed. This amount in turn is calculated by reference to Departmental guidelines on cost recovery. The Committee suspects that full inquiry would reveal that the costs sought to be recovered include the capital and overhead costs of the computer system. Where the computer system was installed for non-FOI reasons, it is not appropriate that any capital and overhead costs be charged to FOI users: only direct costs should be charged to the FOI requester.

Some agencies recommended that this should be increased.[16] One of the IDC's recommendations was to 'amend the Regulations to raise photocopy charges to reflect the actual cost to agency'.[17]

19.16 The Committee does not support this recommendation. First, the Committee does not believe that the expense to each agency of determining its actual cost of photocopying at each place where it does FOI access-related copying can be justified. Secondly, there is a danger that in working out the 'actual cost', agencies will include capital and other overhead costs for copiers used primarily for non-FOI purposes. Where the purchase of equipment is justified on non-FOI grounds, and the FOI-related use is merely incidental, it is improper to ascribe any element of the fixed costs related to that equipment to FOI. Thirdly, the Committee regards the current charge as roughly reflecting actual costs, although there may be considerable variation between agencies.[18] Not all agency FOI-related copying is done under optimum conditions. But the Committee would consider any charging system for photocopying that resulted in a cost to the user of more than 10 cents per page unreasonable.

Application fees

19.17 The present charging regime provides that agencies are not obliged to process an otherwise valid access request unless the request is accompanied by the payment of an 'application fee' of $30.[19] There is provision for requests for some types of

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16. Submissions from the Australian Federal Police, p. 4 (Evidence, p. 461); the Department of Communications, p. 6.
17. IDC Report, p. 4 (Option A14) endorsed by the second supplementary submission from the Department of Local Government and Administrative Services, p. 5.
18. The prices charged by a random sample of commercial photocopying services in Canberra in November 1987 ranged from 8c to 15c per page. In some cases, the per page costs fell as the number of pages to be copied increased. Presumably, similar variations will be evident amongst agencies depending upon the volume of material photocopied and the quality of the photocopiers employed.
19. FOI Act, s.15(1); FOI (Fees and Charges) Regs, reg.5.

documents to be exempt from the payment of fees and for applicants to seek remission of fees.

19.18 Some submissions opposed on principle the automatic levying of any fee for making a request.[20] In addition, any application fee may deter some potential users.

19.19 Subject to the scope and operation of the exemption and remission provisions (discussed below), the Committee does not regard the imposition of application fees as unreasonable. The imposition of fees deters frivolous applications,[21] and goes some way towards implementing the 'user pays' principle. The Committee does not accept that the 'right' of access necessarily entails that applications should be free.

19.20 However, the Committee is concerned that the $30 fee may be excessive, and may deter meritorious applicants. In addition, it is not clear how the figure of $30 was selected. It is intended to cover the cost of basic administrative procedures involved in processing the request.[22] It appears that this increase is intended to reflect a move towards full cost-recovery. Under the original scheme, provision was made for an $8 charge for administrative procedures, while the disallowed scheme contained provision for a $20 charge for the same purpose.

19.21 The Committee accepts that there should be some allowance for inflation, and the 1982 amount of $8 should therefore be increased. But inflation alone cannot explain an

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20. Submissions from Dr A. Ardagh, p. 5; the Library Association of Australia, p. 7; and Mr Paul Chadwick, p. 7.
21. According to the third supplementary submission from the Attorney-General's Department, p. 1, para. 3, 'It is not possible to say with any degree of certainty what effect the introduction of application fees and increased charges have had on the level of frivolous or vexatious requests. A quick telephone poll of FOI co-ordinators in a cross-section of major agencies suggests, however, that there has probably been a decline in such requests in agencies ... in which there is a low incidence of income maintenance related requests.'
22. Senate, Hansard, 25 September 1986, p. 804 (Senator Grimes).

increase from $8 to $30 in four years, nor from $20 to $30 between July 1985 and November 1986. The Government argued that the increase from $8 to $20 was partially influenced by the fact that it had proved to be necessary for officers of higher seniority (and hence higher salary) to handle FOI requests than had been anticipated originally.[23] This does not explain the major part of the increase from $20 to $30. It may be that a significant part of the increase from $8 to $30 represents a shift from partial towards full cost-recovery.

19.22 The Committee does not accept that the amount of the fee should be set with a view to full cost-recovery. The Committee takes the view that a fixed application fee of $15 would both deter frivolous applications and contribute towards the costs of FOI.

19.23 **The Committee recommends that the $30 application fee be reduced to $15.**

19.24 Senator Stone dissents from this recommendation.

Charges for search and retrieval

19.25 The original, the disallowed and the current charging regimes all provide for a charge for the time spent searching for and retrieving documents. The amounts are respectively $12, $30 and $15 per hour. The current scheme also introduces a new basis for charging: the time spent deciding whether to grant, refuse or defer access to a requested document or to grant access to a copy with deletions. This includes times spent in consultation with any person and in notifying any interim or final decision upon the request. The applicable amount is $20 per hour.

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23. Senate, Hansard, 13 November 1985, p. 2052 (Senator Gareth Evans).

19.26 The Committee accepts that it is appropriate to provide for a charge for search and retrieval time where access is granted, and regards the current rate of $15 per hour as appropriate.

19.27 **However, the Committee recommends that there be an upper limit upon the amount of time for search and retrieval which may be chargeable in respect of any one request.**

Charge for decision-making time

19.28 There is no data upon the amount of time agencies spend making decisions. Consequently, it is not possible to determine whether the time spent is decreasing as familiarity with FOI increases. While it is clear that agencies spend a significant amount of time making decisions, the Committee is unable to determine whether inefficient agencies, or those less disposed to openness, have tended to spend increased time in decision-making to thwart the operation of the FOI Act. However, in the comparable area of charging for search and retrieval time, no cases of excessive charging due to inefficiently organised filing or agencies' attempts to inflate charges were brought to the Committee's notice.[24]

19.29 Requests for documents containing business information are not typical of all requests. But the Inter-Departmental Committee Report estimated that in 1984-85 an average of 0.5 staff-days were spent on search and retrieval in response to each FOI request for business information. The corresponding average of the time spent on matters which would be chargeable as decision-making time under the current charging regime was at

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24. The Inter-Departmental Committee Report pointed out (p. G10) that substantial decision-making time in the processing of FOI requests is not a ploy to delay disclosure, but reflects the complex policy issues raised by some requests. In addition, agencies must be prepared to justify decision-making time if a complaint is made to the Ombudsman or a charge appealed to the AAT.

least 10 staff days.[25] The total cost of this time spent on consultation and deliberation was $2.1m.[26]

19.30 In the light of this, the Committee does not oppose the imposition of charges in respect of decision-making time.[27] It is appropriate that some degree of cost-recovery should be attempted. The ability to recover costs in this way will be affected by the scope of exemption from and remission of FOI charges. The relevant provisions are discussed below.

19.31 The Committee also accepts that $20 per hour is a reasonable rate if decision-making time is to be a chargeable item.[28]

19.32 **However, the Committee recommends that there be an upper limit upon the amount of decision-making time which may be chargeable in respect of any one request.**

Charges where no documents located

19.33 The original charging regime provided that some charges were payable in respect of requests for access, while other charges applied to the provision of access.[29] In theory at least, it was possible for administration and search and retrieval charges to be payable even where no relevant documents were located.

19.34 Under the current regime, this may become more common because the $30 application fee must be paid in order that the request constitute a valid FOI access request. There is no

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25. IDC Report, p. C17.
26. Total derived from data in IDC Report, pp. C17 and C22.
27. Contrast the views of the Administrative and Clerical Officers Association: Evidence, pp. 1172-73; and submission from Dr A. Ardagh, pp. 5-6.
28. Cf. IDC Report, p. G10.
29. FOI (Charges) Regs. 1982, Schedule I lists the first category, Schedules II, III, IV list charges in the second category.

express provision for the refund of this fee if no documents are located or no access is provided. Search charges may be paid and not refunded in cases in which no documents are located.

19.35 There are two arguments for imposing charges even though no documents are located or access is not granted. First, agencies are required to perform the work and incur the expense as a result of the request.[30] Secondly, information that no relevant documents exist may be of considerable value to the applicant.[31] Similarly, it may be of considerable value to an individual to learn that an agency does not hold any information, or a particular type of information, relating to the individual.

19.36 However, the Committee acknowledges that most FOI applicants do want to see the documents requested. For these people, it is unsatisfactory that they should be required to pay fees and charges yet obtain nothing in return. The possibility that this may happen may deter some potential applicants from seeking access. In addition, attempts to collect charges which have been notified frequently prove difficult when no access has been granted. Agencies often have to write off these charges as bad debts.

19.37 On balance, the Committee does not recommend that there be any automatic refund of any fees or charges paid if no relevant documents are located or no access is granted. It follows that the Committee does not believe that there should be

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30. Cf. Submission from Telecom Australia, p. 5 (Evidence, p. 753).

31. For example, one witness informed the Committee of a case in which he requested access to documents which he believed did not exist - Evidence, p. 447 (Confederation of Australian Industry). The object of the request was to confirm that the Government had failed to carry out certain economic studies prior to launching particular policy proposals. Confirmation would thus have enabled the applicant to attack the proposals for having been researched inadequately. For different examples, where documents exist but access is refused, see Evidence, p. 169 (Attorney-General's Department); Evidence, p. 1030 (Australian Broadcasting Tribunal); Kyrou E., 'Administrative Law: A Sunrise Industry for the Legal Profession?', (1987) 25(6) Law Society Journal 45, pp. 49-50.

any automatic refund in the less drastic case, where access is granted to a copy of the requested document from which deletions have been made. Insuperable administrative problems would arise if agencies were required to assess the extent to which such access was of some value to the applicant.

Statutory limits on chargeable search or decision-making time

19.38 There are several reasons for limiting the number of hours for which applicants may be charged, even though agency staff may spend more hours in search and retrieval and/or decision-making in processing the request. First, it was never intended that full cost-recovery apply to FOI. Secondly, a statutory ceiling may go some way toward meeting the objection that time-based charges may mean that applicants have to pay for agency inefficiency, obstructionism, unjustified caution etc.[32] Thirdly, a ceiling may enable applicants to determine in advance the maximum amount for which they may be charged, apart from variables such as per page photocopying charges.

19.39 Any system of statutory limits may operate unfairly as between those making simple and complex requests. Simple requests may be processed within the limited hours, and therefore all hours may be chargeable. Complex requests may require more time, and not all the hours expended will be chargeable. Consequently people making simple requests will contribute proportionately more to cost-recovery than people making complex requests. It follows that applicants have no incentive to modify or circumscribe a request where it has been established that the processing of the request will exceed the limits on chargeable hours.

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32. Submission from the Ombudsman, p. 8: 1/6 of complaints investigated to finality result in findings of deficient processing by agencies of FOI requests (Evidence, p. 1315); 'The Age' pp. 21-22 (Evidence, pp. 266-67); joint submission from the Australian Consumers' Association, Inter Agency Migration Group, Welfare Rights Centre, pp. 12-15 (Evidence, pp. 861-64).

19.40 On this view, it may be preferable to charge a significantly lower hourly rate but have no ceiling upon the chargeable hours. This would mean that the rate of cost-recovery would be constant across all types of requests, whether simple or complex. It would also give all applicants subject to the charges an equal incentive to frame their requests as precisely as possible. However, a scheme of this type provides no checks upon inefficient, ultra-cautious etc. agencies charging for excessive hours. For this reason the Committee favours introducing a system of statutory limits.

19.41 The simplest form of statutory limit would be to set a single amount as a ceiling. Any combination of hours spent on search and retrieval and/or on decision-making would be chargeable up to this limit. Section 22 of the Victorian FOI Act provides that the total of all the chargeable elements shall not exceed $100, except where the request involves the use of computers.

19.42 The IDC Report considered introducing separate limits for search/retrieval and decision-making time, and within each of these categories a limit of 1 hour where the request related to personal documents relating to the applicant and 15 hours for all other documents.[33]

19.43 For the purposes of comparison, the Inter-Departmental Committee estimated the mean cost of providing access in 1985-86 to be $310.[34] The average cost per request of providing access to particular categories of documents was as follows:

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33. IDC Report, p. G.9.
34. IDC Report, p. A19.

Document Type	Total Requests (%)	Costs per Request
Personal	24,544 (73.8)	194
Business (private sector)	2,273 (6.9)	637
Personnel	4,005 (12.1)	340
Policy	1,195 (3.6)	997
Internal administration	372 (1.1)	114
Law enforcement	97 (0.3)	2,632
Business (public sector)	134 (0.4)	1,906
Other	608 (1.8)	980

19.44 These figures give some indication of the way in which ceilings on chargeable time will result in less than full cost-recovery. It should be noted that the definition of 'personal' for the purpose of this table may not be identical to the category of 'personal documents' for the purpose of the one hour time limit proposed by the Inter-Departmental Committee. Some 'personnel' and 'law enforcement' documents may relate to the personal affairs of applicants in the relevant sense. However, the Committee does not regard the possibility of disputes over whether a request relates to 'personal' or 'other' documents as sufficient grounds for rejecting different ceilings for different categories of documents.[35]

19.45 In chapter 15 above, the Committee recommended that Part V of the Act should not be constrained by any narrow interpretation of the phrase 'personal affairs' adopted in the context of section 41. For the purposes of the distinction between 'personal' and 'other' documents in this context, the Committee considers that the wider Part V interpretation of 'personal' should apply.

19.46 **The Committee recommends that the Part V interpretation of 'personal affairs' be applied for the purpose of determining whether a document is a personal document for the purposes of the charging regime.**

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35. On this difficulty, see the submission from the Department of Aviation, p. 2.

19.47 On balance, the Committee favours a system of different limits according to the category of documents sought over a system imposing a single limit. The former enables the charges for providing access to documents containing personal information to be kept relatively low, and thus to be consistent with the principle that subjects of official files should be able to gain access to that information.[36] Charges for other categories of documents, where this principle is not relevant, may be higher.[37] For this reason, and to avoid further complication, there should only be two categories, personal and other. For ease of administration, the same hourly limits should apply to search/retrieval time and to decision-making time.

19.48 The Committee considers that limits of 2 hours for personal and 15 hours for other requests should be adopted. The maximum cost to an applicant of a request for personal documents, using the hourly rates accepted above, would be $15 application fee + (2 x $15 =) $30 search/retrieval time + (2 x $20 =) $40 decision-making time = $85. On the same basis, the maximum for any other type of document would be $15 + ($15 x 15 hours =) $225 search/retrieval time + ($20 x 15 hours =) $300 decision-making time = $540. Charges for any supervised access, photocopying etc. would be additional in both cases.

19.49 In many cases, of course, persons seeking access to personal documents will be exempted from charges and their fees will be remitted. (See discussion below on this point.)

19.50 The Committee also records its view that these limits should not be linked to the section 24 test of unreasonably burdensome requests. It should not be possible to characterise,

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36. Cf. Privacy Bill 1986, Information Privacy Principle 6.
37. Contrast submission from Dr A. Ardagh, p. 7, where it is argued that differential charging for access to personal and other documents risks reducing FOI to little more than a set of privacy provisions.

even prima facie, requests as unreasonably burdensome merely because these limits have been exceeded.[38]

19.51 **The Committee recommends that the maximum charge for a request for access to (i) personal documents, be application fee plus a 2 hour search/retrieval time-fee plus a 2 hour decision-making time-fee; and (ii) other types of documents, be application fee plus a 15 hour search/retrieval time-fee plus a 15 hour decision-making time-fee.**

19.52 **The Committee further recommends that the fact that the cost of processing a request exceeds the maximum charges not be a relevant factor for the purposes of the section 24 workload test.**

Exemption from charges and remission of charges

19.53 In principle, the Committee regards as appropriate the provisions which exempt categories of requests from any requirement to pay application fees or charges, supplemented by an opportunity for applicants to ask agencies to exercise their discretion to a remit fees and/or waive charges in particular cases.

19.54 The category of requests exempted from fees and charges is limited to requests for access to documents that contain information relating to a claim for, or decision in relation to, the payment to the applicant of a 'prescribed benefit'. This term is defined by the FOI (Fees and Charges) Regulations, reg.6(1) as:

> a pension, allowance or benefit payable under -
>
> (a) the Seamen's War Pensions and Allowances Act 1940
> (b) the Social Security Act 1947;
> (c) the Student Assistance Act 1973; or

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38. Contra: submission from the Department of Local Government & Administrative Services, p. 12.

(d) the Veterans' Entitlements Act 1986, and any payment of a like nature the purpose of which is to provide income support to persons of inadequate means.

19.55 The Committee considered whether it would be possible to cast the exemption in narrower terms, leaving to all those excluded from exemption the right to seek remission of FOI fees and charges on grounds of financial hardship.[39] (Remission is discussed below.) The Committee considered that it would be too cumbersome to list in the FOI Act or Regulations all the payments under these Acts which are neither means/assets tested nor otherwise restricted by their nature to those in financial need.

19.56 If the Government were to devise a simple administrative regime which more precisely targeted the classes of persons who are exempted from fees and charges, the Committee would not object to the replacement of the list contained in the FOI (Fees and Charges) Regulations.[40]

Discretions not to levy a charge

19.57 Agency discretions not to impose charges provide one reason why charges are imposed in respect of such a small proportion of FOI requests. First, an agency may treat requests as falling outside the FOI Act altogether, and provide the material free of charge. In theory, it is arguable that sub-section 94(3) of the FOI Act requires that whatever charges ought to be imposed for access under the Act should also be imposed where access is granted apart from the Act. In practice, no-one has any motive to argue this point.

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39. Dr A. Ardagh argued in her submission, p. 6, that this exemption may be drawn too widely. Not everyone in receipt of benefits, allowances etc. under these Acts is unable to afford to pay for FOI access. Not all payments provided by the Acts are means and/or assets tested.

40. E.g. entitlement to possession of a (Pensioner) Health Benefit card might be an appropriate criterion by which to grant exemption from fees and charges.

19.58 Secondly, regulation 3 of the FOI (Fees and Charges) Regulations confers a discretion on an agency whether to impose charges upon FOI applicants. Government guidelines direct a charge should not be imposed where:

> . the documents to which access is sought are documents of a kind which are customarily made available free of charge ...
>
> . the levying of such a charge in a particular case would be inconsistent with existing practices in relation to making documents or information available on request. (Thus, if it is the practice of an agency to allow its clients access to its documents free of charge or at a nominal charge less than those fixed by the Regulations, that practice should continue).[41]

19.59 The Committee accepts that it would not be consistent with the object of FOI to charge in such cases. It may be that as recollections fade as to what was customarily made available without charge or what were the practices prior to the introduction of the FOI Act, some amendment to the wording of these guidelines will be required. The Government guidelines also state that

> charges should be imposed and a deposit collected in respect of every request under the Act. Sensible administration suggests, however, that where an applicant would obviously apply for and be granted remission under section 30 of the Act, no charge should be imposed. In these instances agencies and Ministers should exercise the discretion under section 29 and decide not to impose a charge. But it is emphasised that this course should be followed only in the clearest cases for remission - normally remission is a matter to be considered only when the applicant seeks it.[42]

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41. FOI Memorandum No. 29/1 (June 1985), para. 17.
42. FOI Memorandum No. 29/1 (June 1985), para. 19. See also FOI Memorandum No. 41 (revised, June 1985), paras. 6-7.

19.60 The Committee does not disagree with this. But it appears that a significant number of agencies ignore the last sentence of the quoted passage. Where requests are for personal documents, some agencies assume that applicants would apply for remission in each case, and that it would be appropriate in each case to grant that remission.

19.61 Applying this approach across the board simplifies an agency's administration of the FOI Act. However, one effect of adopting this approach is that applicants to whom charges apply and who could afford to pay the charges are not asked to pay. Instead the cost falls upon the taxpayers. The Committee regards this as unsatisfactory.

19.62 **The Committee recommends that the grounds for remission be altered so as to make it clear that the fact that documents relate to the applicant's personal affairs is not of itself sufficient reason for granting a remission automatically.**

19.63 However, the Committee recognises that, unless all discretion to waive charges is removed, agencies will be able to waive charges in particular cases or entire classes of cases. It would not be practical to remove all discretions.

19.64 The Committee regards any loss of revenue resulting from the unnecessary waiver of FOI charges as a matter for the Government. It merely draws attention to the fact that a significant number of applicants who could, consistently with FOI principles, be asked to pay charges are apparently not being notified of charges.

19.65 The Administrative Review Council raised the issue whether such a significant point as the grounds for discretionary waiver should be dealt with in the Act or Regulations, rather

than be left to administrative guidelines.[43] The Committee has a preference for having such matters dealt with in legislation as a matter of principle. This both permits parliamentary control, and facilitates public awareness.[44] Further, the Administrative Appeals Tribunal may not give due weight to the administrative guidelines.[45] However, in practice, no difficulties have arisen out of the guidelines. The Committee does not, therefore, recommend that the substance of these guidelines be put in legislative form.

Remission

19.66 Sub-section 30(3) provides for the basis upon which agencies may remit charges:

> Without limiting the matters which the agency or Minister may take into account for the purpose of determining whether or not to remit a charge under sub-section (2), the agency or Minister shall take into account-
>
> (a) whether the payment of the charge or of any part of the charge would cause financial hardship to the applicant or to a person on whose behalf the application was made;
>
> (b) whether the document to which the applicant seeks access relates to the personal affairs of the applicant or a person on whose behalf the application was made; and
>
> (c) whether the giving of access is in the general public interest or in the interest of a substantial section of the public.

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43. Submission from the Administrative Review Council, p. 59.
44. For comment on the balance between matters dealt with in guidelines and in the Regulations see Senate Standing Committee on Regulations and Ordinances, 73rd Report, p. 17 (December 1982) and 74th Report, pp. 9-10 (March 1984).
45. E.g., the discussion in Re Waterford and Attorney-General's Department (No. 2) (1986) 9 ALD 482, pp. 487-88.

19.67 Section 30A provides for remission of the application fee on the same basis as paragraphs 30(3)(a) to (c). However, these are the only grounds for remission. There is no equivalent in section 30A to the sub-section 30(3) formula, 'without limiting the matters' etc. As a result, there is wider scope for remission of charges than there is for remission of the application fee.

19.68 The Committee does not see any reason for this distinction.

19.69 **The Committee recommends that the wider sub-section 30(3) formula apply also to section 30A remission of application fees.**

19.70 The Committee supports the availability of remission on financial hardship grounds.[46] In 1985-86, two-thirds of applications for remission relied upon this ground alone.[47] Apparently no difficulties have arisen in determining whether 'financial hardship' exists in practice.

19.71 The Attorney-General Department's guidelines state that remission 'should be granted where the documents to which the applicant seeks access relate to the personal affairs of the applicant in the absence of other relevant countervailing factors'.[48] The only example given of a relevant factor is where the applicant has refused an offer of access outside the Act. Financial hardship cases aside, the Committee sees no reason why

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46. Cf. 1979 Report, para. 11.41.
47. FOI Annual Report 1985-86, p. 27.
48. FOI Memoranda No. 41 (revised, June 1985), para. 10.

the fact that documents relating to personal affairs are sought should give rise to what is in effect a presumption that fees and charges should not be payable.[49]

19.72 The Committee recognises that individuals should be able to discover and inspect information held by government about them. The ceilings proposed above should ensure that requests relating to this type of material will not incur excessive charges. A presumption that access should be free does not seem to be justified.

19.73 The Committee also supports the remission of charges where access is in the general public interest,[50] although applications for remission on this ground are relatively infrequent.[51] Arguments have been made that this ground of remission should be clarified.[52] It is suggested that working journalists should be entitled to the remission as a matter of course.[53] Alternatively, it has been argued that there should be presumption that journalists are not entitled to remission as a matter of course.[54] There has also been debate over whether parliamentarians should be entitled to remission as a matter of course.[55]

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49. Cf. submission from the Department of Foreign Affairs, p. 7 (Evidence, p. 1062); Evidence, pp. 936-39 (Australian Consumers' Association); p. 1175 (Administrative and Clerical Officers Association); p. 1205 (Department of Finance). Contrast the submissions of the Privacy Committee (NSW), pp. 4-5; and the Young Liberal Movement of Australia, p. 1.
50. Cf. 1979 Report, para. 11.42.
51. FOI Annual Report 1985-86, p. 27: 8% of remission applications relied solely on public interest grounds in 1985-86.
52. E.g. submissions from the Department of Foreign Affairs, p. 7 (Evidence, p. 1062); the Political Reference Service Ltd, p. 15 (Evidence, p. 965); the Department of Aviation, p. 2.
53. Evidence, pp. 285-290 ('The Age'), 318-19 (Mr R. Howells); submission from Mr Paul Chadwick, p. 4.
54. Submission from the Department of Transport, p. 5.
55. See for example the following comments made in the Parliament: House of Representatives, Hansard, 9 October 1985, pp. 1651-53 (N.A. Brown); Senate, Hansard, 13 November 1985, p. 2048 (Senator Missen), pp. 2052-53 (Senator G. Evans), p. 2060 (Senator Puplick).

19.74 Mr Lindsay Curtis, of the Attorney-General's Department, described the policy on remission for journalists:

> Our policy position, in line with the government policy, is that there is not automatic exclusion of journalists, and that we would ordinarily, I think, expect journalists to pay because, let us be frank, for the most part they are making requests on behalf of the papers which they represent. I think to that extent they may be distinguished, for example, from members of parliament who do not have commercial organisations behind them.[56]

19.75 The main points of the guideline with respect to grants of remissions to Parliamentarians are:

- requests on behalf of constituents to be treated for remission purposes as if made by the constituent directly;

- requests for material normally provided in answer to a Parliamentary Question and able to be provided within the workload limits normally applicable to answering Parliamentary Questions - remission to be granted;

- requests for information contained in a document which would normally be provided to the Member of Parliament in accordance with the Government Guidelines for Access by Individual Members of Parliament to Public Servants and Officers of Statutory Authorities - remission to be granted; and

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56. Evidence, p. 120. The Administrative Appeals Tribunal has rejected automatic waiver of fees for requests by journalists: see for example Re Fewster and Department of Prime Minister and Cabinet (17 December 1986) para. 13.

. all other requests to be referred to the Minister responsible for the agency or to be dealt with in accordance with any guidelines issued by that Minister.[57]

19.76 The Committee takes the view that the position with respect to remission for both journalists and members of Parliament is satisfactory. No change is recommended.

Review of agency decisions on remission of charges

19.77 The first step in collecting FOI charges is for the agency to decide that it will impose a charge in relation to a request. The applicant must be notified of this decision. Applicants may seek review of this decision in the same way as they may seek the review of decisions to refuse access, that is, by internal review,[58] and review by the Administrative Appeals Tribunal.[59]

19.78 Alternatively, the applicant may, in effect, concede liability and ask the agency to grant a remission under section 30 of some or all of the notified charges. No provision is made for internal review of the decision whether to remit charges. The Administrative Appeals Tribunal has no jurisdiction to review an agency's decision in respect of remission.[60]

19.79 In 1979, the Committee opposed the suggestion that the Administrative Appeals Tribunal should be able to review decisions to waive or reduce fees.[61] However, in its submission, the Administrative Review Council argued that, contrary to the Committee's apprehensions in 1979, experience has shown that the

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57. FOI Memorandum No. 41 (June 1985), para. 13.
58. FOI Act, s.54(1)(b).
59. FOI Act, s.55(1)(c).
60. Re Waterford and Attorney-General's Department (1985) 8 ALD 545; Re Howells and Australian Telecommunications Commission (5 February 1987).
61. 1979 Report, paras. 11.43-11.44.

Tribunal is unlikely to confuse the question of remission, where the status, motives, etc of the applicant are relevant, with questions of rights of access, where these matters are not relevant.[62]

19.80 The Committee notes that the sub-section 30(3) listing of criteria for the grant of remission reduces the prospect that irrelevant criteria may be taken into account. Similarly, in dealing with questions of awards of costs (s.66), the Administrative Appeals Tribunal is required to deal with matters which are analogous to those relevant to remission. Further, the Administrative Appeals Tribunal deals with similar matters in reviewing agencies' discretionary decisions to impose charges under section 29.

19.81 One factor which the Administrative Appeals Tribunal may consider when reviewing a section 29 decision to impose a charge is whether it would be administratively futile to impose a charge where the applicant would be likely both to seek and to be granted a remission under section 30.[63] In order to review section 29 decisions, the Administrative Appeals Tribunal must have regard to the criteria listed in sub-section 30(1), although the criteria governing section 29 decisions are theoretically distinct from the criteria governing remission decisions under section 30.

19.82 Administrative Appeals Tribunal Deputy President Hall has commented that the overlap between these two theoretically distinct sets of criteria 'may lead to possible confusion and may be wasteful of resources'.[64] He made the further point that

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62. Submission from the Administrative Review Council, pp. 51-57, esp. p. 57.
63. Re Waterford and Attorney-General's Department (No. 2) (1986) 9 ALD 482, p. 488; Re Bailey and Commonwealth Tertiary Education Commission (8 December 1986), para. 17(f).
64. Re Waterford and Attorney General's Department (1985) 8 ALD 545, p. 553.

> if there is to be a reviewable discretion at all in respect of the imposition of charges, there may be a question whether, in the light of experience gained since the time of the Senate Committee's deliberations, there is a need for more than one discretionary decision in that regard (cf the US FOI Act).[65]

19.83 The Committee does not object to the Administrative Appeals Tribunal reviewing agency decisions on the remission of charges. The ordinary FOI Act facilities of internal review and Administrative Appeals Tribunal review should be available in respect of decisions on remission of charges and application fees.

19.84 This conclusion leads to the further question whether decisions to remit charges (s.30) should be merged with decisions to impose those charges (s.29). The Committee recognises that it may be administratively less complex to have a single (reviewable) decision whether charges should be paid. However, this would require the consolidation of the two separate sets of criteria for the section 29 and section 30 decisions.

19.85 At present, the section 29 criteria focus upon matters which are largely within the knowledge of the agency. For example, whether the documents requested are of a type to which access is customarily provided free of charge. In general, these criteria may be applied in the absence of any expression of view or argument by the applicant. By contrast, to the extent that they are set out in the FOI Act, the remission criteria tend to focus upon matters which can be decided properly only after the applicant's views have been heard.

19.86 This is not an insurmountable bar to consolidating the decisions. It may be possible to require applications to contain any argument which the applicants might wish to make as why charges should not be payable in respect of their applications.

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65. Ibid.

This would require applicants to be aware that agencies had a discretion with respect to the imposition of charges, and to know the relevant criteria. This presupposes a knowledge which many applicants may lack.

19.87 Alternatively, agencies may be able to make only tentative decisions about the imposition of charges. Their decisions would become binding and charges payable only if, after being notified of the tentative decision and the criteria for not imposing/remitting the charges, applicants did not seek the variation of those decisions. It is possible that some refinement of detail would be necessary. However, the Committee considers that this approach would be workable.

19.88 In general, this approach would avoid the requirement that applicants should possess detailed knowledge about the FOI Act, whilst enabling agencies to consider all the relevant information before making any firm decision whether to waive charges. The criteria which should be taken into account in reaching this decision should be a combination of those relevant to section 29 and section 30, as was discussed above.

19.89 **The Committee recommends that the section 29 and section 30 decisions be consolidated.**

Deposits

19.90 'The Age' suggested that agencies should not be able to require the payment of deposits for charges which applicants are liable to pay.[66] Alternatively, some agencies advocated strengthening the ability to require payment of deposits as a precondition to processing requests.[67] In its submission, the Treasury stated that:

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66. Submission from 'The Age', p. 27 (Evidence, p. 212).
67. E.g. submission from Telecom Australia, p. 5 (Evidence, p. 753).

> Treasury experience indicates that charging a deposit before work commences reduces the incidence of frivolous requests ... Under the Regulations as they apply at the moment, however, it is not usually possible to seek a deposit.[68]

19.91 The Committee considers that the requirement that application fees should be payable in advance, introduced as part of the new charging regime which took effect in November 1986, will provide adequate deterrence in those situations where deposits cannot be required or are administratively difficult to impose. Accordingly, the Committee has not examined the Regulations relating to deposits in detail.

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68. Submission from the Department of Treasury, p. 9 (Evidence, p. 623). See also the submission from the Department of Local Government & Administrative Services, p. 11, on the difficulty of requiring a deposit under the current regulations.

CHAPTER 20

AAT AND FEDERAL COURT FILING FEES

20.1 The Administrative Appeals Tribunal Regulations (Amendment) 1987 imposed a fee of $200 payable on lodging an application for review by the Tribunal of, inter alia, most reviewable decisions made under the FOI Act. The fee has since been raised to $240. The fee does not apply to review of decisions relating to documents which in turn relate to decisions made under a series of named Acts, which (broadly) provide for income support. In addition, where 'the proceeding terminates in a manner favourable to the applicant', the fee is refunded.[1]

20.2 The Federal Court of Australia Regulations (Amendment) 1987 introduced a fee of $300 payable when lodging an appeal to the Court from a decision of the Tribunal. The fee has since been raised to $360. This fee, like all other Court filing fees, is not required to be paid by appellants in receipt of legal aid or where payment would impose substantial hardship.[2]

20.3 It is not possible to ascertain the impact of these fees on the volume of review applications from the available statistics.[3]

20.4 Questions which arise are whether, in principle, fees should be introduced; whether, if so, the amounts specified are appropriate; whether the circumstances in which fees are not payable are appropriate; and whether provision for refund is appropriate. The imposition of the fees affects many types of

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1. Administrative Appeals Tribunal Regulations, reg.20.
2. Federal Court of Australia Regulations, reg.2(4).
3. Cf. FOI Annual Report 1986-87, pp. 34-35. See also, third supplementary submission from the Attorney-General's Department, p. 2 (para. 5).

matters taken to, and all types of matters taken from, the Administrative Appeals Tribunal, not merely freedom of information matters.

20.5 As was noted in chapter 19 above, Senator Powell is of the view that there should be no fees imposed upon applications for review of FOI matters.

Need for a fee

20.6 According to the Attorney-General's Department, the decision to impose filing fees was one of a number of decisions taken during the 1986 Budget deliberations 'intended to reduce costs by achieving greater efficiency in the review of administrative decisions and by rationalising the availability and use of the various avenues of review and access to information.'[4] The Committee accepts that there should be some fee upon the lodging of applications with the Tribunal for the review of FOI decisions.

Size of the fee

20.7 The amount of $240 does not represent full cost recovery.[5]

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4. Submission from Attorney-General's Department in relation to the Administrative Decisions (Judicial Review) Amendment Bill 1986, p. 1. See also House of Representatives, Hansard, 8 October 1986, p. 1619 (Mr C. Hurford).
5. IDC Report, p. A21, estimated that the cost of providing a three-member Tribunal was $2095 per sitting day.

20.8 The fee payable for commencing a matter in other Commonwealth courts, with date of last increase in brackets, is as follows:

- High Court of Australia - $150 (1/11/86)[6]
- Federal Court of Australia - $240 (1/9/87)[7]
- Family Law Court of Australia - $240 (1/9/87)[8]
- ACT Supreme Court - $180 (1/5/87)[9]
- ACT Magistrates Court - $30 (24/3/87)[10]

20.9 It is not appropriate to impose the same filing fee upon applications for review lodged in the Administrative Appeals Tribunal and the Federal Court. To the extent that appeals from decisions of the Tribunal lie to the Federal Court, the Administrative Appeals Tribunal is inferior to the Federal Court. Further, the Administrative Appeals Tribunal is intended to provide cheap, speedy, and informal justice as compared with the Federal Court. It would seem to follow that the fees for lodging applications for review in the Tribunal should be significantly lower than the fees for initiating appeals in the Federal Court.[11]

20.10 Sub-section 44(3) of the Administrative Appeals Tribunal Act, confers upon the Federal Court jurisdiction to hear appeals from the Tribunal and provides

> that jurisdiction may be exercised by that Court constituted as a Full Court and shall be exercised by the Court so constituted if the

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6. SR 305 of 1986 amending High Court Rules, Third Schedule.
7. SR 171 of 1987 amending Federal Court of Australia Regulations, Schedule, Item 1.
8. SR 175 of 1987 amending Family Law Regulations, reg.11.
9. SR 55 of 1987 amending Australian Capital Territory Supreme Court (Fees) Regulations, Schedule.
10. ACT Regulation 2 of 1987 being Magistrates Court (Civil Jurisdiction) (Fees) Regulations, reg.2.
11. In both the Federal and Family Courts, the fees payable for filing appeals from a single judge to a full court are $360. In the High Court, the fee for filing a notice of appeal is $200.

> decision of the Tribunal was given by the Tribunal constituted by a presidential member or by members at least one of whom was a presidential member.

20.11 Where the matter is heard by a Full Court, it is appropriate that the same $360 fee should apply to appeals from the Administrative Appeals Tribunal as applies to appeals from a single judge of the Federal Court.

Exemption from liability to pay fees

20.12 The grounds for exemption from the liability to pay the $240 filing fee in the Administrative Appeals Tribunal are listed in sub-regulation 19(2) of the Administrative Appeals Tribunal Regulations by reference to decisions taken under a series of Commonwealth Acts.[12]

20.13 It is incongruous to confer upon the Administrative Appeals Tribunal no power to waive filing fees when such a power is possessed by the Federal Court exercising jurisdiction under the FOI Act.[13] This may have either of two consequences. A user who is unable to afford the $240 (or any other) filing fee may be denied access to justice. In turn, this may raise human rights/civil liberties issues, although this may be countered by the argument that the Administrative Appeals Tribunal is merely an administrative body and not a court. Alternatively, applicants will be required to pay the $240 filing fee to the Tribunal, and

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12. According to the Budget Statements 1986-87, p. 292, this exemption is intended to be confined to applications relating to personal income maintenance matters e.g. pensions and benefits.

13. E.g. High Court Rules, Order 72, Rule 12 confers on the High Court a general power to remit fees on public interest grounds - 'in a particular case for special reason'. For examples of narrower powers to remit, see the Federal Court of Australia Regulations, reg. 3(4); Family Law Regulations, reg.11(4); Australian Capital Territory Supreme Court (Fees) Regulations, reg.2(4); and Magistrates Court (Civil Jurisdiction) Ordinance 1982 (ACT), s.292(4).

then, on a further appeal from the Tribunal to the Federal Court, on the grounds of substantial hardship have the Court waive the $360 filing fee which is payable upon appeals from the Tribunal.

20.14 **The Committee recommends that the fee for lodging applications for review of FOI decisions with the Administrative Appeals Tribunal be less than that for filing documents to commence proceedings with the Federal Court.**

20.15 **The Committee recommends that a fee of $120 be payable for lodging with the Administrative Appeals Tribunal applications for review of FOI decisions.**

20.16 Senator Stone dissents from the recommendation contained in paragraph 20.15.

20.17 **The Committee further recommends that the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal be empowered to waive the payment of filing fees on the same general criteria as is the Registrar of the Federal Court, inter alia, where payment of the fee 'would impose substantial hardship' upon the applicant.**

Reverse-FOI

20.18 The sections of the FOI Act which govern reverse-FOI use the expression 'decision' (s.58F(1), s.59(1)). Since the fee regulations operate by reference to 'a decision other than a prescribed decision', they apply to reverse-FOI applicants,[14] unless specific exemption is made. Consequently, reverse-FOI applicants initiating reverse-FOI proceedings in the Administrative Appeals Tribunal will be required to pay filing fees.

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14. Administrative Appeals Tribunal Regulations, reg.19(1).

20.19 As was discussed earlier, the cost to information-providers of seeking to prevent access to 'their' documents should be minimal. The appropriateness of imposing filing fee upon reverse-FOI applicants depends upon the existence of provisions enabling them to recover their costs.

20.20 The Committee considers that its recommendations for the award of costs, combined with the possibility of the refund of the filing fee under Administrative Appeals Tribunal Regulations, regulation 20, will ensure that reverse-FOI applicants are not exposed to unreasonable expense in protecting 'their' documents. Accordingly, the Committee does not recommend that reverse-FOI applicants be exempted from filing fees.

'Proceeding terminates in a manner favourable to the applicant'

20.21 Regulation 20 of the Administrative Appeals Tribunal Regulations provides for the refund of the filing fee where 'the proceedings terminate in a manner favourable to the applicant'. Typical FOI applications to the Administrative Appeals Tribunal involve a number of documents and/or parts of documents to which access has been denied. It is common for access to be granted to one or more of these documents, or parts of documents, between the time at which Administrative Appeals Tribunal proceedings are initiated and the Tribunal's handing down of its decision.

20.22 In deciding whether to refund the $240 filing fee, either of two approaches could be adopted. The formal approach would be to refund the filing fee whenever any further access were to granted after the payment of the filing fee.[15] The

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15. The Committee notes that the following comment was contained in the Explanatory Memorandum accompanying the Taxation Laws Amendment Bill (No. 4) 1986 which imposed a $200 filing fee refundable, inter alia, when the proceedings 'terminate in a manner favourable to the applicant': 'the variation of a decision or the termination of proceedings in a manner favourable to a person will be taken to have occurred in circumstances where the objection decision is adjusted to any extent in favour of the person' (p. 100, emphasis added).

substantive approach would be to attempt to determine to which documents or parts of documents the applicant 'really' wanted to have access. Where, as commonly happens, additional access has been granted to purely formal parts of letters or, say, to the name of agency staff who made a particular report but not the part of the report to which the applicant 'really' sought access, no refund would be made. As is the case with awards of costs by courts, some attempt would be made to decide who had 'won' in substance.

20.23 It is not clear whether the section 66 test of the FOI Act will be relevant in this context. Nor is it clear why the regulation 20 provision for the refund of filing fees departs from the section 66 criteria.

20.24 Sub-section 66(1) of the FOI Act provides that the Administrative Appeals Tribunal may recommend the payment of costs were 'the person is successful, or substantially successful, in his application for review'. This provision has been considered in a number of Administrative Appeals Tribunal decisions.[16] The Tribunal has considered the quality (as well as the quantity) of the documents released and the applicant's 'stated purpose' as being relevant.[17]

20.25 The Committee regards this approach to the award of costs as appropriate, and considers that it should also apply with respect to the refund of filing fees.

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16. E.g. Re Lianos and Secretary, Department of Social Security (No. 2) (1985) 9 ALD 43, p. 46, Deputy President Hall: 'Substantially successful' depends upon how much information that was previously denied has been obtained as a result of the proceedings before the Tribunal. 'Success in this regard is not necessarily measured by the number of documents or the number of pages or words released. Information varies in quality ... In my view, therefore, there is both a quantitative and a qualitative element in evaluating the extent to which the applicant has "succceeded"...'.

17. E.g. Re Hillock and Aboriginal Development Commission (16 March 1987); Re Lordsvale Finance and Department of the Treasury (No. 4) (22 August 1986).

20.26 The Committee recommends that regulation 20 of the Administrative Appeals Tribunal Regulations be amended to replace the phrase 'proceeding terminates in a manner favourable to the applicant' with the same test as is applied in respect of the award of costs: where the applicant is 'successful or substantially successful' in the application for review.

Application withdrawn before being heard by Tribunal

20.27 The regulation of refunds of the filing fees in respect of freedom of information matters is complicated by the fact that agencies (but not the Tribunal) may release requested material ex gratia (FOI Act, s.14). It is not clear whether the ex gratia release of documents after the lodgement of an application for review by the Administrative Appeals Tribunal will result in a refund of the $240 filing fee.[18]

20.28 Where documents are released ex gratia, applicants are likely to withdraw their applications. In the Committee's view, such applicants should be entitled to the refund of their filing fees.

20.29 It is possibly only to conjecture about the effect which the possibility of fee refunds might have upon agency decisions to release material after proceedings have been commenced in the Administrative Appeals Tribunal. Agencies may be reluctant to concede on 'minor' points if they consider that they can sustain their exemption claim in respect of the documents or parts of the documents which they think are central to applicants' requests.

20.30 However, in the Committee's view, any agency reluctance to concede on 'minor' points, and thus to entitle applicants to

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18. The Committee notes that under s.66 of the FOI Act the Administrative Appeals Tribunal may recommend that costs be paid even though agencies have released material previously claimed to be exempt on an ex gratia basis rather than as the result of a decision of the AAT: Re Lianos and Secretary, Department of Social Security (No. 2) (1985) 9 ALD 43, pp. 45-46.

the refund of filing fees, will be off-set by the risk that the Tribunal may award costs against the agency in the event that the application is unsuccessful.

20.31 In the Committee's view, applicants should be entitled to the refund of the filing fee where they withdraw their applications before the preliminary conference, or as a result of conciliation efforts which form part of the preliminary conference, or at some later stage.

20.32 **The Committee recommends the Administrative Appeals Tribunal (Amendment) Regulations 1987 be amended to also empower the Registrar or a Deputy Registrar of the Administrative Appeals Tribunal to refund to the applicant the prescribed filing fee paid for the lodgment with the Tribunal of an application for review of an FOI decision where her/his application is withdrawn before the dispute is heard by the Tribunal.**

CHAPTER 21

STATISTICS

21.1 The 1986 amendments reduced the statutory reporting requirements to what the Government considered to be the minimum necessary in order to monitor the general operation of the Act.[1] Agencies are now specifically required to report upon the following matters:

- number of section 19 access requests
- number of requests for which access was granted in whole, in part, or not at all
- number of applications for internal review and for AAT review, with results in each category
- details of charges and fees collected
- number of requests to amend personal records, with results
- identification of guidelines on FOI issued to agencies by the Attorney-General's Department
- description of any other efforts by that Department to assist agencies to comply with their FOI obligations

21.2 These are minimum requirements. The Government intends to keep further information. Senator Gareth Evans, on behalf of the Government, informed the Senate that:

> There is a desire, as there has been in the past, to keep the maximum amount of information about the way the system is working and the costs that are being incurred in relation to it and I give ... [the] assurance that that objective will continue. Implicit within the collection of such data is, obviously, continued close supervision by the Attorney-General's Department of the way in which the system is being administered by

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1. Senate, Hansard, 23 September 1986, p. 805 (Senator Grimes).

> the other agencies and that implies a degree of discipline over the way in which the system is being operated.[2]

21.3 Mr. Paul Chadwick suggested to the Committee that:

> Easing the scrutiny of how agencies are applying the FOI Act would encourage those who obstruct it. Early warning of abuse or of legitimate problems in administering the act will cease ...[3]

21.4 In the Committee's view, this does not justify retaining the costly statistical reporting system which prevailed prior to the 1986 amendments. The FOI Act has been in operation for more than four years, and has now been the subject of two extensive reviews: one by this Committee, and one by the Inter-Departmental Committee which examined the costs of the operation of the freedom of information legislation on behalf of the Government. Consequently, the Committee considers that the cost of detailed reporting cannot be justified in the future.

21.5 Accordingly, the Committee endorses the 1986 reduction in the scope of compulsory reporting. In so doing, the Committee relies upon the undertaking given by Senator Evans on behalf of the Government that the Attorney-General's Department will continue to scrutinise and supervise the operation of the Act. In particular, the Committee notes that information about the costs of freedom of information will continue to be collected and made available to the Parliament.[4] The Committee would oppose the abandonment of this reporting.

21.6 Mr Paul Chadwick also criticised the 1986 amendment which introduced and defined 'partial access' for statistical purposes. The effect of the definition (s.93(3A)) is that partial

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2. Senate, Hansard, 15 October 1986, p. 1365.
3. Submission from Mr Paul Chadwick, p. 6.
4. Cf. FOI Annual Report 1986-87, p. 51.

access may be recorded as having been granted where only a very small proportion of the material requested has been released. This may tend to distort the statistics about the operation of the Act.[5] Equally, partial access may be recorded where only insignificant (from the applicant's point of view) documents are withheld or deletions are made. The Committee acknowledges that this may occur.

21.7 While the total figures for the grant of access or denial of access may be taken to indicate the degree to which access-seekers have been satisfied, the figure for partial access is ambiguous. The Committee does not know of any economical way in which to render the reporting of partial access less ambiguous.

21.8 Any attempt to refine the category of partial access by reference to the quantity of material withheld as a proportion of that requested would ignore the fact that quality rather than quantity may be important to many access-seekers. Alternatively, the quality of the material released may be assessed only by reference to the applicant's motive.

21.9 Quite apart from the practical difficulty of determining motives, **the Committee recommends that agencies not have regard to the motives of access-seekers for statistical or any other purposes.**

21.10 Senator Stone endorses this recommendation only insofar as it precludes the consideration of motives for statistical purposes.

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5. Submission from Mr Paul Chadwick, p. 6.

CHAPTER 22

PUBLICITY

22.1 The sections 8 and 9 publication requirements were revised by the 1986 amendments to the FOI Act. Most submissions on this reference had been received before the 1986 amendments were proposed, and consequently did not address the revised sections 8 and 9 publication requirements.

Section 8 material

22.2 The 1986 amendments did not affect the scope of the material required to be published by section 8 concerning functions and documents of agencies. The 1986 amendment to section 8 altered only the method of publication.

22.3 The Committee endorses the 1986 amendment which introduced the requirement that section 8 material be included in agencies' annual reports, or, in the case of agencies which do not issue annual reports, in the annual reports issued by the parent departments. The Committee notes that the IDC Report contains an extensive discussion of the savings in costs which will flow from this method of publication.[1]

22.4 The Committee does not regard incorporation of section 8 material into annual reports as being inferior to independent publication.[2] The Committee recognises that, in whatever form this material is published, there is unlikely to be hard evidence that the benefits of publication outweigh the costs. This is true of much of the information published by government.

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1. IDC Report, Attachment B.
2. But contra: submission from Mr Paul Chadwick, p. 1.

22.5 The quantities of annual reports printed for sale and free distribution vary as between agencies. As a broad generalisation, the quantity for free distribution is considerably larger and the quantity for sale smaller than the corresponding copies of the section 8 statements as part of the Commonwealth Government Directory. While the pattern of distribution may vary, the Committee does not consider that, in general, agency annual reports are any less widely available than are the parts of the Directory.

22.6 The section 8 statements in the Commonwealth Government Directory were published on a portfolio basis, not agency by agency. Most agencies of any significant size or consequence issue annual reports. One beneficial effect of the 1986 amendment to section 8 is to reduce the occasions on which people seeking information about agencies need to discover the identity of the umbrella department.

22.7 Incorporating the section 8 material may alter the emphasis in annual reports in that the reporting of annual statistics and events affecting agencies during the year may be balanced by the presence of increased material about the structure of the agencies.[3] The Committee considers that this may be desirable, provided the quality and quantity of information about annual statistics and the like is not reduced.[4]

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3. The Committee is aware that concern has been expressed by the Joint Committee on Publications on the increasing size of annual reports in its Review of the Cost and Distribution of the Parliamentary Paper Series (1986) pp. 10-15. But the concern is directed at inclusion of promotional material, rather than section 8 type material.

4. The Committee notes Recommendation No. 6 in Report No. 262 of the Joint Committee on Public Accounts, Guidelines for Annual Reports, (1986) and the recommendation of Joint Committee on Publications on p. 14 of its report, Review of the Cost and Distribution of the Parliamentary Paper Series (1986) that Government guidelines on the content and production of annual reports contain reference to the requirements of FOI Act, s.8.

Section 9 material

22.8 Section 9 requires each agency to make available two categories of material. The first comprises the pre-existing documents which make up the 'internal law' which each agency applies in its decision-making. This includes the manuals, guidelines, precedents, administration and enforcement procedures, etc. by which the agency administers legislation, and which are not otherwise published. The second category is a statement or index indicating where copies of the first category of documents may be inspected or purchased. Each agency is required to create a statement or index and keep it up to date.

22.9 The Inter-Departmental Committee Report noted that:

> Some agencies have found that the s.9 requirement has great advantages for the efficiency of their internal management and has generally improved their administration. The production of an index along the lines of that required by s.9 is now viewed as good administration, although other formats may be preferred. Similar indexes may be maintained by some agencies even if the FOI s.9 requirement were abolished.[5]

22.10 The Committee does not consider that the costs of preparing and updating section 9 statements should be large.[6] Most of the material in these statements is already on in-house

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5. IDC Report, p. B5.

6. The Inter-Departmental Committee estimated the 1984-85 salary and overhead costs of preparing and publishing section 9 indices was about $1m. (p. B3) No estimate was made of other costs involved. However, even apart from this omission, the Committee is not convinced that this is an accurate indication of the true on-going staff costs of publishing section 9 indices. The estimate derives from a sample survey of selected agencies and relies upon 1984-85 figures. Of the 25 agencies responding, one (Department of Social Security) accounted for 11 staff-years out of the total of 22.75 reported (p. A10). The next highest totals reported were 4.30 staff-years (Tax) and 4.16 (Territories). These seem high when compared to the totals for other departments such as Employment and Industrial Relations (0.72, fourth highest), Veterans Affairs (0.46), Aviation (0.40), Industry, Technology and Commerce (0.25) and Attorney-General's (0.06).

computer systems and is (or should be) automatically amended as relevant files are created or closed. Even where the statements are very detailed (as is the case with the Department of Social Security and the Australian Taxation Office), the cost of preparation should be small. As files are opened, or manuals created etc., it is necessary only to flag them on the agency computer index of files as files which should be identified for section 9 purposes. A list of flagged items may then readily be printed with little difficulty. Once the filing system has been established along such lines the annual costs of generating section 9 statements should be minimal.

22.11 Accepting this as the case, the Committee is of the view that section 9 statements should continue to be produced and kept up to date.

22.12 The 1986 amendment to sub-section 9(2) removed the requirement of publication in the Gazette, and replaced it with a requirement that these statements or indices made available for inspection and purchase at each Information Access Office. (See above on these Offices).

22.13 The Committee endorses this amendment, subject to the earlier noted reservations about the value of the Information Access Offices. Equally, the Committee would not object to a system in which statements were made available at agency offices upon request. Submissions from agencies generally supported this system,[7] and a similar system applies under the Victorian Freedom of Information Act.[8]

Other proposed publication requirements

22.14 The Committee received few suggestions for the mandatory

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7. E.g. submission from the Department of Arts, Heritage & Environment p. 6.
8. See also the IDC Report, p. B11.

publication of additional categories of information. The Victorian Freedom of Information Act, section 10, requires the publication of a register of Cabinet decisions containing details about each decision, its reference number and the date on which it was made. 'The Age' recommended that a similar register should be published by the Federal Government, but without any provision for discretion to omit particular decisions.[9]

22.15 The Committee does not support any proposal for the establishment of a public register of Cabinet decisions. If there were to be such a register established, it would be essential to incorporate into the register a mechanism by which to omit references to sensitive decisions (for example, on impending tax rate changes). A partial register might convey a misleading impression of Cabinet activity.

22.16 Another suggestion[10] also drew upon the Victorian Freedom of Information Act - publication of detailed lists of the types of documents which are required to be included in the indices which agencies are required to publish.[11] The Committee does not support this proposal. In the Committee's view, it is sufficient that, upon request, such material may be made available under the FOI Act.

22.17 One user suggested that, 'in the spirit of openness which the Act represents', a public register should be established to record the details of all freedom of information

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9. Submission from 'The Age', p. 12 (Evidence, p. 197). The recommendation draws upon the views of the minority report of the Coombs Royal Commission into Australian Government Administration of 1976, although that report recommended that the Prime Minister should have a discretion whether to enter details of a decision in the register. [RCAGA, Appendix, vol 2, p. 17].

10. Submission from 'The Age' p. 11; (Evidence, p. 196); submission from the Law Institute of Victoria, p. 7 (Evidence, p. 380).

11. E.g. reports by inter-departmental committees, committees and sub-units within agencies, and experts of various kinds, whether agency staff or outsiders. The range of experts includes management, scientific, technical, environmental and valuation experts. This would exclude pre-decisional documents and internal working documents.

access requests including name of requesters, dates of requests, and brief descriptions of documents to which access was sought.[12] The Political Reference Service Ltd suggested that the public availability of this data

> would provide readily accessible information about the use of FOI procedures. It might also allay to some extent continuing concerns, for example in the business community about the possibility of error or oversight in the administration of the reverse FOI procedures.[13]

22.18 A public register of this type would raise significant privacy issues. Questions have been raised in Parliament, but not resolved, on whether it is proper for Ministers to reveal details about FOI requests made by private citizens (including the requester's identity) to the Parliament.[14]

22.19 A public register of freedom of information requesters may assist agencies to co-ordinate their responses where a requester makes essentially similar access requests to a number of agencies. But this is speculative, and agencies did not suggest or support the idea of a public register in the evidence to the Committee.

22.20 The Committee does not support the suggestion of a public register of freedom of information access requests. In particular, the Committee is concerned about the possibility of invasions of privacy and the uncertainty as to any benefits which might flow from the establishment of the register.

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12. Apparently some agencies maintain and (internally) circulate this information informally. Submission from the Political Reference Service Ltd, p. 11 (Evidence, p. 961).

13. Submission from the Political Reference Service Ltd, p. 11 (Evidence, p. 961).

14. House of Representatives, Hansard, 28 February 1985, pp. 385 (N.A. Brown) and 447 (Speaker). See also the submission from the Business Council of Australia, p. 6 (Evidence, p. 776). (Opposed the disclosure of the identities of businesses opposing access in the reverse-FOI context).

FOI Handbook and other publicity measures

22.21 It is not certain how far publicity about the FOI Act has penetrated.[15] A sample survey, reported in the Attorney-General's FOI Annual Report 1983-84, pp. 106-7, found that only 38% of interviewees had heard of the FOI Act. More recent data is not available. It was suggested to the Committee that further efforts to publicise FOI are desirable.[16]

22.22 The Committee recognises that more can always be done to publicise a government program: even highly expensive publicity which aims to saturate will not reach all its intended audience. However, the Committee considers that adequate steps have been taken to publicise the FOI Act.

22.23 The Committee does not envisage any major publicity campaign on freedom of information. But the Committee is concerned lest the Government direction against further publicity should inhibit minor but useful publicity measures either by the Government as a whole or by individual agencies.

22.24 The Committee does not think that there is sufficient justification for producing an FOI Handbook. Non-government publishers have supplied many of the needs intended to be met by

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15. Submission from the Attorney-General's Department, p. 7 (Evidence, p. 12). For an example of the types of publicity, see ibid., pp. 69-70 (Evidence, pp. 74-75); FOI Annual Report 1984-85, pp. 108-110. In 1985, a page of information on freedom of information was added to the Community Information pages of telephone directories. In addition, a number of individuals and non-governmental organisations have provided publicity about freedom of information.

16. E.g. Evidence, p. 444 (Confederation of Australian Industry); submissions from the Australian Pensioners' Association, p. 4; the Library Association of Australia, p. 10.

the Handbook. The Committee notes that, according to the 1986-87 FOI Annual Report, the Attorney-General's Department plans to produce a revised edition of the Freedom of Information 'Guidelines' book as resources permit.[17]

Nick Bolkus
Chairman

The Senate
Parliament House
Canberra

December 1987

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17. FOI Annual Report 1986-87, p. 49. The individual guidelines are aimed more towards agencies than they are to the general public. Since the book was published in 1982, updates and new guidelines have become available in loose-leaf form.

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS WHO MADE WRITTEN SUBMISSIONS TO THE COMMITTEE

ABORIGINAL DEVELOPMENT COMMISSION	Canberra, ACT
ADMINISTRATIVE REVIEW COUNCIL	Canberra, ACT
'THE AGE'	Melbourne, Vic
AGRICULTURAL AND VETERINARY CHEMICALS ASSOCIATION OF AUSTRALIA	Sydney, NSW
ALCOA OF AUSTRALIA LIMITED	Melbourne, Vic
ARDAGH, Dr A.	Wagga Wagga, NSW
ARTS, HERITAGE AND ENVIRONMENT, DEPARTMENT OF	Canberra, ACT
ATTORNEY-GENERAL'S DEPARTMENT (4 submissions)	Canberra, ACT
AUSTRALIA COUNCIL	North Sydney, NSW
AUSTRALIAN BRITISH CHAMBER OF COMMERCE	Canberra, ACT
AUSTRALIAN BROADCASTING TRIBUNAL (2 submissions)	North Sydney, NSW
AUSTRALIAN CHEMICAL INDUSTRY COUNCIL	Melbourne, Vic
AUSTRALIAN CONSUMERS' ASSOCIATION, THE INTER AGENCY MIGRATION GROUP, THE PUBLIC INTEREST ADVOCACY CENTRE, and THE WELFARE RIGHTS CENTRE (SYDNEY)	Sydney, NSW
AUSTRALIAN CUSTOMS SERVICE	Canberra, ACT
AUSTRALIAN FEDERAL POLICE	Canberra, ACT
AUSTRALIAN GOVERNMENT SENIOR EXECUTIVES ASSOCIATION VICTORIAN BRANCH	Melbourne, Vic
AUSTRALIAN HERITAGE COMMISSION	Canberra, ACT
AUSTRALIAN INSTITUTE OF CRIMINOLOGY	Canberra, ACT
AUSTRALIAN LAW REFORM COMMISSION	Sydney, NSW

AUSTRALIAN MEDICAL ASSOCIATION	Glebe, NSW
AUSTRALIAN NATIONAL PARKS AND WILDLIFE SERVICE	Canberra, ACT
AUSTRALIAN NATIONAL RAILWAYS COMMISSION	Keswick, SA
AUSTRALIAN NATIONAL UNIVERSITY	Canberra, ACT
AUSTRALIAN PATENTS, TRADE MARKS AND DESIGNS OFFICES	Canberra, ACT
AUSTRALIAN PENSIONERS' FEDERATION	Newcastle, NSW
AUSTRALIAN TAXATION OFFICE (2 submissions)	Canberra, ACT
AUSTRALIAN WOOL CORPORATION	Melbourne, VIC
AUSTRALIANS FOR ANIMALS	Paddington, NSW
AUSTRALIANS FOR RACIAL EQUALITY	Sydney South, NSW
AVIATION, DEPARTMENT OF	Canberra, ACT
BERRY, Mr J.	Duncraig, WA
BUEGGE, Mrs M.	Bruce Rock, WA
BUSINESS COUNCIL OF AUSTRALIA	Melbourne, Vic
CHADWICK, Mr P.	Melbourne, Vic
COMMONWEALTH BANK OFFICERS' ASSOCIATION	Sydney, NSW
COMMONWEALTH OMBUDSMAN (2 submissions)	Canberra, ACT
COMMUNICATIONS, DEPARTMENT OF	Canberra, ACT
COMMUNITY SERVICES, DEPARTMENT OF	Canberra, ACT
CONFEDERATION OF AUSTRALIAN INDUSTRY	Canberra, ACT
CRA LIMITED	Melbourne, Vic
CRAMB CORPORATE SERVICES	Canberra, ACT
CULLEN, Mr P. (2 submissions)	Canberra, ACT
DAVIES, Justice J.D.	Canberra, ACT
DEFENCE, DEPARTMENT OF	Canberra, ACT
DOOHAN, Mr J.W.	Willagee, WA

EDUCATION, DEPARTMENT OF	Canberra, ACT
EMPLOYMENT AND INDUSTRIAL RELATIONS, DEPARTMENT OF	Canberra, ACT
FEDERATION OF ETHNIC COMMUNITIES' COUNCILS OF AUSTRALIA INC.	Sydney, NSW
FINANCE, DEPARTMENT OF	Canberra, ACT
FOREIGN AFFAIRS, DEPARTMENT OF	Canberra, ACT
FOREIGN AFFAIRS, MINISTER OF	Canberra, ACT
FRANKEL, Mr P.	Caulfield South, Vic
GREAT BARRIER REEF MARINE PARK AUTHORITY	Townsville, Qld
GREENLEAF, Mr G.	Kensington, NSW
GRICE, Mr B.F.	Red Hill, Qld
GRIFFITH, Dr G.	Canberra, ACT
HEALTH, DEPARTMENT OF (2 submissions)	Canberra, ACT
HERMANN, Mr A.	East Brighton, Vic
HOUSING AND CONSTRUCTION, DEPARTMENT OF	Canberra, ACT
HOWELLS, Mr R.F. (3 submissions)	Nunawading, Vic
IMMIGRATION AND ETHNIC AFFAIRS, DEPARTMENT OF	Canberra, ACT
INSTITUTE OF PATENT ATTORNEYS OF AUSTRALIA	Melbourne, Vic
INTER-AGENCY CONSULTIVE COMMITTEE	Canberra, ACT
KIRBY, Justice M.D.	Sydney, NSW
LAW INSTITUTE OF VICTORIA (2 submissions)	Melbourne, Vic
LAW SOCIETY OF NEW SOUTH WALES	Sydney, NSW
LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY	Canberra, ACT
LIBRARY ASSOCIATION OF AUSTRALIA	Ultimo, NSW

LOCAL GOVERNMENT AND ADMINISTRATIVE SERVICES, DEPARTMENT OF (3 submissions)	Canberra, ACT
LOCAL GOVERNMENT AND ADMINISTRATIVE SERVICES, MINISTER OF	Canberra, ACT
McCORMACK, Dr G.	Melbourne, Vic
MANWELL, Prof. C.	Adelaide, SA
MARTIN, Mr P.V.	Sydney, NSW
MASON-COX, Mr J.G.	Wagga Wagga, NSW
MOCNIK, Mr C.H.	Darwin, NT
MOORE, Mr J.	Somerton Park, SA
OZOLS, Mr G.	Canberra, ACT
PETERS, Dr F.E. (2 submissions)	Canberra, ACT
POLITICAL REFERENCE SERVICE PTY. LTD. (2 submissions)	Canberra, ACT
POTTER, Mr K.	South Oakleigh, Vic
PRICES SURVEILLANCE AUTHORITY	Sydney, NSW
PRIMARY INDUSTRY, DEPARTMENT OF	Canberra, ACT
PRIVACY COMMITTEE (NSW)	Sydney, NSW
PUBLIC SERVICE BOARD	Canberra, ACT
QUEENSLAND GOVERNMENT (2 submissions)	Brisbane, Qld
RESERVE BANK OF AUSTRALIA	Sydney, NSW
RESOURCES AND ENERGY, DEPARTMENT OF	Canberra, ACT
RETURNED SERVICES LEAGUE OF AUSTRALIA	Canberra, ACT
SIMPSON, Mr D.R.	Sydney, NSW
SPECIAL MINISTER OF STATE, DEPARTMENT OF	Canberra, ACT
SPORT, RECREATION AND TOURISM, MINISTER OF	Canberra, ACT
TELECOM AUSTRALIA	Melbourne, Vic
TELFER, Mr B.	Coffs Harbour, NSW
TERRITORIES, DEPARTMENT OF	Canberra, ACT

TRADE, DEPARTMENT OF	Canberra, ACT
TRANSPORT, DEPARTMENT OF	Canberra, ACT
TREASURY, DEPARTMENT OF THE (2 submissions)	Canberra, ACT
VETERANS' AFFAIRS, DEPARTMENT OF	Canberra, ACT
WISEMAN, Mr J. (4 submissions)	Hawthorn, Vic
YOUNG LIBERAL MOVEMENT OF AUSTRALIA	Canberra, ACT

APPENDIX II

WITNESSES WHO APPEARED AT PUBLIC HEARINGS

Administrative and Clerical Officers Association

Mr J. Pearce

'The Age'

Mr M. Smith, Assistant Editor
Miss M.J. Simons, Journalist Specialising in Freedom of Information

Alcoa of Australia Limited

Mr L.L. McClintock, Assistant Company Secretary

Attorney-General's Department

Mr L.J. Curtis, Deputy Secretary
Dr R.A.I. Bell, Senior Assistant Secretary, Freedom of Information Branch
Mr P.M. Ford, Special Adviser, Level 2, attached to the Freedom of Information Branch
Mr W.A.B. Wells, Principal Legal Officer, Freedom of Information Branch

Australian Broadcasting Tribunal

Mr L.T. Grey, Principal Executive Officer (Legislation)
Miss C.T. Sabadine, Head of Secretariat (FOI Co-ordinator)

Australian Consumers' Association

Ms P.J. Smith, Manager

Australian Federal Police

Inspector R.H. Saunders

Australian National University

Prof. I.G. Ross, Deputy Vice-Chancellor.
Dr R.V. Dubs, Registrar

Australian Taxation Office

Mr R.L. Conwell, First Assistant Commissioner
Mr J.M. McCarthy, Acting Assistant Commissioner
Mr T.J. Nairn, Executive Officer (Freedom of Information)

Business Council of Australia

Mr G.D. Allen, Executive Director
Mr J.P. Warner, Solicitor

Commonwealth Ombudsman

Mr C.T. Hunt, Deputy Commonwealth Ombudsman for Freedom of Information Matters
Mr G.K. Kolts, Q.C. Commonwealth Ombudsman

Confederation of Australian Industry

Mr R.C. Gardini, General Counsel

CRA Limited

Mr J.L. Armstrong, Managing Director, Group Professional Services
Mr G.E. Littlewood, General Manager, Corporate Relations
Ms S. Lo, Associate Counsel

Davies, Justice J.D., President, Administrative Appeals Tribunal

Finance, Department of

Miss D. Bates, Director, Resource Policies and Management Branch
Mr J. Galloway, Assistant Secretary, Resource Policies and Management Branch
Mr M. Keogh, Acting Assistant Secretary, Public Administration and Accounting Development Branch
Mr B. Thornton, Assistant Secretary, Staff Budgeting Branch
Mr D. Wallace, Acting First Assistant Secretary, Financial Management and Accounting Policy Division

Foreign Affairs, Department of

Mr J.H. Brook, First Assistant Secretary, Legal and Consular Division
Mr J.G. Fennessy, Acting Head, Freedom of Information Section
Mr P.E. Fergus, Head, Administrative Law Section, Legal and Consular Division

Health, Department of

Mrs M.G. Deane, Acting Director, Administrative Law Section
Dr G.J. Murphy, Assistant Secretary, Food and Environmental Protection Branch
Mr M.J. Roche, First Assistant Secretary, Corporate Resources
Mr W.T.L. Taylor, Assistant Secretary, Hospitals and Insurance Branch

Mr A. Hermann

Mr R. F. Howells

Immigration Advice and Rights Centre (formerly Inter Agency Migration Group)

Ms D. Muirhead

Immigration and Ethnic Affairs, Department of

Mr W.A. McKinnon, Secretary
Mr A.E.F. Metcalfe, Director, Advisings Section, Legal Branch
Mr B.L. Smith, Director, International Movement Control

Law Institute of Victoria

Mr M.J. Clothier, Member, Administrative Law Committee
Mr E.J. Kyrou, Member, Administrative Law Committee

Dr F. E. Peters

Political Reference Servcice Pty. Ltd.

Mr P.G. Timmins, Managing Director

Public Interest Advocacy Centre

Ms K. Harrison

Public Service Board

Mr W. Baxter, Acting Assistant Director, Ethics and Public Administration Section
Mr M.C.B. Bonsey, Assistant Commissioner, Legislation and General Branch
Ms M-A. Henderson, Director, Ethics and Public Administration Section
Dr P. Wilenski, Chairman

Mr H. M. Selby

Telecom Australia

Mr B.W. Byrnes, Manager, Special Projects and Freedom of Information
Mr M. P. Pickering, Acting Manager, Freedom of Information and Special Projects

Treasury, Department of the

Mr E.A. Evans, Deputy Secretary, Development and Taxation
Mr J. Hanks, Chief Finance Officer
Mr F.G.H. Pooley, First Assistant Secretary
Ms L. Toohey, Freedom of Information Liaison Officer

Veterans' Affairs, Department of

Mr E. Attridge, First Assistant Secretary, Legal Services Division
Mr P.L. Cowan, Officer, Freedom of Information Section
Mr P. James, Director, Freedom of Information Section
Mr D. Volker, Secretary.

Welfare Rights Centre

Ms G. Moon, formerly Principal Solicitor

APPENDIX III

MAJOR PARALLEL PROVISIONS IN FOI ACT AND ARCHIVES ACT AFFECTED BY COMMITTEE RECOMMENDATIONS

FOI Act	Archives Act	Recommendation No.	Topic
s.33	34	63,64	Reporting of issue of conclusive certificates
s.43	s.33(1)(j)	83	Professional affairs
s.45	s.33(1)(d)	85	Breach of confidence
s.58A(3)	s.45(3)	65	Notices of non-revocation of conclusive certificates
s.58B	s.46	66	Constitution of Administrative Appeals Tribunal in conclusive certificate cases
s.58C	s.47	107	Conclusive certificate hearing before the Administrative Appeals Tribunal
s.64	s.53	108	Production of exempt documents to the Administrative Appeals Tribunal
-	s.34(4)	67	Duration of conclusive certificates

APPENDIX IV

DISCREPANCIES IN REPORTING OF FOI COSTS

Department of Finance

The Department of Finance's Annual Report 1984-85 stated:

> The cost of Freedom of Information to the Department during the year was assessed as $123,610. This cost was assessed in accordance with guidelines issued by the Attorney-General's Department and takes account of overheads. The overheads percentage used was calculated in accordance with the formula contained in Volume 4 of the Personnel Management Manual.[1]

The 1984-85 FOI Annual Report 1984-85 at page 327 listed the total cost to the Department of Finance for that year as being $65,630 made up of salary costs (including 88% overheads) of $63,830 and non-labour costs of $1800.[2] When the Committee raised the discrepancy with the Department at a public hearing, the explanation offered was that the difference resulted from differing methods of calculating overheads.[3]

A more detailed explanation was later supplied by the Department of Finance in a letter to the Committee dated 9 September 1986:

> In calculating the costs, the Attorney-General's Department obtained from Finance an estimate of the staff years the latter had expended on FOI within three groups, viz FOI staff, decision makers and support staff. The cost calculations were done by the Attorney-General's Department on the basis that the staff years were multiplied by an average salary for each group and 88% added to the total for on costs. The same average

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1. P. 63.
2. See similarly the figures for 1986-87: the Department of Finance Annual Report 1986-87, p. 127, gives the total cost of FOI as $43,496; but the FOI Annual Report 1986-87, p. 112, lists the total cost as $38,952.
3. Evidence, pp. 1198-99.

> salaries were applied to all agencies and thus did not reflect actual salary expenditure within individual agencies.
>
> The figure shown in the Finance annual report more accurately represents the salary costs for FOI in the Department. Actual salaries for each group were used rather than generalised averages and the calculation of the percentage on costs to be applied gave rise to a figure of 113.5%, primarily because of a higher incidence of computer services costs than that used in the example formula.

The Committee accepts that where a Department uses actual salaries it will not arrive at totals identical to those of the FOI Annual Reports, which use averages for salaries.[4] But the Committee would expect the differences to be small if the average salary levels used to produce FOI Annual Report totals have been chosen carefully.

Yet, after allowing for the use of 113.5% rather than 88% to calculate on-costs, the actual salaries of those Department of Finance officers engaged in FOI duties must have been nearly 60% higher than the agency-wide averages used by the Attorney-General's Department to translate staff-hours as supplied by agencies into the dollar costs shown in the FOI Annual Reports. If these averages understate the actual salaries to this extent across all agencies, the staff cost of FOI, reported in the 1984-85 FOI Annual Report, page 328, as being $18,441,299, is only about 60% of the actual cost.

There is some reason to suggest that the Department of Finance is atypical in that it uses more senior staff to process FOI requests than the agency-wide average. According to the 1984-85 FOI Annual Report 1984-85, Appendix E, the Department of Finance is one of only a few agencies where the authority to grant access and the authority to refuse access is confined to senior executive service level.

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4. The FOI Annual Reports warn that this may occur: e.g. 1984-85 Report, p. 126.

The averages used in 1984-85 to produce the FOI Annual Report costs assume staff time spent on FOI falls into one of three groups, to each of which an average is assigned:

. officers working wholly or partially on FOI	$25,800
. principal officers and their advisers	$35,400
. support staff	$14,800[5]

The average used for principal officers is below the salary level that applies at the lower end of the senior executive service scale.

The Committee does not consider that the averages used are only about 60% of the actual salary costs of all agencies. For the many agencies where FOI decision-making is done by junior and middle level officers, the averages are probably close to actual staff costs.

Nevertheless, the examination of the difference in reported costs did underline the fact that averages, not actual case-by-case costs, form the basis of the totals in the FOI Annual Reports. Whilst this need not necessarily lead to any large mis-statement of the actual costs, it is a reason to be cautious in using the figures in those Reports in any precise way.

Australian Broadcasting Tribunal

The Australian Broadcasting Tribunal's Annual Report 1984-85, page 28, stated that the 'total cost to the Tribunal for freedom of information activities in the [reporting] period was about $16,000'. The ABT's total costs are shown as $32,983 in the FOI Annual Report 1984-85. This is made up of $25,666 salary cost + 88% overheads and $7317 for non-labour costs. In the respective 1983-84 Reports, the totals given are $21,500 and $31,253.

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5. FOI Annual Report 1984-85, p. 126.

The Australian Broadcasting Tribunal provided the Committee with an explanation of the discrepancy. In part, it arose from the Australian Broadcasting Tribunal's use of the actual salary levels of staff involved in FOI work. The FOI Annual Report figure was derived by multiplying staff hours (as supplied by the agency) by an average salary. In part, it arose because the Australian Broadcasting Tribunal added 85% to salary totals to reflect overheads, while the FOI Annual Report added 88%. According to the Australian Broadcasting Tribunal:

> However, the discrepancies in the 1984-85 figures were principally caused by arithmetic errors made by both the Tribunal and A-G's. The Tribunal's original estimate of its salary costs was $8,607-87, to which was added 85% on-costs of $7,316-69, giving a total of $15,924-56. On rechecking we have discovered that the salary cost for the hours reported should have been $12,907-98. With the 85% on-costs added, the total should have been $23,879-76. Using its own formula, A-G's estimated the Tribunal's costs, including salaries and 88% on-costs, at $25,666. This figure is comparable with the Tribunal's reviseed calculation. However, the Department also added the Tribunal's earlier reported on-costs ($7317) to give the reported total of $32,983.
>
> The discrepancy in the figures for the 1983-84 year also appears to approximate to the 85% on-cost figure reported by the Tribunal for that year.[6]

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6. Letter from the Australian Broadcasting Tribunal to the Committee, 22 August 1986.