

1991

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES
FREEDOM OF INFORMATION AMENDMENT BILL 1991
EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Hon. Michael Duffy).

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE SENATE
TO THE BILL AS INTRODUCED.

OUTLINE

The main purpose of the Freedom of Information Amendment Bill 1991 is to implement a number of the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Committee) in its 1987 Report on the Operation and Administration of Freedom of Information Legislation.

In particular the Bill amends the Freedom of Information Act 1982 to :

- . simplify the procedure for making a request for access to documents;
- . simplify the procedure for agencies to impose charges for access to documents;
- . clarify the interpretation of provisions in the Act which exempt documents from public disclosure;
- . widen section 24 of the Act allowing refusal of requests for access to documents if processing the requests would involve a substantial or unreasonable diversion of agency resources;
- . clarify the operation of provisions permitting members of the public to seek the amendment of records containing personal information which is incomplete, incorrect, out of date or misleading;
- . clarify the operation of provisions allowing review by the Administrative Appeals Tribunal of decisions made by Government agencies on requests for access to documents.

The Bill will also make a number of other minor technical amendments to the Act.

Financial Impact

The widening of the provision in the Act allowing refusal of requests for access on the ground of substantial or unreasonable diversion of agency resources will produce resource savings in some agencies. The other amendments made by the Bill will not have any significant financial impact.

Clause 1 - Short title

1. When the Bill is enacted it will be cited as the Freedom of Information Amendment Act 1991. The Principal Act which is amended by the Bill is the Freedom of Information Act 1982.

Clause 2 - Object

2. Clause 2 amends the statement of the objects of the FOI Act in section 3 of that Act. The amendment will extend the statement of the objects of the Act to refer to the right under Part V of the Act to have amendments made to incomplete, incorrect, out of date or misleading personal information in the records of government agencies.

Clause 3 - Interpretation

3. Clause 3(a) amends the definition of 'prescribed authority' in section 4 of the Act to implement a Senate Committee recommendation that bodies established by Orders in Council be subject to the operation of the FOI Act in the same manner as bodies established by Acts of Parliament.
4. Clauses 3(b) and 3(e) amend the definition of 'responsible Minister' and insert a new subsection 4(9) in the Act to take account of the fact that some Departments and authorities have two or more Ministers with responsibilities in relation to their functions.
5. Clause 3(c) replaces the definition of 'document' in the Act with an up to date definition which is also to be used in the Evidence Bill 1991. The new definition will ensure that access under the Act can be provided in the form of a copy of a computer tape or disk as recommended by the Senate Committee.
6. Clause 3(d) inserts a new definition of 'edited copy' for the purpose of clauses 15, 16, 17 and 18 of the Bill.
7. Clause 3(d) also inserts a definition of 'personal information' for the purposes of provisions of the Act relating to the disclosure of such information. The expression 'personal information', which is taken from the Privacy Act 1988, replaces the more limited and uncertain phrase in the FOI Act 'information relating to personal affairs'.

Clause 4 - exemption of certain bodies

8. Clause 4(a) makes a minor drafting amendment in sub-section 7(1) of the Act. Sub-section 7(1) provides that the person holding and performing the duties of the office specified in Part 1 of Schedule 2 of the Act are not prescribed authorities for the purpose of the Act. Part 1 of Schedule 2 specifies more than one office. Clause 4(a) therefore amends sub-section 7(1) to refer a person holding and performing the duties of an office.

9. Clause 4(b) omits and replaces the definition of 'competitive commercial activities' in sub-section 7(3) of the Act. The Senate Committee recommended that the exemption for documents relating to the competitive commercial activities of government business enterprises be extended to protect documents relating to commercial activities which those enterprises are likely to undertake in future. Clause 4(b) inserts a new definition of 'commercial activities' to include activities that may reasonably be expected in the foreseeable future to be carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments.

Clause 5 - certain documents to be available for inspection and purchase

10. Clause 5 amends sub-section 9(4) of the Act to implement a Senate Committee recommendation that principal officers of agencies be empowered to delegate to agency officers decisions on the deletion of matter which is exempt from public disclosure under the exemption provisions of the Act.

Clause 6 - unpublished documents not to prejudice public

11. Clause 6 makes a minor drafting amendment to section 10 of the Act to replace a redundant reference to Gazette notices under section 9 of the Act. The Freedom of Information Amendment Act 1986 replaced the requirement in section 9 for Gazette notification with a requirement for notification at Information Access Offices. Clause 6 amends section 10 to refer to Information Access Offices established under section 28 of the Act.

Clause 7 - right of access

12. Clause 7 amends section 11 of the Act to implement a recommendation by the Senate Committee that agencies should not impose a threshold requirement that persons seeking access to documents demonstrate a specific reason or need for access. Clause 7 inserts a new sub-section 11(2) to provide that a person's right of access under the Act is not affected by the person's reasons for seeking access. An agency's or Minister's belief as to the applicant's reasons, based on such matters as the applicant's identity or occupation, is also irrelevant to the threshold right of access. As the Committee recognised that motive and need to know may be relevant to specific procedural matters or the application of particular exemptions in the Act, new sub-section 11(2) is expressly made subject to other provisions of the Act.

Clause 8 - Part not to apply to certain documents

13. Clause 8(a) amends sub-section 12(1) of the Act to clarify the right of an applicant to obtain access to information in government documents about that person or other persons. Sub-section 12(1) provides that a person is not entitled to obtain access under the FOI Act to a document which is open to access under the Archives Act unless the document contains information relating to the personal affairs of a person. Clause 8(a) replaces the limited and uncertain expression 'information relating to the personal affairs' with the expression 'personal information'. The expression 'personal information' is defined in clause 3(d) of the Bill.

14. Clause 8(b) amends sub-section 12(2) of the Act to implement a Senate Committee recommendation that companies, as well as private individuals, have access under the Act to documents in existence 5 years prior to the commencement of the Act in December 1982. Paragraph 12(2)(a) of the Act is amended by clause 8(b) to provide that there is no right of access to a document in the possession of an agency 5 years prior to the commencement of the Act unless the document contains personal information about the applicant or contains information relating to the applicant's business, commercial or financial affairs.

Clause 9 - requests for access

15. Clause 9 implements a recommendation by the Senate Committee for the abandonment of the two tier access request structure under sections 15 and 19 of the Act. Clauses 9 and 13 do this by omitting sub-section 15(1), sub-section 15(2) and section 19 and replacing them with new sub-sections 15(1), 15(2), 15(5) and 15(6).

16. Clause 9(a) substitutes new sub-section 15(1) to provide that a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document. New sub-section 15(2) re-inserts requirements (currently in sections 15(1), 15(2) and 19(1) of the Act) that the request be in writing, provide information to enable identification of the requested document, specify the applicant's address and be accompanied by the prescribed application fee.

17. Clause 9(a) also implements recommendations by the Senate Committee for the abolition of the system of prescribed addresses of agencies and Ministers in favour of applicants sending requests for access to the address of an agency or Minister listed in the telephone directory. New paragraph 15(2)(d) requires that requests for access be sent to the agency's or Minister's official address specified in the current telephone directory. Where an agency has a number of offices listed in the directory, the request must be sent to an office which is specified in the telephone directory as a regional or central office of the agency.

18. Clause 9(b) substitutes new paragraph 15(5)(a) to impose a requirement (currently in sub-section 19(1)) that an agency take all reasonable steps to notify an applicant of receipt of a request within 14 days of receipt. New paragraph 15(5)(b) re-inserts a requirement (currently in sub-section 19(3)) that an agency take all reasonable steps to notify an applicant of a decision on a request within 30 days of receipt of the request.

19. Clause 9(b) also implements a recommendation by the Senate Committee that the period for notifying a decision on a request be extended by a further period of 30 days where the agency or Minister consults with a State Government, business or individual in accordance with sections 26A, 27 or 27A of the Act. New paragraph 15(6)(b) re-inserts a requirement (currently in section 19(5)) that the agency or Minister notify the applicant of the extension for the purposes of consultation.

Clause 10 - request for access to personnel records

20. Clause 10 inserts a new section 15A to implement recommendations by the Senate Committee that agency employees be required to use internal agency procedures to seek access to personnel records before seeking access under the FOI Act. Sub-section 15A(1) defines personnel records for the purpose of section 15A. Sub-section 15A(2) provides that an employee must not make a request under the FOI Act for access to his or her personnel records unless the person has made a request for access to the records under the agency's established procedures for access to personnel records. A person who, having made a request under the agency's established procedures, is not notified by the agency of the outcome of the request within 30 days or who is not satisfied with the outcome, may request access under the Act. The established procedures for most agencies will be the Personnel Management Manual Guidelines on Staff Access to Records. Section 15A will not apply in relation to employees of an agency which has no established procedures in relation to access to personnel records.

Clause 11 - transfer of requests

21. Clause 11 amends section 16 of the Act which provides for the transfer of requests by an agency to another agency. Clause 11(a) implements a Senate Committee recommendation by inserting a new sub-section 16(3A) to make clear that an agency may transfer part rather than the whole of a request to another agency. Clause 11(b) implements another Senate Committee recommendation by omitting and replacing sub-section 16(5) to make clear that where a request is transferred to an agency, the request applies in relation to the documents which were the basis for the transfer but not to other documents in the possession of that agency which might fall within the terms of the request.

Clause 12 - requests involving the use of computers

22. Clause 12 makes amendments to section 17 consequential upon the amendment of the section 4(1) definition of 'document' by clause 3(c). The new definition of 'document' inserted by clause 3(c), together with existing section 20(1)(b) of the Act, will allow applicants to request access in the form of provision of a copy of a computer disk or tape. Section 17 is amended by clause 12 to provide that where an applicant desires access to information that is not available in written documents of the agency but does not wish to be provided with access in the form of a copy of the computer disk or tape on which the information is recorded, then the agency must produce a written document by using the computer.

Clause 13 - repeal of section 19

23. Clause 13 repeals section 19 of the Act consequential upon the amendments made to section 15 by clause 9 of the Bill.

Clause 14 - deletion of exempt matter or irrelevant material

24. Clause 14 implements Senate Committee recommendations that an agency should not refuse access to a document on the ground that the document is misleading but that an agency should be able to delete material from documents on the ground that the material is irrelevant.

25. Clause 14(a) inserts new sub-paragraphs 22(1)(a)(i) and (b)(i) to provide that where an agency decides to refuse access to a document on the ground that it is an exempt document and it is possible for the agency to make a copy of the document with the exempt material deleted, the agency must make such a copy and give the applicant access to it. These paragraphs omit the provision, currently in section 22(1)(b) of the Act, which enables an agency to refuse to provide access to a copy with deletions if the copy would be misleading. Clause 14(a) also inserts new sub-paragraphs 22(1)(a)(ii) and (b)(ii) to provide that where an agency decides that a document contains information which can reasonably be regarded as irrelevant to the subject matter specified in the applicant's request, the agency must make a copy of the document with the irrelevant material deleted and give the applicant access to it.

26. New paragraph 22(2)(a) requires the agency to inform the applicant that exempt or irrelevant material has been deleted. The agency's decision to delete exempt or irrelevant material is subject to provisions in the Act providing for internal review (s.54(1)(a)) and review by the Administrative Appeals Tribunal (s.55(1)(a)).

Clause 15 - requests may be refused in certain cases

27. Clause 15 substitutes section 24 of the Act to implement certain recommendations by the Senate Committee for changes in the operation of the provision which permits an agency to refuse a request which would involve a substantial and unreasonable diversion of the agency's resources.

28. Sub-section 24(1) is omitted and replaced by clause 15 to implement a Senate Committee recommendation that refusal of access on workload grounds under section 24 not be limited to requests which are expressed to relate to a class of documents. Sub-section 24(1) as amended by the Bill provides that an agency may, without any processing of a request, refuse the request if processing the request would substantially and unreasonably divert the resources of the agency from its other operations.

29. New sub-section 24(2) implements a Senate Committee recommendation that in making decisions on refusal of requests on the ground of substantial and unreasonable diversion of resources, agencies assess the resources needed to consult with third parties about disclosure of the documents and to examine documents to make decisions on deletion of exempt matter. New sub-section 24(2) provides that, in making a decision under sub-section 24(1), an agency may have regard to the work involved in identifying, locating or collating documents; in deciding whether to grant or refuse access; in making copies or copies with deletions; and in notifying the applicant of its decision.

30. New sub-section 24(3) implements a Senate Committee recommendation that, in making a decision on refusal of a request on the ground of substantial and unreasonable diversion of resources, agencies should not have regard to the fact that the cost to the agency of processing the request exceeds the maximum charge that the agency may impose under the FOI (Charges) Regulations in respect of the request. Sub-section 24(3) provides that, in making a decision under sub-section 24(1), the agency is not to have regard to whether the cost of the resources diverted by processing the request exceeds the maximum charge which may be imposed under the regulations for requests of that kind.

31. New sub-section 24(4) implements a Senate Committee recommendation that an applicant's motives not be treated as relevant to decisions whether to refuse a request on the ground of substantial and unreasonable diversion of resources. New sub-section 24(4) provides that in deciding to refuse access under sub-section 24(1) an agency is not to have regard to the applicant's reasons for seeking access. An agency's belief as to the applicant's reasons, based on such matters as the applicant's identity or occupation, is also irrelevant in making a decision under section 24(1).

32. New sub-section 24(5) replaces the current sub-section 24(2) in the Act and implements a Senate Committee recommendation that the current sub-section 24(2) not be limited to requests which are expressed to relate to a class of documents. New sub-section 24(5) provides that an agency may refuse a request if it is apparent from the description of the documents in the request that all of the documents are exempt and that no obligation would arise under section 22 to provide an edited copy or that the applicant does not wish to have access to an edited copy. The agency may refuse the request in such cases without identifying any documents. Sub-section 24(2) also provides that the agency is not obliged to specify the exemptions relied on in respect of each document. However, the agency would, in giving the applicant a statement of reasons for its decision to refuse the request under section 26, be obliged to state the grounds of exemption it relies on to attract the operation of sub-section 24(5).

33. New sub-section 24(6) replaces the current sub-section 24(3) and implements a Senate Committee recommendation that, before an agency refuses a request under sub-section 24(1), the agency should notify the applicant in writing of its intention to refuse the request, provide suggestions and information as to how the request may be narrowed and identify an agency officer with whom the applicant may consult with a view to narrowing the request. New sub-section 24(6) provides that an agency must not refuse a request under section 24(1) (or refuse it for non-compliance with paragraph 15(2)(b) inserted by clause 9 of the Bill) unless the agency has met certain requirements. These requirements are that the agency give the applicant written notice of its intention to refuse the request and of the identity of an officer of the agency with whom the applicant can consult. The agency must also give the applicant a reasonable opportunity to consult. This consultation may be oral or in writing. The agency must assist the applicant with information which would enable the applicant to make the request in a form so that processing the request would not substantially and unreasonably divert the resources of the agency within the meaning of sub-section 24(1) or so that the request provides sufficient information to enable the agency to identify the requested documents within the meaning of paragraph 15(2)(b).

34. New sub-section 24(7) is consequential upon the provision made in new sub-section 24(6) for agencies to defer making decisions on requests where consultation with the applicant is necessary. New sub-section 24(7) provides that, in the application of the 30 day time limit under new sub-section 15(5) for agencies to notify decisions on requests, the period of consultation under new sub-section 24(6) is not to be taken into account.

35. Clause 15 also inserts a new section 24A to implement a Senate committee recommendation that an agency be able to respond to a request by stating that it is unable to locate the documents requested by the applicant having taken all reasonable steps to do so. New section 24A provides that an agency may refuse a request if the agency, having taken all reasonable steps to find the document, is satisfied that the document cannot be found or that the document does not exist. The agency's decision is subject to internal review (s.54(1)(a)), and review by the Administrative Appeals Tribunal (s.55(1)(a)). The AAT has the power to require the agency to conduct further searches for the document (s.55(5)).

Clause 16 - Procedure on request in respect of documents likely to affect Commonwealth - State relations

36. Clause 16 amends section 26A of the Act to implement a Senate Committee recommendation that the process of consultation with a State Government be compulsory where an agency proposes to release a document from which exempt material has been edited in accordance with sections 22 and 33A of the Act. Clause 16 implements the recommendation by adding a reference to 'edited copy' after references to documents in section 26A.

37. Clauses 16(f), 16(g) and 16(j) implement a Senate Committee recommendation that documents should not acquire protection from disclosures simply as a result of the process of consultation with State governments. Currently paragraph 26A(2)(b) provides that an agency shall not give access to a document on which consultation with a State is taking place until any appeal by the State to the Administrative Appeals Tribunal has been decided. Clause 16(f) and 16(g) amend paragraph 26A(2)(b) to make clear that it does not prevent disclosure of the document where the State's appeal to the AAT is withdrawn or dismissed. Clause 16(j) inserts a new sub-section 16(3) to make clear that a decision by the AAT that the document is exempt from disclosure under section 33A does not prevent the agency deciding, in response to a subsequent request, that the document is no longer exempt under section 33A.

Clause 17 - procedure on request in respect of documents relating to business affairs

38. Clause 17(a) omits and replaces sub-section 27(1) of the Act to implement a Senate recommendation for the removal of a provision that, before engaging in consultation with a business on disclosure of a document, an agency may decide whether the business might reasonably wish to contend that the document is exempt. New sub-section 27(1) provides that an agency must not decide to grant access to a document containing information about business, professional or financial affairs unless the agency gives the person or business concerned a reasonable opportunity to make submissions about disclosure and the agency has had regard to those submissions.

39. Clause 17 also amends section 27 to implement a Senate Committee recommendation that the process of consultation with a business be compulsory where an agency proposes to release a document from which exempt material has been edited in accordance with sections 22 and 43 of the Act. Clause 17 implements the recommendation by adding a reference to 'edited copy' after references to documents in section 26A.

40. Clause 17(c), (d) and (e) implement a Senate Committee recommendation that documents should not acquire protection from disclosure simply as a result of the process of consultation with business. Currently paragraph 27(2)(b) provides that an agency shall not give access to a document on which consultation with business is taking place until any appeal by the business to the AAT has been decided. Clause 17(c) and 17(d) amend paragraph 27(2)(b) to make clear that it does not prevent disclosure of the document where an appeal to the AAT is withdrawn or dismissed. Clause 17(e) inserts a new sub-section 17(3) to make clear that a decision by the AAT that the document is exempt from disclosure under section 43 does not prevent the agency deciding, in response to a subsequent request, that the document is no longer exempt under section 43.

Clause 18 - procedure on request in respect of documents containing personal information

41. Clause 18 implements a Senate Committee recommendation that the provision in the Act for consultation with a person on disclosure of personal information about that person be modified in accordance with the Committee's recommendations on consultation with business about the disclosure of business information (see paragraphs 38 to 40 of this memorandum). Clause 18 also replaces the limited and uncertain expression 'information relating to personal affairs' with the expression 'personal information'. The expression 'personal information' is defined in clause 3(d) of the Bill.

Clause 19 - charges

42. Clause 19 omits and replaces sections 29 and 30 of the Act to implement a Senate Committee recommendation for the consolidation of the sections. The amendment alters the existing procedure of imposition of a charge by the agency followed by an application for remission of the charge by the applicant. New section 29 will provide for the administratively simpler process of notification by the agency of a preliminary assessment of a charge together with a right of the applicant to contend that the charge should not be imposed. In accordance with the Senate Committee's recommendation new sub-section 29(5) does not expressly, require an agency to have regard to the fact that the requested documents contain personal information about the applicant. However, that fact remains a consideration relevant to the agency's decision whether to impose a charge under section 29 if the applicant contends that a charge should not be imposed. The agency is required to have regard to the factors of financial hardship and the public interest. Either of these factors may be sufficient to establish that a charge should not be imposed.

Clause 20 - Remission of application fees

43. Clause 20(a) amends section 30A of the Act to implement a Senate Committee recommendation that the grounds of remission of application fees not be limited to financial hardship, personal affairs or public interest. Clause 20(a) amends section 30A to provide that the agency may remit an application fee for any reason.

44. Clause 20(b) amends section 30A(1) to make clear that an agency may remit the whole or part of an application fee. Clause 20(c) omits sub-paragraph 30A(1)(b)(ii) to implement a Senate Committee recommendation that the Act not list, as a ground for automatically not imposing a charge, the fact that the requested documents contain personal information about the applicant. However, in accordance with the Senate Committee Report, that fact remains a consideration relevant to the agency's decision whether to remit an application fee if the applicant contends that the fee should be remitted. Clause 20(d) makes an amendment consequential upon the redrafting of section 15 of the Act by clause 9 of the Bill.

Clause 21 - certain periods to be disregarded for the purposes of processing requests

45. Clause 21 makes amendments to section 31 consequentially upon the amendments made by clauses 9, 13 and 19 of the Bill. Section 31 provides for the period, available to an agency for notifying a decision on a request for access to documents, to be extended for the period until the applicant pays the charges payable in respect of a request.

Clause 22 - documents affecting national security defence or international relations

46. Clause 22 amends section 33(1), (2) and (4) of the Act to implement a Senate Committee recommendation that the redundant references to the public interest in section 33 be deleted.

Clause 23 - documents affecting relations with States

47. Clause 23(a) substitutes sub-section 33A(2) to implement a Senate Committee recommendation that a certificate issued by a Minister under section 33A conclusively determine both that disclosure of information in a document would affect relations with a State and that disclosure would not on balance be in the public interest. Clause 23(b) omits and replaces sub-section 33A(4) to implement the same Senate Committee recommendation.

Clause 24 - Cabinet documents

48. Clause 24(a) substitutes sub-section 34(2) to implement a Senate Committee recommendation that a certificate, issued by the Secretary of the Department of Prime Minister and Cabinet under section 34, conclusively determine both that a document is a Cabinet document and that the document does not contain purely factual material which would not disclose Cabinet deliberations or decisions. Clause 24(b) omits and replaces sub-section 34(4) to implement the same Senate Committee recommendation.

Clause 25 - Executive Council documents

49. Clause 25(a) substitutes sub-section 35(2) to implement a Senate Committee recommendation that a certificate, issued by the Secretary to the Executive Council under section 35, conclusively determine both that a document is an Executive Council document and that the document does not contain purely factual material which would not disclose Executive Council deliberations or decisions. Clause 25(b) substitutes sub-section 35(4) to implement the same Senate Committee recommendation.

Clause 26 - periods for which certain certificates remain in force

50. Clause 26 inserts a new section 36A in the Act to implement a Senate Committee recommendation that 'conclusive' certificates issued under sections 33, 33A, 34 and 35 not remain in force indefinitely. New sub-section 36A(1) provides that regulations may prescribe maximum periods for which certificates remain in force. Subsection 36A(2) provides that a certificate remains in force for a period specified in the regulations unless revoked sooner.

Clause 27 - documents affecting enforcement of law and protection of public safety

51. Clause 27 amends section 37 of the Act to overcome the effect of the Federal Court decision in June 1987 in the Department of Community Services and Jephcott which determined that an agency could not respond under section 25 of the FOI Act to a request for access to a document, by neither confirming nor denying the existence of the document, if the document does not in fact exist. That decision limited the ability of agencies to protect the identity of confidential sources of information about fraudulent benefit claims. Clause 27 amends section 37(1)(b) to provide that a document is exempt from disclosure if it would enable a person to ascertain the existence or non-existence of a confidential source of information in relation to the enforcement or administration of the law.

Clause 28 - documents to which secrecy provisions of enactments apply

52. Clause 28 substitutes sub-section 38(1) of the Act to implement a Senate Committee recommendation that the Act contain in a schedule an exhaustive list of secrecy provisions to which the section 38 exemption should apply. Clause 28(a) inserts a new sub-section 38(1) to provide that a document is exempt from disclosure if disclosure of the document, or information in the document, is prohibited under a provision of an enactment listed in schedule 3 to the Act. Schedule 3 is inserted by clause 47 of the Bill. As the list of secrecy provisions in schedule 3 is intended to be exhaustive, a document covered by a secrecy provision in an enactment which comes into operation after the commencement of the Freedom of Information Amendment Act 1991 will not be exempt under section 38 unless the enactment amends schedule 3 or the enactment provides that section 38 applies to the secrecy provision in that enactment.

53. New sub-section 38(1A) is inserted by clause 28 consequential upon the repeal and replacement of sub-section 38(1) to ensure that a person is not denied access under section 38 of the FOI Act to a document merely because the secrecy provision to which section 38 applies prohibits disclosure of the document to other persons but not to that person. For example, if an enactment containing a section 38 secrecy provision also contains a provision allowing disclosure at the discretion of the agency and if the agency exercises the discretion to disclose a document to a person who has made an FOI request for the document, the document is not exempt from disclosure under s.38 to that person. In such a case officers of the agency would have the protections of sections 91 and 92 of the FOI Act.

54. Clause 28(b) amends section 38(2) to replace the limited and uncertain expression 'information relating to the personal affairs' with the expression 'personal information'. The expression 'personal information' is defined in clause 3(d) of the Bill

Clause 29 - documents affecting personal privacy

55. Clause 29(1)(a) amends section 41 of the Act to replace the limited and uncertain expression 'information relating to the personal affairs' with the expression 'personal information'. The expression 'personal information' is defined in clause 3(d) of the Bill.

56. Clause 29(1)(b) substitutes sub section 41(3) to implement a Senate Committee recommendation that where the disclosure of documents containing information provided by persons qualified as psychologists, marriage guidance counsellors or social workers might be detrimental to an applicant's health or well-being, the question of disclosure be determined by such a qualified person. New sub-section 41(3) provides that where a request is made for access to a document containing information provided by a qualified person and it appears that disclosure might be detrimental to the applicant's health or well-being, access is to be given to a qualified person nominated by the applicant. The qualified person would then determine whether and in what circumstances the applicant would have direct access. Qualified person is defined in new sub-section 41(8). New sub-section 41(7) implements a Senate Committee recommendation that decisions under sub-section 41(3) be subject to delegation within an agency in accordance with section 23 of the Act.

57. New sub-section 41(4) provides for a qualified person, who is the author of a document containing personal information of a medical or psychiatric nature, to be notified of the agency's decision to disclose the document. New paragraph 41(4)(c) makes clear that notification is not required if the disclosure was made with the qualified person's knowledge, for example where disclosure was through the author under sub-section 41(3). The obligation to notify under sub-section 41(4) is subject to requirements in s.41(5) and (6) that notification be reasonably practicable.

58. Clause 29(2) provides that the amendments made by clause 29(1) apply to requests received before the commencement of the Bill unless they are finally disposed of before commencement.

Clause 30 - documents relating to business affairs

59. Clause 30 implements a Senate Committee recommendation to make clear that the exemption in section 43 of the Act, for documents the disclosure of which would unreasonably adversely affect a person in respect of his lawful professional affairs, relates to the running of a professional practice rather than the status of an individual as a member of a profession. Clause 30 inserts a new sub-section 43(4) to provide that for the purpose of section 43 information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Clause 31 - documents relating to research

60. Clause 31 implements a Senate Committee recommendation for a new exemption for some documents containing scientific or technical research. New section 43A provides that a document is exempt from disclosure under the Act if it contains information relating to research that is or will be undertaken in an agency and if disclosure would be likely to unreasonably expose the agency to disadvantage. As the exemption is directed at preventing the premature disclosure of research that may destroy an agency's research advantage, new sub-section 43A(2) limits the exemption in sub-section 43A(1) to research that is yet to be completed.

Clause 32 - documents containing material obtained in confidence

61. Clause 32 implements a Senate Committee recommendation that the breach of confidence exemption in the Act 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. The amendment overcomes decisions by the Administrative Appeals Tribunal which have created uncertainty as to the scope of section 45 and which have expanded the exemption to protect some confidences that the general law does not protect, such as information about a crime or fraud. Clause 32 amends sub-section 45(1) to provide that a document is an exempt document if its disclosure under the Act would found an action by a person, other than the Commonwealth, for a breach of confidence.

Clause 33 - amendment and annotation of personal records

62. Clause 33 substitutes Part V of the Act to implement Senate Committee recommendations for changes in provisions relating to amendment of incomplete, incorrect, out-of-date or misleading personal information in agency records. Clause 33 also omits the provisions of Part VA of the Act (Role of the Ombudsman) because clause 37 of the Bill transfers those provisions to Part VI of the Act.

63. New sub-section 48(1) implements Senate Committee recommendations for deletion from the existing section 48(1) of a limitation on requests for amendment to personal records by persons who are not Australian citizens or whose continued presence in Australia is not subject to limitations as to time imposed by law. New sub-section 48(1) also implements Senate Committee recommendations that Part V allow amendment of any record lawfully provided to the applicant (whether under the FOI Act or otherwise) and that Part V provide for two distinct types of applications: amendment and annotation. New section 49 provides for applications for amendment of records and new section 51A provides for applications for annotation. In accordance with the Senate Committee's recommendations, requests for annotation cannot be refused unless the annotation sought by the applicant is irrelevant, defamatory or unnecessarily voluminous (new section 51B). New section 51E makes clear the agency's right to add its own annotation to the record. New sub-section 48(1) also includes the expression 'personal information' in place of the more limited and uncertain expression 'information relating to the personal affairs'. The expression 'personal information' is defined in clause 3(d) of the Bill.

64. New sections 49 and 51A implement a Senate Committee recommendation that the Act specify in detail the information that applications for amendment and annotation must contain. New section 51C implements Senate Committee recommendations relating to transfer between agencies of requests for amendment or annotation of records. New section 51D substitutes provisions (currently in sub-sections 50(3) 50(4) and 50(5) of the Act) that agencies take all reasonable steps to notify a decision on an application for amendment or annotation within 30 days, that such decisions be subject to delegation within an agency and that statements of reasons for decision be provided where an agency refuses to amend or annotate a record.

Clause 34 - internal review

65. Clause 34 amends section 54(1) of the Act to implement Senate Committee recommendations that decisions under section 41(3) concerning access through a medical practitioner be subject to internal review; that applications for internal review be directed to the agency rather than to the agency's principal officer; that review rights in relation to decisions on amendment of personal records be set out in a form intelligible to the lay person; and that decisions on imposition and remission of charges be consolidated so that the ordinary facilities of internal and AAT review are available in respect of those decisions.

66. New sub-sections 54(1A) and (1B) implement Senate Committee recommendations that the time for internal review be extended to 30 days and that the time limit for requesting internal review take account of a 15 day period in which the applicant, after obtaining access to documents, should make a decision whether to seek review.

67. New sub-sections 54(1C) to (1F) implement Senate Committee recommendations that internal review be available to parties consulted under reverse FOI; that the right of review also extended to a person who should have been consulted but was not; and that the fee for internal review not be payable by persons seeking internal review in a 'reverse FOI' context.

68. New sub-section 54(1G) implements a Senate Committee recommendation that decisions whether to extend the period allowed for applications for internal review be subject to delegation within an agency. Clauses 34(b), (c) and (d) make amendments consequential to the changes made to sub-section 54(1) by clause 34(a).

Clause 35 - applications to the Administrative Appeals Tribunal

69. Clause 35 amends section 55(1) to implement Senate Committee recommendations that decisions under section 41(3) to provide access through a medical practitioner be subject to AAT review; that review rights on amendment of personal records be set out in a form intelligible to the lay person; and that decisions on imposition and remission of charges be consolidated so that the ordinary facilities of AAT review are available in respect of those decisions.

70. Clauses 35(b), (c) and (d) make amendments consequentially upon the insertion in the Act of new sub-sections 55(1), 54(1A) and 57(3).

71. Clause 35(e) inserts a new sub-section 55(5) to implement Senate Committee recommendations that a decision by an agency, that a document cannot be located or does not exist, be subject to AAT review. New sub-section 55(5) makes clear that on review by the AAT, the Tribunal's powers include power to require further searches for the document.

72. Clause 35(e) also inserts a new sub-section 55(6) to implement a Senate Committee recommendation that guidelines be inserted in the Act to better define the circumstances in which review of agency decisions to refuse to amend or to annotate records will be available. Paragraphs 55(6) (a), (b) and (c) state the instances which the Senate Committee proposed as constraints on any review of decisions relating to correction of records.

Clause 36 - application to Tribunal where decision delayed

73. Clauses 36(a) and (b) amend section 56 of the Act consequentially upon amendments made by clauses 9 and 13 of the Bill. Clause 36(c) and (d) implement a Senate Committee recommendation that review rights in relation to decisions on amendment of personal records be set out in a more intelligible form. Clause 36(e) omits and replaces sub-section 56(5) to make clear that, in an AAT review of a deemed refusal of access, the review may be extended to the actual decision of the agency at the discretion of the AAT rather than at the discretion of the applicant. This amendment is necessary to ensure that applicants do not restrict AAT hearings to a futile review of a deemed decision.

Clause 37 - complaints to the Ombudsman

74. Clause 37 inserts a new section 57 in the Act to implement Senate Committee recommendations relating to the role of the Ombudsman in reviewing agency action in the exercise of powers or the performance of functions under the FOI Act. Clause 33 omits the provisions of existing Part VA of the Act to implement the Senate Committee's recommendation that provision for complaint to the Ombudsman be integrated into Part VI of the Act. In accordance with the Senate Committee's recommendations new section 57 omits provision for a Deputy Ombudsman for freedom of information matters, for reports by the Ombudsman to the Public Service Board on the action of agency officers under the FOI Act and for the Ombudsman to represent applicants in AAT proceedings. New subsection 57(6) implements a Senate Committee recommendation that the Act better define the circumstances in which review of agency decisions to refuse to amend or annotate records will be available. New section 57(8) implements a Senate Committee recommendation that the FOI Act not confer jurisdiction upon the Ombudsman in respect of bodies that are not prescribed authorities for the purpose of the Ombudsman Act 1976.

Clause 38 - proceedings upon the exercise of powers under sub-sections 58(4), (5) or (5A)

75. Clause 38 amends section 58A consequentially upon amendments made by clauses 23, 24, and 25 of the Bill.

Clause 39 - review of certain decisions in respect of documents relating the Government of a State

76. Clause 39 amends section 58F to implement Senate Committee recommendations that a right to seek AAT review in a reverse FOI context not be contingent upon the State having been consulted but instead rest on the State being a party which should have been consulted; that in a 'reverse FOI' review by the AAT the onus of establishing that access should not be given to documents should be on the party or parties who argue against allowing access; and that an agency should have a duty to notify a State that the agency's decision on disclosure of documents affecting Commonwealth State relations is under review by the AAT.

Clause 40 - review of certain decisions in respect of documents relating to business affairs

77. Clause 40 amends section 59 to implement Senate Committee recommendations that a right to seek AAT review in a 'reverse FOI' context not be contingent upon a business having been consulted but instead rest on the business being a party which should have been consulted; that in a 'reverse FOI' review by the AAT the onus of establishing that access should not be given to documents should be on the party or parties who argue against allowing access; and that an agency should have a duty to notify a business that the agency's decision on disclosure of documents affecting the business is under review by the AAT.

Clause 41 - review of certain decisions in respect of documents containing personal information

78. Clause 41 amends section 59F to implement Senate Committee recommendations that a right to seek AAT review in a 'reverse FOI' context not be contingent upon a person having been consulted but instead rest on the person being a party who should have been consulted; that in a 'reverse FOI' review by the AAT the onus of establishing that access should not be given to documents should be on the party or parties who argue against allowing access; and that an agency should have a duty to notify a person that the agency's decision on disclosure of documents affecting the person is under review by the AAT.

Clause 42 - onus

79. Clause 42 amends section 61 of the Act to implement a Senate Committee recommendation that, in a 'reverse FOI' review by the AAT, the onus of establishing that access should not be given to documents should be on the party or parties who argue against allowing access.

Clause 43 - production of exempt documents

80. Clause 43 amends section 64 to implement a Senate Committee recommendation that the AAT have power to oblige agencies to produce documents at any stage of proceedings.

Clause 44 - protection against certain actions

81. Clause 44 amends section 91 of the Act to implement a Senate Committee recommendation that the protection given by section 91 to agencies in respect of the disclosure of documents not be lost if the agency fails to consult with a State, business or individual in accordance with sections 26A, 27, or 27A.

Clause 45 - reports to Parliament

82. Clause 45 amends section 93 of the Act consequentially upon the amendments made by clauses 9 and 13 of the Bill.

Clause 46 - Schedule 2

83. Clause 46(a) amends schedule 2 of the Act to omit a redundant reference to the Australian Egg Board. Clause 46(b) inserts a reference in schedule 2 to the National Health and Medical Research Council (which is made subject to the Act by the amendment to the definition of 'prescribed authority' by clause 3(a) of the Bill) in order to exempt documents in the possession of members of the NHMRC who are not officers of an agency. Clause 46(c) amends schedule 2 consequential upon the amendment made to section 7(3) of the Act by clause 4 of the Bill.

Clause 47 - schedules 3 and 4

84. Clause 47 inserts a new schedule 3 in the Bill consequential upon the amendment made to section 38 of the Act by clause 28 the Bill. Clause 47 also inserts a new schedule 4 in the Bill consequential upon the amendment made by clause 31 of the Bill.

1991

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

SENATE

FREEDOM OF INFORMATION AMENDMENT BILL 1991

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendment to be moved on behalf of the Government

(Circulated by authority of the Attorney-General,
the Hon. Michael Duffy, MP)

AMENDMENT TO BE MOVED ON BEHALF OF THE GOVERNMENT TO THE
FREEDOM OF INFORMATION AMENDMENT BILL 1991

OUTLINE

The amendment to be moved by the Government omits an incorrect reference in the Bill to telephone directories published by the Australian Overseas Telecommunications Corporation.

Financial Impact

The Government amendment will have no financial impact.

The proposed Government amendment will amend clause 9 of the Bill.

2. Clause 9 of the Bill amends section 15 of the FOI Act to specify the requirements of a valid request for access to documents of an agency or Minister. New paragraph 15(2)(d) requires requests to be sent to the address of an agency or Minister specified in a telephone directory published by the Australian and Overseas Telecommunications Corporation.

3. The Corporation will not become operational until 1992. In addition future competitors of AOTC may publish telephone directories. The Government amendment therefore alters clause 9 of the Bill so that new paragraph 15(2)(d) will provide that requests are to be sent to the address of an agency or Minister specified in any current telephone directory.

