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Part V of the Act: the creation of a right to seek amendment of personal records which contain incorrect, incomplete, out of date or misleading material.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).