

## Meeting successful requests

### Forms of access (clause 18)

**10.1** Clause 18 provides that access to a document can be given in a number of ways. Sub-clause (1) provides that an applicant may be allowed to inspect a document or may be provided with a copy of the document; be provided with means to view a film or to hear a sound recording; or be provided with a transcript of a sound recording or of shorthand notes. Sub-clauses (2) and (3) require that access shall be given in the form requested by the applicant unless doing so would interfere unduly with the operations of the agency or with the performance by the minister of his functions; would be detrimental to the preservation of the document; would be inappropriate, having regard to the physical nature of the document; or would involve an infringement of copyright.

**10.2** The Committee received little evidence and no complaints about these provisions. This is not, we believe, because issues about forms of access are unimportant, but rather because witnesses assumed that the Bill adequately specified a variety of forms appropriate to the different methods by which government information is now recorded and stored. On the face of it the Bill does appear to be adequate in this respect, and no other forms of access that might be needed have occurred to us. We do recognise, nevertheless, that there are many administrative and procedural questions concerning the form in which access is given that are yet to be fully resolved. We were disappointed that these matters were not canvassed in the submissions we received from agencies. Some idea of the various issues that may arise can be gleaned from the submission from the Department of Social Security, which did discuss some of the implications of clause 18. The Department said for example that 'additional space . . . is thought to be required for each of the . . . regional offices considered likely to have a significant demand for access to personal files'. In addition 'partitioning may be necessary to ensure privacy'. In some circumstances, the Department said, 'the lack of private office space may require an inquirer to accept an appointment to peruse a file at a specified time so that steps can be taken to ensure some privacy for the client'. The Department said also that 'offices may require additional photocopying facilities so that demands for copies of documents can be readily met'. Finally, the provision of additional microfilm viewers could be required 'if the office routine is not to be disrupted by requests from members of the public for access to information stored in micro-fiche form'.<sup>1</sup>

**10.3** We appreciate that these matters are likely to be addressed in the regulations made pursuant to the Bill. Even so, we would hope that agencies will individually examine these questions and be in a position to make a public announcement on the procedures they propose to adopt under clause 18 before the regulations are gazetted and the Bill commences operation. As the objective of clause 18 is to facilitate access to documents, members of the public have a definite interest in reviewing the procedures agencies propose to adopt. We feel, moreover, that agencies could benefit from discussing matters such as these

<sup>1</sup> Submission no. 117, incorporated in *Transcript of Evidence*, pp. 2137-38.

with the public. Although it is beyond the scope of our present inquiry to anticipate all the issues that may arise in implementing clause 18, there are a few important issues that we think should be borne in mind by agencies when they are undertaking the preparatory studies that we have envisaged. We mention them in the following paragraphs.

**10.4 Reading rooms.** To our mind the public would be greatly assisted if agencies, where appropriate, established reading rooms containing such items as the statements and indexes published under Part II, documents commonly requested under the legislation, new reports or studies of the agency that are non-exempt, and copies of publications relevant to the administration of the Bill, such as the regulations and staff guidelines or procedures. We note that some United States agencies have adopted this practice, and that it appears to be of benefit and use both to the agency and its clients.

**10.5 Costs of access given in different form.** The Freedom of Information Legislation Campaign Committee submitted that a person should not 'be required to pay a fee that is greater than the fee that would have been payable if access were given in the form requested'.<sup>2</sup> This seems to us a reasonable proposal and we recommend that clause 18 be amended accordingly. The circumstances specified in clause 18 (3) as justifying the grant of access in a different form than that requested are all ones beyond the control of the individual applicant, and we believe that he should not be financially prejudiced as a result. This amendment should also ensure that agencies will be less inclined to depart from the terms of the applicant's request otherwise than for clear and defensible reasons.

**10.6 Regional availability.** A question of costs will also arise where a person residing in one city makes a request to inspect a document located in another city. We assume that, in many cases, it will be convenient for the agency to transfer a copy of the document to the city of the applicant's residence, if there is a Commonwealth Government office in that city. In our opinion, agencies should establish procedures that will permit applicants to inspect documents or copies thereof at the closest regional office of the Commonwealth Government, and to do so without paying any copying costs that may have been incurred (unless, of course, the applicant requests a copy of the document).

**10.7 Transcripts.** The Australian Broadcasting Commission indicated in evidence that it already sells to the public recordings of some programs on sound cassettes and that it could lose appreciable revenue if transcripts also had to be provided to the public under the Bill for a nominal sum.<sup>3</sup> Since this matter has been raised, and is obviously an important one, we think it desirable to record our understanding that in circumstances such as these, an agency is not required to make available an additional form of access (such as a transcript). This result, on our reading of the Bill, follows from paragraph 10 (1) (c) which provides that 'A person is not entitled to obtain access under this Part to . . . a document that is available for purchase by the public in accordance with arrangements made by an agency.'

#### **10.8 Recommendations:**

- (a) In order to enable public discussion of proposed access arrangements, agencies should announce the arrangements they propose to make under clause 18 before the regulations are gazetted and the legislation commences operation.**

<sup>2</sup> Submission no. 9, incorporated in *Transcript of Evidence*, p. 167.

<sup>3</sup> *Transcript of Evidence*, p. 1291.

- (b) Agencies should, where at all practicable, establish reading rooms to assist the public to peruse manuals, indexes and other information required to be made available.
- (c) The Bill should be amended to provide that where access is granted, pursuant to clause 18 (3), in a form other than that requested, a person should not be required to pay a fee greater than the fee that would have been payable if access were given in the form requested.
- (d) Applicants should be entitled to inspect documents at their closest regional Commonwealth Government office without paying any copying costs that may necessarily be incurred by the agency to make such inspection possible.

### **The problem of copyright**

**10.9** Some aspects of the effect of copyright law on the operation of the Freedom of Information Bill have already been canvassed in Chapter 9, in relation to the protections afforded by the Bill to the givers of information, but the matter requires more detailed attention than was there appropriate. On the face of it paragraph 18 (3) (c), providing that access may be given in a form different to that requested if access in that form would infringe copyright, appears to be fair. But further consideration of the provisions of copyright law suggests that this clause could potentially have a very marked impact in interfering with access.

**10.10** Pursuant to section 32 (1) of the *Copyright Act* 1968 Australian authors retain copyright in all unpublished original literary works. Incidents of the copyright are the right to control publication of the work or reproduction in a material form (s.31). The description 'original literary work' is sufficiently broad to cover such items as ministerial correspondence and submissions to ministers or departments by private persons or organisations. Consequently the Commonwealth could be argued to be breaching copyright if it provided an applicant with a photocopy of a document received from a private person or organisation without the express authority of that person or body. Access to the document cannot be denied altogether on copyright grounds, and an agency could certainly allow inspection of the document. However, this may be inappropriate and against the applicant's wishes in the case of a lengthy or complex document, or it may be difficult if an applicant does not live in a city where there is a regional Commonwealth Government office.

**10.11** There are other dangers also with clause 18 (3) (c). For instance, a private organisation that wished its submissions to government to remain confidential could in a practical sense hamper access by denying the government authority to reproduce the document. A practice such as this, which allows entities outside agencies to determine the form, and possibly the extent, to which access will be given, is inconsistent with the objective of the Bill that all these matters should be regulated in accordance with statutory guidelines administered by agencies. Where private interests seek to influence, advise or pressure governments, their views become a matter of public concern, and disclosure should be regulated by statutory criteria, formulated and agreed upon publicly. We believe that the recommendations we have made elsewhere in this report (especially in Chapter 25, dealing with the question of commercially sensitive information and the provision of Reverse-FOI actions in relation thereto) sufficiently protect the legitimate interests of non-government information suppliers without the necessity for any resort by them to copyright protection.

**10.12** A suggestion has been made that paragraph 18 (3) (c) is in fact designed to protect copyright in other categories of documents submitted by private individuals to agencies, such as programs and manuscripts provided to the ABC and the Australia Council. While protection of copyright in these items would be explicable, it is clear that the clause goes far beyond this role. Moreover the nature of the protection it does afford is somewhat illusory, since a member of the public may still inspect the manuscript in question despite paragraph 18 (3) (c). There is, in any event, a prohibition against publication or reproduction of the manuscript by members of the public, as we have earlier indicated, which exists regardless of whether an agency can provide copies to the public. Lastly, we point out that we have elsewhere in this Report (see Chapter 12) recommended that one of the particular examples given (program material of the ABC) should in any event be exempted by regulation from the operation of the Bill.

**10.13** In our opinion paragraph 18 (3) (c) should be altered. Three possibilities suggest themselves. First, the clause could be deleted entirely and the Bill amended to provide that the granting of access to a document in any form does not amount to a breach of copyright. The main impediment to the adoption of this procedure might appear to be Australia's obligations under the Berne Convention for the Protection of Literary and Artistic Works, by which Australia is bound. The Convention requires the signatories to ensure by legislation the exclusive right of authors to authorise the reproduction of their literary works (Article 9 (1)). Strictly speaking, Australia is only obliged to grant this protection to authors who are nationals of other countries bound by the Union, and to works first published in one of those countries (Article 3 (1)). On this view Australia's obligations would be very limited, and the Convention would be observed if paragraph 18 (3) (c) only applied to documents supplied to government which had originated outside Australia. However, the accepted custom is that a country does not afford less protection to the authors of its own country than it extends to authors of other countries.

**10.14** A further qualification on Australia's obligations under the Berne Convention appears to be authorised by Article 9 (2), which provides that:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The Convention debates which led to the adoption of this provision in the Stockholm revision of the Berne Convention establish that it is intended to permit fair dealing, and that otherwise the right of the author to compensation is preserved. Section 183 of the *Copyright Act* 1968 (which we discussed earlier in paragraph 9.46) seems to amount to such a fair dealing provision.

**10.15** Although we do not purport to have undertaken an exhaustive study of copyright law, in our opinion it is certainly arguable that the Commonwealth would be able to take an expansive view as to what it is permitted to do by way of reproducing for freedom of information applicants submissions or documents that it has received from the public. Another theoretical justification on which it might seek to do this is that, in routine circumstances, it has received an implied licence from a person submitting information to it to reproduce that information. Although there do not appear to be any judicial authorities in point, we believe the Commonwealth could well adopt a line such as this as the rationale of the legislative policy espoused in the Bill.

**10.16** A second option is to enact some criterion, either in the Bill or in the *Copyright Act* 1968, for distinguishing between documents in respect of which copyright would be protected (e.g. artistic manuscripts) and documents in respect of which it would not (e.g. submissions to public inquiries). Were it possible to choose a relevant criterion, which we seriously doubt, it appears to us that it would be so general as to create problems more numerous or difficult than those which the amendment of paragraph 18 (3) (c) would be designed to resolve.

**10.17** Thirdly, something akin to a Reverse-FOI procedure could be devised. Copyright would only be protected, and reproduction in response to a request declined, if a person submitting information to the government specifically reserved his copyright in this respect. If he did, then of course it would be open to an agency to return the document to the person. While this option is preferable to paragraph 18 (3) (c) as it stands, it clearly has deficiencies. It does not overcome the basic copyright problem to which we have referred, but merely avoids it and reserves the right to prohibit reproduction to those individuals or organisations that are knowledgeable as to the pathways by which the intention of the legislation can be thwarted.

**10.18** To our mind, the first option is clearly preferable. If the government sees its way clear to adopt this approach without breaking any obligations Australia has under the Berne Convention, as we believe it probably can, we recommend that it do so.

**10.19 Recommendation: Clause 18 (3) (c) of the Bill should be deleted, and the Bill amended to provide that the the granting of access to a document in any form does not amount to a breach of copyright.**

#### **Deferment of access (clause 19)**

**10.20** Requests may be made to the right agency and the agency may intend to release the information. It may nevertheless not wish to do so immediately, for good reasons. Clause 19 is meant to cover this possibility. It provides that access to a document can be deferred where it is reasonable to do so in the public interest, or having regard to normal and proper administrative practices, or to action required by law to be taken in relation to the document requested. The sorts of documents intended here appear to be those relating, for example, to new taxation proposals, or to statutory requirements to table a report in Parliament, or press statements embargoed until a specific date. In submissions, departments suggested a number of other examples. The Department of Administrative Services thus referred to documents in the course of publication where deferment should be related to the publication date proposed by the publishing service.<sup>4</sup> The Department of the Capital Territory also suggested that "it would not be proper . . . for material to be published before it was received by the person for whom it was prepared".<sup>5</sup>

**10.21** The proposal to permit deferment was opposed in a number of submissions. The Women's Electoral Lobby (Victoria) for example thought that "there is a danger that . . . deferment procedures could be used in a controversial situation in order to confront the applicant (and general public) with a "fait accompli"". <sup>6</sup> The Council of Australian Government Employee Organisations also regarded clause 19 "as an unnecessary and over-cautious escape clause which

<sup>4</sup> Submission no. 141, p. 4.

<sup>5</sup> Submission no. 149, incorporated in *Transcript of Evidence*, p. 2223.

<sup>6</sup> Submission no. 7, incorporated in *Transcript of Evidence*, p. 368.

could allow unjustified deferments of consideration of applications'.<sup>7</sup> On the other hand a number of witnesses thought that there were safeguards against the abuse of the provision. The Department of the Capital Territory for example pointed out that the provision 'is only available for a specified time or until the occurrence of a particular event and only where public interest or normal proper administrative practices require such an action. The Administrative Appeals Tribunal has the jurisdiction to review such a decision and can reasonably be expected to deal adequately with any abuse of this procedure'.<sup>8</sup> Another witness, Mr D. Bubner, also thought that the provision was useful because access 'may be sought to a draft document but deferment may allow time for a better (more readable or more "acceptable"), or even a non-exempt, document to be prepared. On some occasions a document may be a borderline case in relation to exemption provisions and time will be needed by senior officers or a minister to make a considered decision'.<sup>9</sup>

**10.22** The Committee believes that there are legitimate uses for the period of deferment provided for in the Bill, especially if the provision is used sensitively by departments so that they can release material in due course for which they would otherwise feel disposed to claim exemption. We emphasise that a departmental decision to defer access can be appealed to the Administrative Appeals Tribunal and clause 19 (2) provides that an applicant shall be informed, as far as practicable, of the period for which the deferment will operate. Nevertheless, the clause could be tightened up considerably. We are concerned with the impossible vagueness and potential width of the words 'or having regard to normal and proper administrative practices', and recommend their deletion. In addition, it would be desirable for an agency or a minister, when giving notice of intention to defer, to be required to do so within a specified period of time. It may be that a deferment response is covered by the sixty day time limit specified in clause 17, but this is not entirely clear, and the Bill should be amended to ensure that it is. Usually it should be reasonable or practicable for such a response to be given much sooner, but a maximum period of sixty days should be set for this as for other kinds of response. When the response period under clause 17 is reduced in accordance with our recommendation in Chapter 8, this period should be correspondingly reduced.

**10.23 Recommendation: Clause 19 should be amended so as to—**

- (a) delete the words 'or having regard to normal and proper administrative practices';
- (b) require the notification of the intended deferment to be communicated to the applicant as soon as practicable but in any event not later than sixty days after the request is received.

**Deletion of exempt matter (clause 20)**

**10.24** Clause 20 provides for the deletion from a requested document of exempt matter 'where practicable'. Accordingly, an individual can still obtain requested information even if what he wants is mingled with other material which the agency determines to be exempt. This clause in a sense supplements the general spirit of clause 15 (which provides that information stored in computers should

<sup>7</sup> Submission no. 8, incorporated in *Transcript of Evidence*, p. 996.

<sup>8</sup> *Transcript of Evidence*, p. 2223.

<sup>9</sup> Submission no. 105, p. 4.

be made available if it can be rendered into discrete documentary form) and clause 18 (which provides, among other things, that except for overriding reasons of necessity access should be given in the form requested by the applicant), and is an important and valuable one. It would be indefensible if the presence of some exempt information in a source were to exempt the whole of the information.

**10.25** The key to the effective operation of this clause is the sensitive application of the phrase 'where practicable'. We can only hope that agencies will apply this liberally, flexibly, and in accordance with the general spirit of the Bill, and take considerable pains to ensure—even if this involves such steps as the masking out of individual paragraphs or even sentences on a page—that the maximum possible material is disclosed. We note that a failure to observe the letter of this clause enables an appeal by the applicant to the Administrative Appeals Tribunal, and hope further that, here as elsewhere, the Ombudsman (whose proposed functions are discussed in detail in Chapter 29) will exert a significant restraining influence on those agencies which are minded to ignore its spirit.