



20 December 2012

Dr Allan Hawke AC
C/- Mr Richard Glenn
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Business and Information Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: foireview@ag.gov.au

Dear Dr Hawke,

Submission to Review of the Freedom of Information Act

The Administrative Appeals Tribunal (AAT) welcomes this opportunity to provide a submission to your review of the *Freedom of Information Act 1982* (FOI Act) and the *Australian Information Commissioner Act 2010*.

Of the matters listed for review in the terms of reference, the three that are of particular relevance to the AAT are:

- 1(c) the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters;
- 1(d) the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account:
 - (i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and
 - (ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;
- 1(e) the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act.

This submission deals primarily with matter 1(e) and includes some brief comments on matters 1(c) and (d).

1(c) The effectiveness of the new two-tier system of merits review

Merits review before 1 November 2010

Prior to the commencement of the FOI reforms, the AAT was the only external merits review body. In general, it could review an agency's FOI decision once the agency had undertaken an internal review.

Merits review after 1 November 2010

Following the commencement of the reforms, once an agency makes a decision, an applicant can either seek an internal review or apply for review by the Information Commissioner directly. Regardless of whether an applicant seeks internal review, before the AAT can review an agency's decision, the Information Commissioner must first either review the agency's decision or decide, under s 54W(b), that the interests of the administration of the FOI Act make it desirable that the decision be considered by the AAT. Therefore, under the new system, if an applicant seeks internal review before applying to the Information Commissioner, the original decision may have been reviewed twice before an application is made to the AAT.

We do not consider the AAT is in a position to comment on the effectiveness of the reform of the merits review system given the limited number of applications that have been made to the AAT under the new two-tier system. Twenty-four applications under the post November 2010 FOI Act have been received so far, of which four have been finalised. Further, of the 24 applications, 19 have been made following a decision of the Information Commissioner to decline to review an agency's decision pursuant to s 54W(b).

1(d) The reformulation of the exemptions in the FOI Act

The limited number of applications relating to requests made from November 2010 means that the AAT has had little experience in dealing with the revised exemptions. Only one application has been heard and determined under the Act as amended and this did not raise any of the reformulated exemptions.

1(e) The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act

As you are aware, the AAT is covered in whole, by the FOI Act. Unlike the courts, the AAT is not exempt from the FOI Act in relation to any aspect of its operations. The AAT is of the view that it should be exempt from the operation of the FOI Act in relation to activities undertaken for the purpose of carrying out its functions under the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Legislative framework governing access to information held by the AAT

Section 35 of the AAT Act requires the AAT to conduct its hearings in public and reflects an expectation that evidence given before the AAT and documents lodged with the AAT will generally be made available to the public. The AAT is also required to operate in accordance with the principle of open justice. However, AAT members and staff are subject to a range of legislative provisions which prohibit the disclosure of information in particular circumstances. These confidentiality obligations are found in the AAT Act and in other Acts and legislative instruments which confer jurisdiction on the AAT.

AAT policy and practice relating to access to documents held by the AAT

The AAT has developed a range of policies and practices relating to access to documents which seek to strike a balance between the principle of open justice, the requirements of procedural fairness and the protection of personal information within the regulatory framework that applies to the Tribunal. These policies and practices operate separately to the AAT's process for managing FOI requests. However, they

are broadly consistent with the aims of the FOI Act by generally giving members of the public a right to information or documents held by the AAT.

In general, parties and their representatives are permitted to access, and make copies of, all documents on their file at any stage of the proceeding. Persons who are not parties are not permitted to access any document on a file prior to the conduct of a hearing without the express authorisation of an AAT member. Once a hearing has been conducted, any person may access records of the evidence given before the AAT, documents lodged with the AAT in relation to the application and the AAT's decision. This access is subject to any confidentiality order made by the AAT under section 35 of the AAT Act or another legislative provision which prohibits the disclosure of particular information.

Information about matters before the AAT may also be made publicly available in a number of other ways. Information on matters listed before the AAT on any particular day, including the names of the parties, is published on the AAT's website and provided to newspapers for publication. Subject to any countervailing confidentiality requirements, the AAT will disclose on request basic information relating to an application, including the names of the parties, listing details and the outcome. Further, AAT decisions are generally published on the Internet through the AustLII website and provided to legal publishers for reproduction in electronic and paper form.

Basis for proposed exemption

As set out above, the FOI Act provides that federal courts are exempt from the operation of that Act, except in respect of matters of an administrative nature (s 5). The rationale for creating a similar exemption for the AAT is predicated on the basis that the Tribunal's functions and operations are sufficiently similar to those of the courts. This is the basis on which the Australian Law Reform Commission (ALRC) recommended that the AAT, and potentially some other tribunals, should be partially exempt from the operation of the *Privacy Act 1988*: see [35.74] to [35.82] in *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108, 2008). Similar matters arise in relation to the application of the FOI Act.

The AAT notes that the Senate Standing Committee on Legal and Constitutional Affairs stated in its 1979 report on the Freedom of Information Bill 1978 that one reason for giving the courts an appropriate exemption was the desirability of avoiding any interference in the proper administration of justice. The Committee said it would not be appropriate for FOI legislation to be the vehicle for obtaining access, where this was otherwise unavailable, to court documents filed by parties to litigation nor as a substitute or supplement for discovery procedures.

Similar considerations apply to the AAT. The AAT submits that access to documents relating to applications under the AAT Act should be dealt with in accordance with policies and practices developed by the AAT in the context of the operation of the principle of open justice, meeting the requirements for procedural fairness and providing appropriate protection of personal information.

Some examples may help to elucidate the issues that can arise.

- A non-party may request access to a document in a case otherwise than under the FOI Act. The request may be refused either by a member or a district registrar in accordance with the AAT's general legislation and policy. The non-party may then request access under the FOI Act and a staff member will need to consider whether or not to grant access to the document. The AAT does not consider it desirable that a staff member can be required to consider a request under the FOI Act while the AAT is otherwise dealing with that case, particularly where a member may have already refused access.
- The AAT may order under section 35 of the AAT Act that a particular document should not be disclosed to anyone other than a party to the proceeding. If a request were made by a non-party for access to such a document under the FOI Act, the AAT could not refuse that request simply on the basis that the AAT had made a suppression order. The AAT would need to identify an appropriate exemption under the FOI Act. The test for determining whether a suppression order should be made under the AAT Act is not identical to the tests to be applied in relation to exemptions in the FOI Act, even if there are similarities. The applicability of any particular exemption will depend on the circumstances. It is conceivable that a staff member could decide that no exemption applies to the document. To release the document, however, would be a breach of the AAT's suppression order.
- The provisions of the FOI Act dealing with requests for amendment or annotations of personal records potentially give rise to practical problems for the AAT. For example, it would not be appropriate to amend or annotate an AAT decision that has been published. However, under the FOI Act, the only basis on which the AAT could refuse a request to annotate a decision is that the statement is irrelevant, defamatory or unnecessarily voluminous.

In general, requests from parties for access to documents held by the AAT are dealt with otherwise than under the FOI Act: parties are usually given access to all documents relating to their case on request. While it receives relatively few requests under the FOI Act, the AAT has received at least one request from a non-party seeking access to documents in relation to an active case. The AAT considers that the potential difficulties identified above are sufficiently real to warrant the partial exemption from the FOI Act and it would be preferable to avoid those difficulties occurring.

The AAT notes that the ALRC considered the extent to which a partial exemption to the Privacy Act should apply to tribunals other than the AAT in its 2008 report. Similar considerations would appear to be relevant in relation to a partial exemption from the FOI Act. The AAT, operating as it does in accordance with the principle of open justice, is perhaps most similar to the courts in this area. Whether or not the exemption should be extended to other tribunals, it would appear to be warranted for the AAT.

If you have any questions in relation to the matters raised in this submission or would like any additional information from the AAT, please contact Chris Matthies, Executive Director, Information and Development, on (02) 9391 2474 or at chris.matthies@aat.gov.au.

Yours sincerely,

Signed by Philip Kellow, Registrar, on behalf of

DUNCAN KERR