

**FREEDOM OF INFORMATION ACT 1982:  
FUNDAMENTAL PRINCIPLES AND PROCEDURES**

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**ATTORNEY-GENERAL'S DEPARTMENT**

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## OVERVIEW

It is suggested that all staff involved in FOI work should read **Parts 1 and 2** of these Guidelines on the objectives of FOI legislation and on disclosing material outside the FOI Act. A knowledge of these matters is vital to an overall perspective before becoming involved in the detailed processing of a request and the making of decisions on individual documents.

The democratic reasons underlying the FOI Act need to be part of the approach of those involved in making decisions about access to government information. FOI staff and decision-makers also need to know that the FOI Act is not a code of access to information, and sets only a minimum standard for the disclosure of government-held information in the public interest. That is, it will sometimes be appropriate to disclose information for which an exemption could be claimed.

The Government has directed that non-contentious documents should be disclosed even if they are technically exempt. The use of discretionary disclosure outside the FOI Act, as preserved by section 14, is a proper part of an agency's information practice, although naturally it has to be exercised with careful attention to the possible impact of disclosure on the processes of good government and on third parties.

**Part 3** of these Guidelines deals with some of the fundamental aspects of the enforceable right of access, for example: who may use FOI, what is a document for FOI purposes, what agencies and Ministers are subject to the FOI Act, what government documents are accessible as documents of an agency or a Minister, what are the rights of access to electronically-held information, what are the rules governing the physical form and the place in which access must be given etc.

**Part 4** gives details of material (other than exempt material) which is excluded from access under the FOI Act, such as library material, documents which are available in other ways, some documents of courts and some tribunals and of the Governor-General's Official Secretary, so-called 'prior' documents created before 1 December 1977, documents which cannot be found or do not exist in an agency's possession, and personnel documents which have not yet been sought under any relevant non-FOI schemes of access to such material.

**Part 5** deals with the exercise of the right of access by an applicant eg what needs to be in a request, where in the Act the right of access is given, the relevance or otherwise of the applicant's identity or interest in seeking access to documents, how the scope of a request should be interpreted, and whether a request is limited to those documents already in the possession of an agency at the time a request is made to it.

**Part 6** elaborates on some of the more important aspects of processing a request, in particular the consultations that may be needed with applicants, other agencies and third parties, the provisions for deferring rather than refusing access, and the requirements for redirecting or transferring requests.

**Part 7** gives an overview of the provisions concerning exempt documents and exempt matter in documents. The general nature of the exemption provisions is explained, and information is given concerning wholly exempt agencies and agencies that are exempt in respect of certain kinds of documents only. There is a discussion of the important obligation in section 22 to provide,

wherever possible, edited copies of documents with exempt material deleted, and of the similar provision in section 22 concerning irrelevant material.

**Part 8** examines the question of when it is permissible to refuse a ‘voluminous’ request both in relation to written documents and electronically–stored information. There is also a discussion of the rare situation where it may be permissible to refuse documents without first taking them out and examining them in detail for exempt material.

**Part 9** discusses the FOI legislative scheme that provides protection against certain civil or criminal proceedings which might otherwise have been brought in relation to disclosure of information under FOI (sections 91 and 92). The relevant civil proceedings are those for defamation, breach of confidence or infringement of copyright. Criminal proceedings include those under sections 70 and 79 of the Crimes Act 1914 and those under secrecy provisions contained in individual enactments.

**Appendix 1** is a detailed outline of the procedures involved in processing a request.

**Appendix 2** is the text of the ‘Brazil Direction’ (1985) regarding claims of legal professional privilege.

***Important note:*** Guidelines such as these can only deal with the provisions of the FOI Act in fairly general terms, and in processing individual requests it may be necessary for agencies to seek further advice from the Attorney-General’s Department or their legal services provider.

# **FREEDOM OF INFORMATION ACT 1982: PRELIMINARY AND PROCEDURAL POINTS**

## **1. The Objectives and Philosophy of the FOI Act (Section 3)**

1.1. The FOI Act came into force on 1 December 1982 after a period of discussion and debate spanning more than a decade. It was the first national legislation of its kind to be introduced in a Westminster-type system, and has been followed by similar legislation in many other such systems and in all Australian States, the Australian Capital Territory and the Northern Territory.

1.2. The philosophy underlying the FOI Act may be summarised in the following propositions:

- when government is more open to public scrutiny it becomes more accountable
- if people are adequately informed and have access to information, there is likely to be more public participation in the policy-making process and in government itself
- groups and individuals who are affected by government decisions should know the criteria applied in making those decisions, and
- every individual has a right to:
  - know what information is held in government records about her or him personally, subject to certain exemptions to protect essential public interests
  - inspect files held about or relating to her or him, and
  - have inaccurate material concerning an individual held on file or in computerised databases corrected.<sup>1</sup>

1.3 These aims are embodied in the objects section of the FOI Act (section 3). Subsection 3(1) provides that the object of the FOI Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:

- providing for making available to the public, information about the operations of government agencies (see section 8), and in particular ensuring that rules and practices affecting members of the public in their dealings with those agencies are readily available to those affected by them (see section 9)
- creating a general right of access to information in documentary form in the possession of government agencies and Ministers, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom the information is collected and held by government agencies, and
- creating a supplementary right to amend records containing personal information that is incomplete, incorrect, out of date or misleading.

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<sup>1</sup> *Freedom of Information Act 1982: Annual Report, 1 December 1982 to 30 June 1983*, AGPS, Canberra, 1983, pp.2–3; compare *1979 Senate Standing Committee on Constitutional and Legal Affairs Report*, paras 3.3–3.5.

1.4 In addition, subsection 3(2) provides that Parliament’s intention is that the provisions of the FOI Act must be interpreted so as to further the object in subsection 3(1) and that any discretions conferred by the FOI Act must be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

1.5 Agencies must always keep in mind the objects and intentions contained in section 3 when they are responding to FOI requests. The object is clearly to make available as much government–held information as possible consistent with the protection of essential government and private and business information (see below, para 2.7 on government directions as to exemption claims).

1.6 At the same time, the Federal Court and the AAT have held that, *in interpreting specific exemptions*, the objects clause does not mean that the FOI Act ‘leans’ towards disclosure. In their view, the rights of access and the exemptions in the FOI Act give a correct balance of the competing public interests involved in access, and each is to be interpreted according to the words used, bearing in mind the object of the Act (see eg *News Corporation Limited v National Companies and Securities Commission* (1984) 52 ALR 277 (D9/2); and *Arnold v Queensland* (1987) 73 ALR 607 at 626 (D189)). In *Searle Australia Pty Ltd v PIAC and DCSH* (1992) 108 ALR 163 (D294), the Full Federal Court noted the views of the High Court in a Victorian FOI case, *Victorian Public Service Board v Wright* (1986) 64 ALR 206, that it is proper to give provisions a construction that would further, rather than hinder, free access to information, but that the provisions of section 3 assist interpretation of an exemption only where there are ambiguities—they can not prevail over words plainly expressed.

1.7 On the other hand, where an exemption involves determining where the balance of the public interest lies in relation to disclosure of information, a decision–maker must take into account as an important factor the public interest in facilitating and promoting the disclosure of information (see, for example, *Arnold v Queensland* (above) at 609, which states that where the degree of disadvantage caused by disclosure is small, or the prospect of public disadvantage is comparatively remote, the principle in subsection 3(2) of the FOI Act may be enough on its own to tip the balance in favour of disclosure). There is a strong argument that ‘where access to the documents would enhance the accountability of government and facilitate participation, great weight should be given to the public interest *in* disclosure.’<sup>2</sup> There is a strong public interest in openness of administration, including:

- the need for the public to be better informed and therefore more competent to comment on public affairs, and
- the need to ensure democratic control to the greatest extent possible over the increasing regulation by the government and administration of the affairs of the ordinary citizen.

## **2. The Discretion to Release Documents Otherwise than Under the FOI Act (Section 14)**

2.1 The FOI Act is not a code of access to information—it sets a minimum, not a maximum, standard of public interest in the disclosure of information contained in government-held documents. The FOI Act is not intended to prevent or discourage disclosure of documents

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<sup>2</sup>P Bayne, ‘Public and Private Interests in the Application of the Exemptions’, paper delivered to Info One, the First National Conference on Freedom of Information, Adelaide, 22–24 September 1993, at p.19.

(including exempt documents) over and above the requirements of the Act, so long as it is proper to do so or is required by law (section 14). Section 14 enables a Minister and an agency to disclose a document even when it is exempt under a provision of the FOI Act.

2.2 Disclosure under the FOI Act is disclosure to the general public (see, for example, *Searle Australia Pty Ltd v PIAC and DCSH* (1992) 108 ALR 163 at 179 (D294)) (but note, however, paras 5.5–5.7 on the effects of an applicant’s identity or interest) and, subject to the provisions of subsection 91(2) (see para 9.7) and the general law, the agency making the disclosure has no control over the use to which an applicant puts information obtained under FOI.

2.3 Where information is disclosed outside the FOI Act, an agency may make the disclosure of information conditional on the recipient not disclosing the information more widely. Great care must be exercised in disclosing information outside the FOI Act where the interests of third parties are concerned. Such disclosure should not be made without consultation with those concerned where that is reasonably practicable (see paras 2.8–2.9). In addition, consultations with other agencies that would have been necessary in relation to an FOI request (see paras 6.29–6.34) are equally necessary where disclosure outside the FOI Act is being contemplated.

2.4 Section 14 refers in part to the situation where disclosure is *required* by law. Much legislation refers to the disclosure of information, either to defined persons or to the public at large. For example, some Acts contain specific provisions for matters such as the publishing of annual reports, providing statements of reasons and publishing details of appointments. Disclosure is required by law in other circumstances, such as where a court requires the production of a document not otherwise protected from such production, or where Parliament or a Royal Commission uses its powers to compel the giving of evidence and the production of documents.

2.5 It is less clear what is covered by the words in section 14 ‘where they can *properly* [disclose documents]’. The *1979 Senate Committee Report* (above, footnote 1) commented that the word ‘properly’ was not a term of legal art, but rather constituted an invitation which the Committee wholly supported:

*for decision-makers to apply a commonsense, rather than a narrowly technical approach to the application of the [Act’s] exemption provisions, and to confine their refusals to disclose only to those cases where there would be almost universal consensus that good government would require it. (para 9.2)*

2.6 The use of disclosure outside the FOI Act, as preserved by section 14, is a proper part of an agency’s information disclosure practice. There are many circumstances where it is sensible and a normal part of daily government business for public servants to disclose information and documents held by their agencies. However, where disclosure is made outside the FOI Act, the provisions of sections 91 and 92, which protect an agency or an officer against civil or criminal proceedings where access is required to be given by the FOI Act, or is bona fide believed to be required (see paras 9.2–9.9), do not apply.

### ***Government direction not to refuse non-contentious material***

2.7 In 1985 the Government issued directions that agencies should not refuse access to non-contentious material only because there are technical grounds of exemption available under

the FOI Act. These directions remain applicable. Proper compliance with the spirit of the FOI Act requires that an agency first determine whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out. For example, the fact that an exemption may be claimed under section 42 (legal professional privilege) should only lead to a claim for exemption where disclosure will cause real harm (see 'Brazil Direction' at Appendix 2). Similarly, the 'prior documents' exception in subsection 12(2) (see paras 4.5–4.17) should not normally be relied on unless the request will cause substantial and unreasonable diversion of resources (discussed in Part 8 below). Note also that a section 26 statement of reasons should include the reasons for not exercising the discretion to grant access to documents outside the FOI Act (see New Memo No.26 on statements of reasons, para 75).

### ***Sensitive third party material***

2.8 Agencies must naturally ensure that adequate protection is given to sensitive information relating to personal privacy and commercial confidentiality, and to documents the disclosure of which may be sensitive to other governments (State, Territory or foreign). The protection of personal information in the possession of Australian Government agencies is regulated by the Information Privacy Principles (IPPs) in section 14 of the *Privacy Act 1988* (note particularly IPP 11 on the disclosure of personal information). Where personal information is disclosed *outside* the FOI Act it is necessary to adhere to the requirements in IPP 11.1 that such information shall not be disclosed to a person, body or agency except where:

- the person concerned is reasonably likely to have been aware, or was made aware, that information of that kind is usually passed to that person, body or agency
- the person concerned has consented to the disclosure
- the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the person concerned or of another person
- the disclosure is required or authorised by or under law (IPP 11.1(d)), or
- the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

Where a document containing personal information is subject to access under the FOI Act, and is not exempt under that Act, its disclosure in response to an FOI request is 'required by law' and is therefore permitted under IPP 11.1(d).

2.9 In some cases it will be more appropriate that material relating to sensitive personal or commercial information, which is adequately protected by exemption provisions in the FOI Act (sections 41 and 43), be dealt with and released under the FOI Act. This ensures that third party interests are taken into account (see mandatory consultation provisions in relation to FOI requests in sections 26A, 27 and 27A, discussed in paras 6.29–34). Material therefore released under FOI brings into play the protections against civil and criminal action in sections 91 and 92 (see paras 9.2–9.9 below).

### ***Authorisation to disclose material outside the FOI Act***

2.10 Where an FOI request exists, a decision to disclose a document outside the FOI Act may be made by the responsible Minister, the principal officer of an agency or by an officer of an agency acting within the scope of authority in accordance with arrangements approved by the responsible Minister or the principal officer (for guidance on such arrangements under section 23, see Revised FOI Memo No. 45/1, issued 7 December 1984). Where there is no FOI request, a Minister or a senior public servant should authorise any publication or giving of access to a document outside the FOI Act to ensure there is no infringement of provisions such as section 70 of the *Crimes Act 1914* (Cth). The power of authorisation may be delegated in the normal way. An agency may have a system of access to particular categories of documents, and the FOI Act does not interfere with any such arrangements for disseminating information or documents otherwise than under the FOI Act. Again, an agency may have its own guidelines on when non-FOI disclosure of information or documents is proper.

2.11 It is not expected that the FOI Act be relied on to preclude access to information or documents which otherwise would ordinarily have been made available. Some legislation requires information or documents to be made available to the public (see para 2.4), and other legislation provides for the publication of certain information (for example, the *Marriage Act 1961* provides for the publication of a list of all authorised marriage celebrants). The FOI Act does not affect the operation of such provisions. It might, of course, enable access to a wider range of material than is required to be published under specific provisions.

2.12 Agencies and Ministers are expected to continue to respond to oral requests for information as they did before introduction of the FOI Act, provided they bear in mind the provisions of the Privacy Act (para 2.8) and any applicable secrecy provisions. Where oral responses are given to such requests, the officers concerned should have in mind that the recipient of an oral response may subsequently seek to verify it by making a request under the FOI Act for access to the documents.

### **3. The Right to Obtain Access to Documents of an Agency and to Official Documents of a Minister**

3.1 Subsection 11(1) of the Act gives to ‘every person’ *a legally enforceable right* to obtain access in accordance with the FOI Act to a ‘document of an agency’ and to ‘an official document of a Minister’, unless the document is an ‘exempt document’.

#### ***Who may exercise the right to obtain access?***

3.2 The right of access given by subsection 11(1) of the Act extends to ‘every person’. ‘Every person’ in this context means every person everywhere and includes (but is not limited to):

- individual persons resident in Australia, whether they are Australian citizens or aliens, and whether or not they are entitled to permanent residence in Australia (*Re Chandra and Department of Immigration and Ethnic Affairs* (1984) 6 ALN N257 (D33))
- individual persons resident abroad, whether or not they are Australian citizens (*Re Lordsvale Finance Limited and Department of Treasury* (1985) 9 ALD 16 (D117)),

provided they specify an address in Australia to which notices under the FOI Act can be sent

- a body corporate, such as a company (*News Corporation Limited v National Companies and Securities Commission* (1984) 52 ALR 277 at 292 (D9/2))
- an individual person serving a sentence in prison (*Re Ward and Department of Industry and Commerce* (1983) 8 ALD 324 (D13/2)), and
- an individual person who is a minor.

### ***What is a document?***

3.3 The word ‘document’ is defined in subsection 4(1) of the FOI Act to include:

- any of, or any part of:
  - any paper or other material on which there is writing
  - a map, plan, drawing or photograph
  - any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them
  - any article or material from which sounds, images or writing are capable of being reproduced with or without the aid of any other article or device
  - any article on which information has been stored or recorded, either mechanically or electronically
  - any other record of information, or
- any copy, reproduction or duplicate of such a thing, or
- any part of such a copy, reproduction or duplicate.

The definition of ‘document’ expressly excludes library material maintained for reference purposes (see para 4.1). The definition of ‘document’ in subsection 4(1) is very wide as it includes any ‘record of information’.

3.4 The definition includes sound recordings, films, videotapes and microfilm. It also includes computer tapes or disks (including CD-ROMs) (see paras 3.36–3.41 on electronically-stored information). The definition of ‘document’ includes ‘any part of’ a thing included within the definition of a document. This provision enables applicants to ask for specific parts of larger documents, for example, a particular appendix to a report, in such a way that it is not necessary for the agency to examine the larger document for exemptions. Similarly, where a request fairly interpreted is *clearly* for specific parts of documents and not their entirety, an agency should respond to the request in those terms (if there is any doubt, consult—see paras 6.3–6.7). It would still be necessary to inform the applicant of the material that has been deleted from documents as irrelevant (see para 7.22–7.24).

3.5 The inclusion in the definition of ‘document’ of the words ‘any other record of information’ would seem to cover any other form in which information is recorded which is not covered in the specifically identified forms referred to in the preceding paragraphs of the definition eg a painting (such as a portrait) that constitutes a record of information. It would even extend to

three-dimensional objects which record information, such as a land-use planning model, or a sculpture of a person. The definition is not exhaustive in form, and clearly includes items within the ordinary English meaning of ‘document’ such as a letter, memorandum, file note, email or report. A request for access to a file is a request for access to all documents on the file, *and includes the file cover*.

3.6 A request for all documents relating to a particular subject-matter would include, for example, a computer printout containing the names of all files thought to be relevant (see paras 3.42–3.48 on the obligation under section 17 to provide a written document from computer-held information), though in many cases the applicant may not be interested in receiving such a printout (and care is needed as to any sensitive material which may appear on such a list, such as personal names etc). If there is any doubt as to what documents are requested by the applicant, consult the applicant (see paras 6.3–6.4).

3.7 The definition of ‘document’ includes ‘yellow slips’ or ‘post-it notes’. Note that some file registries, when putting files away or archiving them, will remove such slips which are affixed to existing folios and fix them to a blank sheet of paper and give them new folio numbers. It cannot be assumed that such slips are not part of the permanent record when an officer parts with them. It is important that such slips not be used in the case of material which should remain part of the permanent record, and they cannot be used as a way of avoiding the provisions of the FOI Act.

3.8 The practical, commonsense approach to interpreting the ambit of a request for access to documents on a specified subject is to construe it as excluding irrelevant material in any of the documents which fall within the request (see paras 7.22–7.24 on ‘irrelevant material’). It will still be necessary to inform an applicant of what has been excluded as irrelevant (see para 7.22). At the same time, an application should not be narrowly and legalistically construed (see para 5.10) and material should not be excluded as ‘irrelevant’ unless it clearly is so. Once again, consult the applicant in cases of doubt. (See also New FOI Memo No.26, para 38 on the meaning of ‘document’ when preparing a section 26 statement of reasons.)

### ***What is an agency?***

3.9 ‘Agency’ is defined in subsection 4(1) of the FOI Act to mean ‘a Department of the Australian Public Service that corresponds to a Department of State of the Commonwealth’, or a ‘prescribed authority’. Parliamentary Departments do not come within the definition of ‘Department’ in subsection 4(1) and their documents are not subject to the FOI Act. The House of Representatives and the Senate are not agencies, and Members of Parliament are not subject to the FOI Act (see *Re Said and John Dawkins, MP* (D307), and paras 3.24–3.26 on an ‘official document of a Minister’).

3.10 ‘Prescribed authority’ is defined in subsection 4(1) of the FOI Act. It means:

- a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of an ‘enactment’ (also defined in subsection 4(1)) or an Order-in-Council, with certain exceptions which include an incorporated company or association (but see next dot point), Territory Legislatures, and Royal Commissions (but see para 3.32 below): paragraph 4(1)(a) of the definition,

- certain bodies which are declared by the Freedom of Information (Miscellaneous Provisions) Regulations to be prescribed authorities, being *either* bodies established by the Governor-General or by a Minister, *or* incorporated companies or associations over which the Commonwealth is in a position to exercise control: paragraph 4(1)(b) of the definition, and
- some other persons holding certain kinds of office or appointment: paragraphs 4(1)(c) and (d) of the definition.

Subsections 4(2) and (3) deem certain statutory boards, councils, committees and office-holders not to be prescribed authorities.

3.11 There are provisions in the FOI Act to deal with the situation where an agency is abolished. Under subsection 4(6):

- if the functions of an abolished agency are acquired by another agency, a request made to the abolished agency is deemed to have been made to the other agency, and any decision made by the abolished agency in respect of a request is also deemed to have been made by the other agency
- if the functions of the abolished agency are acquired by more than one other agency, a request to or a decision of the abolished agency is deemed to have been made to or by whichever agency has acquired the functions (of the abolished agency) to which the requested document most closely relates, or
- if the documents of the agency are deposited with the National Archives of Australia, a request to or a decision by the abolished agency is deemed to have been made to or by the agency to the functions of which the document the subject of the request most closely relates.

3.12 An agency which is deemed by subsection 4(6) to have received a request or made a decision, but which was not in existence at the time of the request or decision, is deemed, for the purposes only of dealing with the request or decision under the FOI Act, to have been in existence at the relevant time (subsection 4(7)).

3.13 Under sections 5 and 6, courts and bodies listed in Schedule 1 (such as the Australian Industrial Relations Commission) are deemed to be prescribed authorities (see paras 4.3–4.4). The Australian Defence Force and some other bodies are deemed to be part of the Department of Defence for the purposes of the FOI Act (subsection 4(4)).

3.14 Under subsection 7(1) and Part I of Schedule 2 of the FOI Act, certain bodies are deemed not to be agencies for the purposes of the Act. These include a number of security and intelligence agencies and other bodies. A full list of agencies which are subject to the FOI Act is published each year in the Attorney-General's annual report to Parliament on the FOI Act (which is available at <[www.ag.gov.au/foi](http://www.ag.gov.au/foi)>).

### ***Exempt agencies***

3.15 Agencies which are wholly exempt from the FOI Act because of subsection 7(1) and Part I of Schedule 2 (these include a number of security and intelligence organisations and other bodies) or agencies which do not come within the definition of 'Department' or 'prescribed authority' are

not required to comply with the publication requirements of sections 8 and 9 of the FOI Act and are not obliged to respond to requests for access to their documents. It is nonetheless good administrative practice for such an agency to reply courteously to an applicant stating that the agency is not subject to the FOI Act. Such agencies may exercise a discretion to release documents even where there is no FOI or other requirement to do so (see Part 2 above).

3.16 Where another agency receives a request for access to a document which originated in or was received from an agency which is exempt under section 7 and Part I of Schedule 2 *and* the document is more closely connected with the functions of that exempt agency than with those of the agency receiving the request, the request must be transferred to the Department which administers the exempt agency (subsection 16(2)—see FOI Memorandum 31 ‘Inter-agency consultation and section 16 transfers of requests’ and paras 6.26 and 6.28). There is a similar provision in subsection 51C(2) concerning requests for amendment under section 48.

### ***What is a ‘document of an agency’?***

3.17 The term ‘document of an agency’ is defined by subsection 4(1) of the FOI Act to mean a document ‘*in the possession of an agency*’, whether it was *created in* the agency or *received by* the agency from another agency or a source outside the government. Therefore, the *source* of a document is not the determinative factor: whether an agency is *in possession* of a document is the critical factor.

### ***Possession***

3.18 In determining whether a document is in the possession of an agency, the relevant considerations are the purpose for which documents are created, the capacity in which officials create or handle the documents and whether the agency is in a position to exercise control over the documents (*Re Mann and Capital Territory Health Commission* (1983) 5 ALN N261 (D4), *Re Wertheim and Department of Health* (1984) 7 ALD 121 (D44)). Documents are received in an agency if they are received by an officer on behalf of the agency in the course of his or her duties. For example, while documents may be personal records (even if they are kept on the premises of an agency), they become documents of an agency if they are placed in the agency’s files (*Re Healey and Australian National University* (D65); *Re Barkhordar and ACT Schools Authority* (1987) 12 ALD 332 (D172)).

3.19 Documents that belong to a private person and are not in the control of an agency are not documents in the possession of that agency, but documents *are* documents of an agency if created in the agency by officers of the agency as a part of their duties. Documents do not need to be on an official file of an agency to constitute documents of that agency; loose notes in drawers of desks or filing cabinets, the contents of notebooks, floppy disks, work diaries and bunches of dates, and so on, if created or received by an officer of an agency in the course of the officer’s duties, are documents of the agency. In *Re Bradbury and the Registrar, Administrative Appeals Tribunal* (1991) 22 ALD 412 (D263) the AAT accepted that bench books and notes prepared by members of AAT panels were documents of the AAT for the purposes of the FOI Act (despite earlier claims of exemption, access was ultimately granted by the Registrar before the review decision was made).

3.20 A document is ‘in the possession of’ an agency for the purposes of the FOI Act in certain cases even though it may not be in the *physical possession* of the agency, where the circumstances are such that the agency has a *right to immediate physical possession* of the document (sometimes known as ‘constructive possession’) eg where a person has wrongfully removed a document from the files of the agency and the agency is entitled to recover the document from that person.

3.21 There is a similar situation where a consultant is employed by an agency under a contract which provides that the agency is entitled to immediate possession of all (or some) documents held by the consultant in connection with the subject matter of the consultancy. In other cases it may be provided in the contract that there is no right of possession on the part of the agency until the completion of the contract. Even if the consultancy contract is silent on the question, the facts of the dealings between the agency and the consultant may establish that the agency has a right of possession under the general law (in particular the law of agency) with respect to some or all of the documents in the physical possession of the consultant. It may be preferable to settle the question explicitly in the contract, although agencies should generally not give up the right of access to documents which they use or rely on in performing their functions.

3.22 A similar situation may arise in relation to an external group appointed by an agency or Minister to provide advice or conduct a review, or to handle particular aspects of an agency’s operations such as personnel records, payroll etc. In the case of ‘outsourced’ information which is a part of the normal functions of an agency (including personnel matters) it is consistent with the objects of the FOI Act that a Commonwealth agency retain the right of immediate possession wherever possible. (See also paras 3.49–3.51 below on possession of electronically–stored information.)

3.23 A document held at an overseas post by an agency is a document of that agency for the purpose of the FOI Act (*Re O’Grady and AFP* (1983) 5 ALN N420 (D16)) and is therefore subject to requests for access under the FOI Act.

### ***What is an official document of a Minister?***

3.24 The term ‘official document of a Minister’ is defined in subsection 4(1) of the FOI Act to mean a document in the possession of a Minister, in her or his capacity as a Minister, and relating to the affairs of an agency or of a Department of State. Documents of a personal or party political kind, or comprising the records of a Minister in her or his capacity as a Member of Parliament, do not fall within the definition. For example, a document relating only to electorate matters is not an official document of a Minister. Representations which a Minister receives in her or his capacity as a Member of Parliament from a constituent concerning the affairs of an agency within another portfolio would not be an official document of the Minister (see *Re Said and John Dawkins MP* (D307) where the AAT found it had no jurisdiction in relation to a request for access to a Minister’s constituency correspondence). However, representations, whether made to a Minister in that capacity or in the capacity of a local MP, relating to an agency within the Minister’s own portfolio, do come within the scope of the term ‘official document of a Minister’.

3.25 An official document of a Minister that contains some matter that does not relate to the affairs of an agency is an exempt document (see paragraph (c) of the definition of ‘exempt document’ in subsection 4(1) of the FOI Act). There is, however, an obligation under subsection

22(1) to provide an edited copy of the non-exempt matter in the document where it is reasonably practicable to do so, except where it is apparent from the request or from consultation that the applicant does not want an edited copy (see New FOI Memo No.26, paras 71–74 and paras 7.14–7.16 below). The Minister must respond to the request and inform the applicant that the document disclosed is an edited copy, and of the grounds of the deletions and the provisions under which the deletions have been made (paragraph 22(2)(a) of the FOI Act). Where the request relates only to documents which in their totality are not official documents of a Minister, there is no formal obligation to respond to the request under the FOI Act, but good administration would require that the Minister inform the applicant why the request for those documents is not valid under the FOI Act (compare the situation in *Re Said* (above)).

3.26 For the purposes of the definition of ‘official document of a Minister’, a Minister is deemed to be in possession of a document that has passed from her or his possession if he or she is entitled to access to the document and the document is not a document in the possession of an agency (subsection 4(1), definition of ‘official document of a Minister’). A document of a Minister that is placed with the National Archives of Australia is subject to a right of access by the Minister while he or she remains in that office, and is therefore subject to FOI access as an ‘official document of a Minister’. Where the Minister ceases to hold that office, a document held by the National Archives of Australia is subject to a continuing right of access by the Department concerned, and is therefore subject to FOI access as a ‘document of an agency’. A Minister is not deemed to be in possession of a document that was submitted to the Minister by her or his Department, considered by the Minister and returned to the Department without the Minister retaining a copy of it—it would be a document of an agency. However, the Minister would be in possession of any copy of such a document retained in the Minister’s office.

### ***Documents in the custody of the National Archives of Australia***

3.27 A document placed by an agency in the custody of the National Archives of Australia (NAA) is deemed by the FOI Act to be a document in the possession of that agency (subsection 13(2) of the FOI Act). On receiving a request for access to the document, the agency must retrieve the document from the custody of NAA and notify the applicant of its decision on access. (Different considerations apply if the document is more than 30 years old—see para 3.22). This means agencies cannot escape their obligations under the FOI Act by transferring documents to NAA. If an agency which placed a document with NAA has ceased to exist, the document is deemed to be in the possession of the agency with functions to which the documents are most closely related (subsection 13(2)).

3.28 Where an applicant seeks access to an agency document in the custody of NAA that is more than 30 years old *and* does not contain personal information, there is no right of access under the FOI Act (paragraph 12(1)(a)). The applicant must seek access from NAA under the provisions of the *Archives Act 1983*.

3.29 An applicant seeking access to documents containing personal information about the applicant has a right of access under the FOI Act which is not limited by the age of the documents (subparagraph 12(2)(a)(i)). There is a similar right for a legal person (whether an individual, company or other organisation) to seek access, to a document (of any age) containing information relating to the person’s business, commercial or financial affairs (subparagraph 12(2)(a)(ii)). An applicant in that case is entitled to insist that an agency retrieve a document (of

any age) from NAA and notify a decision on access under the FOI Act. The FOI Act does not prevent an applicant going directly to NAA to obtain access under the *Archives Act 1983* to a document containing personal or other relevant information concerning the applicant if he or she wishes (subsection 13(4)). Some of the exemptions in the *Archives Act 1983* are, because of the age of the documents to which they apply, less restrictive of disclosure than those in the FOI Act.

3.30 Documents are not subject to the FOI Act if they are placed in the custody of NAA by someone other than an agency (subsection 13(1))—eg a deposit of records in NAA by a private individual. These documents *may* be open to public access under the *Archives Act 1983*. Documents relating to the administration of NAA are subject to access under the FOI Act (paragraph 13(1)(d)).

### ***Documents in the collection of the Australian War Memorial, the National Library of Australia and the National Museum of Australia (section 13)***

3.31 A document is not subject to the FOI Act if a person other than an agency placed it in the collection of the Australian War Memorial, National Library of Australia or the National Museum of Australia (subsection 13(1)). A document placed by an agency in the collection of one of the above-mentioned institutions (or in the custody of the National Archives of Australia) is deemed to be a document of that agency (subsection 13(2)). Material in those collections is not subject to the *Archives Act 1983* (see definition of ‘exempt material’ in subsection 3(1) of that Act). On receiving a request for access to a document placed by an agency in one of these collections, the agency must retrieve the document and notify the applicant of its decision on access. This means agencies cannot escape their obligations under the FOI Act by transferring documents to these collections. If the agency which placed the documents in a collection ceases to exist, the documents are deemed to be in the possession of the agency with functions to which the documents are most closely related (subsection 13(2)).

### ***Royal Commission documents***

3.32 A Royal Commission is not an agency under the FOI Act (see subparagraph (a)(vi) of the definition of ‘prescribed authority’ in subsection 4(1)), but documents of completed Royal Commissions in the custody of the National Archives of Australia are, for the purposes of the FOI Act, documents of the Department of the Prime Minister and Cabinet (subsection 13(3)).

### ***The right to obtain access to information, as distinct from documents***

3.33 As a general rule, the right created under the FOI Act is a right of access to documents, not information as such (see subsection 11(1) and the reference in paragraph 3(1)(b) to ‘access to information in documentary form’).

3.34 The FOI Act does not generally require an agency to:

- make available information which is not in its possession in a documentary form, for example names and addresses not in an agency’s documents (*Re Wiseman and Transport* (1985) 12 ALD 707 (D130)), and

- collect information from a number of documents in its possession and create a new document, as it may, for example, in preparing a response to a Parliamentary question (*Re Davis and Attorney-General's Department* (D126)).

3.35 Agencies are generally not obliged to research information—the obligation is only to provide access to existing documents. In practice, where there is a request for electronically–stored information, the process of copying separate pieces of information on to, for example, a floppy disk, would in effect create a new document, but would be within the requirements of the FOI Act in certain circumstances (see para 3.37). Agencies can reach agreements with applicants about preparation of new documents where this would reduce costs and where administrative common sense dictates eg where it is a simple matter of answering a question rather than collecting and collating many documents. Requests must be read fairly—if it is clear that an applicant seeks access to material under the FOI Act, or a request could readily be met by provision of existing documents, a request for information should be treated as a request for documents, subject to any necessary consultations with the applicant. See also para 5.10 concerning consultation with an applicant as to the scope of a request.

### ***Requests for electronically–stored information***

3.36 The FOI Act provides for access to information ('any article') stored mechanically or electronically (subparagraph (a)(v) of the definition of 'document' in subsection 4(1)). Computer programs also seem to be included under the definition of 'document', but, as with other documents, the form of access may be varied if provision of a copy would infringe a non-governmental copyright (paragraph 20(3)(c)) (see para 3.55). As a result, access to computer-held information is no longer confined to access to hard copy as provided for in section 17 (see paras 3.42–3.48).

3.37 An applicant may request access directly to information on a computer database including the information on a computer disk or tape. The information sought may be the whole of the information stored on the database, disk or tape, or it may be only part or parts of the stored information. The definition of 'document' includes 'any part of' a document. One result of that is that a request for information held in electronically–stored form would apply to bits of information scattered over a particular database, computer disk or tape, so long as it is possible to copy or view that information (or produce a hard copy of it under section 17—see paras 3.42–3.48) without substantially and unreasonably diverting the resources of the agency (subsection 24(1)) (see Part 8 below). If it is unclear which form of access an applicant desires (eg a computer disk or tape or a hard copy of information), the agency should consult with the applicant.

3.38 An applicant may request *direct access* (as against access to hard copy under section 17) to electronically–stored information in any of the appropriate ways provided in the FOI Act (section 20 – see paras 3.53–3.58). An agency is obliged to provide access in that form unless one of the exceptions in subsection 20(3) applies (see para 3.55 below). For example, an applicant may want to obtain a copy of all information on a disk or tape. Paragraph 20(1)(b) refers to such a copy. If the applicant wants access to information which is scattered across several disks or tapes, he or she is entitled under paragraph 20(1)(b) to be provided with a floppy disk, for example, containing (copies of) those separate pieces of information.

3.39 As is apparent, the provision of information in the form of floppy disks or tapes may enable the applicant to manipulate the information in any way the applicant sees fit on the basis of the software available to her or him. However, it should be noted that the form in which access is given does not affect whether a document is exempt or not (see section 20 on forms of access and paras 3.53–3.58). If information is not exempt in written form then the same information will not be exempt in the form of a floppy disk or a computer tape. However, in relation to personal information especially (subsection 41(1)), the possibility of further manipulation of information even if it is released in written form is a relevant factor in considering whether disclosure is unreasonable or not. It is a question of whether disclosure to the whole world is unreasonable, and even information disclosed in a written form may later be put in electronic form and manipulated.

3.40 An applicant may prefer to inspect the information held on an electronically–stored document by ‘online access’ rather than requesting a copy of that information. However, providing online access may present difficult problems to an agency, and an agency would be able in appropriate cases to invoke subsection 20(3) where such inspection ‘(a) would interfere unreasonably with the operations of the agency...; or (b) ... having regard to the physical nature of the document, would not be appropriate’. The latter exception should only be claimed where there are real difficulties involved in allowing an applicant to inspect the document, for example difficulties of a physical kind or of the kind which might arise in not being able readily to exclude exempt material from inspection.

3.41 Subject to appropriate safeguards, online access may in many cases eventually prove more cost–effective for both applicants and agencies, and more helpful in the provision of useful information, than the traditional form of access to written documents.

### ***Section 17 – provision of ‘hard copy’ of electronically–stored information***

3.42 Another exception to the general rule that FOI does not require preparation of a new document (para 3.34) is in section 17. The section applies where it appears from a request that the applicant desires information that is *not available in discrete form* (see para 3.44) *in the written documents* of the agency, and the applicant doesn’t want to be provided with a computer tape or computer disk on which the information is recorded.

3.43 If the agency can produce a written document (transcript, hard copy, computer printout etc.) containing the information in discrete form by use of a computer or other equipment ordinarily available to it for retrieving or collating stored information; or make a transcript from a sound recording held in the agency, the agency is required to treat the request as if it were a request for such a written document containing the requested information in discrete form, and to produce that document (subject to exemption claims).

3.44 The word ‘discrete’ in section 17 means ‘separate’. It will be a question of judgment as to whether the requested information exists in discrete form in an agency’s written documents, subject to external review by the AAT or investigation by the Ombudsman.

3.45 The following are examples of situations in which an obligation to provide a written document under section 17 would arise:

- where there is a request for information, which is not held in separate form in written documents in an agency's files, but which is held in electronically-stored form in various places on an agency's databases—subject to the workload test (see Part 8 below), and to having the software to produce the information, the agency would be required to give access by provision of a written document containing the requested information obtained by application of the appropriate software, unless the applicant had indicated a wish to be provided with a computer tape or disk on which the information is recorded, and
- where there is a request for the complete contents of an existing computer tape or disk, an obligation would arise to provide a printout under section 17 of the whole tape or disk, unless the information is already available in separate form in written documents of the agency, or the applicant indicated a wish to be provided with a copy of the tape or disk—subject again to the workload test and to having the software to produce the information.

3.46 The question of the workload limitation on section 17 is discussed in paras 8.18–8.21. There is a limit on the amount of manipulation of data required under section 17, whether or not the workload test in subsection 17(2) applies. For example, production of statistical information from existing raw data would not seem to be mandated. If an agency no longer has the hardware or software necessary to retrieve the requested information, an agency is likely to be relieved of the obligation to produce the requested hard copy. However, the words 'by the use of a computer' do not make the right to provide a hard copy dependent on the ordinary use by the agency of particular software. If there is other software easily available to the agency which it could use for retrieval of requested information, an obligation to provide hard copy might be held to arise under subsection 17(1), unless precluded by the workload test in subsection 17(2).

3.47 Section 17 does not apply to Ministers. They are limited to section 20 as to forms of access in processing requests for electronically-stored information (see paras 3.53–3.58 on forms of access).

3.48 The obligation under section 17 is to deal with a request that satisfies the preconditions in the section as if it were a request for a written document produced by the use of a computer or other equipment, or by making a transcript from a sound recording. The FOI Act applies as if the agency had such a written document or transcript in its possession. When a hard copy or transcript is produced, it must then be treated in the same way as any other document which has been identified as relevant to a request, including the making of decisions concerning the application of exemptions to any of the material in the written document and the deletion of exempt material under section 22 (see paras 7.18–7.21 below and paras 71–74 in New Memo No.26 on statements of reasons).

### ***Whether electronically-stored information is in the possession of an agency***

3.49 There is an issue concerning whether an agency, that ordinarily has computer access to databases held by other Commonwealth or State agencies or private organisations, is required by section 17 to search those databases and obtain copies of requested information. This situation may arise, for example, from information sharing arrangements. In most cases, the FOI Act will not apply to such information, because its operation is limited to documents (including computer disks or tapes) in the possession of agencies subject to the FOI Act (see subsections 11(1) and 15(1)). For example, online access by a Commonwealth law enforcement agency to databases of

State and Territory law enforcement agencies would not lead to a right of access under the Commonwealth FOI Act to those other databases.

3.50 However, where an agency has provided another person or body with computerised data, for example under an ‘outsourcing’ agreement relating to certain tasks or functions of the agency, and has an immediate right of access to that data, whether by online access or by obtaining computer disks or tapes, then the data would be subject to FOI access on the basis of the agency’s right to possession (or ‘constructive possession’ – see para 3.20). In *Beesley v Australian Federal Police* (2001) 111 FCR 1, the Federal Court considered the meaning of ‘possession’ in the context of the FOI Act and held that possession includes both physical and constructive possession.

3.51 A further case which may arise is where an agency shares its computer facilities with an outside person or organisation not subject to the FOI Act, for example a consultant. If the information provided by that organisation is available to officers of the agency in the course of their duties, it would be subject to FOI access as being in the possession of the agency. The outcome in a particular case will depend on the form of any agreement with an outside organisation and the actual dealings between the agency and the organisation.

### ***Identification and location of relevant electronically–stored information***

3.52 All information held on a server, a hard disk, a floppy disk or a CD–ROM (unless part of library material maintained for reference purposes) is potentially subject to access under the FOI Act and all such information relevant to an FOI request must be identified and appropriate decisions made about its disclosure in the same way as for written documents. This will be subject to the provisions of section 17 (see paras 3.42–3.48). Every agency must devise its own guidelines and processes for efficiently recovering such information.

### ***Forms in which access may be given (section 20)***

3.53 Section 20 of the FOI Act provides that an applicant may obtain access to a document in one or more of the following forms:

- a reasonable opportunity to inspect the document
- provision of a copy of the document
- making arrangements for viewing a film or videotape or hearing a sound recording, and
- provision of a transcript of a sound recording or of shorthand notes.

See New Memo No.29, Appendix 2 for the relevant charges for different forms of access.

3.54 Access to a document in the form of the provision of a copy is not limited to access in the form of a photocopy. If the document, due to its age or condition, will not photocopy, it would be appropriate to provide a typed or handwritten copy. However, the copy should not differ from the original text, except to the extent necessary to delete exempt matter under section 22, and the deletion of such matter should be indicated in the copy. Nor should the text be simplified on the grounds that a lay reader may not be conversant with the terminology used in the document (eg where there is scientific, technical or medical terminology). An agency is, however, free to provide an applicant with a separate amplification or explanation of the document.

3.55 An applicant has a right to be given access in the form requested, unless the giving of access in that form:

- would interfere unreasonably with the operations of an agency or the performance of a Minister's functions, in which case the agency may refuse to make the actual documents available for inspection and make copies available (paragraph 20(3)(a)). (See Part 8 below for a discussion of the similar concept of what is a 'substantial and unreasonable diversion of resources'.)

*Example*

An example would be where an applicant wishes to inspect documents that are required by an agency for its everyday operations. The agency may refuse to make the actual documents available for inspection and make copies available instead. Again, where an applicant seeks access to a typed transcript of a tape recording, an agency may give access to the tape itself. In order to satisfy the test, an agency or Minister needs to show that the work involved in providing a particular form of access would be unreasonable, as in *Re Bradbury and Commonwealth Ombudsman* (D185) where the AAT upheld the Ombudsman's decision not to provide (further) access by inspection because of the disruption to the work of the Ombudsman's office previously caused by the applicant.

- would be detrimental to the preservation of the document (paragraph 20(3)(b)) – for example, where an applicant wishes to make a copy of a videotape on her or his own videotape recorder and damage might be done to the original videotape, or where, because of the fragility of the document or for other reasons, personal inspection may result in damage to the document
- would be inappropriate having regard to the physical nature of the document (paragraph 20(3)(b))—for example, a document that will not photocopy, due to its age or condition, or a painting or sculpture containing a record of information, could be made available for inspection, or an original computer tape from which it is impracticable to remove exempt material could be provided in the form of the non-exempt material copied on to a floppy disk or tape, or
- would, but for the FOI Act, involve an infringement of copyright (other than that owned by the Commonwealth, an agency, or a State) in respect of matter not relating to the affairs of an agency (paragraph 20(3)(c)).

Subsection 91(1) of the FOI Act states that no action for infringement of copyright lies against the Commonwealth, an agency, a Minister or an officer by reason of the authorising or the giving of access to a document, where either (a) access was required by the FOI Act to be given (or would have been required to be given but for the operation of subsection 12(2), or (b) access was authorised by a Minister, or by an officer authorised under section 23 or 54, in the *bona fide* belief that the FOI Act required access to be given (see paras 9.2–9.8 below for a discussion of section 91). Giving access under the FOI Act does not authorise further acts which would amount to a breach of copyright (see subsection 91(2), discussed in para 9.7).

Paragraph 20(3)(c) refers to the infringement of copyright which would have occurred *but for the operation of section 91* (see the words 'but for this Act'). The effect of paragraph 20(3)(c) is that there is nothing preventing the disclosure under the FOI Act of material

where its disclosure would otherwise have involved a breach of copyright, but an agency or Minister has a discretion to grant access to the material in a different form from that requested. The discretion has rarely been exercised, and should only be utilised in exceptional cases (see discussion in the *1979 Senate Committee Report*, paras 10.9–19).

*Example*

An agency has in its possession a sound recording of a talk given by a Minister in a private capacity, in which the Minister has partial copyright on the basis of the notes used, and the Minister objects to release of the sound recording but not to release of a transcript. The agency could give access in the form of a transcript instead of in the form of a copy of the tape.

3.56 Where the giving of access to a document in the form requested by the applicant would have any of the above consequences, access in that form may be refused and access given in another form (see subsection 20(3)). In such a case, no greater charge may be imposed than if access had been given in the form requested (subsection 20(4)). A decision to give access in another form than that requested is a refusal to grant access to a document in accordance with a request and may be reviewed internally (paragraph 54(1)(a)) and, where appropriate, by the AAT (paragraph 55(1)(a)).

*Electronic documents*

3.57 An agency may provide an applicant with electronic documents in response to an FOI request.

3.58 Security and privacy issues relating to information stored as metadata held within Microsoft Office documents have been identified. Usually an agency will not intend to provide access to a document with information that has been designated as ‘hidden’ (eg personal details of authors, revision history, review comments) or information that allows collaboration on writing and editing the document. Therefore, it is preferable that all Microsoft Office documents are converted into PDF format, or have their metadata cleansed using an agency approved process, prior to being sent outside the agency network.

***Information Access Offices (section 28)***

3.59 Subsection 28(2) of the Act provides that a person who is entitled to obtain access to a document shall have that access provided, if he or she so requests, at the Information Access Office having appropriate facilities to provide access in the form requested that is closest to her or his normal place of residence. Regional offices of the National Archives of Australia in the capital cities of all States and Territories provide the facilities of the Information Access Offices (see Commonwealth of Australia Gazette No G47, 29 November 1983). Further details about Information Access Offices is in FOI Memo No. 61, issued in November 1983.

3.60 Where an applicant is entitled to access to a document and the applicant requests that access be provided at an Information Access Office, an agency or Minister is obliged, subject to the provisions concerning forms of access (see next para), to provide access to the document at an Information Access Office, rather than at the place where the document is normally held or at any

other place. There is no such obligation where documents are made available outside the FOI Act (see Part 2 above).

3.61 Subsection 28(3) provides that nothing in section 28 is to prevent an agency from giving access to a document, in accordance with subsection 20(3), in a form other than the form requested by the applicant. Such a decision is, however, subject to internal and AAT review, and may be investigated by the Ombudsman.

*Example*

An applicant in Perth seeks to inspect a file held by an agency in Canberra. She requests that it be made available in the Information Access Office in Perth. The agency instead grants her request by providing photocopies of the documents, on the ground that to send the file to Perth would interfere unreasonably with the operations of the agency (see subsection 28(3) and paragraph 20(3)(a)). The agency is not required to send the original documents to Perth, but its decision would ultimately be subject to AAT review.

3.62 Subsection 28(4) provides that a person who is granted access to a document at an Information Access Office shall not be charged any additional costs which may be incurred by an agency or Minister in providing access there rather than at a location more convenient to the agency or Minister.

#### **4. Material (other than exempt material\*) excluded from the right of access**

\* For exempt material, see Part 7, Exempt Documents (below).

##### ***Library material***

4.1 Library material maintained for reference purposes is specifically excluded from the definition of ‘document’ in subsection 4(1) of the FOI Act (para 3.3), and is not subject to the right of access under the FOI Act. An agency claiming that a document is not available for access under the FOI Act because it is library material should be prepared to support its claim by showing that the document is entered in its library’s catalogue. An agency is not able to put a document outside the FOI Act merely by placing it in its library. The document must properly form part of its library reference material. While library material maintained for reference purposes is not available for access *under the Act*, there is nothing to prevent an agency from allowing members of the public access to its library material under separate arrangements. A decision to refuse access to a document on the ground that it constitutes library material is subject to internal review and review by the AAT (as a refusal of access in accordance with the request: paragraphs 54(1)(a) and 55(1)(a)), and to investigation by the Ombudsman.

##### ***Documents otherwise available (sections 12 and 13)***

4.2 Some classes of documents are excluded from the right of access under the FOI Act because they are otherwise available. These are:

- Commonwealth records in the custody of the National Archives which are open to public access under the *Archives Act 1983* (paragraph 12(1)(a)—see para 3.28)

- documents that are, subject to a fee or other charge, available as part of a public register or otherwise, in accordance with a Commonwealth law other than the FOI Act (paragraph 12(1)(b))—for example, the Register of Patents and patent specifications under the *Patents Act 1990*
- documents that are, subject to a fee or charge, open to public access as part of a land title register in accordance with a law of a State or Territory (paragraph 12(1)(ba))
- documents that are otherwise available for purchase in accordance with arrangements made by the agency (paragraph 12(1)(c))—for example, from the agency itself, and
- the memorial collection of the Australian War Memorial, library material in the National Library of Australia, historical material in the National Museum of Australia and archival material in the National Archives, except where the documents concerned have been placed in those collections by an agency (subsection 13(1))—see para 3.31.

***Non-administrative documents of courts, tribunals and the Governor-General’s Official Secretary (sections 5, 6 and 6A)***

4.3 The right to obtain access to documents of Commonwealth courts, such as the High Court, the Federal Court and the Family Court, and of those bodies listed in Schedule 1 of the FOI Act (not including, for example, the Social Security Appeals Tribunal, or the AAT, which is not a court and is treated as a normal agency), and of the Governor-General’s Official Secretary, is restricted to documents of an administrative nature (see sections 5, 6 and 6A). Those agencies and persons are deemed to be prescribed authorities, but the holder of a judicial office or other court office, in his or her capacity as the holder of that office, is deemed not to be a prescribed authority, and is not to be included in a Department. However, a registry or other office of a court, tribunal or other body, and the staff of such a registry or office in that capacity, are taken to be part of the court, tribunal or other body (see also subsection 6A(2) as to documents in the possession of a person employed under section 13 of the *Governor-General Act 1974*).

4.4 In *Loughnan, Registrar of the Family Court v Altman* (1992) 111 ALR 445 (D306), the Full Federal Court held that the words ‘document of (a) court’ in section 5 mean not simply a document in the possession of a court, but rather a document having a particular connection with the functions of a court (for example, court orders, warrants, affidavits, subpoenas, etc). In that case, a transcript of a Family Court *ex tempore* judgment in the possession of Auscript was held to be a document of that court. Agencies need to be alert to documents which come within the reasoning of the Federal Court and to be ready to transfer such documents to the relevant court in such cases—see paras 6.19–6.25 on transfers.

***Documents created or received before 1 December 1977 (‘prior documents’) (subsection 12(2))***

4.5 Generally, a person has no *right* under the FOI Act to obtain access to documents that have come into the possession of an agency or a Minister prior to 1 December 1977 (so-called ‘prior documents’)—see subsection 12(2).

4.6 However, before relying on subsection 12(2) as a ground for refusing access to documents, agencies must have regard to government directions concerning claims for exemption of documents on purely technical grounds (see para 2.7). Disclosure of prior documents is protected under sections 91 and 92 against certain civil and criminal proceedings which might otherwise

occur. The reason for this is to encourage agencies to give access to prior documents even though the applicant has no legally enforceable right of access to them (FOI Memorandum No. 64, para 4; and see paras 9.2–9.9 on sections 91 and 92).

4.7 Generally, the subsection 12(2) exception should not be relied on unless granting access to prior documents would involve a substantial and unreasonable diversion of an agency's resources (see Part 8 below). See also Part 2 above on the discretion to disclose information outside the FOI Act. While agencies may believe that all requested prior documents are exempt, to claim subsection 12(2) as a ground of refusal denies to the applicant the opportunity to test exemption claims in detail in internal and AAT review, and is unfair where no workload problem exists.

4.8 Where an agency does not rely on the subsection 12(2) exception in notifying refusal of access to documents, the subsection 12(2) exception does not apply for the purposes of review proceedings in the AAT (see subsection 58(7)).

4.9 Where the documents are not exempt, and are not covered by the exceptions in paragraphs 12(2)(a) and (b), release of 'prior documents' is equivalent to release under the FOI Act and the protections in sections 91 and 92 apply (see para 4.6 above). Where the documents are exempt under the FOI Act, but it is decided that they are non-contentious and should be disclosed (see para 2.6), the protections in sections 91 and 92 do not apply and the same principles apply as in the case of disclosure outside the FOI Act (see Part 2 above).

4.10 The *Archives Act 1983* allows certain categories of researchers to apply to use Commonwealth records that are not publicly available. This process, known as 'special access', may be used to view records less than 30 years old or records over 30 years old but not publicly available because of the types of information they contain. Further information about special access is available on the National Archives of Australia website at <[www.naa.gov.au](http://www.naa.gov.au)>.

4.11 The subsection 12(2) exception does not apply in the case of a document where:

- the document or the relevant part of the document contains information that is personal information about the applicant (subparagraph 12(2)(a)(i)) (and see definition in subsection 4(1) of 'personal information')
- the document or the relevant part of the document contains information relating to the applicant's business, commercial or financial affairs (this applies not only to individual persons but also to companies and other legal persons) (subparagraph 12(2)(a)(ii)), or
- access to the document or the relevant part of the document is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister to which the person has lawfully had access (subparagraph 12(2)(b)).

#### *Workload considerations*

4.12 An agency intending to claim subsection 12(2) because of workload considerations must determine whether the exceptions in paragraphs 12(2)(a) and (b) are applicable. Upon review by the AAT, the onus is on the agency to establish that its decision is justified (see section 61). Although information about a corporation is not 'personal information', an applicant which is a corporation can have business, commercial or financial affairs.

4.13 There is provision in subsection 12(3) for making regulations modifying subsection 12(2) to enable a person to obtain access to documents to which the applicant would otherwise not be entitled to access, but no such regulations have been made.

4.14 Any document of an agency or official document of a Minister to which an applicant has *lawfully* had access may constitute the springboard to obtain access to a prior document. A person cannot build upon a ‘leaked’ or illegally obtained document to obtain the benefit of paragraph 12(2)(b). A person is not limited to the case where he or she obtains a document under the FOI Act (any lawful access will do), nor to the case of a document which came into the possession of a Minister or agency after 1 December 1977.

4.15 Whether or not a prior document is ‘reasonably necessary’ to enable a proper understanding of another document is ultimately an issue to be decided by reference to the particular documents. Mere reference in a document to a prior document would not of itself be sufficient to justify access to the prior document if the document to which the applicant has access stands on its own. Any doubt should be resolved in favour of the applicant.

4.16 ‘Proper understanding’ of a document does not necessarily mean proper understanding of the subject matter of the document. Therefore, it is not relevant that an applicant wishes to have fuller information on a subject referred to in a document to which he or she has already had access. The question is whether access to prior documents is *necessary* to a proper understanding of *that* document, that is, an understanding which is appropriate having regard to circumstances such as the subject matter of the document, the nature and extent of the information the document seeks to convey and the extent to which a document by its own terms conveys that information (*Re Waterford* (above) and *Re Corkin and Department of Immigration and Ethnic Affairs* (1984) 6 ALN 224 (D36)). ‘Reasonably necessary’ means necessary by objective requirements of normal intelligence and literacy, not by reference to the capacity of the person seeking access to the prior documents (*Re Waterford* (above)).

4.17 The onus is on an applicant initially to assess whether he or she needs access to other documents to enable her or him properly to understand a document. Where the applicant identifies documents as necessary for this purpose and the agency refuses access under subsection 12(2), the onus is then on the agency in any review by the AAT to establish that the decision refusing access is justified (section 61; *Re Anderson and Immigration and Ethnic Affairs* (1986) 4 AAR 414 (D135)). It is not necessary for an agency in its statement of reasons for a decision to endeavour to anticipate and answer every possible claim by an applicant that access to a prior document may facilitate a proper understanding of a document to which access has been granted (*Anderson and Boehm* (above)).

#### ***Documents which cannot be found or which do not exist in an agency’s possession (section 24A)***

4.18 Section 24A provides that an agency or Minister may refuse a request for access to a document if all reasonable steps have been taken to find the document, and the agency or Minister is satisfied that the document *either*:

- is in the agency’s or Minister’s possession but cannot be found, or

- does not exist (the meaning here is that the document does not exist in the agency's possession—if the agency is aware the document exists in the possession of another agency, it should seek to transfer the request (paragraph 16(1)(a)) or direct the applicant to the appropriate agency (subsection 15(4)) (see paras 6.19–6.25).

4.19 A complementary provision in subsection 55(5) makes it clear that the AAT has power to require an agency or Minister to conduct further searches for a document if it is not satisfied with the agency's efforts to find the document. The Ombudsman has a similar power and may also use her or his powers to examine an agency's records and record system.

4.20 The power of refusal in section 24A includes its use in the following fact situations:

- where a single document has been requested but cannot be found in the agency's records
- where a number of documents have been requested but none can be found in the agency's records
- where a request relates to a number of identified documents, some of which are located and some of which cannot be found, and
- where an agency is satisfied it has found all documents in its possession which satisfy the applicant's request, but the applicant is not satisfied that the agency has located all relevant documents (section 24A is relevant here whether or not the agency or Minister makes reference to it in the access decision, since implicitly a decision is being made under that provision).

In the first three of these situations, section 24A applies both when the agency or Minister believes that the document(s) which cannot be found is (or are) in its (or her or his) possession, and when it is believed that the document(s) is (or are) not in the agency's or Minister's possession.

4.21 The capacity for internal and AAT review does not depend on a decision being made specifically under section 24A.

### ***Personnel documents (section 15A)***

4.22 A number of agencies have provision for access to their own personnel records by present or past employees. In view of these arrangements for access outside FOI, section 15A of the FOI Act provides that an employee or former employee of an agency may not request access under the FOI Act to her or his personnel records (defined as documents containing personal information kept for personnel management purposes), unless the employee or former employee first makes a request under any internal procedures for staff access to records and is either:

- not satisfied with the outcome of the request, or
- not notified of the outcome within 30 days of the date the request was made.

4.23 Where an employee or former employee makes an FOI request for records without seeking access under relevant internal agency procedures, the applicant should be informed that the request will be dealt with as a request under those procedures and the application fee should be returned. At the same time, the applicant should be informed of her or his right to seek access

under the FOI Act if dissatisfied with the access given or if a decision is not made within 30 days (paragraph 15A(2)(d)).

## **5. Exercising the Right of Access**

### ***The requirements of a request (section 15)***

5.1 All that is required by subsection 15(2) for a valid request for access to a document of an agency or an official document of a Minister is that it:

- be in writing
- provide sufficient information to enable the agency to identify the requested documents
- give an Australian address to which notices can be sent
- be sent or delivered to the address of the agency's central or regional office, or the Minister's address, in the phone book, and
- be accompanied by the \$30 application fee (where the application fee is remitted under section 30A, no application fee is payable for the purposes of subsection 15(2): see subsection 30A(2) and New FOI Memorandum No 29 on fees and charges).

An applicant need not specify that the request is made under the FOI Act (see paragraph 6.3 for the position where the request is not valid under section 15).

5.2 In making an FOI request, there is no requirement that a person use a particular form (for example, a standard request form). A sample application form is at the back of the *FOI at a glance* document on the FOI website at <[www.ag.gov.au/foi](http://www.ag.gov.au/foi)>.

5.3 While an agency may encourage an applicant to follow particular procedures in making requests for access, the agency cannot refuse a request solely on the grounds that the applicant failed to observe its published procedures.

### ***Right of access (section 18)***

5.4 Where a person makes a valid request under section 15 for access to a document, and pays any fees and charges that are required under the Freedom of Information (Fees and Charges) Regulations, he or she is entitled to be given access to the document in accordance with the FOI Act, although an agency or Minister is not required to give access to a document at a time when it is exempt (see subsections 18(1) and (2)). Decisions to grant or refuse access to documents are in effect made under section 18 (see comments by the AAT in *Re Wilson and Australian Federal Police* (1983) 5 ALD 343 at 350–1 (D5)).

### ***Applicant's identity or interest in seeking access to documents***

5.5 As a general rule, an applicant's identity or reasons for seeking access to documents are considerations irrelevant to an access decision. In particular, an applicant need not establish a need to know basis before he or she is given access to documents (*Re Mann and Commissioner of Taxation* (1985) 3 AAR 261 (D67)). Subsection 11(2) provides that, subject to the Act, a person's right of access is not affected by any reasons the person gives for seeking access, or an

agency's or Minister's belief as to what are those reasons. Therefore, in general, the applicant's identity, or any particular use he or she will make of the documents, makes no difference to the decision whether to grant access to documents (*Re Sunderland and Defence* (1986) 11 ALD 265 (D154)) There are statutory exceptions to this proposition (see subsections 38(2), 41(2)) and 43(2), and in the case of some exemptions, the public interest in an applicant obtaining access to information relating to herself or himself may be taken into consideration in assessing the balance of the public interest in disclosure.<sup>3</sup>

5.6 Where documents are disclosed in response to an FOI request, there is no restriction under the FOI Act on what the applicant may do with them – disclosure is to the public generally (*News Corporation Ltd v NCSC* (1984) 57 ALR 550 at 559 (D9/5); *Re S and Commissioner of Taxation* (D239); *Searle Australia Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163 at 179 (D294)) (but note para 9.7 below on the restriction on some further publication in subsection 91(2)). The question, whether justice would be frustrated by the applicant's failure to obtain access should not be taken into account (*Re Green and AOTC* (D298)). An access decision should therefore normally be made on the assumption that the content of any documents disclosed will become public.

5.7 Subsection 24(4) of the FOI Act states that an applicant's reasons for seeking access cannot be taken into account in decisions under subsection 24(1) concerning 'substantial and unreasonable diversion' of an agency's resources (see below paras 8.6–8.10 on subsection 24(1)).

### ***Identification of documents and scope of a request (section 15)***

5.8 An applicant is required only to provide such information about the documents to which he or she seeks access as will enable a responsible officer of the agency, or the Minister concerned, to identify those documents (subsection 15(2)). A precise description is not necessary. Documents may be described in broad terms as so long as the description is sufficiently informative to enable the documents to be identified. Examples are:

- all documents relating to a particular person
- all documents relating to a particular subject matter, and
- all documents of a specified class that contained information of a particular kind.

An applicant does not have to quote a file and folio number or give the precise date of the document. It may be sufficient, for example, to describe a document by reference to a newspaper report of its existence, or by reference to a particular place at which documents are located, for example, 'all documents relating to X held in the Townsville regional office' of an agency.

5.9 An FOI request is not invalid because it is framed as a request for information rather than documents. While the right of access under the Act is to documents, not information (see para 3.33) a request should be read fairly and, if it is clear that the applicant seeks material under the FOI Act, it should be treated as a request for access to documents (*Young v Wicks* (1986) 13 FCR 85 (D90)).

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<sup>3</sup> See in particular P Bayne, 'Freedom of information and access for privacy purposes', 64 *Australian Law Journal* (1990), 142–146, and P Bayne, 'Public and Private Interests in the Application of the Exemptions', paper delivered to Info-One, First National Conference on Freedom of Information, Adelaide, 22–24 September 1993.

5.10 A request for access should be construed in a broad commonsense way and not by rules of construction developed for the interpretation of legal documents (*Re Timmins and NMLS* (1986) 4 AAR 311 (D105)). An applicant normally does not know the content of documents in question and often the best he or she can do is to identify a document described by a genus or class of documents (*Timmins*).

5.11 A request must be read fairly and extends to any documents which might reasonably be taken to be comprised within the description used by the applicant (*Re Gould and Department of Health* (D57)). In *Re Anderson and AFP* (1986) 4 AAR 414 (D137), the AAT said that ‘in urging a commonsense approach to the identification of the documents containing the requested information (the Tribunal) would not wish to be understood ... as suggesting a narrow or pedantic approach to the construction of any request for access’. A request cannot be refused on the ground that it does not sufficiently identify the documents sought, unless the applicant is given a reasonable opportunity to provide a more adequate identification (see subsection 24(6) and para 6.4).

5.12 An applicant must be assisted in completing a request if he or she is uncertain how to identify the documents sought (subsection 15(3)).

5.13 If the applicant ought to make the request to another agency, he or she must be helped to direct the request to that other agency (subsection 15(4)). Officers are more likely than most applicants to be in a position to identify, from the Commonwealth Government Directory and other sources, which agency is likely to have the requested documents.

5.14 Where a request is very broad and may relate to a large number of documents, it is sensible to discuss the request with the applicant in order to clarify its terms and, where appropriate, to narrow its scope (see below para 6.6). This may occur either before the provision under section 29 of an estimate of charges (see New FOI Memo No.29, para 26), or afterwards, in an attempt to cut down unnecessary charges to the applicant and unnecessary expenditure of resources on the agency’s part. Any changes to the request should also be confirmed in writing in a letter to the applicant to avoid misunderstandings.

### ***Cut-off date for requests***

5.15 The FOI Act gives an applicant a right of access only to documents in existence at the time a request is lodged with an agency. An applicant cannot insist that his or her request covers documents created after the request is received (*Re Edelsten and AFP* (1985) 4 AAR 220 (D140)). However, if it is administratively convenient to do so, it is recommended that agencies include subsequent documents which relate directly to the request (since the applicant could submit a further request for them).

5.16 On internal review under section 54, the date of receipt of the request is still the cut-off date for determining which documents are the subject of the request, although once again an agency should where possible include any subsequent relevant documents. The AAT has power to consider all documents within the ambit of a request notwithstanding that they came into existence between the time of the decision under review and the time of the Tribunal’s decision (*Re Murtagh and Commissioner of Taxation* (1984) 54 ALR 313 (D27); *Re S and Commissioner of Taxation* (D296A)), and agencies will need to be ready to respond to a direction from the AAT to produce such documents and to make submissions as to whether they are exempt or not.

## 6. The Obligations of Agencies and Ministers in Responding to Requests

### *Processing requests*

6.1 Appendix 1 contains a paper setting out a brief overview of ‘Processing FOI Requests’ and a small number of sample letters. The other parts of these Guidelines deal only with those issues needing to be dealt with in greater depth than in Appendix 1. New FOI Memo No.29 contains details on the fees and charges aspects of processing requests, and includes some sample letters.

6.2 Guidance on section 23 arrangements for decision makers may be found in Revised FOI Memo No 45/1 issued on 7 December 1984.

### *Consultations with applicants*

6.3 Amongst the statutory requirements to consult with or assist applicants are sections 15, 22 and 24 of the FOI Act. Where a person wishes to make a request to an agency, or has made a request that does not comply with section 15, subsection 15(3) imposes a duty on the agency concerned to take reasonable steps to assist the person to make a request in a manner that complies with section 15. Where a person has made a request to one agency that should have been directed to another agency, the first agency has a duty under subsection 15(4) to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister, or it may transfer the request in appropriate cases (section 16; see paras 6.19–6.25).

Subsection 15(4) does not apply to a Minister (although the transfer provisions do—see subsection 16(6)). However, sensible administrative practice suggests that Ministers or their staff should assist applicants to make a valid request to the appropriate person or body (see *Re Said and John Dawkins, MP* (D307)).

6.4 There is further provision for helping applicants in subsection 24(6), which provides that an agency or Minister must not refuse to grant access to a document on the ground *either* that it doesn’t comply with subsection 15(2) (see para 5.1) *or* that the work involved in processing the request would substantially and unreasonably divert the resources of the agency or Minister (see Part 8 below), unless the agency or Minister takes certain steps. These steps are discussed in para 8.11.

6.5 Section 22, which concerns the provision of edited copies of documents with exempt matter deleted (see paras 7.18–7.21), acknowledges that it may be appropriate to consult with an applicant as to whether the applicant would wish to be given access to an edited copy. It will often be advisable to check with an applicant whether he or she is happy to receive edited copies. This is especially the case where most of what is in the documents will be deleted from the copies released. If it is quite clear, either from the request or from consultation that the documents are not useful to the applicant in that form, there is no point in providing them, and a simple refusal will be preferable.

6.6 Agencies should be alert to the need to consult with applicants so as to reduce the volume of material covered by a request (or ‘narrow the scope of a request’), whether before or after notification of estimated charges under section 29. While consultation is required by the FOI Act in some circumstances, the process of consultation should not be limited to those cases where the FOI Act requires it (see paras 6.3–6.5). Early consultation with an applicant, even in those cases

where there is no suggestion that compliance with the FOI Act involves a ‘substantial and unreasonable diversion of resources’ (subsection 24(1)), can reduce the work involved in dealing with the request while at the same time ensuring that the applicant is given early access to all relevant documents which are being sought. In many cases, for example, an applicant may not be aware of the nature and volume of the agency’s record holdings, and, as a result, a request will be expressed in wider terms than is necessary to meet the applicant’s needs. The assistance which agencies give to applicants should be given in an equitable, even-handed way without regard to the public servant’s view of the quality of the application or of its likely outcome.

6.7 Officers handling requests should also have in mind the objects of the FOI Act set out in subsection 3(1) and that it is the express intention of the Parliament that any discretions conferred by the Act should be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information (see subsection 3(2)).

### ***Time limits for responding to a request***

6.8 On receiving a valid request under section 15 of the FOI Act, an agency or Minister must take reasonable steps to *acknowledge* its receipt as soon as practicable, but in any case, not later than 14 days after the day on which the request is received (paragraph 15(5)(a)).

6.9 An agency or Minister is also required to take all reasonable steps to enable the applicant to be notified of a decision on a request that is valid under subsection 15(2) (see paras 5.1–5.3) as soon as practicable, but in any event not later than 30 days after the day on which the request is received by the agency or Minister (see paragraph 15(5)(b)). The 30 days are calendar days commencing on the day after the request is received (*Acts Interpretation Act 1901*, subsection 36(1)).

6.10 The 30-day time period for notifying a decision on a request may be extended to 60 days if an agency or Minister determines in writing that consultation with an individual person, a State Government or a business organisation is appropriate under sections 26A, 27 or 27A before a decision on access can be made (subsection 15(6)). The agency or Minister must inform the applicant as soon as possible that the period has been extended (paragraph 15(6)(b)).

6.11 If a time period expires on a weekend, public holiday or bank holiday, then the period can be extended to the following day that is not a weekend, public holiday or bank holiday (*Acts Interpretation Act 1901*, subsection 36(1)).

6.12 The 30-day period ceases to run where the applicant is notified of a preliminary assessment of an amount of a charge (subsection 29(1)), or of imposition of a charge (subsection 29(6)) in respect of the request, and does not recommence until payment of the charge or a deposit or a number of other occurrences take place (subsections 31(1) and (3), and see New FOI Memo No.29, para32). Where an applicant does not receive a decision on a valid request within the 30-day period, or that period as extended, he or she is entitled to appeal to the AAT as if the request had been refused on the last day of that period (subsection 56(1)). This process is known as a ‘deemed refusal’. Subsection 56(3) enables the Ombudsman to intervene within the 30-day or 60-day period if, on receipt of a complaint of unreasonable delay by an agency, the Ombudsman believes that complaint to be justified.

6.13 The 30-day limit applies only to the notification of the decision on the request, and not to the actual provision of access to the documents sought. However, access should be provided as soon as practicable after the decision to grant access has been made and any charge has been paid. Undue delay in providing access is a ground for complaint to the Ombudsman.

6.14 The time spent by an agency, in consulting an applicant under section 24 to narrow a request, is not to be taken into account in calculating the 30-day period (subsection 24(7)).

6.15 It is open to an applicant and an agency to agree on a program for progressive (or staged) release of documents outside the time limits set by the FOI Act (*Re Eastman and Department of Territories* (1983) 5 ALD 187 (D1)); and see *Re Geary and Australian Wool Corporation* (D203) where the AAT allowed staged release but reduced the time the agency wanted for completion of processing a complex request).

### ***Section 21 – deferral of access***

6.16 Section 21 specifies several circumstances in which an agency may defer the provision of access to a document. The use of section 21 involves a decision to grant access to the documents concerned. Although the power to defer access is framed as a discretionary one, the Federal Court said in *Harris v ABC* (1983) 50 ALR 551 (D10/1) that the court may require it to be exercised where it is necessary for the public benefit. However, it must be noted that agencies have a continuing right to release documents outside the FOI Act: see section 14. In *Re O’Grady and the AFP* (1983) 5 ALN N420 (D16), the AAT rejected a claim that disclosure of documents would be premature and contrary to the public interest because it would impede the conduct of an investigation of the applicant’s behaviour as a member of the AFP contingent in Cyprus. On the contrary, the AAT considered that immediate disclosure might assist a fair and impartial investigation.

6.17 The circumstances in which subsection 21(1) permits the deferral of access, and the periods of deferral permitted, are:

- if the publication of the document concerned is required by law—until the expiration of the period within which the document is required to be published
- if the document concerned has been prepared for presentation to Parliament or for the purpose of being made available to a particular person or body or with the intention that it should be so made available—until the expiration of a reasonable period after its preparation for it to be so presented or made available
- if the premature release of the document concerned would be contrary to the public interest—until the occurrence of any event after which, or the expiration of any period of time beyond which, the release of the document would not be contrary to the public interest. An example would be where it is necessary to wait for the completion of negotiations between an agency and a third party, at the completion of which particular documents would no longer be sensitive, and
- if a Minister considers that the document concerned is of such general public interest that the Parliament should be informed of the contents of the document before the document is otherwise made public—until the expiration of 5 sitting days of either House of the Parliament.

6.18 Where access is deferred, the agency or Minister must inform the applicant of the reasons for the decision (subsection 26(1)), and in doing so must indicate as far as practicable the period for which the deferment will operate (subsection 21(2)). The decision to defer access must be given within the time limits for decisions, but clearly the granting of access may occur outside that period. Decisions to defer access are subject to internal review and AAT review in the normal way (paragraphs 54(1)(c) and 55(1)(b)), except that a decision by a Minister based on the desirability of informing Parliament before FOI disclosure is not subject to AAT review (subsection 21(3)). A right of AAT review in this circumstance would not have been of great significance to an applicant as the deferral is not valid after the expiration of five Parliamentary sitting days, and the AAT is unlikely to hear the matter before then. An applicant could complain to the Ombudsman about a decision to defer access, and this might result in a quicker response than an appeal to the AAT.

### ***Redirecting and transferring requests (sections 15 & 16)***

6.19 Where a person has directed to an agency a request which should have been directed to another agency or a Minister, it is the duty of the agency receiving the request to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister (subsection 15(4)—see para 6.3).

6.20 The obligation to assist an applicant under subsection 15(4) is complemented by section 16, which sets out the procedural requirements for the transfer of a request from one agency to another. Revised FOI Memo No. 31 (issued January 1985) deals with inter-agency consultation and transfer of requests under section 16, and the details are not repeated here (and see paras 3.28–3.33 in Appendix 1).

6.21 An agency may transfer a request to another agency in relation to some only of the documents covered by the request (subsection 16(3A)).

6.22 Where a transfer occurs, whether it is partial or for all documents requested, the request is taken to be a request made to the transferee agency for access to the document(s) that is (are) the subject of the transfer, and is taken to have been received by the transferee agency at the time at which it was first received by the transferee agency (subsection 16(5)). Subsection 16(3A) restricts a transferred request to the documents which are the subject of the transfer. Therefore, the request does not apply to all documents in the transferee agency's possession which fall within the terms of the request (those parts of paras 12, 17 and 37 of Revised Memo No. 31 dealing with this issue are now superseded). See also paras 6.26–6.28 and 7.14–7.17 on compulsory transfers.

6.23 When transferring a request:

- forward a copy of the request
- forward a copy of the receipt for payment of the application fee, if applicable
- advise the date of receipt of the request
- advise the applicant (subsection 16(4)), and
- where it is necessary to enable the transferee agency to deal with the request, send it a copy of the document(s) (subsection 16(4)).

6.24 Section 51C enables a transfer of a request for amendment or annotation of personal records in circumstances similar to those relating to requests for access to documents. The only significant difference is the provision in subsection 51C(7) that, where a transferee agency or Minister decides to amend or annotate a record, that agency or Minister must give to the transferor agency a written notice of the decision and of any amendment or annotation made to a record. The transferor agency or Minister must then amend or annotate their records in the same manner as in the case of the transferee agency's or Minister's records.

6.25 If it may be necessary to neither confirm nor deny the existence of documents (which may have originated from a confidential source or a security agency) under section 25 (see New FOI Memo No.26, Part 5), consultation with any relevant agency should be undertaken before completing transfer. If an applicant is advised of the existence of documents when notified of transfer then a refusal neither confirming nor denying existence of the documents cannot be made. See also paras 6.26 and 7.14–7.17.

### ***Compulsory transfers (subsections 16(2) & (3))***

6.26 Subsections 16(2) and (3) provide for the compulsory transfer of documents in certain circumstances. Where a document has originated with, or been received from, a body or person specified in Part I of Schedule 2 (an exempt agency—see paras 3.15–3.16), and the document is more closely connected with the functions of that body or person than with those of the agency receiving the request, the request must be transferred to the Department whose Minister administers the enactment under which the body or person is established or appointed (subsection 16(2)). For example, documents originating with ASIO and relating to its functions must be transferred to the Attorney-General's Department (and see previous para on consulting before transfer). See paras 7.13–7.17 on exemption for intelligence and security documents.

6.27 Where a document has originated in, or been received from, an agency listed in Part II of Schedule 2, or an agency that is a body corporate established by or under an Act specified in Part III of Schedule 2, and the document is more closely connected with the functions of that agency than those of the receiving agency, subsection 16(3) provides that the receiving agency must transfer the request to the other agency.

6.28 Subsections 16(2) and (3) help to overcome the problem that documents subject to section 7 are only exempt in the hands of the originating agency. See FOI Memo No. 31 for further details concerning compulsory transfers (and note that some of the Departments mentioned are no longer responsible for the agencies shown, and the lists of Schedule 2 agencies are no longer accurate).

### ***Consultations with other agencies***

6.29 Questions relating to consultations with other agencies or within an agency are dealt with in paras 3.20–3.23 of Appendix 1, 'Processing FOI Requests', and in more detail in Revised FOI Memo No. 31, 'Inter-agency Consultation and Section 16 Transfer of Requests', paras 3-8. Consultation should take place with all relevant agencies both where (a) the decision-making agency is inclined to release a document; and (b) where that agency is *not* initially inclined to disclose a document (since another interested agency may have good reason to favour disclosure of the document).

6.30 The consultation procedure, and the formal provisions of section 16 of the FOI Act for transfer of requests between agencies, are designed to ensure that as far as possible the responsibility for making a decision whether a document should be disclosed is entrusted to the agency which is best able to make an informed assessment about the sensitivity of the document's contents.

6.31 The FOI Act does not provide a procedure for resolution of differences between agencies on whether a document should be disclosed. It assumes that agencies will consult where there are common interests in a particular document, and that established methods of consultation and dispute resolution within the government structure can be relied on to deal with any problems which may arise.

6.32 If an agency is unable to obtain agreement from another agency to release of a document, consideration should be given to whether the subject matter of the document is more closely connected with the functions of that other agency. If it is, the objecting agency should accept a transfer of the request in accordance with section 16 (see paras 6.19–6.25 and Revised FOI Memo No 31).

6.33 Except where a request has been transferred in accordance with section 16 of the FOI Act, the legal responsibility for dealing with the request remains with the agency to which the request was made. The fact that another agency has been consulted and does not wish a document to be disclosed does not absolve the agency that received the request from making its own decision on whether access to the document should be given.

6.34 Where a document which may be a Cabinet document is within the scope of a request, it is essential to consult the FOI Co-ordinator at the Department of the Prime Minister and Cabinet. Similarly, where requested documents concern a foreign government or agency, or their disclosure might damage Australia's international relations, it is necessary to contact the FOI Co-ordinator of the Department of Foreign Affairs and Trade. If the disclosure of a document might damage the security of the Commonwealth, it is necessary to contact the Attorney-General's Department.

### ***Statutory consultations with third parties (sections 26A, 27 & 27A)***

6.35 Broadly speaking, State Governments, commercial organisations and private individuals must be consulted where their interests may be affected by the release of documents (sections 26A, 27 and 27A).

6.36 The FOI Act requires agencies to undertake consultation when they are considering granting access to documents. However, voluntary consultation in cases where an agency is intending to withhold a document is advisable as it may reveal that the third party has no objection to the release of the document. (See para 3.25 of Appendix 1; FOI Memo No. 43, on the section 43 business affairs exemption and section 27 reverse FOI procedure; and Revised FOI Memo No. 21/1, on documents in which a State or a territory has an interest). An agency's obligation to consult depends on whether the document contains the relevant information, and on whether it is 'reasonably practicable' to consult (sections 27 and 27A only).

6.37 The consultation procedures in relation to personal information are set out in FOI Memo No. 94 and FOI Memo No 98.

6.38 When undertaking consultation with a third party, an agency should write to the party, and where possible and appropriate, attach copies of the documents concerned (see Attachments to Appendix 1). There is no point in sending copies of lengthy documents which have been submitted by the third party, unless that party seeks a copy. In cases where a copy of the document itself cannot be attached because, for example, the document contains sensitive information which should not be disclosed to the third party, as full as possible a description of the information should be provided to the third party.

6.39 The agency takes into account the submissions made by a third party when making a decision on release. However, a third party does not have a power of veto on the decision to release documents. If an agency decides to release a document despite the objections of the third party, that party should be notified in writing at the same time the applicant is notified of the decision (paragraphs 26A(2)(a), 27(2)(a), and 27A(2)(a)).

6.40 The third party then has 30 days in which to apply for internal review of a decision (sections 54(1C), (1D), (1E) and (1F)). A third party also has the right to appeal to the AAT without seeking an internal review, and access should not be granted to the applicant until the time limit has expired for appeal to the AAT (sections 26A, 27 and 27A). Although in FOI matters this is usually 60 days after receipt of a notice of a decision (see subsection 55(4)), in the case of 'reverse-FOI' it is 30 days after notice to the third party of an FOI decision (if the notice includes the findings on material questions of fact and the reasons for the decision) (see sections 58F, 59 and 59A which exclude the operation of section 55 of the FOI Act). Therefore, an agency needs to wait at least 30 days after the third party receives notice of the decision before releasing the contested documents.

6.41 At the consultation stage it is unnecessary and inadvisable to disclose the name of the applicant, although it may become necessary to do so at a later stage, particularly in response to an FOI request for that information.

6.42 It will sometimes be necessary to consult with exempt agencies (for example, ASIO and other security agencies) in relation to documents which originated from, or may have originated from, such agencies, particularly where section 25 may need to be used on behalf of the exempt agency (see paras 6.25 and 7.17 and New FOI Memo No.26, paras 86–93).

## **7. Exempt Documents and Exempt Matter in Documents**

7.1 The right of access given by subsection 11(1) does not extend to exempt documents. Subsection 18(1) provides that where a valid request is made and appropriate charges are paid, an applicant shall be given access to the relevant documents in accordance with the FOI Act. Consistently with subsection 11(1), subsection 18(2) provides that an agency or Minister is not required by the FOI Act to give access to a document at a time when the document is an exempt document. The power to refuse access to documents on the ground that they are exempt arises by implication from section 18 (in conjunction with subsection 11(1)).

7.2 An exempt document is defined in subsection 4(1) of the Act. It means:

- a document exempt by virtue of a provision of Part IV of the FOI Act (the exemptions in sections 33 to 47A)
- a document in the possession of an agency that is exempt altogether from the operation of the Act by virtue of subsection 7(1) of the Act (see paras 3.15 and 7.8)
- a document which is an exempt document by virtue of subsections 7(2), (2AA) or (2A) of the Act (see paras 7.9–7.17), or
- an official document of a Minister that contains some matter that does not relate to the affairs of an agency (see paras 3.24–3.26).

Subsection 4(1) also defines ‘exempt matter’ as meaning ‘matter the inclusion of which in a document causes the document to be an exempt document’, and section 22 makes provision for the deletion of this exempt matter wherever possible so that access can be given to the remaining non-exempt portions of documents (see paras 7.18–7.21 below).

### ***Exemption provisions (Part IV)***

7.3 Guidance on the meaning and application of the exemption provisions in Part IV of the FOI Act is in FOI Memorandum No 98. Additionally, there is some other valuable material in earlier Memos, issued by the Attorney-General’s Department, about the exemption provisions (even though those Memos were issued a long time ago). The earlier Memos are referred to in Table 1. The Attorney-General’s Department is progressively updating all FOI Memos, and as part of this project it will incorporate into the updated Memos the material from the earlier Memos which remains applicable.

### ***Date of application of amended or new exemptions***

7.4 The situation may arise where an amendment is made to the FOI Act after receipt of a request for access but before a decision on the request has been made or finalised. The amendment may be to an existing exemption or other provision of the FOI Act, or it may involve the inclusion of a new provision such as a completely new exemption (as, for example, inclusion of a new entry in Schedule 2).

7.5 In some cases the amending legislation will itself deal with the question of its applicability to existing requests. However, in the case where no such specific provision is made, the situation as to the applicable provision is not clear. Where amendments favourable to the applicant are concerned, the date of the agency’s or the AAT’s decision would appear the appropriate date at which to determine the applicable exemptions and their provisions (see *Re Motor Trades Association of Australia and Trade Practices Commission* (D305); compare *Re Green and AOTC* (D298) and *Re Harm and Department of Social Security* (D304) where the AAT took the date of the agency’s decision as the relevant date for the AAT as well).

7.6 The situation is more doubtful where a new or more rigorous exemption, enacted after receipt of an application, restricts the applicant’s access rights as they were at the time of the application. It is not completely clear whether it is the amended law which applies to agency and

AAT decisions (subsections 18(2) and 58(2) may carry that implication) or whether the applicant has an accrued right of access to documents not exempt at the time of application, which could only be overridden by express words. In such circumstances, it is considered that agencies would have an arguable claim for exemption under amended provisions of the FOI Act, but (as in all cases) they should not make merely technical claims if there is nothing genuinely sensitive about the information.

### ***Section 32 – exemptions stand alone – multiple exemptions can apply to same material***

7.7 Section 32 contains an unusual and important principle for the interpretation of exemptions and a clarification as to their application. In summary, it provides that:

- each exemption stands alone and must not be interpreted as limited in its scope or operation by the provisions of any other exemption – that is, each exemption should be given its full width of meaning, unrestricted by any implications drawn from the existence or terms of other exemptions; and
- more than one exemption may apply to the same document or part of a document.

### ***Exempt agencies***

7.8 Documents in the possession of agencies which are wholly exempt from the provisions of the FOI Act are exempt (see para 7.2) and are not subject to access under FOI (see paras 3.15–3.16 on responding to requests to exempt agencies).

### ***Exemption for documents relating to competitive commercial activities of trading agencies etc. (section 7 and Parts II & III of Schedule 2)***

7.9 The effect of subsections 7(2) and (2AA) (in conjunction with the definition of ‘exempt document’ in subsection 4(1) – see para 7.2) is to exempt certain documents in the possession of agencies listed in Part II of Schedule 2, or established by an Act listed in Part III of Schedule 2. Most of these documents are documents relating to the ‘commercial activities’ of agencies listed in Schedule 2, but there are others, for example the ABC and SBS are exempt in relation to their ‘program material and ... datacasting content’, and the Reserve Bank of Australia in relation to documents ‘in respect of its banking operations ... and in respect of exchange control matters’.

7.10 The term ‘commercial activities’ is defined in subsection 7(3) as:

- activities of an agency conducted on a commercial basis in competition with persons other than governments or their authorities, or
- activities of an agency that may reasonably be expected in the foreseeable future to be conducted on a commercial basis in competition with persons other than governments or their authorities.

This exemption is limited to documents received or brought into existence in the course of, or for the purposes of, any activities conducted on a commercial basis in competition with non-government persons (subsection 7(4)). Schedule 2 applies only to documents actually in the hands of the relevant agencies. However, subsection 16(3) provides for the mandatory transfer to

the relevant agency of a request received by another agency for documents covered by Schedule 2 (see paras 6.26–6.28).

**TABLE 1  
LIST OF EXEMPTIONS**

<b>Exemption</b>	<b>Subject-matter</b>	<b>Memo No.</b>	<b>Date issued</b>
33	Defence, national security and international relations	48	12.11.82
33A	Commonwealth/State relations	21/1	7.2.84
34 & 35	Cabinet and Executive Council documents	34/1	1.12.84
36	Deliberative process documents	27	10.9.82
37	Law enforcement and protection of public safety	37	23.11.82
38	Secrecy provisions	38	8.11.82
39	Commonwealth financial or property interests	39	11.11.82
40	Operations of agencies	40	22.11.82
41	Personal information	23/1	1.12.84
42	Legal professional privilege	42	16.11.82
43	Business affairs	43	29.10.82
43A	Documents relating to research	92	–
44	National economy	44	5.11.82
45	Breach of confidence	35	24.9.82
46	Contempt of court or of Parliament	46	12.11.82
47	Documents arising out of companies and securities legislation	–	–
47A	Electoral rolls and related documents	–	–

7.11 Agencies which are referred to in Part II of Schedule 2, or established by an Act referred to in Part III of Schedule 2, are required to respond in the normal way to requests for documents which they consider to be exempt under Schedule 2 and section 7. They must identify, collate etc all documents which fall within the scope of the request, whether thought to be exempt documents or not, and must comply with the requirements to give a full statement of reasons under subsection 26(1) (see generally New FOI Memo No.26). See also para 6.27 for compulsory transfers of requests relating to documents exempt under Schedule 2, Parts II and III.

7.12 A decision by an agency that its documents are exempt from disclosure under section 7 and Schedule 2 is reviewable by the AAT (see eg *Re Geary and Australian Wool Corporation* (D59); *Re Anderson and Attorney-General's Department* (1986) 4 AAR 414 (D85); *Re Political Reference Service and Telecom* (1986) 12 ALD 545 (D150); *Re Aldred and Department of Foreign Affairs* (D266)). When the AAT is satisfied that the documents are properly within subsection 7(2) or 7(2AA) and the Schedule, it will go no further as to those documents, but if it is not so satisfied, the documents will not be exempt on this ground.

### ***Exemption for intelligence and security agency documents (section 7 and Parts I & II of Schedule 2)***

7.13 A number of Australian intelligence and security agencies are themselves exempt from the operation of the FOI Act under subsection 7(1) and Part I of Schedule 2. These are:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Office of National Assessments (ONA), and
- Inspector-General of Intelligence and Security (IGIS).

In addition, the Department of Defence is exempt in relation to documents in respect of activities of the Defence Intelligence Organisation and the Defence Signals Directorate (see subsection 7(2) and Part II of Schedule 2). Under subsection 7(2A) documents of all these agencies in the hands of other agencies are also exempt. Subsection 7(2A) exempts an agency from the operation of the FOI Act in relation to documents that have originated with, or been received from, the above intelligence and security agencies. The exemption does not extend to documents *created from* material provided by intelligence agencies. However, note that in line with procedures for the protection of sensitive information held by the Commonwealth, the reproduction of classified material in other documents is to be kept to a minimum, commensurate with operational requirements.

#### *Example:*

An agency cannot claim the subsection 7(2A) exemption in respect of a document it has constructed which contains extracts of, or information from, a document from an intelligence agency.

7.14 The Attorney-General wrote to all Ministers in 1984 asking that they take action to ensure that the intelligence agency exemption is only relied on in circumstances where the document in question is a genuine security document received *before* receipt of an FOI request relating to it. The Government gave an undertaking in Parliament that administrative directions would be given

to ensure that subsection 7(2A) is not misused by seeking to protect a document by sending it first to a security or intelligence agency and then obtaining it back.

7.15 Agencies should have regard to the directions in these Guidelines in applying subsection 7(2A) to ensure that the spirit of the exemption is properly observed. Notwithstanding the exemption of agencies from the operation of the FOI Act in relation to documents originating with, or received from, intelligence agencies, the mandatory obligation to transfer requests for such documents to relevant portfolio Departments in accordance with subsections 16(2) and (3) continues to apply (see paras 6.26–6.28).<sup>4</sup>

7.16 A Department to which a mandatory transfer is made under section 16 must respond in the normal way to requests for such documents, and its decisions are subject to review by the AAT (see above paras 7.11–7.12, and paras 8.23–8.27 below on the use of subsection 24(5)). In the case of a request for a document created from material provided by an intelligence agency, in appropriate cases the request *may* be transferred in accordance with subsection 16(1) to the Department whose Minister is responsible for the relevant intelligence agency.

7.17 Subsection 16(4) requires an agency transferring a request in whole or in part to inform the applicant of the transfer. An agency *must*, before transferring a request relating to documents originating with, or received from, an intelligence or security agency, and before informing an applicant of a transfer, consult the relevant Department for that organisation about whether the existence of the document should be revealed. Paragraphs 26–27 of FOI Memo No. 31 contain full directions on this matter, including the use of section 25.

### ***Deletion of exempt matter (section 22)***

7.18 Where a decision is made to refuse access to a document on the ground that it is an exempt document, there is an obligation under section 22 to consider whether it would be possible to make a copy of the document with such deletions that the copy would not be exempt

7.19 If, having regard to the nature and extent of the work involved in deciding on and making those deletions and to the resources available for that work, it is reasonably practicable for such a copy to be made, there is an obligation to make it available, unless it is apparent from the request, or as a result of consultation with the applicant, that the applicant would not want such a copy (see FOI Memorandum No. 22, section 22 deletions, and New FOI Memorandum No. 26, statements of reasons, paras 71–74). It may be sensible to consult the applicant as to her or his wishes where so little material would remain after deletions are made that the information received would be useless or nearly so (see para 6.5). This gives an opportunity to save the applicant charges, and may avoid the embarrassment of an applicant complaining about the worthless character of the material received.

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<sup>4</sup> The relevant portfolio Departments in respect of the intelligence and security agencies mentioned in para 7.11 are as follows: Australian Security Intelligence Organisation - Attorney-General's Department; Australian Secret Intelligence Service - Department of Foreign Affairs and Trade; Office of National Assessments, Inspector-General of Intelligence and Security - Department of the Prime Minister and Cabinet; Defence Intelligence Organisation, Defence Signals Directorate - Department of Defence.

### ***Whether ‘reasonably practicable’ to make deletions (paragraph 22(1)(c))***

7.20 Paragraph 22(1)(c) justifies a refusal of access only in the situation where a decision has been made that specific exemptions in the FOI Act apply to documents and, with the available resources, it is not reasonably practicable to decide on and make deletions to the extent necessary to remove the matter covered by those exemptions.

#### *Example*

A decision maker identifies examples of material in a large criminal investigation report which are exempt matter under paragraph 37(2)(a) (premature disclosure of material prejudicial to the fair trial of accused persons). Paragraph 22(1)(a) applies to allow refusal of access to the whole report only if it is not reasonably practicable with the available resources to decide on the full extent of deletions required to excise all the material covered by the paragraph 37(2)(a) exemption.

7.21 In considering whether deletions are ‘reasonably practicable’, regard should be had to the advice in paras 8.2–8.17 (on ‘substantial and unreasonable diversion of resources’), although in the case of paragraph 22(1)(c), there is no reference to the word ‘substantial’. It may be doubted whether there is any difference in the result of the two tests.

### ***Irrelevant material in a document (section 22)***

7.22 Section 22 provides among other things that:

- where an agency or Minister decides that to grant a request for access to a document would disclose information that would reasonably be regarded as irrelevant to the request, and
- it is possible for the agency or Minister to make a copy of the document with such deletions that the copy would not disclose the irrelevant information, and
- it is reasonably practicable to make such a copy (see paras 7.20–7.21 above),

the agency or Minister shall make and grant access to such a copy, unless it is apparent from the request or as a result of consultation with the applicant that the applicant would not want access to an edited copy.

This provision permits the deletion of material *reasonably* considered irrelevant to the request. The words ‘reasonably considered’ indicate an objective test of whether the material is in fact irrelevant. This provision makes it unnecessary to consider the application of exemptions to material which an agency knows an applicant has not requested. However, while the decision-maker is not required to give a full section 26 notice and statement of reasons, he or she must (as in the case of deletion of exempt material: see New FOI Memo No. 26, para 16) inform the applicant under subsection 22(2):

- that the document provided is an edited copy with irrelevant matter deleted, and
- the ground for deletion of that material. (The applicant should be given an accurate description of the matter deleted as irrelevant so that he or she can decide whether or not to appeal against the decision.)

### *Example*

An applicant requests access to all documents of an agency relating to her. The agency has in its possession the minutes of the agency's governing council that contain only one section relating to the applicant. The agency may make a decision on that section and, if appropriate, release it without considering whether the rest of the report is exempt from disclosure under the FOI Act. It must tell the applicant what it has done and why.

7.23 In applying the provision concerning irrelevant material, agencies should bear in mind comments by the AAT that FOI requests should be interpreted fairly, in a broad commonsense way (see para 5.11). Requests are not legal instruments to be interpreted by rules of legal construction. If there is doubt as to whether an applicant would want particular information, an agency should ascertain the applicant's wishes. In a case decided before the insertion of subparagraph 22(1)(a)(ii), the AAT said that it should not 'be taken as suggesting that an agency, by describing a document as in part outside the ambit of the request, should seek to avoid facing up to what is in substance a claim of exemption' (*Re Anderson and AFP* (1986) 4 AAR 414 (D137)). The 'irrelevant material' provision must not be used as a mechanism for avoiding obligations under the FOI Act. The AAT and the Ombudsman would take a serious view of any such abuses brought to their attention.

7.24 A decision to exclude material from the scope of a request on the ground that it is irrelevant to the request is subject to internal review and review by the AAT as a refusal to grant access to a document in accordance with a request (paragraphs 54(1)(a) and 55(1)(a)). The question to be determined on review is whether it is reasonable to regard disputed material as relevant or irrelevant to the request (see, for example, *Re Gold and Department of the Prime Minister and Cabinet* (D314)).

## **8. Requests involving substantial and unreasonable diversion of resources, or requests for documents described in such terms that they are clearly exempt in their entirety**

8.1 There are two provisions in the FOI Act under which a request may be refused on the ground that compliance 'would substantially and unreasonably divert the resources of the agency from its other operations', and there are several other closely-related provisions.

8.2 As well as applying to voluminous requests for access to written documents (subsection 24(1), paras 8.11–8.17), the test may be applied in the case where a request could be met by producing a print-out from a computer or word processor or by transcribing a sound recording (section 17, paras 8.14–8.21). In addition, there is a similar test in paragraph 22(1)(c) (see paras 7.20–7.21).

8.3 There is provision in the third party consultation provisions (sections 26A, 27 and 27A—see paras 6.29–6.42) for consultation with appropriate third parties where it is 'reasonably practicable' to do so. In these provisions the concept of 'reasonably practicable' includes the question of workload, but also extends more widely to questions such as the particularity of locating the third parties concerned.

8.4 In paragraph 20(3)(a) there is provision for refusing access in the form requested by an applicant where to do so would 'interfere unreasonably' with the operations of an agency or the performance by a Minister of her or his functions (see para 3.46).

8.5 Note also the direction given above on not using the ‘prior’ documents exception in subsection 12(2) unless a request will cause substantial and unreasonable diversion of resources (para 4.7).

### ***The general meaning of ‘substantial and unreasonable diversion of resources’***

8.6 In providing for a test of substantial and unreasonable diversion of resources, Parliament intended that a balance be struck between the public interest in access to information and the resources which must be employed to provide access in accordance with that request. As a consequence of the enactment of FOI legislation, the processing of requests for access to documents is a legitimate part of each agency’s functions. FOI requests may require reallocation of resources within an agency. It is only where the diversion of resources to meet an FOI request is *both substantial and unreasonable* that the exceptions in sections 17 and 24 apply. The key to effective and efficient administration of these provisions of the Act is *early* consultation with applicants.

8.7 The term ‘resources’ should be understood as including not only staff resources, but also finance and equipment. Therefore, the employment of staff on overtime, or the expenses of transferring staff from one location to another, would involve a diversion of resources. The reference to resources is, however, not to be construed as limited to those members of an agency’s staff who are immediately designated for FOI work. The term ‘resources of the agency’ should be understood as the resources available to the agency at any particular time for dealing with FOI requests. This may sometimes require the deployment of staff from other areas. In many agencies, FOI requests are dealt with by the line areas of the agency. The reference to resources of the agency will, in those cases, include those persons in the line areas who are available, or who might reasonably be made available, for dealing with requests in those areas.

8.8 The requirements of sections 17 and 24 call for judgment in the making of the necessary management decisions about the use of staff and other resources. The amount of staff and money made available to an agency is a matter for the Government; it is within the limits of the resources in fact available to an agency that decisions have to be made under section 17 and subsection 24(1).

8.9 Section 17 and subsection 24(1) refer to a diversion of resources that is both *substantial and unreasonable*. A minimal diversion of resources will not be enough to justify refusal. The word ‘unreasonable’ means that all considerations relevant to the extent of the resources needed to meet a request should be considered (*Re Swiss Aluminium Ltd and Trade* (1986) 10 ALD 96 (D106)).

8.10 The reference to all relevant considerations in *Swiss Aluminium* includes not only considerations relevant to the operations of the agency, but also considerations of the public interest in the giving of access to the particular documents. If any benefit will flow to the public from giving access to the documents in response to such a request, this should be weighed in the balance in considering whether the request involves an unreasonable diversion of an agency’s resources. It is not necessary to decide whether individual documents would be exempt or not (see the discussion on the meaning of ‘the giving of access is in the general public interest etc.’ in New FOI Memo No.29, paras 87 and 92).

## ***Section 24: requests which would cause substantial and unreasonable diversion of resources***

8.11 Subsection 24(2) provides that, in assessing whether the processing of a request would involve ‘substantial and unreasonable diversion of resources’, an agency or Minister is to have regard to certain resources that would have to be used in processing a request, but does not limit other matters to which regard may be had. The resources specifically identified are:

- those involved in identifying, locating and collating the documents within the filing system of the agency or the office of the Minister;
- those involved in deciding whether to grant, refuse or defer access to relevant documents, or to grant access to edited copies of the documents, including resources that would have to be used in:
  - examining the documents to identify exempt matter
  - consulting any person or body outside the agency about the request
  - making copies or edited copies of documents, and
  - notifying any interim or final decision on a request.

8.12 A request must sufficiently identify the documents to enable them to be located and identified, so that the request satisfies section 15 (see para 5.1). Dealing with a request may involve a considerable amount of work, especially if a large number of documents is involved, or the filing system is such that they cannot be easily located. The test of difficulty in identifying and locating documents is to be applied having regard to the actual nature of the filing system of the agency concerned. Filing systems are designed to enable an agency to locate and retrieve documents for its own purposes. If its functions do not require documents to be indexed according to a particular subject-matter, then that is an issue to be taken into account in dealing with a request for all documents concerning that subject-matter. However, inefficiencies in the filing system would not be a ground for invoking subsection 24(1).

8.13 Agencies should not readily resort to the provisions of subsection 24(1), and should do so only in circumstances where there is a genuine case for arguing that there would be a substantial and unreasonable diversion of resources. All decisions to refuse documents on the basis of subsection 24(1) are subject to AAT and Ombudsman review, and the AAT has in the past scrutinised such claims closely. Agencies should bear in mind some of the following matters referred to by the AAT in cases concerning the words ‘substantial and unreasonable’:

- if the agency’s decision to rely on subsection 24(1) is challenged in the AAT, the agency will have the onus of establishing that processing the request involves a substantial and unreasonable diversion of resources (subsection 61(1))
- to claim the subsection 24(1) exception successfully, the agency must show that the work involved is not only ‘substantial’ but also ‘unreasonable’. The word ‘unreasonable’ requires a balancing of relevant considerations, including the public interest factors favouring the giving of access to the documents as a group (see para 8.6). The applicant’s right of access to documents under the FOI Act is one factor to be weighed in the balance (*Swiss Aluminium* (above))

- the agency needs to make an accurate estimate of the work involved in meeting the request, including the number and volume of documents/files to be searched and assessed for disclosure or refusal of access and an estimate of staff-hours likely to be involved. An agency must make some count of the number of potentially relevant documents which have to be searched and on which decisions need to be made. The estimate must not be such as to allow substantial error (*Swiss Aluminium* (above)). If any claim is to be made in relation to decision-making time, it will usually be necessary for the process of estimation to involve officers who are expert in the area concerned. If the claim is only in relation to the work involved in locating, identifying and collating the documents, clerical staff without experience in the subject matter may be able to make the estimates (*Swiss Aluminium*)
- the complexity of decision-making will need to be considered, bearing in mind that many FOI decisions are inherently complex and not to be denied simply on that ground. The question of complexity is relevant only to the likely requirement of resources. Examples of questions which might be asked include: How many exemptions need to be considered? How complex is the subject-matter of the documents? How much expertise is needed to identify exempt matter in the documents? How much consultation will be required? How much work will be involved in making copies or edited copies of the documents?
- the resources available within the agency to undertake particular aspects of processing the request will need to be considered. Agencies might reasonably be expected to make available staff to undertake routine aspects of processing such as locating, collating and copying documents, but particular qualifications or experience may be necessary for other aspects (for example, understanding the consequences of disclosure of some documents may require particular expertise)
- the other functions of officers will need to be considered. While the processing of FOI requests is one function of an agency, subsection 24(1) allows an agency to balance the work involved in carrying out that function with the demands imposed by other functions. There is no reason, however, why resources should not be made available from other areas of an agency. (The test of diversion from other operations will include whether a line area is substantially impaired in its capacity to deal with its ordinary functions. Diversion of resources to the point where serious delay would be caused to other programs could be 'substantial'. The 'unreasonableness' of the diversion will likewise have to be judged in part by the effect on other programs, and the significance and importance of those programs.)
- the character of the agency may well be relevant – for example, a very large request would be more likely to have a substantial and unreasonable effect on a small agency than on a large Department, and
- in many cases of large and complex requests, it may be possible to agree with the applicant that disclosure of documents be staged over a period of time outside the time limits in the FOI Act (see, for example, *Re Geary and the Australian Wool Corporation* (D203)). Where an application is made to the AAT because of a deemed refusal of a request (subsection 56(1)), the AAT may allow further time to an agency to deal with the request (subsection 56(6)).

8.14 Subsection 24(4) provides that an applicant's reasons for seeking access (or an agency's or Minister's belief as to those reasons) cannot be taken into account in decisions under

subsection 24(1). Therefore, the fact that an applicant's interest may seem trivial, or that the applicant seeks to embarrass an agency or Minister, is not relevant. However, this does not mean that the agency should disregard all consequences of disclosure, and it must take them into account in considering the public interest in disclosure under the test of what is 'unreasonable'. Disclosure of documents is disclosure to the general public (see *Searle Australia Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163 at 179 (D294)). Again, subsection 24(3) provides that any maximum amount of charges payable under the regulations (when compared to the cost to the agency of processing the request) is not to be taken into account in determining whether there would be substantial and unreasonable diversion of resources.

8.15 Under subsection 24(6), before an agency or a Minister refuses to grant access to a document under subsection 24(1), the agency or Minister must give the applicant a written notice stating an intention to refuse access and identifying a contact officer with whom to consult with a view to making the request in a form that would remove the ground for refusal. The notice should include a breakdown of the estimated time for each step, level of officer involved and the operations of the agency which will be substantially and unreasonably diverted. The applicant must be given a reasonable opportunity to consult on this question and, as far as reasonably practicable, should be provided with information which would assist the applicant to make a request in a form that would not be subject to refusal under subsection 24(1).

8.16 What is envisaged in subsection 24(6) is that the difficulties of dealing with a request in the form it is put forward should be explained to the applicant. The applicant should be assisted in identifying with more particularity the documents he or she seeks; or in reducing the field of search or the volume of documents involved. What is a reasonable opportunity for consultation in terms of subsection 24(6) is a question which can only be answered by having regard to all the circumstances surrounding the request (*Swiss Aluminium* (above)).

8.17 There is nothing to prevent less formal means of consultation before issuing a written notice under subsection 24(6) of an intention to refuse access. In a simple case this could involve a telephone call or, alternatively, more information may be sought by way of a letter. In a more complex case the consultation requirement might only be met by the agency arranging a meeting with the applicant at a mutually convenient time to discuss the difficulties and how best those difficulties may be overcome.

### ***Section 17: electronically-stored information or sound recordings: substantial and unreasonable diversion of resources***

8.18 Whether compliance with a request that comes within the provisions of section 17 would constitute a substantial and unreasonable diversion of an agency's resources from its other operations is an issue to be decided having regard to all the circumstances of a particular request, including:

- the amount of machine-time and personnel hours required to produce the document containing the information requested
- the availability of machine-time and personnel
- the amount of other work required to be processed on the machine for the purposes of the agency's other operations, and

- any modification of programs required to enable access to the information in the form requested (see para 8.20).

8.19 Subsection 17(2) only relates to substantial and unreasonable diversion of resources in producing a written document under subsection 17(1). It does not apply to the process of decision-making in relation to such a document, this being a matter for consideration under subsection 24(1).

8.20 The obligations under section 17 to produce a computer print-out containing the desired information may not apply where this would require extensive modification of an existing program (see comments in para 8.33 of the *1979 Senate Committee Report*). Writing a new program may be so resource intensive that it could meet the test of a substantial and unreasonable diversion of resources. Whether it does or not will depend on the circumstances of each case. Agencies should not automatically reject a request simply because it may require modification of an existing program. There will be cases where data can be retrieved in ways other than those normally used by the agency but which would not require any significant reprogramming. If so, subsection 17(2) would not justify an agency refusing to meet the request. In some cases it may be possible to make arrangements for an applicant to pay for making changes to a program or writing a new one.

8.21 An agency may recover appropriate charges and this is a relevant consideration for the agency to weigh under subsection 17(2). The FOI (Fees and Charges) Regulations provide for the actual cost to be recouped where computer use is required to meet a request under the FOI Act (see New FOI Memo No.29, paras 47–52).

### ***Notifying reasons for decisions***

8.22 An applicant must be given reasons for any refusal to give access in response to his or her request on the ground that processing the request would involve a substantial or unreasonable diversion of resources or that the request falls within subsection 24(5) (paras 8.23–8.27). A decision to refuse access under sections 17, 22 or 24 is reviewable by the AAT (sections 54(1)(a) and 55(1)(a) and *Re Swiss Aluminium* (above)). See New Memo No.26 on notification of decisions and statements of reasons.

### ***Section 24(5): requests for documents described in such terms that they are clearly exempt in their entirety***

8.23 There is one limited situation where there is a discretion for a decision-maker not to locate and identify relevant documents as part of the decision-making process, and not to identify and describe the documents in a section 26 statement of reasons (see New Memo No.26 for statements of reasons). Subsection 24(5) (*which is not itself an exemption*) permits the refusal of access in accordance with a request *without having identified any or all relevant documents*, and without specifying the exemptions claimed in respect of each document, *but only if* it is apparent from ‘*the nature of the documents as described in the request*’:

- that *all* of the documents are exempt, *and*
- that there would be no obligation to provide edited copies of *any* of the documents under section 22 (alternatively, it may be apparent from the request, or as a result of a consultation

with the applicant, that the applicant would not wish to have access to an edited copy of any of the documents).

8.24 The purpose behind the provision is to avoid unnecessary work where it is clear *as a matter of logic on the face of the request* that documents sought are exempt and that there is no obligation to consider making deletions. *The double test in this provision will be satisfied only very rarely.* Although the provision is no longer formally restricted to requests for classes of documents, the practical situation is that only requests for certain very limited classes of documents will meet the double test in the provision. It must be noted that if an agency employs subsection 24(5), it places the applicant under a severe disadvantage in that he or she is unaware of the details of the documents which satisfy the request and is unable to test the exemptions claimed against those details. The AAT and the Ombudsman are likely to take a very serious view of any misuse of this exceptional provision.

8.25 The making of an exemption claim in relation to a requested document depends normally on a careful examination of the document in question, and an exemption claim does not normally follow as a matter of logic from the description of the document in the request. The application of most exemptions is a question of fact depending on the contents of the documents, the reasonable expectations as to the effects of their release, the circumstances of their creation, or a combination of these factors, and it is necessary to inspect the documents before claiming exemption for them. *If any question may arise as to their exempt status, or as to the release of particular text of documents, the provision cannot operate.* It is not meant to deny the applicant useful information where there might be a real question concerning the exempt status of any of the documents, and use of the provision is discretionary not mandatory.

#### *Examples*

An obligation to disclose parts of documents under section 22 may arise even in the case of documents which fall within the description of a class exemption such as section 34 (Cabinet documents), for example because only a part of the document contains a copy or extract from a Cabinet submission (paragraph 34(1)(c)), or because part of a Cabinet submission contains purely factual material and would not disclose any deliberation or decision of Cabinet the fact of which has not been published (subsection 34(1A)). Even a request for 'all Cabinet documents relating to X' would therefore not be a proper case for the use of subsection 24(5).

It would also be quite improper to employ subsection 24(5) where an agency intended to claim legal professional privilege (section 42) for all requested documents. The question whether legal professional privilege is applicable to a particular document is a complex question of fact, and an applicant may wish to contest the decision in relation to particular documents. In addition, it is clear from the High Court decision in *Waterford v Commonwealth (No.2)* (1987) 163 CLR 54 (D195) that even when a document is subject to legal professional privilege, some parts of it may not be protected by that privilege and an obligation would arise under section 22 to provide an edited copy.

Another example where use of subsection 24(5) would be wrong is a request by X for all documents held relating to X's previous de facto wife Y, made to an agency which has a secrecy provision prohibiting the disclosure by an officer of information with respect to the affairs of another person acquired in the course of the officer's duties. Before it could be

held that subsection 38(1) of the FOI Act operated to protect the particular documents, it would be necessary to be satisfied that neither subsection 38(1A) (access to a document, or an edited version of it under section 22, is not prohibited where it would not be prohibited by the secrecy provision itself) nor subsection 38(2) (access is not prohibited to personal information, *including joint personal information*, about the applicant) applied to any of the documents or parts of documents. It would therefore be necessary to view the documents to ascertain whether subsections 38(1A) or (2) had any application—for example to documents containing joint personal information concerning both X and Y—enabling release of some information. There might also be a question as to whether the relevant information is in fact ‘personal information’. There is no scope here for use of subsection 24(5).

8.26 The following is an example of a request where the use of subsection 24(5) would be justified:

A request, transferred to the Attorney-General’s Department under subsection 16(2), for ‘all documents held by you relating to and originating with ASIO’ – by definition the documents are all completely exempt (para (b) of definition of ‘exempt document’ in subsection 4(1)), and no question of edited copies arises (though there is nothing to prevent the Department, on the advice of ASIO, from releasing all or part of any document outside the FOI Act).

8.27 Any refusal of a request under subsection 24(5) is subject to internal review and AAT review, as well as to scrutiny by the Ombudsman.

## **9. Disclosure of Defamatory and Other Material (Sections 91 and 92)**

9.1 A document is not exempt from disclosure under the FOI Act merely because it might contain defamatory material. Unless an exception or exemption in the Act applies, the document must be disclosed even if disclosure exposes *the author* of the document to possible legal action for communicating any defamatory matter to the officers of the agency. In practice no special protection for authors is necessary, because they are generally protected by the defences available at common law in defamation actions (e.g. the defence of qualified privilege open to a person, who has an interest or duty in communicating defamatory material to officers of an agency who have a corresponding interest or duty to receive it: and see para 9.5). Where no defence is available at common law, the policy of the FOI Act is nevertheless that a person who may have been defamed should have (a) a right of access to the relevant document and (b) a right to correct information that is incorrect or misleading (see Part V of the FOI Act and FOI Memo No. 92, paras 52–53 concerning the current provisions for amendment of personal records; see also Information Privacy Principles 6 and 7 in section 14 of the Privacy Act). However, section 91 of the FOI Act ensures that an agency and its officers are not exposed to an action for defamation in respect of *disclosure under the FOI Act*.

### ***Section 91—protection against actions for defamation, breach of confidence or infringement of copyright***

9.2 Subsection 91(1) of the FOI Act is designed to ensure that the release of documents under the FOI Act does not provide a foundation for certain kinds of legal action against the

Commonwealth or an agency or person involved in the disclosure of the documents or, in some circumstances, against the author of a document. It provides protection where *either*:

- access to a document was required to be given under the FOI Act, or would have been required to be given but for subsection 12(2) (relating to ‘prior documents’—see paras 4.5-4.14); note that the intention here was to encourage agencies to give access to prior documents even though the applicant has no legally enforceable right of access to them (FOI Memo No. 64. para 4; and see below para 9.4), *or*
- access to a document was authorised by a Minister, or by an officer authorised under sections 23 or 54 to make access decisions, in the *bona fide* belief that the access was required by the FOI Act to be given. (However, where an officer does not have such a *bona fide* belief, protection under this section will not be available.)

9.3 Where subsection 91(1) of the FOI Act applies, an action for defamation or breach of confidence or infringement of copyright may not be brought against the Commonwealth, an agency or a person giving access to a document, by reason only of the giving of access, or of authorising access, to the document. Likewise, the giving of access to a document, or any publication of a document which results from the giving of access under the FOI Act, cannot be used as the foundation for an action for defamation or breach of confidence against the author of the document.

9.4 Subsection 91(1) does not, however, relieve the author of the document from any liability which he or she would have had apart from the giving of access to the document under the FOI Act. Therefore, if a document is defamatory and the author of the document is not otherwise protected by the law of qualified privilege in accordance with the law of defamation, he or she remains liable. Subsection 91(1) does not prevent the use of the document to which access is given under the FOI Act as evidence in a suit for defamation against the author of the document.

9.5 So far as the access to ‘prior documents’ is concerned (see paras 4.5–4.7), in making a decision about documents to which the applicant does not have a *right* of access because of their age, an agency should note, when considering whether to grant access, that the legal protection afforded by sections 91 and 92 covers the granting of such access. However, they would not do so if the documents were technically exempt and were released outside the FOI Act (see Part 2 above).

9.6 The protective provisions of subsection 91(1) apply also where there has been a failure to comply with the consultation requirements of sections 26A, 27 and 27A. No action for defamation, breach of confidence or infringement of copyright lies against the Commonwealth, an agency, a Minister or an officer merely because of a failure to comply with those consultation provisions (subsection 91(1A)).

9.7 Although the provision of FOI access is in effect provision of access to the public generally (see, for example, *Searle Australia Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163 at 179 (D294)), subsection 91(2) provides that giving such access, for the purposes of the law of defamation (or breach of confidence), or for further dealings with the information for the purposes of the law of copyright, does not constitute authorisation or approval for further publication.

9.8 Section 91 does not confer any protection in relation to disclosure of documents outside the FOI Act (see Part 2 above on such disclosure).

***Section 92—protection in respect of offences***

9.9 Section 92 operates in the same circumstances as section 91 to provide that neither a person authorising access to any document, nor any person concerned in the giving of access, is guilty of a criminal offence by reason only of the authorising or the giving of access. For example, section 92 will relieve from criminal liability any authorised officer of an agency involved in giving access under the FOI Act where, although the FOI Act requires access to be given, a secrecy provision applying to that officer prohibits the disclosure (it is thought that such a situation may arise, for example, under subsection 38(2) of the FOI Act). Protection is equally available where an authorised officer of an agency gives access to a document, the disclosure of which is prohibited by a secrecy provision, in the mistaken but *bona fide* belief that the FOI Act requires such access to be given.

## **APPENDIX 1**

### **PROCESSING FOI REQUESTS**

#### ***Who May Make an FOI Request?***

A right of access to documents is given by section 11 of the FOI Act to ‘every person’. ‘Person’ in this context includes persons resident in Australia or abroad, whether or not they are Australian citizens, companies, prisoners, or children.

#### ***The Right to Obtain Access to Documents***

Generally, the right of access created under the FOI Act is to documents, not information (section 11). The FOI Act does not generally require an agency to make available information which is not in documentary form, nor to collect information to create a new document.

Agencies are not obliged to research information—the obligation is only to provide access to existing documents.

#### ***Requirements of a Request***

A valid request for a document must be in writing, be accompanied by an application fee (if applicable), and provide such information concerning the document as is reasonably necessary to enable the agency to identify the document (subsection 15(2)).

The FOI Act requires requests to be accompanied by an application fee, where applicable (s.15(2)). This means that if a letter seeking access to documents is received without the application fee, it is not a request in accordance with the Act, and should not be acknowledged as a request nor recorded in the Quarterly Statistical Return to the Attorney-General’s Department. The letter should be acknowledged and the applicant advised that the matter cannot proceed as an FOI request until the application fee of \$30 is paid or remitted (see New FOI Memo No. 29, Appendix 4). Agencies have a duty under the Act to take reasonable steps to assist applicants in making requests which comply with section 15.

If an applicant includes an application for remission of the fee in the application for documents, and the fee is remitted, the date the time limit for the request starts running is the date of the remission decision.

### ***Acknowledging Requests***

The FOI Act requires agencies to notify the applicant within 14 days that the request has been received by the agency (subsection 15(5)). If the request was received in a State Office and forwarded to Canberra, for instance, the 14 days starts from the date of receipt in the State office. There is no set form of acknowledgment but it should be in writing and quote any agency reference number for the request (see Attachments 1 and 2).

### ***Interpretation of Requests***

The Administrative Appeals Tribunal has said that a request for access should be construed in a broad common sense way and not by rules of construction developed for the interpretation of legal documents. An applicant does not know the content of documents and the best the applicant can do is to identify a document that may be described only by a genus or class. A request must be read fairly and extend to any documents which might reasonably be taken to be comprised within the description used by the applicant. If the request is very broad or you are having difficulty determining what the applicant seeks, you should discuss the request with the applicant to clarify the terms of the request. You would need to confirm your conversation with the applicant and the agreed terms in writing.

The FOI Act gives an applicant a right of access only to documents in existence at the time a request is lodged with an agency. An applicant cannot insist that the request covers documents created after the request is received. On internal review under section 54, the original date of receipt of the request is still the cut-off date for determining which documents are the subject of the request.

### ***Monitoring Requests***

The FOI Act requires each agency to collect certain statistical information needed to complete the agency statistical return forms. This information also allows for the processing of requests to be monitored. This may help in complying with the other requirements of the FOI Act, especially time limits. Agencies should monitor how many current requests they have, details of who is processing each request and the current status of each request.

It can be useful to retain a copy of each request in a central location (eg the FOI Section) for reference in case of queries while requests are being processed.

There is no set method for processing requests. Most agencies raise a separate file for each request. Details of requests received are also recorded in some form of register (electronic or manual).

Many agencies attach forms to the request file to assist action officers involved in processing requests, and record details of action taken on requests. The details recorded on a request file should include the decision and reasons for decision; the results of any consultation undertaken; estimated and actual processing time, response times; and fees and charges imposed and collected.

### ***Statistics***

The FOI Act requires the Attorney-General to prepare an annual report on the operations of the Act (section 93). Information for the report is provided by all agencies to the Attorney-General's Department in quarterly and annual statistical returns.

To ensure that an agency can provide the required information efficiently and correctly, it is essential to have procedures for recording the required information about each request. The method of record-keeping will depend on the size of the agency and facilities available. At a minimum, the amount of data recorded should be sufficient to complete the Quarterly and Annual Statistical Returns. Quarterly Statistical Returns are due 21 days after the end of each quarter and the Annual Statistical Return is due by the 31st of July each year.

### ***Consultation***

Consultations may be necessary in the following circumstances:

- where a person wishes to make a request to an agency, or has made a request to an agency that does not comply with section 15 (ie the request is not made in writing, is not accompanied by an application fee or does not provide sufficient information to identify the document) it is the duty of the agency to take reasonable steps to assist the person to make the request in a manner that complies with section 15
- to clarify with the applicant the terms of request (this type of consultation may be necessary to clarify the request—this may be at any stage of processing (subsection 15(3))
- to reduce the scope of the request (section 24). An agency must not refuse a request on the ground that it does not provide sufficient information to identify the document sought or is too wide in scope, without first giving the applicant a reasonable opportunity of consultation with a view to making the request in a form that would remove that ground for refusal (subsection 24(6)). The time limit for processing the request is suspended while consultation under section 24 is being undertaken, and resumes on the day the applicant confirms or alters the request (subsection 24(7))
- to identify within an agency the location and sensitivity of documents

- to ascertain to which agency the request belongs
- to determine whether other agencies hold any relevant documents
- to refer a request
- to transfer a request (section 16)
- to determine whether an agency objects to release of their documents which are held by the consulting agency, and
- to identify whether another agency holds a similar request.

When you have a request which seeks access to Cabinet documents, it is essential to consult the FOI Co-ordinator at the Department of the Prime Minister and Cabinet. Even though Cabinet documents are a class exemption, the FOI Co-ordinator will assist you in claiming appropriate exemptions in respect of the accompanying documents eg draft submissions, reports etc.

Similarly, where you have a request for documents concerning a foreign government, you should contact the FOI Co-ordinator for the Department of Foreign Affairs and Trade. That Department will undertake any necessary consultation with the foreign government on your behalf.

State governments, commercial organisations and private individuals must be consulted where their interests may be affected by the release of a document (sections 26A, 27, 27A). The FOI Act requires you to undertake consultation when you are considering granting access to the documents. However, consultation will often inform an agency's decision as there have been occasions where a third party has had no objection to the release of a document when the agency was intending to withhold the document.

When undertaking consultation with third parties you should write to them and attach copies of the documents concerned (see Attachments 3, 4 and 5) or provide a description of the documents if you are unable to attach copies. You should also write to the applicant informing her or him of the extension of time for processing the request which is provided for in subsection 15(6) (see Attachment 2). A third party does not have a power of veto on the decision to release a document. The agency takes into account the submissions made by a third party when making a decision on release. If an agency decides to release documents against the objections of the third party, that party should be notified in writing at the same time the applicant is notified of the decision. The third party then has 30 days in which to apply for an internal review of the decision. Access should not be granted to the applicant until the 30-day time limit has expired or an internal review has been carried out.

Some agencies will need to consult with exempt agencies (eg ASIO, other security agencies and certain government business enterprises) in relation to documents which

originated from or may have originated from that agency, particularly where section 25 may be used by the exempt agency. In relation to compulsory transfer of requests for documents of exempt agencies, FOI Memorandum No. 31 will help determine the relevant Department to which Department is to be transferred. Only the relevant department responsible for an exempt agency can make decisions on the documents.

Agencies may undertake consultation with the Attorney-General's Department to seek guidance in processing requests and in interpretation of the FOI Act. Agencies may consult with their legal service provider regarding the handling of AAT appeals.

### *Transfers*

When transferring a request:

- forward a copy of the request
- forward a copy of receipt for payment of application fee, if applicable
- advise the date of receipt of request, and
- advise the applicant (subsection 16(4)).

Attachment 6 contains examples of letters to the transferee agency and to the applicant.

It is important that all transfers be undertaken as soon as possible as the request is deemed to have been made to the agency accepting the transfer. The 30-day time limit starts from when the initial agency received the request. When transferring a request it is advisable to consider sending an advance copy of the request to the other agency if there is likely to be any delay in preparing the formal transfer documentation.

The FOI Act provides that an agency may transfer a request where the document requested is held by another agency or the subject matter of the request is more closely connected to the functions of another agency, subject to the agreement of the other agency (paragraphs 16(1)(a) and 16(1)(b)).

The FOI Act provides that where a requested document originates from or relate to the functions of exempt agencies listed in Part 1 of Schedule 2, and is more closely connected to the functions of the agency, the request **shall** be transferred to the relevant Department responsible for the exempt agency (subsection 16(2)).

Subsection 16(3) provides a procedure for mandatory transfer to agencies in Part II of Schedule 2 (which are exempt in respect of particular documents). When transferring a request relating to documents received from an exempt agency, remember to forward copies of documents.

If it is necessary to neither confirm nor deny the existence of documents (which originated from a confidential source or a security agency) using section 25, consultation with the relevant agency should be undertaken before completing transfer. If an applicant is advised of the existence of documents when notified of transfer then a refusal neither confirming nor denying existence of the documents cannot be made.

### ***Time Limits***

The FOI Act imposes certain time limits in respect of requests. Requests must be acknowledged within 14 days of receipt, and a decision on access notified within 30 days. All time limits are calendar days, not working days.

The time limit for responding to a request can be extended by 30 days where consultations with State Governments, commercial organisations or a person, other than the applicant, under sections 26A, 27 and 27A respectively are undertaken (subsection 15(6)). In such cases you should advise the applicant in writing (see Attachment 5).

Where an agency decides that an applicant is liable to pay a charge in accordance with section 29, the clock stops on the day the applicant receives a written notice from the agency. See paragraph 32 of New FOI Memo No. 29 for more information.

While the 30-day time limit applies only to the notification of the decision on the request, and not to the actual provision of access to the documents sought, access should be provided as soon as practicable after the decision to grant access has been made and any charge has been paid.

Other relevant time limits are:

- amendment of personal records (30 days)
- remission of application fee (30 days)
- decision to reduce or not to impose a charge (30 days)
- internal review application (30 days)

Applicants can apply to the AAT when they are not notified of a decision within the prescribed time limits. Undue delay is also a ground for complaint to the Ombudsman.

### ***Authorisation of Decision Makers***

Officers making decisions on requests have to be authorised by the principal officer of the agency (section 23).

Officers can be authorised to make the following decisions:

- to grant, deny or defer access to documents
- to grant access in another form
- to delete matter from a document
- to impose or remit a charge
- to remit an application fee
- to grant or refuse a request to amend a personal record
- to extend time limits, and
- to defer access.

Some officers will have authority to make all decisions, others will have limited authority; for example, to grant access but not to refuse access. The level of decision-maker will vary between agencies. When processing requests it is essential that all decisions are made by authorised officers.

Officers cannot review their own decisions (subsection 54(2)), so authorisations should provide for review of decisions by officers senior to the initial decision maker. If an initial decision is made by the Minister or the principal officer of the agency (such as the Secretary of a Department), it is not possible to have an internal review of the decision, and the applicant must apply to the AAT for review.

### ***Forms in Which Access May be Given***

The FOI Act provides (section 20) that access to a document may be given to an applicant in one or more of the following forms:

- inspection
- provision of a copy of the document
- provision of a means of viewing a film or videotape or hearing a sound recording
- provision of a transcript of a sound recording or of shorthand notes
- provision of a computer printout, and
- magnetic data.

### ***Statement of Reasons for Decision***

Where access is not granted as requested, section 26 of the FOI Act requires the applicant to be given notice in writing. This applies where the decision is made that:

- giving of access is to be deferred

- the document is not a document of the agency
- the document is an exempt document
- the document is available by other means (such as under the *Archives Act 1983*), in accordance with another enactment, or available for purchase
- the document does not exist or cannot be located
- processing the request would be an unreasonable diversion of resources, and
- access will be given in a different form.

A Statement of Reasons must be just that. When claiming an exemption it is not sufficient to merely quote the relevant section of the FOI Act to the applicant. You must give full reasons for claiming the exemption. Section 26 requires a decision-maker to “state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision”. A statement which fails to provide full reasons will probably draw an internal review.

A Statement of Reasons also applies when notifying a decision on internal review.

## ***Review of Decisions***

### *Internal Review*

The FOI Act provides that an applicant may apply for a review of a decision (section 54) within 30 days after the date of notification of that decision. If an agency does not notify the applicant of the result of the review within 30 days of receipt of the application, then the applicant has the right to make an application to the AAT (subsection 55(3)).

The FOI Act requires applications for internal review to be accompanied by an application fee, where applicable (section 54). This means that if an application is not accompanied by the application fee it is not a valid application. The applicant should be advised that there is no obligation on the agency to undertake a review until the application fee is paid or remitted.

### *Administrative Appeals Tribunal*

The FOI Act provides that an application accompanied by an application fee (currently \$300), may be made to the AAT for review of a decision refusing to grant access or deferring the provision of access to a document, or a decision to impose a charge, within 60 days of the date of notification of the decision on internal review (section 55). Agencies are required by the AAT Act to lodge statements of reasons for decisions with the AAT within **28 days** of receiving advice of the appeal.

An agency which receives notice of an appeal to the AAT may request their legal services provider to represent them in the matter. An agency which intends to conduct its own case may wish to seek advice from the Attorney-General's Department as appropriate.

### *Ombudsman*

An applicant may complain to the Commonwealth Ombudsman at any time about an agency's processing of a request or its decision on access to documents.

## **Attachment 1**

### **ACKNOWLEDGMENT (WHEN FEE RECEIVED) SAMPLE**

Dear «applicant»

I refer to your letter of «date» in which you sought access to documents relating to «subject of request» under the *Freedom of Information Act 1982*.

Payment of the application fee was received on «date of receipt» and the statutory period for processing your request will commence from that date. The receipt for your payment is attached.

You will be notified of any additional charges in relation to your request or of a decision as soon as practicable.

Yours sincerely

FOI Coordinator

## **Attachment 2**

### **ACKNOWLEDGMENT (EXTENSION OF TIME LIMIT) SAMPLE**

***To be used in conjunction with Attachment 1 where appropriate***

Dear «applicant»

As your request covers documents which concern Commonwealth relations with a State Government/contains information concerning the business, commercial or financial affairs of an organisation, or a person's business or professional affairs/contains an individual's personal information, the Department is required to consult with that State Government/commercial organisation/private individual before making a decision on the release of those documents.

Subsection 15(6) of the *Freedom of Information Act 1982* (copy enclosed) provides for an extension of 30 days to the statutory 30-day time limit for processing requests. Therefore, the time limit for processing your request will expire on «date».

Yours sincerely

FOI Coordinator

### Attachment 3

## LETTER CONSULTING STATE GOVERNMENTS SAMPLE

Dear «*consultee*»

### REQUEST UNDER THE COMMONWEALTH FREEDOM OF INFORMATION ACT 1982

The «*agency/department*» has received a request under the *Freedom of Information Act 1982* seeking access to «*subject of request*». I have attached documents relevant to the request which originated with, or may be of interest to your organisation.

Under the FOI Act, where a document is identified as falling within the scope of a request and contains matter originating from a State and that State may reasonably have objections to the release of the document, consultation is required before the Department can make a decision to release that document. Any objection to release must be based on the grounds for exemption contained in section 33A of the FOI Act.

These grounds are:

- (i) that disclosure would or could reasonably be expected to cause damage to relations between the Commonwealth and any State; or
- (ii) that disclosure would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of the State, to the Commonwealth Government.

The above grounds for exemption do not apply in respect of the disclosure of matter in the document which would on balance, be in the public interest.

To enable this Department to give full consideration to this request, your comments are sought on whether disclosure of any of the enclosed documents would satisfy the grounds for exemption outlined above. The mere assertion that release of the documents would be a breach of confidence or that Commonwealth/State relations would be damaged is not sufficient to sustain exemption of the documents from disclosure under the FOI Act. The responsibility for providing reasons for withholding documents, together with supporting evidence, rest with the organisation opposing release.

Section 22 of the FOI Act allows information to be deleted from documents where that information should not be disclosed. Would you please consider whether deletion of any specific information would eliminate or substantially reduce any objections you might have to the release of the documents.

While your comments will be taken into account in the decision-making process, the decision-maker within this Department is ultimately obliged to form his or her own view regarding the appropriateness of release.

If the decision-maker decides to release any of the documents with or without deletions being made, and you have made a submission detailing your objections to this release, you will be given the opportunity to apply for an internal review of the decision prior to the actual release of the documents to the applicant.

Comments on release of the documents would be appreciated by «*date*» and should be addressed to:

Director  
FOI Section  
«*Agency/department*»  
«*Address*»

Should you have any enquiries concerning this matter, please do not hesitate to contact me on «*phone*».

Yours sincerely

FOI Coordinator

## Attachment 4

### LETTER CONSULTING COMMERCIAL ORGANISATIONS SAMPLE

Dear «*consultee*»

The «*agency/department*» has received a request under the *Freedom of Information Act 1982* seeking documents relating to «*subject of request*».

The Department has identified the enclosed documents as relating to the request in respect of your company's activities.

You may be aware that the FOI Act contains specific provisions under section 43 of the FOI Act to exempt from disclosure, documents containing information relating to business affairs. In order to use these provisions the Department has to establish that disclosure would:

- (a) reveal trade secrets; or
- (b) reveal information having a commercial value which could be, or could reasonably be expected to be, destroyed or diminished if disclosed; or
- (c) have any other adverse effect on the operation or activities of a business.

Of particular significance to this Department is:

- (1) whether disclosure would or could reasonably be expected to unreasonably affect your organisation in respect of its lawful business, commercial or financial affairs; or
- (2) whether disclosure could reasonably be expected to prejudice the future supply of information to the Commonwealth.

To enable this Department to give full consideration to this request, I seek your comments on whether disclosure of any of the enclosed documents would adversely affect your business activities in any of the ways outlined above. If it is considered that your business activities could be affected, please support your conclusions with sufficient reasons to enable this Department to substantiate your claim to the applicant.

Section 22 of the FOI Act allows information to be deleted from documents where that information should not be disclosed. Would you please consider whether deletion of any specific information would eliminate or substantially reduce any objections you might have to the release of the documents.

The mere assertion that release of the documents would or could have an adverse effect on your business would generally be insufficient to sustain exemption of the documents from disclosure under the FOI Act if the matter be finally determined by the Administrative Appeals Tribunal.

Your comments will be taken into account in the decision-making process. If the decision-maker does not agree with your recommendation, I will contact you again concerning your review rights.

Your comments on the release of the documents should be addressed to:

The Director  
FOI Section  
«*Agency/department*»  
«*Address*»

It would assist this Department to meet its obligations under the FOI Act if a reply could be provided by «*date*».

If you have any enquiries concerning this matter, please do not hesitate to contact me on «*phone*».

Yours sincerely

FOI Coordinator

## Attachment 5

### LETTER CONSULTING PRIVATE INDIVIDUALS SAMPLE

Dear «*consultee*»

The «*Agency/department*» has received a request under the *Freedom of Information Act 1982* seeking documents relating to «*subject of request*».

This Department has identified the enclosed documents as relating to the request and considers they contain personal information about yourself.

Where disclosure of documents would involve an unreasonable disclosure of a private individual's personal information (including a deceased person) the Department is not required to give access to that document.

The term 'personal information' is defined in the FOI Act to mean:

*information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

To enable this Department to give full consideration to the request, I seek your comments on whether you consider that disclosure of any of the enclosed documents would involve an unreasonable disclosure of your personal information. If you believe that disclosure would be unreasonable, please provide your reasons so the Department may make an informed decision.

Section 22 of the FOI Act allows information to be deleted from documents where that information should not be disclosed. Please consider whether deletion of any specific information would eliminate or substantially reduce any objections you might have to the release of the documents.

Although the decision-maker will not be bound by the comments you make they will be given careful consideration. Should your comments not be accepted I will contact you concerning your review rights.

Please forward your comments on the release of the documents to:

The Director  
FOI Section  
«*Agency/department*»  
«*Address*»

It would assist the Department to meet its obligations under the Act if a reply could be provided by «*date*» .

Should you have any enquires concerning this matter, please do not hesitate to contact me on «*phone*».

Yours sincerely

FOI Coordinator

## Attachment 6

### (1) TRANSFER LETTER TO ANOTHER AGENCY UNDER PARAGRAPHS 16(1)(a) AND (b)

#### SAMPLE

**NOTE:** This is a fictitious example only, illustrating some of the issues that may arise in transferring part of a request. It is not intended as a precedent letter, since each case will differ from every other.

30 November 2005

Ms Mary Brown  
FOI Coordinator  
Department of the Prime Minister and Cabinet  
3-5 National Circuit  
BARTON ACT 2600

Dear Ms Brown

I refer to our telephone conversation yesterday about the FOI request from Mr Tom White MP for access to all documents concerning the development of government policy in relation to the opening of further uranium mines. The request specifies a number of sub-categories of documents which she seeks.

2. I enclose a copy of Mr White's request together with a copy of the receipt for payment of the \$30.00 application fee. The request was received by this Department on 19 November 2005, and an acknowledgment and estimate of charges under section 29 was sent to Mr White on 26 November 2005.

3. Among the documents Mr White has requested are those relating to discussions on this subject between this Department and PM&C between June and December last year. I understand from our conversation that «*name of other agency*» has a number of documents which satisfy this part of Mr White's request and which are not held by this Department, and that you are prepared to accept a transfer of the request in respect of those documents.

4. I am therefore transferring this request to your Department in relation to the documents mentioned above. I do so under paragraph 16(1)(a) of the FOI Act on the ground that the documents are in your possession. The relevant date from which the 30 day period runs for making a decision is 19 November 2005, the date we received the request.

5. On a second matter, three of the documents in our possession fall within the scope of Mr White's request for access to documents which relate to the role played by PM&C in coordinating discussions on the opening of new uranium mines. As the subject-matter of these documents more closely concerns the functions of your Department than those of this Department, and you have agreed to a transfer, I am transferring the request to you in relation to those three documents under the provisions of paragraph 16(1)(b) of the FOI Act. I understand you have identical copies of two of those documents (letters from your Secretary to our Secretary, dated 10 September and 12

October 2005), but not of the third, a letter from our Secretary to your Secretary, dated 15 October 2005. To enable you to deal with the transferred request, I enclose a photocopy of that letter.

6. I note that the decision-makers in our two Departments will consult together about issues affecting the other Department before making a final decision.

7. Please let me know if I can be of any further assistance.

Yours sincerely

John Smith  
FOI Coordinator

**Attachment 6 (continued)**

**(2) NOTIFICATION TO APPLICANT OF TRANSFER TO ANOTHER  
AGENCY  
UNDER PARAGRAPHS 16(1)(a) AND (b) OF THE FOI ACT**

**SAMPLE**

30 November 2005

Mr Tom White MP  
Member for Jonestown  
Parliament House  
CANBERRA ACT 2600

Dear Mr White

I refer to your FOI request received by this Department on 19 November 2005 for access to all documents held by us concerning development of government policy relating to the opening of further uranium mines. I acknowledged the request on 26 November 2005, when I also wrote to you concerning the question of charges.

2. I am now writing to inform you that I have transferred parts of your request to the Department of the Prime Minister and Cabinet (PM&C) under the provisions of paragraphs 16(1)(a) and (b) of the FOI Act. I enclose a copy of section 16. That Department has agreed to accept the transfer.

3. Firstly, under paragraph 16(1)(a), I have transferred your request to that Department in relation to a number of documents relating to discussions between the two Departments between June and December 2004. PM&C has copies of these documents, but none of them are in our possession. We do have other documents on this subject about which we will be making access decisions in the near future.

4. Secondly, under paragraph 16(1)(b), I have transferred the request to PM&C in relation to three documents which relate to the role played by that Department in coordinating discussions on the opening of new uranium mines. These documents relate more closely to the functions of PM&C than to those of this Department.

5. As you may be aware, the transferred request in relation to the specific documents mentioned above is, under subsection 16(5) of the FOI Act, taken to be a request made to PM&C, for access to those documents, on the date this Department received it, namely 19 November 2005.

6. The contact officer at PM&C is Ms Mary Brown and her telephone number is *«phone number»*. Ms Brown will write to you shortly concerning those parts of your request which have been transferred to that Department.

Yours sincerely

John Smith  
FOI Coordinator

## APPENDIX 2

### ‘BRAZIL DIRECTION’: CLAIMS OF LEGAL PROFESSIONAL PRIVILEGE

#### ATTORNEY-GENERAL’S DEPARTMENT

#### FROM THE SECRETARY CANBERRA

First Assistant Secretaries  
Directors of Legal Services  
FOI Managers

#### Claims of Legal Professional Privilege Exemption under the Freedom of Information Act

The purpose of this minute is to draw attention to the procedure to be followed before the legal professional privilege exemption under the FOI Act is claimed. More general advice and information are contained in FOI memorandum No. 42.

2. Section 42 of the FOI Act provides that documents are exempt from disclosure if they would be privileged from production on the ground of legal professional privilege. Section 14 provides that nothing in the Act is intended to prevent or discourage agencies from giving access to exempt documents where they can properly do so. Federal Cabinet decided in June 1985 that agencies should not claim exemption for documents which have no particular sensitivity.
3. A claim for legal professional privilege is one that must be made by the client. An agency should not be advised to claim the exemption simply because it is available. Where a client agency wishes to assert a claim of legal professional privilege in respect of a document which has no apparent sensitivity, the attention of the client agency should be drawn to the Cabinet decision mentioned above. The client should be advised that legal professional privilege should be waived unless some real harm would result from release of the documents.
4. The client should be consulted before a decision on access is made—see FOI memorandum No. 42, paragraphs 20–24. In particular, a decision should not be made to refuse access to documents in the possession of this Department on the ground of legal professional privilege exemption unless there are written instructions from the client agency that the privilege is to be claimed.
5. I ask all officers involved in granting access to documents under the FOI Act, or in advising other agencies on handling their FOI requests, to ensure attention to this matter.

P. BRAZIL

2 March 1986