

Freedom of Information Memo No. 26A

Arrangements with regard to consultation with state governments under section 26A

This memorandum supersedes previous FOI Memorandum No. 26A and that part of update No 1 of FOI Memorandum No. 21 (issued 7 February 1984) which deals with consultation with State Government agencies under section 26A of the *Freedom of Information Act* 1982.

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ATTORNEY-GENERAL'S DEPARTMENT
CANBERRA

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Introduction

1. This memorandum supersedes previous FOI Memorandum No. 26A and that part of Update No 1 of FOI Memorandum No. 21 which deals with consultation with State Government agencies under section 26A of the *Freedom of Information* (FOI) Act.

+ **Statutory requirements under section 26A**

2. Section 26A requires consultation with the States (section 4(1) definition of 'State' includes the Australian Capital Territory and the Northern Territory) in certain circumstances when an FOI request is received by a Commonwealth agency. Where FOI access is sought to a document which originates with or was received from a State, or the information it contains originated with or was received from a State, consultation is required before access can be given to the document whenever it

appears that a State may reasonably wish to contend that the document is exempt under section 33A (documents affecting relations with States).

+ Administrative arrangements with regard to consultation with the State Governments

3. Arrangements have been put in place to facilitate consultation with State Government agencies where consultation is required pursuant to section 26A. Agreement has been obtained from the States that all correspondence and communication should, at first instance, go through the delegated FOI contact officer of the particular agency and not directly to the author or action officer whose name may appear on the document. This procedure has been put in place to ensure FOI requests are appropriately received and monitored, and to minimise inconsistency across jurisdictions where an applicant makes FOI requests across several Commonwealth and State agencies.

4. The Information Access Unit holds current lists of names and telephone numbers of State FOI contact officers. For further details ring Tel. (02) 6250 6492.

+ When to consult

5. Agencies should note that consultation with State agencies is not restricted to the consultation which must take place under section 26A, nor to documents which might be considered for exemption under section 33A. Accordingly, the procedures for consultation with the States should be regarded as appropriate in the case of a request for any document the disclosure of which might adversely affect State interests.

6. Consultation with State agencies is not to be regarded as necessary in all circumstances. For instance, where documents obtained from State agencies are of a routine nature, and have been publicly released without objection from a State in the past, the Commonwealth agency should continue to release the documents without consultation.

7. Where large volumes of information are exchanged between Commonwealth and State agencies on a regular basis, and, correspondingly, large numbers of FOI requests are received concerning that information, standing arrangements should be put in place for the handling of such information. Such arrangements should be included in Section 8 statements.

+ Requirement to consult with the Department of the Prime Minister and Cabinet

8. The Prime Minister has particular responsibility for Commonwealth/State relations, for example, relations between the Prime Minister and Premiers. Where a request is received seeking access to documents relating to communications between the Prime Minister and a Premier, or documents the disclosure of which might be expected to cause damage to relations between the Commonwealth and the States, the Department of the Prime Minister and Cabinet (through the FOI Co-ordinator) should be informed and, where appropriate, consulted on the release of the documents.

+ Extension of time where consultation is required

9. The requirement to consult a State agency may necessitate an extension of the 30 day statutory time limit (section 15(5)(b)) for the notification of a decision to the applicant. Section 15(6)(a) provides for an extension of a further 30 days where a requirement under section 26A makes it appropriate to do so. Where this is necessary, the agency or Minister must, as soon as practicable, inform the applicant that the period has been extended (section 15(6)(b)).

10. The State agency should be notified of the period within which a reply should be given and informed that where a response is not received within the specified period, it will be assumed that there is no objection to the release of the document concerned and that consultation has been concluded under section 26A(1).

+ Requirement to consult other Commonwealth agencies

11. An agency receiving a request for documents in which a State has an interest will need to consider whether any other Commonwealth Minister or agency has an interest in the subject matter of the documents which would require that other Minister or agency to be consulted.

+ An agency is not bound by a State's submission under section 33A

12. Where a submission has been received from a State, claiming that the document in question is exempt under section 33A, an agency is not bound to accept such a submission and deny access to the applicant. Documents containing material received from or directed at a State do not as a class come within the section 33A exemption. Each document is to be considered in the light of the circumstances of the particular case. For the exemption to be established there must either be a reasonable expectation of damage to Commonwealth-State relations, or the disclosure of material communicated in confidence by a State Government or State authority to the Commonwealth Government or a Commonwealth authority. In addition, section 33A(2) contains a balancing public interest test. (It is intended to issue, as soon as possible, a revised memorandum on sections 33 and 33A.)

13. Where a decision is made to exempt a document under section 33A, no further contact with the State is required unless the applicant appeals to the Administrative Appeals Tribunal (AAT), in which case the State must be advised (section 58F(3)). The State may apply to be made a party to such an appeal (AAT Act section 30). As a matter of courtesy, the State could be informed of a decision not to release documents even where no appeal is lodged against that decision.

+ Requirement to notify a State where a decision is made to release a document under Section 33A

14. Section 26(A)(2) provides that, where a State has been consulted under section 26A, the State must be notified of a decision to release the document concerned.

+ Internal and external review

15. A State may apply for internal review of a decision to release a document, unless the decision was made by the responsible Minister or the principal officer of the agency (section 54(1C)). The application must be made within 30 days, or such further period as the agency allows, after the day on which notice of the decision was given to the applicant (section 54(1F)). By analogy with proceedings in the AAT (see para. 17 below) only the question of exemption under section 33A may be considered in such a review.

16. The State has a right to apply for AAT review of a decision (section 58F(1)), known colloquially as 'reverse FOI'. This may be after internal review or instead of it. A State must make such an application within 30 days after the day on which notice of the decision was given to the State (section 58F(2A)). If a State applies for review within that period, the document may not be released unless the decision is affirmed by the AAT. If the State does not apply for review within that period, the Commonwealth may provide access to the document without further contact with the State (section 26A(2)(b)).

17. In a reverse-FOI matter a State is restricted to issues relating to section 33A, that is, it is unable to raise other issues which may arise under other exemptions. This is based on analogy with *Mitsubishi Motors Australia Limited v Department of Transport* (1986) 68 ALR 626 (D156) where it was decided that an application under section 59 for review of a decision to disclose documents under section 43 to a third party is limited to matters relating to section 43. The AAT has applied the same principle to 'reverse FOI' proceedings relating to personal information (see *Re McKinnon and Powell & DIEA*, unreported, 12 December 1995). If a State is joined as a party to an existing appeal to the AAT by the FOI applicant, however, it may then argue matters raised by other exemptions. In *Re Parisi and AFP and State of Queensland* (1987) 14 ALD 11 (D211) the Tribunal held that as the State of Queensland had been joined as a party not for any limited or specific purpose, it was entitled to raise whatever claims of exemption were appropriate. See also *Re Strang and DIEA and Siddha Yoga Foundation* (1994) 36 ALD 449 (D352).