

## **Freedom of Information Memo No. 92**

# **Freedom of Information Amendment Bill 1991**

The purpose of this memorandum is to explain the changes to be made by the *Freedom of Information Amendment Bill 1991*

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#### **Commencement of the Amendment Bill**

The purpose of this memorandum is to explain the changes to be made by the Freedom of Information Amendment Bill 1991 when that Bill comes into force.

2. A copy of the Freedom of Information Amendment Bill as passed by Parliament is attached. The Bill will come into operation on 25 October 1991.
3. The changes made by the FOI Amendment Bill 1991 do not have retrospective effect. Thus the Bill will not affect the rights of an applicant which have accrued before the Bill commences. Except where this memorandum says otherwise, agencies should apply the provisions of the Bill only to requests received on or after 25 October 1991.

#### **Procedural Changes**

##### **Procedure for Making an FOI request**

4. The Bill simplifies the procedure for making an FOI request. To date the FOI Act has provided a two-tier request structure of formal and informal requests. The Bill will provide only one procedure for making a request. Under new section 15 the requirements for a valid request will be:
  - o a request in writing;

- providing sufficient information to enable the agency to identify the requested documents;
  - giving the applicant's address;
  - sent to the agency's address in the phone book;
  - accompanied by the \$30 application fee.
5. An applicant need no longer specify that his request is made under the FOI Act. Requests need no longer be sent to agency addresses specified in the Gazette or the Commonwealth Government Directory. If an agency has more than one address in the phone book, the request must be sent to the central or regional office of the agency. Agencies still have a duty to assist applicants who need help to make a valid request (ss.15(3), 24(6)).

### **Time Limits**

6. All valid FOI requests will attract the time limits set by the FOI Act for acknowledgment (14 days) and notifying a decision (30 days). The time spent by an agency in consulting an applicant to narrow a request under section 24 is not to be taken into account in calculating the 30 day period (ss.24(7)). Nor is the time taken in awaiting an applicant's response to a notification under section 29 that the applicant is liable to pay a charge to be taken into account in calculating the 30 day period (s.31). The Bill will extend from 15 to 30 days the extra time allowed to an agency which consults a third party about the disclosure of business, State government or personal information under the 'reverse FOI' provisions of the Act (s.15(6)).
7. The Bill introduces a 30 day time limit for applicants to respond to an agency's notification of charges. If there is no response the applicant is taken to have withdrawn the request (s.29(2)). The Bill also extends the time allowed to an agency to conduct an internal review under section 54 from 14 to 30 days (s.55(3)(b)).

### **Fees and Charges**

8. Replaced by New Memo No. 29.

### **Substantial and Unreasonable Diversion of Resources**

9. Superseded by New Memo No. 19.

### **Requests for Apparently Exempt documents**

10. Superseded by New Memo No. 19.

### **Consultation with Third Parties**

11. The Bill widens the right of individuals and business to be consulted before a decision is made on the release of documents affecting their interests. These new rights apply to requests on hand as well as requests received after the commencement of the Bill. The Bill amends section 27 of the FOI Act to omit words which allow an agency to determine whether a business might

reasonably wish to contend that a document is exempt under section 43. The agency's obligation to consult will now simply depend on whether the document contains information concerning business, commercial, financial or professional affairs. The Bill makes a similar amendment to section 27A in relation to consultation with an individual about the disclosure of documents containing personal information about that individual.

12. To date an agency has been able to avoid the obligation to undertake 'reverse FOI' consultation with third parties (business, individuals or State governments) if the agency only gives the applicant access to the documents with deletions of the material to which the third party might object. The Bill amends the Act so that consultation with the third party will be required before any access is given, either to the whole document or an edited copy of the document.
13. The rights of third parties to seek review of agency reverse FOI decisions have been altered by the Bill. Third parties may now seek internal review of agency decisions to grant access (ss.54(1C), (1D) and (1E)). Where a third party has made submissions opposing the disclosure of documents and the agency decides the documents are not exempt (under 33A, 41 or 43), the agency must not release the documents until a 30 day period for the third party to apply for internal or AAT review has expired.

### **Medical or Psychiatric Information**

14. The Bill inserts new sub-section 41(4) to require an agency to notify a qualified person where a document, containing medical or psychiatric information provided by that qualified person, is released to the person who is the subject of that information. The following points should be noted:
  - 'qualified person' is a very wide expression, meaning any person carrying on an occupation involving the provision of care for the health or well being of other people;
  - the obligation to notify applies not only to documents prepared by a qualified person but also to other documents which contain information originating from a qualified person;
  - the obligation applies only to documents containing medical or psychiatric information about an identifiable person; in other words this is information relating to the restoration or preservation of the physical or mental health of a person;
  - the obligation applies whether or not the information provider is in Australia.
15. Under sub-section 41(4) the agency which releases a document has the obligation to 'notify' the information provider. This means that the agency has an obligation to ensure the person actually knows that access has been given. However sub-section 41(4) does not require notification where the information provider knows that access to the document has been given (eg. where access is given under s.41(3) to the information provider instead of the applicant). The agency may use a third party (eg. another agency which gave the information to the agency) to transmit a notification but the agency which

releases the document retains final responsibility for ensuring that the information provider receives the notification.

16. Sub-section 41(5) makes it clear that the obligation imposed by sub-section 41(4) applies only where it is reasonably practicable to notify. A large number of factors may determine what is reasonably practicable. The relevant factors may vary between agencies and between different requests. Sub-section 41(6) draws attention to four possible relevant considerations in determining what is reasonably practicable:
  - a. the length of time since the information was provided;
  - b. the likelihood that the provider is still carrying on practice as a medical practitioner (or other relevant occupation);
  - c. the frequency with which s.41(4) might require the agency to make notifications;
  - d. the resources available to the agency to make s.41(4) notifications.
  
17. It is open to an agency which processes large numbers of requests for medical or psychiatric information to adopt a general policy as to how it will implement s.41(4) having regard to the resources it has available for notifying information providers. In preparing such a policy the agency may have regard to:
  - how many requests are likely to involve notifications under s.41(4);
  - how many notifications under s.41(4) may be required for each request;
  - how difficult it will be to locate certain information providers (it may be reasonably practicable only to notify providers who are still currently in practice);
  - which information providers are likely to need or want to be notified (eg. if the content of a particular class of medical information makes it unlikely that the information provider will be concerned by disclosure, less resources should be allocated to notifying these providers); it may be reasonable to adopt a policy that limits s.41(4) notifications to information provided in recent years; s.41(4) does not apply where the information provider is deceased;
  - what resources are available within an agency to carry out the work involved in s.41(4) notifications (including the staff hours or other expense involved in locating providers, sending notices and ascertaining that notices have been received); it may be reasonably practicable only to send notices to the last known business address of the provider.
  
18. Where an agency adopts a general policy on the implementation of s.41(4), the agency should be careful to vary any such policy in exceptional cases. For example the nature of the information in a document or the agency's knowledge of an applicant's medical or psychiatric condition may make it more possible than usual that the provider might be subject to harassment by the applicant. In these cases the agency should vary its policy to ensure that the applicant is notified of disclosure. Of course in such a case the agency may well have consulted the information provider and have considered any relevant claim for exemption for the document.

## **Deletion of Exempt Matter**

19. The Bill amends section 22 of the FOI Act to widen the right of applicants to have access to documents with exempt material deleted. To date section 22 has allowed an agency to refuse to provide an edited copy of a document if such a document would be misleading. The Bill provides that an agency cannot refuse to provide an edited copy of a document merely because the agency considers that the copy would be misleading.

### **Irrelevant Material**

20. The Bill inserts a new paragraph 22(1)(a)(ii) in the FOI Act to provide that an agency may delete material from documents that can reasonably be regarded as irrelevant to the request. This amendment is designed to make clear that an agency should not use resources in making decisions about the disclosure of material which it knows the applicant has not requested.

#### Example

An applicant requests access to all documents of an agency relating to him. The agency has a report in its possession which contains one section relating to the applicant. The agency may make a decision on and, if appropriate, to release that section without considering whether the rest of the report is exempt from disclosure under the FOI Act.

21. In applying new paragraph 22(1)(a)(ii) agencies should bear in mind comments by the AAT that FOI requests must be interpreted fairly, in a broad common sense way. Requests are not legal instruments to be interpreted by rules of legal construction.
22. As new paragraph 22(1)(a)(ii) does no more than clarify a point of interpretation of the FOI Act which has been the subject of conflicting AAT decisions, agencies may delete irrelevant material in relation to requests on hand as well as requests received after the commencement of the Bill.

### **FOI Access to Pre 1978 Documents**

23. In general the FOI Act is limited to documents created after 1 December 1977. An exception is made where an individual seeks access to documents created before 1 December 1977 which relate to his or her personal affairs (s.12(2)(a)). The Bill extends this exception in three ways:
  - an individual can now seek access to documents created before 1 December 1977 containing 'personal information' about him or her - this includes information relating to work capacity or performance;
  - an individual can now seek access to documents created before 1 December 1977 about his or her business, commercial or financial affairs;
  - a company can now seek access to documents created before 1 December 1977 about its business, commercial or financial affairs.

### **Access by Staff to Personnel Records**

24. The Bill inserts a new section 15A to provide that an employee may not request access to his or her personnel records under the FOI Act unless the

employee has first sought access to the records. For most agencies the relevant procedures will be found in the Personnel Management Manual Guidelines on Staff Access to Records.

25. Where an employee makes an FOI request for records containing information about him or her without first seeking access under internal agency procedures, the applicant should be informed that the request will be dealt with as a request for access under internal agency procedures. The applicant should be told that if he or she is dissatisfied with the outcome of the request he or she can proceed with an FOI request.

### **An Applicant's Motive for Seeking Access**

26. The Bill inserts a new sub-section 11(2) to make a general statement of principle about the rights of access to documents created by the FOI Act: a person's right of access to documents under the FOI Act is not affected by the applicant's reasons for seeking access or by the agency's belief as to the applicant's reasons. However this general principle is expressed to be subject to other provisions of the Act because an applicant's motive or need to know may be relevant to specific procedural matters or the application of particular exemptions in the FOI Act. While an agency should generally determine requests on the basis that disclosure of a document under the FOI Act is disclosure to the world, in some instances the applicant will have a particular interest (eg. the document contains information about him or her) which must be weighed in the balance in deciding whether a procedural or exemption provision in the Act applies to the document.

### **Request for Documents that Cannot be Found**

27. The Bill inserts a new section 24A in the Act to provide that an agency may refuse a request for access to a document if the documents requested do not exist or cannot be found. The Bill also inserts a new sub-section 55(5) in the FOI Act to make it clear that the AAT has power to require an agency to conduct further searches for a document if it is not satisfied with the agency's efforts to find the document.
28. As new section 24A simply confirms the existing practice of agencies in refusing requests for documents that do not exist or cannot be found, agencies may apply section 24A to requests on hand as well as requests received after the commencement of the Bill.

### **Transfer of Part of a Request**

29. The Bill amends section 16 of the FOI Act to provide that an agency may transfer a request to another agency in relation to only some of the documents covered by the request (new sub-section 16(3A)). As this amendment simply confirms the existing practice of agencies in relation to transfers of requests, agencies should apply new sub-section 16(3A) to requests on hand as well as requests received after the commencement of the Bill.

### **New Definition of 'Document'**

30. The Bill will insert a new definition of 'document' in the FOI Act. The new definition is designed to ensure that an applicant can seek access to a computer tape or disk by requesting a copy of it. The applicant still has the right to request the agency to produce a written copy of the material on the disk (s.17). The FOI (Fees and Charges) regulations are being amended to allow agencies to charge for the full cost of providing a copy of a disk or tape.

### **Authorisation of Decision Makers**

31. The Bill widens the scope for delegation of decisions under the FOI Act. The principal officer of an agency may now delegate under section 23 the power to delete exempt material from documents published under section 9, the power under sub-section 41(3) to decide that access to medical or psychiatric information should be provided through a medical practitioner and the power under section 54 to conduct an internal review of a decision.

### **Exemptions**

#### **Competitive Commercial Activities of Agencies**

32. The Bill widens the exemption in sub-section 7(2) for documents relating to the competitive commercial activities of agencies listed in Part II of schedule 2 of the FOI Act. To date the exemption has been limited to competitive commercial activities currently carried on by the agencies. The Bill ensures that the FOI Act will protect information about competitive commercial activities which are not carried on at present but which may reasonably be expected to be carried on in future.

#### **Secrecy Provisions**

33. To date section 38 of the FOI Act has exempted documents from disclosure if they contained information which certain secrecy provisions in other Acts prohibited from disclosure. There have always been doubts about which secrecy provisions section 38 applies to. The Bill removes this doubt by providing that as from the date of commencement of the Bill the fact that a secrecy provision in another Act prohibits disclosure of a document will not make the document exempt from disclosure under the FOI Act unless that secrecy provision is listed in Schedule 3 to the FOI Act.

#### **Confidential Sources of Information**

34. Section 37(1)(b) of the FOI Act provides that a document is exempt if its disclosure would disclose the existence of a confidential source of information in relation to the enforcement or administration of the law. Some agencies need to adopt a policy of responding to all requests for access to documents about confidential sources by neither confirming nor denying the existence of the documents. This response to all requests is necessary to ensure that the 'neither confirm nor deny' response is effective in those cases where the agency does in fact have a document disclosing the existence of a confidential source of information. However in 1987 the Federal Court ruled that an

agency can only give such a response in those cases where it does in fact have a document revealing the existence of a confidential source of information. The Bill overcomes this decision by amending section 37(1)(b) to provide that a document is exempt if it would disclose the existence or non-existence of a confidential source of information in relation to the enforcement or administration of the law.

### **Personal Information**

35. The Bill amends the privacy exemption in section 41 of the FOI Act by replacing the words 'information relating to personal affairs' with the words 'personal information'. The main purpose of the change is to ensure that the privacy exemption is capable of applying to information regarding work performance, capacity or suitability of a person or appointment or promotion.
36. The words 'personal information' will be defined in section 4 of the FOI Act. In general personal information means any information about an identifiable individual. To fall within the definition it is not sufficient that a document contains a person's name or bears a person's signature: the information in the document must say something about the person.
37. The Bill makes a further amendment to the privacy exemption by extending the power of agencies to refuse an applicant direct access to information that may be detrimental to the applicant's physical or mental health (sub-section 41(3)). To date the agency's power has been limited to information provided by a medical practitioner. The Bill widens the power to cover any information provided by a person carrying on an occupation of caring for the physical or mental health or well being of people. However sub-section 41(3) will still require that the agency make a judgement whether disclosure direct to the applicant will be prejudicial to the applicant's health or well-being.

### **Business Affairs Exemption**

38. The Bill amends section 43 of the FOI Act to make a minor amendment to clarify the exemption for documents relating to a person's professional affairs. New sub-section 43(4) makes clear that 'professional affairs' refers to the affairs of a person carrying on a professional practice rather than a person's membership of a profession. Thus documents relating to the activities of a person carrying on a private legal or medical practice are covered but documents relating to the affairs of a salaried doctor or lawyer may not be covered.

### **Breach of Confidence Exemption**

39. The Bill narrows the breach of confidence exemption in section 45 of the Act. To date section 45 has been interpreted as meaning something different from the meaning of 'breach of confidence' at general law. That interpretation has created uncertainty and left open the possibility that section 45 might exempt documents that the general law would not protect from disclosure. The Bill amends section 45 so that it exempts a document only if its disclosure would be actionable at the general law. In future section 45 will not exempt a document from disclosure if under the general law the person to whom the

duty of confidence is owed would be denied assistance by the Courts to restrain disclosure of the document. Thus a document is not exempt under section 45 where disclosure would reveal that fraud or some other crime has been committed.

### **Conclusive Certificates**

40. The Bill makes minor amendments to clarify the operation of 'conclusive certificates' under the FOI Act. Amendments to the FOI (Miscellaneous Provisions) Regulations are to be made relating to the revocation of these certificates.

### **Review**

#### **Review by the Commonwealth Ombudsman**

41. The Bill transfers provisions relating to review by the Commonwealth Ombudsman from Part VA to Part VI (new section 57) of the FOI Act. The Bill does not alter the scope of the Ombudsman's powers to review action taken by agencies under the FOI Act. However the Bill removes provisions in the Act for a Deputy Ombudsman for FOI matters and for the Ombudsman to represent applicants in AAT proceedings.

#### **Internal Review**

42. The Bill extends the scope of internal review under section 54 to allow applications for review of the following decisions:
  - decisions under section 30A whether to remit an application fee;
  - decisions under section 29 whether or not to impose a charge;
  - decisions, following 'reverse FOI' consultation, that a document is not exempt from disclosure under section 33A (Commonwealth/State relations), section 41 (personal information) or section 43 (business affairs);
  - decisions under section 41(3) to refuse access to documents prejudicial to the applicant's health or well-being but provide access to a nominated medical practitioner.
43. The time allowed for internal review has been extended by the Bill from 14 days to 30 days.

#### **Review by the Administrative Appeals Tribunal**

44. The Bill extends the jurisdiction of the AAT by allowing review of agency decisions on remission of application fees and decisions whether or not to impose a charge. The Bill also makes a number of technical amendments relating to onus of proof in reverse FOI proceedings, notification of AAT appeals to reverse FOI third parties and the AAT's power to require an agency to produce documents.

### **Amendment of Personal Records**

45. The Bill makes significant changes to provisions in the Act relating to amendment of personal records. The main changes are:
- to provide for two distinct rights, amendment and annotation of records; an agency will have a discretion whether to amend an incorrect record but cannot refuse a request for annotation of an incorrect record unless the applicant's requested annotation is irrelevant, defamatory or unnecessarily voluminous;
  - to require an applicant's request for amendment or annotation to specify the information claimed to be incomplete, incorrect, out of date or misleading; to specify the applicant's reasons for the claim and to specify the amendment or annotation the applicant seeks;
  - to provide for transfer between agencies of requests for annotation or amendment;
  - to refer to records of personal information, rather than records containing information relating to the personal affairs of a person; this will ensure that records relating to a person's work capacity are subject to amendment or annotation;
  - to change the statement of the objects of the FOI Act to refer to amendment or annotation of incorrect, incomplete, misleading personal records as one of the key objectives of the Act.
46. The Bill also restricts AAT review of agency decisions on amendment of personal records. New sub-section 55(6) prevents the AAT requiring an amendment or annotation:
- a. to a record of a decision under an enactment;
  - b. where the amendment relates to a question that the applicant was entitled to challenge before a court or tribunal;

**Example**

An applicant seeks amendment of a record of an agency's decision that the applicant is not entitled to a benefit; if the applicant had a right of review of the agency's decision, the AAT cannot require amendment or annotation of the record of the agency's decision.

- c. to a record of opinion unless the opinion was based on a mistake of fact or the author was biased, unqualified or acted improperly.

**Further Advice**

47. If you require further advice on the FOI Amendment Bill 1991 please contact the Information Access Unit of the Attorney-General's Department (Telephone 02 6250 6818).

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