

New FREEDOM OF INFORMATION Memorandum No. 94

Amendments Since the Freedom of Information Amendment Act 1991

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Amendments Since the Freedom of Information Amendment Act 1991

1. Introduction

1.1 This memorandum has three purposes, the first of which is to explain amendments that have been made to the *Freedom of Information Act 1982* (FOI Act) since the commencement of the *Freedom of Information Amendment Act 1991* (the 1991 Act) on 25 October 1991. The amending legislation includes the *Law and Justice Legislation Amendment Act (No. 3) 1992* (LAJLAB 3, 1992) and the *Law and Justice Legislation Amendment Act (No. 4) 1992* (LAJLAB 4, 1992) as well as the *Law and Justice Legislation Amendment Act 1994* (LAJLAB 1994), which commenced on 23 June 1994. The amendments made in LAJLAB 3 and 4 of 1992 are included in Reprint No. 4 of the FOI Act, which contains amendments made up to 31 January 1993. It is hoped that a fresh reprint of the FOI Act, to include the LAJLAB 1994 amendments, will shortly be available.

1.2 The second purpose of this memorandum is to assist users of the FOI Act in resolving certain problems and uncertainties which have arisen since the commencement of the 1991 Act.

1.3 The third purpose of this memorandum is to impress upon agencies that where an agency believes that an amendment to the FOI Act or the regulations under the Act is required, no policy approval should be sought for that amendment and no instructions should be sent to the Office of Parliamentary Counsel, without first clearing the proposed amendment with the Information Access Unit, Family and Administrative Law Branch, Attorney-General's Department, c/- Robert Garran Offices, National Circuit, Barton ACT, 2600.

1.4 The same considerations that apply to amendments of the FOI Act apply to the use of section 38(1)(b)(ii) which permits the exemption in section 38 of the FOI Act (documents to which secrecy provisions of enactments apply) to be applied to secrecy provisions by that amendment or by another provision. The policy position is that agreement to the use of section 38(1)(b)(ii) will only be given in the most extreme and urgent circumstances and where the application of the exemption in section 38 would be justified. If section 38 is to be available in relation to a secrecy provision the secrecy provision should be included in Schedule 3 of the FOI Act. Section 38 was amended in 1991 to implement a Senate Committee recommendation that the FOI Act contain in a schedule an exhaustive list of secrecy provisions to which the section 38 exemption should apply. The use of section 38(1)(b)(ii) obviously undermines this purpose and the use of the section should therefore be restricted to unavoidable cases.

1.5 It is also strongly preferable that all amendments to the FOI Act be included in Freedom of Information Amendment Acts or in Law and Justice Legislation Amendment Acts as this makes it easier for users of the FOI Act to keep track of amendments (particularly commencement provisions).

1.6 The amendments made by LAJLAB 1994, except for those relating to amendments to protection from civil and criminal proceedings, Schedules, Parliamentary Secretaries and service by post, make specific provision for the application of the amendments. Where this has been done this is referred to in relation to that amendment. Where this has not been done, it is preferable that an applicant for documents should not be disadvantaged by an amendment made after his or her

application under the FOI Act is received. However, the decisions of the Administrative Appeals Tribunal do not conclude the question of the applicable law where an exemption has been made stronger or a new exemption has been introduced, and agencies may have an arguable claim for exemption in such cases (see New FOI Memo No. 19, paras 7.4–7.5). Such claims should, as normal, only be made for genuinely sensitive information.

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2. Definitions

Cabinet notebooks

2.1.1 The *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994* (the PM&C Act), except for one section not relevant here, commenced on 15 March 1994. It amended the definitions in section 4(1) of the FOI Act by inserting a definition of 'Cabinet notebook' and amended the definition of 'document' in that section to exclude Cabinet notebooks.

2.1.2 The effect of the amendments to the definitions is that access to Cabinet notebooks cannot be obtained under the FOI Act. 'Cabinet notebook' is defined as meaning:

a notebook or other like record that contains notes of discussions or deliberations taking place in a meeting of the Cabinet or of a committee of the Cabinet, being notes made in the course of those discussions or deliberations by, or under the authority of, the Secretary to the Cabinet;

2.1.3 These amendments apply to meetings of the Cabinet and its committees held before or after the commencement of these amendments and to documents created before or after that date.

2.1.4 The amendments made by the PM&C Act have little practical importance. Cabinet notebooks are undoubtedly Cabinet documents within the terms of section 34 of the FOI Act. Section 34 of the FOI Act does not contain a public interest test, and would therefore have protected Cabinet notebooks from FOI release. (See also *Commonwealth v Northern Land Council* (1993) 67 ALJR 405 at 408–9 where the High Court made it clear that 'the disclosure of Cabinet deliberations upon matters which remain current or controversial' was unlikely to be warranted in civil proceedings.)

Prescribed authority – Qantas

2.2.1 The *Qantas Sale Act 1992* made amendments to the FOI Act which were not incorporated in Reprint No. 4 of the FOI Act as at 31 January 1993. The Act amended the definition of 'prescribed authority' in section 4(1) to exclude Qantas Airways Limited and any subsidiary of that company from the operations of the FOI Act. Provision is made by the Act for the repeal of this amendment, and for the repeal of a consequential addition of new section 4(10), concerning determination of the question

whether a body corporate is a subsidiary of another body corporate, when Qantas Airways Limited has been completely sold.

2.2.2 The amendments made by the Qantas Sale Act are cosmetic only. Qantas Airways Limited would only have been an agency for the purposes of the FOI Act and therefore subject to the operations of the FOI Act if it had been prescribed as an agency in Schedule 1 of the Freedom of Information (Miscellaneous Provisions) Regulations. Qantas Airways Limited is not prescribed as an agency in those regulations.

Parliamentary Secretaries

2.3.1 The FOI Act applies to 'official documents of a Minister' and it has been an anomaly that the FOI Act did not apply where 'official documents' were in the possession of a Parliamentary Secretary. LAJLAB 1994 amended section 4(1) to include a definition of 'Minister' which includes a 'Parliamentary Secretary'.

2.3.2 The provisions of LAJLAB 1994 which introduced this amendment do not include a commencement provision, but any applicant whose request for documents under the FOI Act has not been finally dealt with, including on internal review, at the date of commencement of LAJLAB 1994 should be given the benefit of the amendment.

3. PERSONAL INFORMATION

Definition

3.1.1 The 1991 Act inserted a definition of 'personal information' into the FOI Act and throughout the FOI Act replaced the undefined term 'information relating to personal affairs' with the phrase 'personal information'. Although the definition is not identical to that in the *Privacy Act 1988* there is no significant difference between the definition of 'personal information' in the Privacy Act and the FOI Act.

3.1.2 The replacement of 'information relating to personal affairs' with 'personal information' was discussed in FOI Memorandum No. 92, paragraphs 42 to 44. These paragraphs now require some amendment and expansion. It is necessary to exercise some care in considering cases decided after the commencement of the 1991 Act. As late as 12 February 1993 the AAT decided *Re S and Commissioner for Taxation (No. 2)* (unreported (D309)) in apparent ignorance of the amendments.

3.1.3 The Explanatory Memorandum for the 1991 Act stated that the expression 'personal information' was taken from the Privacy Act and replaced the limited and uncertain phrase 'information relating to personal affairs'. FOI Memorandum No. 92 stated that the main purpose of the change was to ensure that the privacy exemption was capable of applying to information regarding work performance, capacity or suitability of a person for appointment or promotion. The amendment also means that the provisions of the Privacy Act and the FOI Act are consistent, which is desirable in that the FOI Act in effect provides a mechanism for enforcing the Information Privacy Principles on access to and amendment of personal information relating to the person concerned.

3.1.4 Paragraph 43 of FOI Memorandum No. 92 requires amendment by deleting the last sentence. The view stated in paragraph 43 was that it was not sufficient that a document contain a person's name or that it bore a person's signature, and that to amount to 'personal information' the information in the document must say something about the person. However, the appearance of a name or signature in the context of a government file or electronically held data will normally convey some information about a person, and this is sufficient to satisfy the statutory definition of 'personal information'.

3.1.5 It is clear from the legislative history of the term 'personal information' that the definition is not limited to 'information relating to personal affairs': see, for example, the Final Report of the Australian Law Reform Commission on Privacy in 1983, Vol. 2 at page 82. In the ALRC's view: 'Any information about a natural person should be regarded as being personal information.' There is no doubt that the present section 41(1) includes information which was not caught by the previous version and that the concept of 'personal information' is a very wide one, limited, however, by the need for the individual's identity to be apparent or reasonably ascertainable from the information (see *Re Hittich and Department of Health, Housing and Community Services*, unreported, 16 June 1993 (D317)).

3.1.6. The application of the definition of 'personal information' requires consideration of several matters. In the first place it is necessary to ascertain whether information is 'about an individual' before turning secondly to the question whether the subject's identity is 'apparent or can reasonably be ascertained from the information or opinion'. However, there is AAT authority for saying that information revealing identity is information about a person irrespective of the context in which the reference to identity is found (see *Re Hittich and Department of Health, Housing and Community Services*, unreported, 16 June 1993, D317). While the AAT in *Hittich* may have gone too far on that point, it was clearly correct in saying that the concept of 'personal information' is wider than the pre-October 1991 concept of 'information relating to the personal affairs of a person' (compare *Re Caruth and Department of Health, Housing and Community Services*, unreported, 18 June 1993 (D318)).

3.1.7. There is little difficulty where the identity of an individual is '*apparent ... from the information or opinion*' (our emphasis), but the determination of whether an individual's identity can be 'reasonably ascertained ... from the information or opinion' is more difficult. The AAT has not yet dealt with the question whether this means that it is only where all the information required to ascertain the individual's identity is contained within the confines of the information itself that the definition applies, or whether it also applies in other cases such as:

- where there are other documents requested which would enable the person to be identified; or
- where it would be reasonable to expect that one or more people in the general community could ascertain the identity by putting together the relevant information and other extrinsic information, and would therefore be able to derive information about the individual from the information in question.

The latter interpretation would involve reading the words 'ascertained from' as meaning ascertained at least in part from, rather than exclusively from, the relevant information. In this Department's view the latter approach would be open to the AAT and the courts, but would require careful consideration on each occasion.

3.1.8 Recent cases indicate confusion in the Tribunal as to the effects of the change in 1991 from the concept of 'information relating to the personal affairs of a person' to the concept of 'personal information' about a person. The view expressed in *Re Marr and Telstra Corporation Ltd* (unreported, 29 October 1993) (D320)) that the two concepts are practically the same, cannot be sustained and the case cannot be used as a precedent for the interpretation of 'personal information'.

3.1.9 There is a tendency to continue using the terminology that was replaced by the 1991 amendments. The Tribunal in *Re Russell Island Development Association and Department of Primary Industries and Energy* (unreported, 13 and 19 January 1994) (D323) initially correctly refers to 'personal information' but in its final references to the exemption in section 41 of the FOI Act it uses the obsolete phrase 'personal affairs'. The Tribunal was possibly influenced by its preceding quotations from cases decided before the 1991 amendments. This error will diminish with the effluxion of time but it is recommended that agencies take care to avoid using the obsolete terminology as it may lead to confusion and obscure the intention behind the introduction of the new concept of 'personal information'.

3.1.10 It is intended to replace the existing FOI Memorandum No. 23, on 'personal affairs', issued 23 September 1982, with New FOI Memorandum 41 on the personal privacy exemption. The new memorandum will explore the issues in full.

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Consultation – personal information

3.2.1 The 1991 amendments to the FOI Act widened the rights of individuals and business to be consulted before a decision was made on the release of documents affecting their interests. The 1991 amendments omitted from section 27, which sets out the procedure for consultation in respect of documents relating to business affairs, words which allowed an agency to determine whether that business might reasonably wish to contend that a document was exempt under section 43. The 1991 amendments made similar amendments to section 27A which sets out the procedure for consultation in respect of documents containing personal information. The amendment to section 27 implemented a Senate Committee recommendation that section 27(1) be amended 'to remove the requirement that, before engaging in reverse-FOI consultation with a business or person, an agency or Minister must decide that that business or person might reasonably wish to contend that a document is exempt under section 43.'

3.2.2 The removal from section 27A of the FOI Act of the qualification, that the person to whom the information related did not have to be consulted where it appeared that the person could not reasonably contend that access would be an unreasonable disclosure of that person's personal information, has caused difficulties. The problems arise partly from the greater width of the concept 'personal information',

which may apply to information such as the names of government officials conducting public business, information which would not have constituted 'information relating to the personal affairs of a person' under the previous provisions (see *Commissioner of Police v District Court of NSW*, unreported, 2 September 1993, NSW Court of Appeal). The removal of the requirement has meant that consultation is required on every occasion even where a person could not reasonably contend that disclosure was unreasonable. The amendment will allow agencies to decide not to consult where they believe the person consulted could not reasonably contend that disclosure would be an unreasonable invasion of the person's privacy. The new section 27A(1A) gives guidance on when it is not necessary to consult, noting matters such as the extent to which the person's personal information is well known and whether the person is known to be associated with the matters dealt with in the document. The amendments made to section 27A apply to requests for documents made on and after 23 June 1994.

3.2.3 A decision not to consult with a person under section 27A is not subject to review by the AAT though a person not consulted has a right to review of the substantive decision under section 59A. In some circumstances, a decision not to consult may be subject to *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) review.

Guidelines for consultation prior to the release of documents containing personal information

3.3.1 A commitment was given in the Senate on behalf of the Government that agencies would be provided with guidelines for the administration of the amended consultation provisions in section 27A (*Hansard*, Senate, Wednesday, 11 May 1994 page 571). This commitment was given because of the possible sensitivity of the information that may be contained in documents containing personal information.

3.3.2 The guidelines should not be interpreted rigidly and where agencies are in doubt they should consult the person to whom the information relates before giving access to documents containing personal information.

3.3.3 Attachment A contains guidelines for consultation prior to release of documents containing personal information. The Attorney-General's Department will revise these guidelines from time to time to resolve any problems which may arise concerning the consultation processes.

4. Publication of Information

4.1 Section 8 of the FOI Act requires the responsible Minister (the Minister administering the relevant Department of State or, in the case of a statutory authority or office, the Minister administering the part of the enactment under which the statutory authority or office is established) to cause specified statements to be published including a statement of the categories of documents that are maintained in the possession of each agency (section 8(1)(a)(iii)). In view of misunderstandings on the part of some agencies, section 8 required clarification of the requirement to publish a statement of the categories of documents.

4.2 LAJLAB 1994 amended the FOI Act by altering section 8(1)(a)(iii) and adding a new section 8(6). The amendment makes it clear that each agency must include in its statement all categories of documents that it holds including those that are open to public access, available for purchase by the public or available without cost. The amendments made to section 8 apply to statements published on and after 23 June 1994.

5. Documents not Available Under the FOI Act

5.1 Section 12 of the FOI Act provides that a person is not entitled to obtain access under the FOI Act to specified documents available to the public in other ways. A person is not *legally* entitled, subject to specified exceptions, to obtain documents that became documents of an agency or official documents of a Minister before 1 December 1977. However, see the guidelines on when this exception should be claimed in New FOI Memo No. 19, paras 4.5–4.14. If an agency does not claim the benefit of the provisions, the AAT is not permitted to have regard to it (section 58(7)). A person is also not entitled to obtain access under the FOI Act to documents available under the *Archives Act 1983* or to certain other documents which are open to public access or available for purchase by the public (see sections 12 and 13 of the FOI Act, and New FOI Memo 19, para. 4.2).

5.2 Documents not available to the public under the FOI Act include documents open to public access as part of a public register. Although the relevant provision (section 12(1)(b)) did not specify it, this did not include documents maintained by each State and Territory. LAJLAB 3, 1992 amended section 12(1) by adding a new section 12(1)(ba) which extended the exemption to documents forming part of land titles registers maintained by each State and Territory where access is subject to a fee or other charge. The AAT was apparently unaware of this amendment when it gave its decision in *Re S and Commission of Taxation (No. 2)*, unreported, 12 February 1993 (D309).

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6. Time Limits

6.1 To reduce uncertainty and confusion in relation to time limits applicable to actions under the FOI Act, a policy has been adopted of, where practicable, standardising time limits at 30 days.

6.2 Section 29 of the FOI Act provides for the imposition of charges for applications under the Act. Section 29(6) sets the time limit for an agency or a Minister to respond where an applicant contends that a charge has been wrongly assessed or should be reduced or not imposed. Section 29(7) provides that, where the agency or Minister does not comply with the time limit, the agency or Minister is taken to have rejected the applicant's contention. Until the commencement of LAJLAB 1994 the time limit specified for the purposes of sections 29(6) and (7) was 28 days. LAJLAB 1994 amends sections 29(6) and (7) to extend the time limit from 28 days to 30 days. The time limit of 30 days also applies to notifications under section 29(1)(f)(ii) given after the commencement of the amendments.

6.3 Section 30A of the FOI Act provides that an agency or Minister may remit an application fee in whole or in part. Section 30A did not expressly provide for an applicant to make a request for remission of a fee and consequently did not provide for a time limit on responding to such a request. LAJLAB 1994 introduced provisions in relation to application fees equivalent to sections 29(6) and (7) for charges. New sections 30A(1A) and (1B) provide for the making of such requests and impose a 30 day limit for the agency or Minister to respond. If the agency or Minister has not responded within 30 days, a decision that no part of the application fee is to be remitted is taken to have been made. The time limit of 30 days applies to requests made after the commencement of the amendments. (Note that the power to remit an application fee in section 30A(1) requires consideration of circumstances which may justify a remission of a fee, whether or not there is a request for remission by the applicant.)

6.4 Sections 58F, 59 and 59A respectively provide for 'reverse FOI' appeals to the AAT by a State or Territory in relation to documents affecting Commonwealth–State relations, by a person in relation to his or her profession or business or by an organisation or the proprietor of an undertaking, and by an individual in relation to personal information, against a decision to release documents to an applicant. Prior to the amendments introduced by LAJLAB 1994, sections 58F, 59 and 59A did not specify a time limit for the exercise of this right of appeal. The applicable time limit was governed by section 29 of the *Administrative Appeals Tribunal Act 1975* and was normally 28 days. To avoid confusion, LAJLAB 1994 introduced the standard time limit of 30 days for all three situations. The time limit of 30 days applies to decisions made by agencies or Ministers on and after the commencement of the amendments on 23 June 1994.

7. Statements of Reasons

7.1 Until the amendment of section 29 of the FOI Act by LAJLAB 1994, section 29 did not specify that an agency or Minister must give an applicant for documents written notice of a decision and reasons for the decision to reject a contention by an applicant under section 29(1)(f)(ii) that a charge had been wrongly assessed, or should be reduced or not imposed. Sections 29(8) and (9) now require that this be done, and the notice of the decision must also state the name and designation of the person making the decision. The applicant must also be given appropriate information about his or her rights with respect to review of the decision, rights to make a complaint to the Ombudsman and the procedure for the exercise of those rights.

7.2 While the new sections differ in form from the equivalent provisions for other decisions in section 26 (reasons and other particulars of decisions to be given), the effect is the same. Section 25D of the *Acts Interpretation Act 1901* sets out rules about the contents of a statement of reasons where there is statutory provision for the giving of reasons. These are equivalent to the requirements of section 26, namely that a notice of reasons must set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

7.3 Similarly, until the amendment of section 30A of the FOI Act by LAJLAB 1994, section 30A did not specify that an agency or Minister must give an applicant for documents written notice of a decision and reasons for the decision to refuse a request

for an application fee to be remitted in whole or part. The amendment in new section 30A(3) to (6) is equivalent to the amendments to section 29, and the same requirements apply in relation to setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based (section 25D of the Acts Interpretation Act).

7.4 The amendments made to sections 29 and 30A apply to decisions made on and after the commencement of LAJLAB 1994 on 23 June 1994.

8. Exemptions

Witness protection

8.1.1 Section 37 of the FOI Act provides an exemption for documents affecting enforcement of the law and protection of public safety. LAJLAB 1994 made amendments to section 37 extending protection for confidential sources of information to participants in witness protection programs.

8.1.2 Section 37 of the FOI Act provides, amongst other things, that a document is exempt from disclosure under the Act if its disclosure would enable a person to ascertain the existence or identity, or the non-existence, of a confidential source of information in relation to the enforcement or administration of the law. LAJLAB 1994 amended section 37 by adding a new section 37(2A) which extended the meaning of 'confidential source of information' to a person who is receiving, or has received, protection under a State, Territory or Federal police witness protection program. As witness protection programs extend to people other than the witnesses, such as the families or associates of witnesses or other people requiring protection, documents relating to such people will be exempt in relation to their identities or the fact that they are or have been part of a witness protection program.

8.1.3 The wording of the provisions in section 37(2A)(a), (b) and (c), which set out the categories of people protected, has been taken from section 8(2A) of the *Australian Federal Police Act 1979*.

8.1.4 The extended protection for persons on witness protection programs applies in relation to requests made under the FOI Act on and after the commencement of LAJLAB 1994 on 23 June 1994.

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Documents arising out of companies and securities legislation

8.2.1 The National Companies and Securities Commission was abolished on 31 July 1992. Section 47 was amended by LAJLAB 4, 1992 to add a new section 47(2), which continued the exemption for documents that were furnished by a State to the Commission before its abolition on 31 July 1992 and which related solely to the functions of the Commission in relation to State law (section 47(1)(c)). The new provision also continues the exemption for documents which were in the possession of the Commission before 31 July 1992 and which related solely to the exercise of the functions of the Commission under State law (section 47(1)(d)). The exemption

provided by new section 47(2) applies to documents in the possession of a Minister or an agency. Sections 47(1)(c) and (d) have no further effect after 31 July 1992.

Electoral rolls and related documents

8.3.1 The *Electoral and Referendum Amendment Act 1992* added a new exemption to Part IV of the FOI Act. The new section 47A, which came into effect on 24 December 1992, limits access to personal electoral roll information by creating a new class of exempt document. The types of document included in the exemption are electoral rolls and prints, microfiches, tapes, or disks of an electoral roll, documents used in preparing an electoral roll and documents derived from an electoral roll. The exemption does not apply to individuals who seek access to records pertaining to themselves. Under the *Commonwealth Electoral Act 1918* electoral rolls are required to set out the surname, given names and address of each elector and, therefore, other information which may be held with those details is not within the terms of the exemption.

Amendments to Schedules

8.4.1 These are dealt with below in Section 12.

9. Review of Decisions

Review – purported decision to grant access to all documents

9.1.1 In *Re Kalman and Department of Veterans' Affairs* (unreported, 23 October 1992 (D303)), the AAT decided that a person did not have a right of review of a decision that purported to grant access to all documents requested by the person. The AAT's decision is contrary to the intention behind the 1991 amendments to introduce a specific provision for the refusal of access where documents could not be found (section 24A FOI Act), to make such a decision subject to review by the AAT (section 55(1)(a) FOI Act) and to confer on the AAT, when reviewing a section 24A decision, a power to require further searches for documents (section 55(5) FOI Act). It was not intended that the availability of AAT review of a decision by an agency, that does not satisfy the applicant that all documents have been identified, should depend on the technicality of whether the agency has refused some documents or has purported to grant access to all of the requested documents. The intention of the amendments in LAJLAB 1994 is to confirm, despite the decision of the AAT, that a person has a right to review of a decision of the latter kind.

9.1.2 Section 54 of the FOI Act provides for internal review by an agency, at the request of an applicant, of a decision in relation to the application. Section 54 has been amended by LAJLAB 1994 to confirm that a person who is an applicant for documents has a right to internal review of a decision which purports to grant access to all the requested documents but does not actually grant that access.

9.1.3 Section 55 of the FOI Act provides that applicants for documents may apply to the AAT for the review of decisions in relation to applications. Section 55 has been amended by LAJLAB 1994 to confirm that a person who is an applicant for

documents has a right to review by the AAT of a decision which purports to grant access to all the requested documents but does not actually grant that access.

9.1.4 These amendments to sections 54 and 55 of the FOI Act apply to decisions in relation to requests for documents whether the decision is made before or after the amendments commence.

Application to AAT where decision delayed

9.2.1 Section 56 of the FOI Act permits an FOI applicant to apply to the AAT where the time limit for granting or refusing access to a document or amending or annotating a record of personal information has passed. In that situation the agency or Minister is deemed to have made a decision to refuse the request for access, amendment or annotation.

9.2.2 Where an application is made to the Tribunal for review of a deemed decision, and before the AAT finally deals with the matter, the agency or Minister makes a decision but does not grant the request in full and in the manner requested, the AAT may now at its own discretion extend the proceedings to review the decision actually made by the agency or Minister. Prior to the amendment of section 56(5) by LAJLAB 4, 1992 this could only occur at the request of the applicant for review. The power to extend the review of a deemed refusal to the actual refusal is discretionary and, if the AAT does not so extend it, the AAT can still review the deemed refusal of all requested documents. It would, however, be in the interests of all parties, including that of the AAT, to review the actual decision as a way of cutting down the scope of the review.

9.2.3 The amendment to section 56(5) commenced on 7 December 1992, and is included in Reprint No.4 of the FOI Act.

Powers of AAT

9.3.1 Section 58 of the FOI Act sets out the power of the AAT to review decisions made by agencies and Ministers under the Act. LAJLAB 4, 1992 amended section 58 to clarify the extent of the AAT's power in relation to applications for review where exemptions are claimed for documents under section 33 of the Act (documents affecting national security, defence or international relationships) or section 33A of the Act (documents affecting relations with the States and Territories).

9.3.2 Sections 33 and 33A were amended in 1991. Section 33 was amended by removing the redundant reference to the public interest and section 33A was amended to ensure that a certificate issued under that section conclusively determined that disclosure would not on balance be in the public interest. LAJLAB 4, 1992 amended section 58 to reflect those changes so that the grounds for review will be consistent with the grounds for exemption for documents as set out in sections 33 and 33A after the 1991 amendments. The amendments to section 58 commenced on 7 December 1992, and are included in Reprint No.4 of the FOI Act.

Certain proceedings of the AAT in private

9.4.1 Section 58C of the FOI Act requires certain proceedings of the AAT to be held in private and these include certain proceedings where the exemptions in sections 33 and 33A are applicable. Sections 33 and 33A were amended in 1991 as indicated in para. 9.3.2 . LAJLAB 4, 1992, accordingly, amended section 58C to re-establish consistency between the exemptions in sections 33 and 33A, and section 58C, a procedural section. The amendments to section 58C commenced on 7 December 1992, and are included in Reprint No.4 of the FOI Act.

Procedure – conclusive certificate – no reasonable grounds – refusal to revoke

9.5.1 Section 58A of the FOI Act sets out the procedure upon a finding by the AAT that there are no reasonable grounds for an exemption claim in a certificate, signed by a Minister or the appropriate officer, which conclusively determines that a document is exempt. LAJLAB 3, 1992 amended section 58A to provide that a Minister who, despite a finding by the AAT that there are no reasonable grounds for an exemption claim, decides not to revoke a conclusive certificate, is required to read a notice to that effect to the House of Parliament in which he or she sits. The amendment to section 58A commenced on 11 December 1992, and is included in Reprint No.4 of the FOI Act.

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10. Protection from Civil and Criminal Proceedings

10.1 Section 91 of the FOI Act provides protection to the Commonwealth, an agency, a Minister or an officer against actions for defamation, breach of confidence or infringement of copyright when access is given to documents to an applicant under section 18 of the FOI Act or on internal review under section 54 of the FOI Act. Section 92 of the FOI Act provides protection against prosecution for criminal offences to a person who gives or authorises access to documents under section 18 of the FOI Act or on internal review under section 54 of the FOI Act. Before amendments made by LAJLAB 1994, neither section 91 nor section 92 provided protection where the documents or information were shown to a State, organisation, business or person in the course of consultation required to take place under sections 26A, 27 or 27A of the FOI Act before documents were released.

10.2 To overcome this omission, LAJLAB 1994 amended sections 91 and 92 of the FOI Act to extend the protection from civil and criminal proceedings provided by those sections to situations where documents have been shown to third parties under section 26A, 27 or 27A of the FOI Act in the course of consultation prior to a decision whether to grant an applicant access to documents.

10.3 In the absence of a provision for a specific date, the protection in the new provision is available in relation to any relevant action which has taken place since commencement of the amendment on 23 June 1994.

11. SERVICE BY POST

11.1 LAJLAB 1994 amended the FOI Act to provide specifically that notices under the FOI Act may be sent by post. The new section 92A expressly provides that notices

and other documents that are required or permitted to be given under the FOI Act may be given by post. The express authorisation that notices may be given by post brings into operation the provisions of section 29 of the *Acts Interpretation Act 1901* which provide:

... unless the contrary intention appears [which it does not in the FOI Act] the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

11.2 The amendment applies to anything posted on or after the date of commencement of LAJLAB 1994 on 23 June 1994.

12. SCHEDULES

Amendments to Part I of Schedule 2

12.1.1 LAJLAB 3, 1992 deleted two items from Part I of Schedule 2, the Canberra Commercial Development Authority and the Superannuation Fund Investment Trust, both of which have been abolished.

Amendments to Part II of Schedule 2

12.2.1 The *Export Finance and Insurance Corporation (Transitional Provisions and Consequential Amendments) Act 1991* amended Part II of Schedule 2 by omitting a reference to the Australian Trade Commission and substituting a reference to the Export Finance and Insurance Corporation. The *Special Broadcasting Service Act 1991* made a minor amendment to the reference to the Special Broadcasting Service in Part II of Schedule 2.

12.2.2 LAJLAB 3, 1992 deleted the Australian Apple and Pear Corporation and the Australian Pork Corporation from Part II of Schedule 2 as both these bodies have been abolished. Other primary industry bodies were deleted as they were covered by the new Part III of Schedule 2 introduced by LAJLAB 3, 1992 (see below). That Act also amended Part II of Schedule 2 by inserting the Attorney-General's Department, the Australian Government Solicitor and the Australian Pork Corporation in relation to documents in respect of *competitive* commercial activities (see definition in section 7(3) of 'commercial activities' and paras 12.4.1–12.4.2 below).

12.2.3 LAJLAB 1994 inserted Comcare and the Commonwealth Scientific and Industrial Research Organisation into Part II of Schedule 2 in relation to documents in respect of *competitive* commercial activities.

12.2.4 LAJLAB 1994 also divided Part II of Schedule 2 into Divisions 1 and 2, placing all items in Division 1, except the Australian Statistician, who was added to Division 2 of Part II by LAJLAB 1994. The Australian Statistician is included in Division 2 of Part II in relation to documents containing information collected under the *Census and Statistics Act 1905*. Division 2 was created in order to avoid the effect of the linkage with the Privacy Act (see next paragraph) from operating to exclude the Australian Statistician from investigation by the Privacy Commissioner.

12.2.5 Section 7 of the Privacy Act exempted from the operations of that Act acts done, or practices engaged in, by an agency specified in Part II of Schedule 2 of the FOI Act, where the act or practice engaged in concerned a record in relation to which the agency is exempt from the operation of the FOI Act. In other words, if there was an exemption for an agency in relation to particular documents in Part II of Schedule 2 of the FOI Act, acts or practices on the part of those agencies were not covered by the Privacy Act. It was not intended that any activities of the Australian Statistician should be exempt from the operations of the Privacy Act. To avoid this result the Privacy Act, as amended by LAJLAB 1994, now provides that exemption from the Privacy Act, for an agency listed in Part II of Schedule 2, only applies where the agency is included in Division 1 of Part II of that Schedule 2.

Part III of Schedule 2

12.3.1 LAJLAB 3, 1992 added a new Part III to Schedule 2. Part III of Schedule 2 lists legislation establishing bodies corporate which are exempt from the operation of the FOI Act in relation to the *competitive* commercial activities of those bodies corporate (see paras 12.4.1–12.4.2).

12.3.2 LAJLAB 1994 deleted the *Honey Marketing Act 1988* from Part III of Schedule 2 as that Act has been repealed.

Meaning of 'commercial activities'

12.4.1 The phrase 'commercial activities' has a restricted meaning when used in section 7 and Parts II and III of Schedule 2 of the FOI Act. The phrase is defined in section 7(3) of the FOI Act as meaning:

- (a) activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments; or
- (b) activities, carried on by an agency, that may reasonably be expected in the foreseeable future to be carried on by the agency on a commercial basis in competition with persons other than governments or authorities of governments.

12.4.2 If the activity is not competitive, or it is only carried on in competition with governments or other government agencies, it is not a commercial activity for the purposes of Parts II and III of Schedule 2 of the FOI Act.

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Schedule 3

12.5.1 The *Sales Tax Amendment (Transitional) Act 1992* amended Schedule 3 of the FOI Act, which contains a list of secrecy provisions to which the exemption in section 38 of the FOI Act applies, to include section 110(2) of the *Sales Tax Assessment Act 1992* .

Schedule 4

12.6.1 The 1991 Act introduced a new exemption for documents containing current research by bodies listed in Schedule 4 of the FOI Act where disclosure of information, relating to research that has not been completed, would be likely unreasonably to expose the body or an officer of the body to disadvantage. LAJLAB 1994 added the Commonwealth Scientific and Industrial Research Organisation to Schedule 4. The Australian National University is the only other body listed in Schedule 4.

ATTACHMENT A

GUIDELINES FOR CONSULTATION PRIOR TO ANY RELEASE OF DOCUMENTS CONTAINING PERSONAL INFORMATION

The following guidelines are provided for the benefit of agencies which are considering the release of documents containing personal information in response to applications under the *Freedom of Information Act 1982* (FOI Act).

1. 'Personal Information'

2. 'Personal information' is defined in section 4(1) of the FOI Act as:

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.

3. Throughout the FOI Act the phrase 'personal information' (which is defined in almost identical terms in the *Privacy Act 1988*) replaces the phrase previously used – 'information relating to the personal affairs of any person' – and the two should not be confused. The phrase previously used had been held not to apply to information regarding only work performance or capacity or suitability of a person for appointment or promotion though there was a possibility that personal affairs information, regarding such private matters as health, personal relationships and financial affairs, could be found amongst such information (see *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 (D215)).

4. There is no doubt that the term 'personal information' includes work performance information (see for example *Re Slezankiewicz and Australian and Overseas Telecommunications Corporation (No. 2)*, unreported, 1 July 1992 (D296) and *Re Warren and Department of Defence*, unreported, 22 December 1993 (D322)).

5. 'Personal information' should generally be interpreted broadly. Depending on the context in which it appears, 'personal information' may include a person's name where nothing else is mentioned in relation to that person as in the case, for example, where the inclusion of a person's name in a list held by the Department of Social Security may indicate that the person is a client of that Department. The question whether the identity of an individual is 'apparent, or can reasonably be ascertained, from' the relevant information may raise difficult questions. **So far as consultation is concerned, it is suggested that agencies should interpret the provisions broadly**

in order not to deprive an individual of an opportunity to make a case for refusal of access to information that may be considered to be 'personal information'.

Statutory requirements for consultation about release of personal information

6. Section 27A of the FOI Act sets out the procedure which an agency is required to carry out before deciding to release documents or parts of documents containing personal information. Section 27A requires that an agency or Minister must not make a decision to grant access to a document or an edited copy of a document, so far as it contains personal information about a person:

- unless, where it is reasonably practicable to do so in all the circumstances (see below, para.13), the agency or Minister has given the person (or the person's legal personal representative where the person is deceased) a reasonable opportunity of making submissions in support of a contention that the document or edited copy of the document is exempt under section 41 (documents affecting personal privacy) so far as the document contains that personal information (section 27A(1)); *and*
- it appears to the decision maker that the person whom the personal information concerns, or the legal personal representative of a deceased person, '*might reasonably wish to contend*' that a document is exempt under section 41 so far as it contains that personal information (section 27A(1AA)).

These provisions apply whether the decision to be made is the primary decision on an FOI request or is a decision on internal review.

7. Section 27A(1A) contains *non-exhaustive* statutory considerations which must be taken into account in determining under section 27A(1AA) whether a person 'might reasonably wish to contend that a document, so far as it contains personal information, is an exempt document under section 41 of the FOI Act'. The present guidelines are intended to assist agencies in taking those considerations into account. The statutory considerations are necessarily general in nature, as it is not possible in legislation to cover all the circumstances that may arise where documents, which contain personal information, are requested under the FOI Act. These guidelines are not a check-list which can be rigidly applied to determine whether consultation is necessary. The matters they refer to should be considered as a whole and a decision should be made on a balanced consideration of all relevant matters.

8. Consultation under section 27A is only required where an agency has reached an interim decision on the material available that disclosure of the personal information would not be unreasonable. Where the agency has decided on the basis of the existing evidence that disclosure would be unreasonable, consultation with the person concerned is not required under the provisions of section 27A. Nonetheless, in many cases an agency may wish to ensure that its conclusion is accurate and voluntarily consult with the person concerned.

9. Not all disclosures of personal information are unreasonable. The determination of whether disclosure is unreasonable or not in any particular case will depend on the balancing of privacy interests of the third party (which themselves have a public

interest dimension—see *Colakovski v Australian Telecommunications Commission* (1991) 100 ALR 111 at 120 (D273)) against the public interest factors which may favour disclosure (see *Re PIAC & DCSH and Searle Australia Pty Ltd*, unreported (D282)), including the general public interest in access to government-held information (see, for example, *Arnold v Queensland* (1987) 73 ALR 607 (D189)). The agency must make a decision for itself on whether disclosure would be unreasonable or not. The third party does not have a veto over disclosure.

SUMMARY OF SECTION 27A

CONSULTATION PROCESS

PRELIMINARY CONSIDERATION whether disclosure would be unreasonable or not

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Decision on basis of existing information that DISCLOSURE WOULD BE UNREASONABLE		PRELIMINARY VIEW on basis of existing information that disclosure WOULD NOT BE UNREASONABLE
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NO CONSULTATION NECESSARY – ACCESS REFUSED		CONSULTATION NECESSARY if third party might reasonably wish to contend that document containing personal information is exempt under section 41
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<p>FACTORS RELATING TO EXISTENCE OF PRIVACY INTERESTS FOR CONSIDERATION in determining whether third party might reasonably wish to contend that information is exempt under section 41:</p> <ul style="list-style-type: none"> • extent to which information is well known • whether person to whom personal information relates is known to be associated with the matters dealt with in document • availability of the personal information from publicly accessible sources • such other matters as decision maker considers relevant.
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Person consulted objects to disclosure –		Person consulted does not object to disclosure.
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consider question of reasonableness of disclosure in all the circumstances, including both personal privacy interests and the public interest in disclosure.		
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DECISION TO REFUSE OR GRANT ACCESS to personal information.		DISCLOSE material that is not objected to, subject to other applicable exemptions.
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Where decision is to disclose personal information and the person consulted objected to disclosure, NOTIFICATION of decision to applicant AND TO THAT PERSON to enable 'reverse FOI' internal review or review by AAT

General approach

Most personal information in government records will require consultation before a decision is made to release it.

10. The general approach that agencies should adopt in deciding whether to consult a person before releasing personal information about that person in response to an application under the FOI Act is that the person to whom the information relates must be consulted. Unless there are compelling factors to indicate the contrary (eg all the personal information concerned is already publicly known), an agency should proceed on the basis that a person to whom personal information relates 'might reasonably wish to contend that the document, so far as it contains that [personal] information, is an exempt document under section 41 [of the FOI Act].' In general terms, determination of whether a person might reasonably wish to make such a contention depends on whether the information relates to possible personal privacy interests which the person might in all fairness, objectively speaking, wish to claim should be withheld from public disclosure.

11. The criteria set out in the amendment to section 27A are designed to address the question of the possible personal privacy interests just referred to. A decision on whether or not *consultation* is required does *not* involve making an *exemption* decision on whether it would be unreasonable to disclose the personal information. Even though the decision maker may think it unlikely that the exemption will apply, it is necessary for her or him to consult under section 27A unless, on consideration of all the circumstances, including the factors mentioned in section 27A(1AA), it appears that there are no possible personal privacy interests which the person might reasonably contend would render the information exempt.

12. Most personal information in government records will require consultation before a decision is made to release it. The mere occurrence of a person's name, or name and address, in a government file will usually be a matter on which consultation should occur. The occurrence of a person's name, or name and address, in a government file or database may indicate other information about that person which raises privacy issues, for example by revealing that a person is a client of a department or is under investigation by an agency. However if no privacy issue arises, for example because of one of the matters specifically mentioned in paras (a) to (c) of section 27A(1A), consultation will not be necessary (see paragraphs 21, 24 and 25 below in relation to public officials). It was not Parliament's intention to provide anonymity for public officials each time one of them is mentioned in a file. That would be contrary to the stated aims of the FOI Act and would not assist in promoting openness or accountability. Consultation gives the person concerned an opportunity to bring to the decision maker's attention reasons why the information is sensitive which may not otherwise be apparent to the decision maker. It not only gives a third party an opportunity to affect the outcome of the primary decision whether or not to release personal information, it also gives her or him a right to be notified of a decision to release the information before release occurs and to take 'reverse FOI' action, by seeking internal review or external review by the Administrative Appeals Tribunal, to prevent the release of information which the third party considers sensitive on privacy grounds (see sections 27A(2), 54(1E) and 59A). The name of the FOI applicant should not be disclosed during consultation.

13. The question whether consultation under section 27A is 'reasonably practicable' or not may raise several kinds of issues. The most obvious circumstance where consultation would not be reasonably practicable is where an agency or Minister, despite making reasonable efforts, is unable to locate the present whereabouts of the relevant person. Again, it may not be 'reasonably practicable' to consult where it proves impossible to locate and contact the person within the time limits in sections 15(5) and (6) (notify reasons for decision within 30 days, or 60 days where statutory consultation is occurring); this should not be lightly assumed, and the speediest form of communication should be used in appropriate cases. A final example would be in some cases where there would be a major workload arising out of the consultations. However, although the language is different, it is suggested that the guidelines for determining whether consultation is 'reasonably practicable in all the circumstances' where there is a workload problem should be those which apply to the provisions in section 24(1) concerning 'substantially and unreasonably divert(ing) the resources of an agency from its other operation' (see New FOI Memo No. 19, Preliminary and Procedural Matters, paras 8.1–8.13). It is not appropriate to assume that, just because an applicant has requested a document which contains personal information which relates to a large number of persons, any one or more of those persons to whom the information relates would not reasonably wish to contend that the document is an exempt document under section 41 of the FOI Act.

Considerations which must be taken into account in determining whether a person might reasonably wish to contend that the exemption in section 41 applies to personal information

Meaning of 'well known'

14. Section 27A(1A)(a) requires that, in determining whether a person might reasonably wish to contend that a document containing personal information is exempt under section 41, regard must be had to the extent to which information is well known. Information is not well known merely because it is available from a publicly available source such as a government register to which the public has access. Information must not be assumed to be well known only because it has been widely published in the past or extensively published in a particular locality. A report in a local newspaper which is some years old and which states that a named person was convicted on a criminal charge would normally be expected to fail on both those grounds. In this context well known means that the information is widely known, not that it is thoroughly known. It is not sufficient that the information is known to a restricted group of persons however considerable their knowledge of the information may be. A large number of police officers and prison officers may be aware that a certain person has a criminal conviction but that does not mean that that information about the person is widely known. Similarly a considerable number of officers of the Department of Social Security, and even other clients of that Department, may know that a certain person is a client of the Department but that would not be a sufficient basis on which to assert that information concerning the status of that person as a client of the Department was well known.

15. When considering this issue, officers should pay attention not only to the extent that the information is known but also to the basis on which it is believed that it is well known. Apart from such information as who is the current Prime Minister of Australia, or other similar information which is available from numerous current sources, officers should take into account the basis on which they believe the information is well known. Apart from examples like the one referred to, an officer taking the view that information is well known should be able to establish the basis for asserting that the information is well known by referring, for example, to the publications or other media sources through which the information became well known.

16. It is necessary to take into account not only whether the information is well known, but also whether the person is 'known to be associated' with the matters referred to in the documents. A person may be a prominent public figure in, for example, politics, business or the arts but that does not mean that everything about that individual may be regarded as well known, even though many of that person's activities may have been widely publicised by that person or others. It could not be assumed that a prominent politician who has been engaged in business as a consultant would be known to be associated with a particular business. However, the situation would be different if that person had herself or himself discussed in a published autobiography, or on a major television show, the person's work as a consultant in that type of business.

17. It may also be appropriate on occasion to consider whether a person who is not a prominent public figure is known to be associated with a particular matter. A person, for example, may be an official of an incorporated association which is engaged in or benefiting from a government program. He or she may, as a result, be considered as 'known to be associated' with matters dealt with in **some** documents relating to that person's status as an official of that incorporated association. Alternatively, the relevant documents may contain an assessment of the person's suitability for

involvement in certain activities which may refer to previous activities of that person with which he or she was *not* 'known to be associated' with except, for example, to a small number of officials.

18. The fact that information is available from a source such as the electoral roll or a telephone directory does not mean that an agency should consider that it may on that basis release the information. The fact that such information is held by a particular agency or in a particular category of documents held by an agency may itself indicate something about the person. The classic examples are addresses and phone numbers which may have been given by a social security client to an agency. That information may be the same as the address appearing in the electoral roll and the number appearing in the phone directory, but because of the context in which it is held by the agency, or the fact that it is held by the agency at all, the public accessibility of the information in another context or from another source would not be a factor indicating that consultation was not required before a decision was made to release the information.

19. Where information held by an agency is in the form of newspaper clippings or extracts from published directories (ie. the information in publicly available in the form in which it is held by the agency), there may in many cases be no personal privacy considerations affected by disclosure of the fact that a particular agency holds that information in a particular context or holds the information at all. However, that will depend on whether in the specific circumstances of each case there is some possible privacy interest which could be affected. For example, even old or dubious information in the form of press clippings could, if it reflected on the reputation of a person, raise issues of privacy such that consultation would be appropriate. The question remains whether there is any possible privacy interest which the person concerned might reasonably wish to protect.

20. The considerations referred to in section 27A(1A) and discussed in these guidelines should not be interpreted in a rigid or technical manner as it is impossible to foresee all the different circumstances that may arise. It is for this reason that the criteria in section 27A(1A) permit other relevant matters to be taken into account. Other matters are only relevant if they assist in determining whether the person to whom the information relates 'might reasonably wish to contend that a document is an exempt document under section 41' of the FOI Act (section 27A(1AA)). An officer's opinion of the character or habits of the person concerned, for example, are not relevant to determining this.

21. One major example of circumstances which would be relevant is where the name of an official appears in a document in the normal course of the official's duties. There is no personal privacy interest in that information, and there is no need to consult with officials in such circumstances. The situation would be different, however, where the information related to something in which there may be some real privacy concern, such as work performance information concerning an individual official, or information relating to alleged disciplinary offences or sexual harassment. Other information relating to an official may be entirely private in nature, such as information relating to the official's entitlement to bereavement leave because of the death of a close relative. There may, therefore, be many situations where it is not possible to make a clear distinction between information relating to an official in the

normal course of his or her duties and other matters. In such situations the official concerned should be consulted before personal information relating to that official is released.

22. Where there is any doubt whether information is well known, whether a person is known to be associated with a particular matter or about the availability of information from publicly accessible sources, the officer processing the application for documents must consult the person to whom the information relates.

23. Where information relates to a person in that person's capacity as, for example a social security client, a taxpayer, a grant applicant, a police witness or a person with a criminal record it is necessary to consult the person before a decision is made to release the information. An exception to this, however would be where the person to whom the information relates had published an autobiography which was currently widely available and which contained exactly the information which is contained in the document sought in the application under the FOI Act, unless the very fact that the government agency had such material on its files itself raised new issues of privacy.

24. The reason for including the discretion in the consultation procedures in section 27A is to avoid the necessity to consult where to do so would clearly be absurd or vexatious to the person who would be consulted because there is no personal privacy interest which would be affected by disclosure. The following are examples of information where, prior to the latest amendments, it was necessary to consult the person concerned:

- A copy of an entry from 'Who's Who' and several newspaper articles on speeches made by a Member of Parliament in the Parliament.
- Information which disclosed that a well known person had carried out consultancy work for an agency – a fact which the person himself or herself had discussed in a published autobiography.
- A copy of a departmental file cover which showed the movement of the file among various officers.
- Numerous references to the Prime Minister and other Ministers and senior officials in otherwise innocuous documents.

25. Generally it would not be necessary to consult a serving or retired officer of the public service where the information in the document only revealed that the officer had performed an act in the course of his or her duty as an officer. On the other hand, consultation would be essential prior to deciding to release any document which indicated that an officer had in any way behaved improperly including, for example, any suggestion that an officer had allowed any improper consideration to influence him or her in the performance of that officer's duty.

(Matters relating to the application of the personal privacy exemption in section 41 of the FOI Act will be dealt with in full in the Attorney-General's Department's forthcoming New FOI Memorandum No. 41).

ATTACHMENT B

AMENDMENTS TO FREEDOM OF INFORMATION ACT 1982 SINCE 1991

Act	Number and Year	Date of Assent	Date of Commencement
<i>Export Finance and Insurance Corporation (Transitional Provisions and Consequential Amendments) Act 1991</i>	149, 1991	21 Oct 1991	1 Nov 1991
<i>Special Broadcasting Service Act 1991</i>	180, 1991	25 Nov 1991	S. 116: 23 Dec 1991 (h)
<i>Sales Tax Amendment (Transitional) Act 1992</i>	118, 1992	30 Sept 1992	28 Oct 1992
<i>Law and Justice Legislation Amendment Act (No. 4) 1992</i>	143, 1992	7 Dec 1992	S. 3: Royal Assent (i)
<i>Law and Justice Legislation Amendment Act (No. 3) 1992</i>	165, 1992	11 Dec 1992	S. 4: Royal Assent (j)
<i>Qantas Sale Act 1992</i>	196, 1992	21 Dec 1992	Schedule (Parts 1, 5): (see Note 2)
<i>Electoral and Referendum Amendment Act 1992</i>	219, 1992	24 Dec 1992	Part 4 (ss. 35, 36): Royal Assent (k)
<i>Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994</i>	33, 1994	15 Mar 1994	15 Mar 1994 except 15(1)
<i>Law and Justice Legislation Amendment Act 1994</i>	84, 1994	23 Jun 1994	S.2: Royal Assent except specified Parts

Note: The references in brackets are to notes in Reprint No.4 of the FOI Act.

ATTACHMENT C

Amendments to other FOI Memorandums

NEW FOI MEMORANDUM NO. 19

Page vii right hand column opposite to reference to section 29:

delete '3.44'

Page 7 paragraph 3.3

In the paragraph after the dot points add after the first sentence:

The definition of 'document' also expressly excludes 'Cabinet notebooks' and 'Cabinet notebook' is also defined in section 4(1).

Page 29 paragraph Note

Under the heading 'Time limits for responding to a request'; delete the paragraph and insert the following paragraph 6.7.1 under the heading:

The FOI Act was amended by the Law and Justice Legislation Amendment Act 1994 the relevant provisions of which commenced on 23 June 1994. The amendments in relation to time limits apply to notifications given under section 29(6), to the period for deeming decisions to have been made under section 29(7), to requests made under the amended section 30A on and after 23 June 1994 and to the period for bringing an appeal under sections 58F, 59 and 59A on and after 23 June 1994. The intention of the amendments is to standardise on the time period of 30 days.

Page 33 paragraph 6.29

In the sentence beginning 'In particular, the obligation'delete 'or section 41'.

In the following sentence, delete 'and 27A'.

Delete the last sentence of the paragraph and add a note that agencies should refer to FOI Memorandum 94 when section 41 and its related consultation section 27A are applicable.

Page 34 paragraph 6.31

In the third sentence delete 'broadly speaking 28 days' and substitute '30 days', and delete from the brackets ';the time for appeal to the AAT is in this case governed by section 29 of the AAT Act.'

In the second last sentence delete 'In practice an agency needs to wait at least 30 days' and substitute 'An agency must wait 30 days ...'.

Delete the last sentence in the paragraph.

Page 35 paragraph 7.4

Add a new sentence:

This was also done by the Law and Justice Legislation Amendment Act 1994 in relation to the amendments made to the FOI Act by Divisions 2, 4, 5, 7, 8 and 9 of Part 8.

Page 36 paragraph 7.8

Add a new paragraph 7.8.1:

The Law and Justice Legislation Amendment Act 1994 amended Part II of Schedule 2 by dividing it into two Divisions because of the link between Schedules 1 and 2 of the FOI Act and the *Privacy Act 1988*. Agencies referred to in Division 1 of Part II of Schedule 2 are exempt from the operation of the Privacy Act in relation to documents in respect of which they are exempt from the FOI Act. The only agency in Division 2 of Part II of Schedule 2 and therefore not exempt from the operation of the Privacy Act in relation to documents for which he or she has an exemption from the FOI Act is the Australian Statistician.

Page 37 Table reference to section 43A add 'see Memo 94'.

Page 49 paragraph 9.6

Delete the last sentence and insert a new paragraph 9.6.1 after paragraph 9.6:

The FOI Act was amended by the Law and Justice Legislation Amendment Act 1994, the relevant provisions of which commenced on 23 June 1994. Section 85 of that Act adds a new section 92A to the FOI Act which expressly provides that notices and other documents that are required or permitted to be given under the FOI Act may be given by post. Inserting this provision means that section 29 of the Acts Interpretation Act 1901 applies so that:

service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

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Appendix 1

page e paragraph 3.38

The time limit for notification of a decision on the remission of an application fee is 30 days.

The time limit for notification of a decision whether or not to reduce or not impose a charge is 30 days (increased from 28 days).

The time limit for applications under section 58F (reverse FOI application by a State), section 59 (reverse FOI application relating to business affairs etc) and section 59A (reverse FOI application in relation to documents containing personal information), which was previously 28 days under section 29 of the *Administrative Appeals Tribunal Act 1975*, is now 30 days; the application must be made within 30 days after the day on which notice of the decision was given to the State, organisation, proprietor or person as appropriate. A new item should be added to the list in paragraph 3.38 – 'reverse FOI applications 30 days'.

The new time limits apply to notifications, requests and decisions occurring on and after the commencement of the amendments on 23 June 1994.

An additional item should be added to the list in paragraph 3.38 – declaration by Tribunal under section 62(2) 28 days

Approval will be sought for an amendment to extend the 28 days in section 62(2) to 30 days and to amend section 62(1) to refer to sections 29 and 30A.

New FOI Memorandum No. 26

page vi under SECTION 2

5th dot point (reference to section 26), 3rd dash (refusal to remit an application fee or reduce a charge) – delete.

Add new dot point under 5th dot point (reference to section 26):

- Sections 29(8) and (9) and 30A(3) and (4) require a statement equivalent to a section 26 statement in relation to decisions not to reduce or not to impose charges, and not to remit application fees in whole or part.

Add new dot point under 6th and final dot point:

- No obligation to give further statements under section 13 of the ADJR Act where a section 29(8) statement or a section 30A(3) statement has been given.

page vi under SECTION 3

1st dot point

Add after 'section 26' – 'section 29(8) or section 30A(3)'.

4th dot point

Add after 'section 26' – 'section 29(8) or section 30A(3)'.

page viii under SECTION 4

1st dot point

Add after 'section 26' – 'section 29(8) or section 30A(3)'.

page ix under SECTION 4

5th and final dot point

Add after '(s.26(2))' – '(see also sections 29(11) and 30A(6))'.

page ix under SECTION 5

1st dot point

Add after '(s.26(2))' – '(see also sections 29(11) and 30A(6))'.

page x under SECTION 6

Add after 'section 26' – 'section 29(8) or section 30A(3)'.

page x after section 26

Add:

WORDING OF SECTIONS 29(8) TO 29(11) AND 30A(3) TO (6)

Note: The wording of sections 29(8) to 29(11) and 30A(3) to (6) differs from that in section 26 but the effect is the same – see section 25D of the *Acts Interpretation Act 1901*:

25D. Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "**reasons**", "**grounds**" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

page 1 add footnote to heading 'SECTION 26 NOTICES'

'Refer also to sections 29(8) to 29(11) and 30A(3) to (6).'

page 5 paragraph 13

Add note:

Section 62(2) does not apply to section 29(8) and section 30A(3) statements. In relation to such statements an applicant should apply under section 28(5) of the *Administrative Appeals Tribunal Act 1975*.

Approval will be sought for an amendment to section 62(2) to resolve this.

page 5 paragraph 14

Add footnote:

'See also sections 29(8) to 29(11) and 30A(3) to (6).'

page 7 'bad statement'

Dot point 7

Add note 'See note added to para. 13.'

page 8 paragraph 19

Dot points 2 and 3 and remainder of paragraph delete

page 9 paragraph 20

Insert in first sentence after 'section 26', '29(8) or 30A(3)'.

2nd sentence – delete.

3rd sentence – delete 'Similarly' and substitute 'However'.

– add after 'section 26', 'or similar'.

– end sentence after 's.28(4)(b)' [The rest is no longer correct with the new ss. 29(8) and 30A(3).]

page 9 Heading Section 3. CONTENT OF STATEMENT OF REASONS

Add footnote:

This also applies to statements under ss 29(8) or 30A(3).

page 16 paragraph 36

Delete 'FOI Memo. No.19 (6 Sept.1982, under revision), paras 44–59'.

Substitute 'New FOI Memo. No.19, paras 6.1 to 6.7'

page 21 paragraph 49

Last sentence – add 'and note' at end of bracketed material.

page 31 Heading Section 4. THE FORM OF THE SECTION 26 NOTICE

Add footnote:

Paras 76–77 also apply to statements under sections 29(8) or 30A(3).

page 33 Heading Section 5. WHAT CAN BE OMITTED FROM A STATEMENT OF REASONS?

Add footnote to '**Section 26(2) – omission of exempt material**' in heading:

This also applies to statements under sections 29(8) or 30A(3); see sections 29(11) and 30A(6).

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page 6 paragraph 12

Last two sentences delete and substitute:

Section 30A(1A) imposes a time limit of 30 days for making a remission decision under s.30A. If the time limit is not complied with, the agency or Minister is taken to have made a decision that no part of the application fee is to be remitted (s.30A(1B)). An applicant may also complain to the Ombudsman about delay in making such a decision.

page 11 paragraph 30

Delete '28 days' and substitute '30 days' twice.

page 20 paragraph 67

Delete '(see FOI Memorandum No.19, paras 24–26)' and substitute '(see new FOI Memorandum No.19, paras 3.44 to 3.47)'.

page 28 paragraph 101

Delete '28 days' and substitute '30 days' three times. Also add the following at the end of the paragraph:

The situation is similar in relation to application fees; see ss 30A(1A) and (1B).

page 28 paragraph 102

Delete 2nd sentence and substitute:

This includes internal and AAT review of deemed decisions under s.29(7) and 30A(1B) (see para.101 above).

Add after last sentence:

FOI Memorandum No.33 should be read subject to later amendments of the FOI Act, particularly in relation to time limits and reviewable decisions.

page 30 paragraph 6

Delete the 2nd last sentence and substitute:

The time limit for making a remission decision is 30 days, ie no later than 30 days after the request was made. If the time limit has passed and the applicant has not received notice of a decision on the request a decision is taken to have been made that no part of the application fee is to be remitted.

page 32 paragraph 12

Delete '28 days' and substitute '30 days'.