

# **FREEDOM OF INFORMATION Memorandum No. 97**

## **Administrative Appeals Tribunal Act 1975 – Amendments Affecting Administration of Freedom of Information Act 1982**

### **Freedom of Information Act 1982 – Amendments and other matters**

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FOI Memorandum No.97

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## **FOI Memorandum No. 97**

### **1. Introduction**

#### **Purpose of this memorandum**

1.1 This memorandum has the following purposes:

- to advise agencies of the effect of the amendments to the *Administrative Appeals Tribunal Act 1975* (AAT Act), made by the *Law and Justice Legislation Amendment Act (No. 1) 1995* (Act

No. 175) (LAJLA Act) on the administration of the *Freedom of Information Act 1982* (FOI Act);

- to advise agencies of amendments to the FOI Act and regulations;
- to bring to the attention of agencies the situation of firms or partnerships in obtaining access to documents as discussed in recent cases;
- to advise agencies of the increase of the fee for applications to the Administrative Appeals Tribunal (AAT);
- to circulate a list of current FOI Memorandums; and
- to circulate the current public information pamphlet on the FOI Act.

## **2. AMENDMENTS INTRODUCED BY LAJLA ACT 1995 – EFFECTS ON ADMINISTRATION OF FOI ACT**

### **Commencement**

2.1 The provisions of the LAJLA Act, which amended the AAT Act, commenced on 16 December 1995, the day the LAJLA Act received Royal Assent.

### **Summary**

2.2 The following amendments to the AAT Act in Schedule 2 of the LAJLA Act should be noted in relation to the administration of the FOI Act;

- Schedule 2 item 3 – new definition of proceeding in AAT Act which includes an application to the AAT under section 62(2) of the FOI Act for a declaration that a statement of reasons is inadequate (paragraph (e) of the definition);
- Schedule 2 item 7 – new provision substituted for existing section 21A(3) in the AAT Act relating to re-constitution of the membership of AAT panels. Section 58B of the FOI Act, for the purposes of the FOI Act, substitutes an alternative section 21A(3) (see paragraph 2.4 below);
- Schedule 2 item 15 – inserts a new section 26 in the AAT Act which, subject to section 42D, restricts the powers of a decision-maker after an application for review is made to the AAT (see paragraphs 2.5 to 2.11 below);
- Schedule 2 item 19 – amends section 37 of the AAT Act (lodging of material documents with the AAT) by making new provision for the lodging of section 37 statements and relevant documents. Section 37 does not apply to documents claimed to be exempt in an FOI AAT

appeal but it does apply to other documents (see paragraphs 2.12 to 2.13 below);

- Schedule 2 item 21 – inserts a new section 42D in the AAT Act which specifically provides the AAT with the power to remit matters to a decision-maker for further consideration at any stage of a review (see paragraph 2.14 below); and
- Schedule 2 item 24 – inserts a new section 43AA in the AAT Act to permit correction of errors in decisions or statements of reasons (see paragraphs 2.15 to 2.17 below).

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## **Details of amendments**

2.3 The purpose of the amendments made by the LAJLA Act was to give effect to the recommendations of the *Report of the Review of the Administrative Appeals Tribunal* (29 November 1991). The General Outline in the Explanatory Memorandum for the LAJLA Act states that the ‘amendments are directed at streamlining the procedures of the AAT and clarifying the powers of the AAT in procedural matters.’ The new definition of ‘proceeding’ which has been inserted in the AAT Act should assist in that clarification – it does not appear to present any problems for the administration of the FOI Act.

### *Reconstitution of the AAT in certain circumstances*

2.4 Schedule 2 item 7 of the LAJLA Act deletes the existing section 21A(3) of the AAT Act and inserts a new section 21A(3) concerning reconstitution of the AAT. This amendment does not affect the operation of section 58B of the FOI Act which in part substitutes different provisions in section 21A for reconstitution of the AAT in certain circumstances. Section 58B only applies where the AAT is hearing a matter in relation to a conclusive certificate or there is a certificate under sections 33(4) or 33A(4) (information as to the existence or non-existence of a document) and a party to the proceedings requests that the AAT be reconstituted. Section 58B was added to the FOI Act in 1983 and has not been amended since. However, section 10 of the *Acts Interpretation Act 1901* means that section 58B of the FOI Act is to be applied to the AAT Act as amended from time to time. Therefore, the provision of the LAJLA Act which substitutes a new provision for the existing section 21A(3) in the AAT Act relating to reconstitution of the membership of AAT panels does not apply in the circumstances in which section 58B of the FOI Act applies.

### *Alteration of decisions*

2.5 It has been the practice of the Information Access Unit (subject to the existence of third party interests) to encourage the further release of documents even after an applicant for documents under the FOI Act has applied to the AAT for review of the agency's decision. The practice has been recognised in a number of AAT decisions on payment of costs of successful applicants. The purpose of such releases is to reduce to the minimum the number of documents that would be in dispute before the AAT. However, the FOI Act does not expressly provide for authorised decision-makers to do this.

2.6 New section 26 provides that a decision, once an application has been made to the AAT, may not be altered otherwise than by the AAT on review, unless the Act or other legislation in question expressly permits the decision to be altered, or the parties and the AAT consent to the making of the alteration. Subject to what is stated in paragraphs 2.10 to 2.11 below in relation to section 56, the FOI Act does not expressly permit decision-makers to alter a decision after an application is made to the AAT. Therefore, decision-makers, unless with the consent of the applicant and the AAT, will no longer be able to release further documents under the FOI Act pending a hearing before the AAT and thereby narrow the matters required to be decided by the AAT (see paragraph 2.8 on release outside the FOI Act). However where an applicant has appealed to the AAT on the basis that the agency or Minister has been deemed, in accordance with section 56(1), to have made a decision refusing to grant access or, in accordance with section 56(1A) to have made a decision refusing to amend or annotate a record of personal information, see paragraphs 2.10 to 2.11 below.

2.7 Section 26 of the AAT Act will apply where an initial FOI application has been made and the decision maker is the Minister or the principal officer of the agency and the applicant appeals to the AAT, because in such cases there is no avenue for internal appeal. Section 26 of the AAT Act will also apply where an applicant has applied to an agency for an internal review and the agency has either made a decision on the request for internal review or has failed to comply with the 30 day time limit prescribed in section 55(3) for notification of a decision on an application for internal review and the applicant exercises his or her right of appeal to the AAT. (The situation in relation to deemed decisions on initial applications is discussed below at paragraphs 2.10 to 2.11 as section 56(5) of the FOI Act makes special provision for such deemed decisions.)

2.8 Subject to what is stated in paragraphs 2.10 to 2.11 below concerning deemed decisions, where an applicant has applied to the AAT any release by an agency of further documents will be made outside the FOI Act. (See section 14 of the FOI Act which preserves an agency's pre-existing right to release documents whether or not they are exempt under the FOI Act.)

Naturally, in proceedings before the AAT, the AAT would need to be informed of any further release of documents. If documents are released outside the FOI Act the protection provided by sections 91 and 92 would not be available. In addition, if the documents contain personal information about persons other than the applicant and the documents are disclosed outside the FOI Act, it is necessary to comply with the requirements of paragraph 1 of Information Privacy Principle 11 that such information shall not be disclosed to a person, body or agency except where one of the exceptions applies. (Where a document containing personal information, and otherwise subject to access under the FOI Act, is not exempt under the FOI Act, its disclosure in response to an FOI request is 'required by law' and is therefore permitted under paragraph 1.(d) of Privacy Principle 11.) The question of sensitive third party material is dealt with in greater detail in paragraphs 2.7 to 2.8 of New FOI Memorandum No.19.

2.9 As a matter of policy, subject to protection for any third party interest in the documents, there should be no objection to such additional releases and it is intended to take the matter up in the Government response to the Report of the Australian Law Reform Commission (Report No 77) and of the Administrative Review Council (Report No 40), Open government: a review of the federal *Freedom of Information Act 1982*.

#### *Alteration of deemed decisions*

2.10 Section 56(1) and (1A) of the FOI Act provide for situations where an agency has exceeded the time limits provided in sections 15 and 51D of the FOI Act for notifying an applicant of the decision on a request for documents or of a decision on a request for amendment or annotation of a document containing personal information of the applicant.

2.11 Section 56(5) of the FOI Act provides that the AAT may treat proceedings commenced in accordance with section 56(1) or (1A) as extending to a review of a decision to refuse the relevant request. Section 56(5) does not directly state that an agency may release further documents or amend or annotate a record of personal information prior to the AAT finally dealing with the matter. However, section 56(5) can only be given effect, after the introduction of section 26 of the AAT Act, by an interpretation which accepts that section 56(5) is a provision that, within the terms of section 26, 'expressly permits the decision to be altered'. As it is, therefore, arguable that section 56(5) expressly permits the decision to be altered, agencies should proceed on the basis that where an applicant has appealed to the AAT on the basis of a deemed initial decision, they may continue to make actual decisions concerning access to or amendment of documents even where an application has been made to the AAT on the basis of a deemed decision.

### *Application of section 37 of AAT Act*

2.12 Section 37(1) of the AAT Act requires a person who has made a decision that is the subject of an appeal to the AAT to lodge relevant documents within the time limit specified. Section 64(1) of the FOI Act provides that in proceedings before the AAT section 37 of the AAT Act does not apply to documents that are claimed to be exempt. The AAT may, however, for the purpose of deciding whether the document is an exempt document, require the document to be produced for inspection by members of the AAT only. Section 37 applies to statements produced in accordance with section 26 of the FOI Act (Reasons and other particulars of decisions to be given) as notices under section 26 are not required to contain anything that would cause the statement to be an exempt document. This applies whether the section 26 statement is given in respect of an application for documents or an application for amendment or annotation of personal records. Similarly section 37 applies to equivalent statements produced in accordance with section 29(8) of the FOI Act in respect of contentions about charges and statements produced in accordance with section 30A(3) of the FOI Act in respect of applications for remission of fees.

2.13 The new sections 37(1) to 37(1AG) are substituted for the existing section 37(1) (statement setting out findings on material questions of fact, including evidence supporting those findings, and reasons for decision) and are intended, amongst other things, to limit the number of copies of documents required in certain circumstances and provide for an extension of time for lodging documents. New section 37(1) requires that two copies of relevant documents (prepared in accordance with section 37(1) or section 28(1) of the AAT Act – section 37(1AD) of the AAT Act) are to be lodged with the AAT within 28 days or such further period as the AAT allows. Section 37(1AA) provides that the AAT may require further copies to be lodged with it. Section 37(1AB) and (1AC) allow the President of the AAT to accept copies of the document setting out the reasons for decision (in the case of FOI proceedings, the FOI Act section 26 statement) though he or she can later require a section 37(1) statement as well. Section 37(1AE) requires decision-makers to serve one copy of the statement of reasons on each other party to the proceedings. The AAT has distributed a letter which sets out its requirements in relation to the administration of section 37(1AE). A copy of this letter is attached as Attachment A. Sections 37(1AF) and 37(1AG) are concerned with procedures in relation to applications for confidentiality under section 35(2) of the AAT Act.

### *Remission of matter to decision maker*

2.14 New section 42D in the AAT Act specifically provides the AAT with the power to remit matters to a decision-maker for further consideration at any stage of a review. The AAT previously did not have the power to order that a matter be remitted to the decision-maker for further consideration unless it set aside the decision under subparagraph 43(c)(ii) of the AAT Act. Where a decision is remitted, the decision-maker may affirm, vary, or set aside the decision and make a new decision in substitution for the decision set aside. Where a decision is varied or a new decision is substituted, the applicant may proceed with the application for review in respect of the varied or new decision or withdraw the application.

#### *Correction of errors by AAT*

2.15 The Notes On Clauses for the LAJLA Act state, in relation to the new section 43AA inserted in the AAT Act, that the section will provide the AAT with the express power to correct an obvious error in the text of the decision or in a written statement of reasons. Section 43AA gives two examples of obvious errors but agencies should not, of course, assume that the examples are exhaustive. The examples are where:

- (a) there is an obvious clerical or typographical error in the text of the decision or statement of reasons; or
- (b) there is an inconsistency between the decision and the statement of reasons.

2.16 There may be some doubt whether the new section 43AA would permit the correction of the terms of a substantive decision where the AAT took the view that its decision had been imperfectly expressed (*Re Huttner and Department of Immigration and Ethnic Affairs (No.2)* (unreported 6 December 1995) (D367)). In *Huttner (No.2)* the AAT relied on an interpretation of section 33 of the AAT Act (Procedure of the AAT) as authorising the use of a general 'slip rule' to make such a correction. However, if the decision in *Huttner (No.2)* is seen as correcting an inconsistency between the decision and the statement of reasons, the decision in that case would be consistent with section 43AA(3)(b).

2.17 In future cases the AAT may take the view that the introduction of a specific provision for correction of errors precludes it from relying on section 33 of the AAT Act as in *Huttner (No.2)*. The application of the slip rule in AAT proceedings prior to the commencement of the LAJLA Act on 16 December 1996 (see paragraph 2.1 above) is discussed in *Re Morris and Australian Federal Police (No. 2)* (unreported 28 April 1995) (D358A) where the AAT reserved the right to reconsider the general issue of the application of the slip rule in an appropriate future case. The central

considerations under the new provisions remain whether orders correctly express the intentions of the AAT and that the ‘reopening of the Tribunal’s reasoning’ must be avoided (see *Re Morris* D358A, paragraph 7 and *Re Dillon and Department of Trade & ors (No. 2)* (1986) 9 ALD 187 at 189 per Deputy President Todd). The AAT continues to have jurisdiction to correct minor errors in drawing up its decisions but it does not have the power to correct a conscious and deliberate decision in respect of a matter or an inconsistency between the reasoning and decision-making process in one area and those in another (*Re Dillon (No.2)* at 189).

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### **3. AMENDMENTS TO FOI LEGISLATION INCLUDED IN FOI ACT REPRINT NO. 5**

#### **Amendments included in Reprint no. 5**

3.1 FOI Memorandum No. 94 dealt with amendments to the FOI Act up to June 1994 and there have been a number of minor amendments to the Act since then. Amendments made by the *Taxation Laws Amendment Act (No. 4) 1994* (see paragraph 3.2 below) and the *Employment Services (Consequential Amendments) Act 1994* (see paragraphs 3.3 to 3.5 below) have been incorporated in Reprint No. 5 which was reprinted as at 31 January 1995.

#### ***Taxation Laws Amendment Act (No. 4) 1994***

3.2 The *Taxation Laws Amendment Act (No. 4) 1994* amended the reference in Schedule 3 of the FOI Act (Schedule of secrecy provisions to which the exemption in section 38 of the FOI Act applies) to the *Taxation (Interest on Overpayments) Act 1983* to substitute a reference to the *Taxation (Interest on Overpayments and Early Payments) Act 1983* to bring the reference in Schedule 3 into line with the change of the short title of that Act. The relevant provision commenced on 19 December 1994.

#### ***Employment Services (Consequential Amendments) Act 1994***

3.3 The purpose of the amendments to the FOI Act introduced by the *Employment Services (Consequential Amendments) Act 1994*, the relevant provisions of which commenced on 1 January 1995, was to extend the operation of the FOI Act to the case management services provided by private sector case managers which are providing employment services as ‘eligible case managers’ in accordance with the *Employment Services Act 1994*. This has been done by including ‘eligible case manager’ in the



definition of ‘agency’ in section 4(1) of the FOI Act and including a definition of ‘eligible case manager’ as meaning:

an entity (within the meaning of the *Employment Services Act 1994*):

(a) that is, or has at any time been, a contracted case manager within the meaning of that Act; and

(b) that is not;

(i) a Department; or

(ii) a prescribed authority;

3.4 Consequential amendments were made to the definitions of ‘principal officer’ and ‘responsible Minister’ in section 4(1) of the FOI Act.

3.5 A new section 6B was introduced into the FOI Act which ensures that the FOI Act only applies to documents of eligible case managers if the application for documents is in respect of the provision of case management services under the *Employment Services Act 1994* to a person referred to the eligible case manager under Part 4.3 of that Act or if the documents relate to the performance of a function conferred on the eligible case manager under that Act.

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## **4. OTHER AMENDMENTS TO FOI LEGISLATION**

### **Prescribed authority – Qantas**

4.1 Paragraphs 2.2.1 to 2.2.2 of FOI Memorandum No. 94 referred to amendments made by the *Qantas Sale Act 1992* which had not been incorporated in Reprint No. 4 which was at June 1994 the latest reprint of the FOI Act. The amendments were inserted by Part 1 of the Schedule of the Qantas Sale Act and were included in Reprint No. 5 of the FOI Act. Part 5 of the Schedule of the Qantas Sale Act was designed to come into effect ‘on or after 100% sale day’ reversing amendments made by Part 1 of the Schedule. The amendments were reversed from 30 August 1995 by deleting ‘(other than Qantas Airways Ltd or a company that is a subsidiary of that company)’ from the definition of ‘prescribed authority’ in section 4(1) of the FOI Act and omitting section 4(10) of the FOI Act.

### ***Commonwealth Bank Sale Act 1995***

4.2 The schedule of the *Commonwealth Bank Sale Act 1995* provides for the amendment of Part I of Schedule 2 of the FOI Act by deleting the reference to "Commonwealth Bank Officers Superannuation Corporation; Commonwealth Trading Bank; Commonwealth Savings Bank; Commonwealth Development Bank". Part I of Schedule 2 lists exempt agencies. The deletion of this item is a consequence of the privatisation of the Commonwealth Bank. The amendment takes effect at the transfer time which is defined as 'the time when the Commonwealth ceases to have the status of being the holder of shares in the Commonwealth Bank that carry more than 50% of the total voting rights attached to the voting shares in the Commonwealth Bank.' It is expected that the transfer time will be mid July 1996.

### ***Transport Legislation Amendment Act (No. 3) 1995***

4.3 Schedule 3 of the *Transport Legislation Amendment Act (No. 3) 1995* amended the reference in Schedule 3 of the FOI Act (Schedule of secrecy provisions to which the exemption in section 38 of the FOI Act applies) to 'Air Navigation Regulations, subregulation 283(1)' to substitute a reference to the '*Air Navigation Act 1920*, subsection 19CU(1)'.

### **Freedom of Information (Miscellaneous Provisions) Regulations**

4.4 The Freedom of Information (Miscellaneous Provisions) Regulations (FOI(MP) Regulations) were amended by the Freedom of Information (Miscellaneous Provisions) Regulations (Amendment) No. 326 of 1995 by deleting item 131 in Schedule 2 of the FOI(MP) Regulations – (Trade Practices Tribunal) – and inserting a new item after item 11:

11A Australian Competition Tribunal Registrar

4.5 These amendments were made necessary by the *Competition Policy Reform Act 1995* which continues the Trade Practices Tribunal, as it existed immediately before the commencement of the relevant provisions in that Act, as the Australian Competition Tribunal.

4.6 Attachment A of FOI Memorandum No. 95 sets out the FOI(MP) Regulations as at the date of that Memorandum. Schedule 2 of the Regulations as set out in that Attachment should be amended as indicated in paragraph 4.4 above.

4.7 The functions of the FOI(MP) Regulations were described in paragraph 1.2 of FOI Memorandum No. 95.

## **5. BUSINESS NAMES**

5.1 Both section 11 of the FOI Act, which provides the basic right of access under the FOI Act, and other sections in the FOI Act, use the word 'person' which normally includes 'a body politic or corporate' as well as an individual. A business name, which includes a firm or partnership trading under a business name and not as individuals, is not a natural person, a body politic or a body corporate and is, therefore, not entitled to make an application under the FOI Act. A business name is not a separate legal entity even though it is owned by a legal entity such as a natural person or a body corporate (*Re Morris and Australian Federal Police*, unreported, 7 April 1995, D358 paragraph 4). A similar situation occurred in *Re Watermark and Australian Industrial Property Organisation* (unreported, 21 December 1995, D373) where the AAT treated an application from a firm of patent attorneys as a personal one from the principal partner of the firm.

5.2 Where a firm or partnership makes an application under the FOI Act under a business name the agency to which the application has been made should contact the firm or partnership and ask whether the application should be treated as an application from a nominated partner in the firm or business as in *Watermark* above. Alternatively if, for example, a firm or partnership is a firm of solicitors acting for a client the application could be made in the name of that client.

## **6. FEE FOR APPLICATION TO THE AAT – INCREASE**

6.1 The fee for an application to the AAT for review of a decision has been increased from \$300 to \$368 from 1 January 1996 by an amendment to the Administrative Appeals Tribunal Regulations. Agencies which hold copies of the pamphlet on the FOI Act (see paragraph 8.1) are requested to amend the amount of \$300 shown as the fee under the heading **AAT review** to \$368 before distributing any copies of the pamphlet to the public.

[Application fee increased to \$500 from 1 September 1996 – New provisions introduced into these regulations from that date provide that the fee will be increased on each biennial anniversary of 1 July 1996 in accordance with a calculation based on the Consumer Price Index.]

## **7. CURRENT FOI MEMORANDUMS**

7.1 The opportunity has been taken to revise the list of current FOI Memorandums and delete Memorandums which are no longer required. The

revised list is set out in Attachment B to this memorandum \*.  
Memorandums have been deleted where they have been replaced by a later Memorandum or all matters dealt with in those Memorandums are no longer relevant. Memorandums which were issued prior to the issue of FOI Memorandum No. 92 on 1 October 1991 (dealing with the *Freedom of Information Amendment Act 1991*) should be treated with caution as amendments to the FOI Act or developing FOI case law may have made particular paragraphs of those Memorandums obsolete. It is intended to issue progressively updated commentaries on the exemption provisions.

## 8. FOI PAMPHLET

8.1 In 1995 the Information Access Unit issued a revised version of the pamphlet on the FOI Act and agencies are requested to destroy any remaining copies of the previous green pamphlet. Printed copies of the pamphlet are available from the Information Access Unit. A copy is attached to this Memorandum as Attachment C \*\*.

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### ATTACHMENT A

#### ADMINISTRATIVE APPEALS TRIBUNAL

Ref: K037

8 March 1996

Address

Dear .....

Recent amendments to the *Administrative Appeals Tribunal Act 1975* have made some changes relating to the lodgment of documents with the Tribunal under section 37 of that Act.

As you know, under section 37, departments and agencies are required to lodge with the Tribunal within 28 days after receiving notice of an application:

- (a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and
- (b) every other document or part of a document that is in possession or under the person's control and is considered by the person to be relevant to the review of the decision by the Tribunal.

Two copies of those documents, generally referred to as the "T documents", are required to be lodged with 28 days. The Tribunal may, however, direct that additional copies be lodged at a later time. Section 37(1AA) now provides that if the Tribunal makes such a direction, it must be complied with.

New section 37(1AE) provides

"A person who is required under subsection (1) or (1AB) to lodge 2 copies of a statement or other document or part of a document with the Tribunal under this section within a particular period must also give a copy of the statement or other document or part of a document within that period to each other party to the proceeding."

Prior to this amendment a copy of the T documents was provided to the applicant by the Tribunal. The amendment makes clear, however, that departments or agencies are now responsible for supplying the documents directly to an applicant and to any joined parties.

In future therefore, departments and agencies will be responsible for forwarding T documents to applicants. An applicant's address for service of documents appears on the copy of the application form forwarded to your department or agency with the notice informing you of the application. There may be some confusion in the initial stages of the new arrangements. It would therefore be desirable if departments and agencies could inform the Tribunal that a copy of the T documents have been sent to the applicant at the time those documents are lodged with the Tribunal.

While the Act provides that two copies of the T documents be lodged with the Tribunal, it will be sufficient for the Tribunal's purposes if only one copy is provided to the Tribunal and the other sent directly to the applicant. As noted above, the Tribunal may require additional copies at a late date if, for example, the matter goes to hearing before a multi-member Tribunal.

I would be grateful if you could pass this letter on to relevant areas in your department or agency so that they are aware of this responsibility. It would also be appreciated if the information could be passed on to your state branches, if relevant.

If any further information is required, please contact me on (02) 391 2497.

Yours sincerely

**KAY RANSOME**  
**Assistant Registrar**

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**FOI MEMORANDUMS ATTACHMENT B**

MEMO NO	PART NO	TITLE	DATE ISSUED
1	-18	DELETED	
19	(NEW)	Preliminary and Procedural Points	17/12/1993
20	(NEW)	Statistics and Reporting	30/05/1993
21	[1]	Documents in which a State or the NT has an interest	07/02/1984
22		DELETED	
23	[1]	FOI Act provisions re documents containing information relating to personal affairs	01/12/1984
24		S. 9: obligations to make documents available for inspection and purchase	13/09/1982
25		Section 8 Statements : Update No. 1	01/09/1988
26	(NEW)	Statements of Reasons	30/06/1993
26A	(NEW)	Section 26A: Procedure on request in respect of documents likely to affect Commonwealth–State relations	30/06/1996
27		The S. 36 internal working document exemption	10/09/1982
28		Part V: amendment of personal records	13/09/1982
29	(NEW)	Fees and Charges	04/11/1992
30		DELETED	
31	[1]	Inter-Agency consultation & S. 16 transfer of requests	01/01/1985
32		DELETED	
33		Review of decisions	15/11/1982
34	[1]	Cabinet & Executive Council Documents (Ss 34 & 35)	01/12/1984
35		S.45 - breach of confidence	24/09/1982
36		DELETED	
37		S. 37 - documents affecting enforcement of law and protection of public safety	23/11/1982
38		DELETED	
39		S. 39 - documents affecting financial or property interests of the Commonwealth or an agency	11/11/1982
40		S. 40 - documents concerning certain operations of agencies	22/11/1982
41		DELETED	
42		S. 42 - legal professional privilege	16/11/1982

43		S. 43 business affairs exemption & S. 27 reverse-FOI procedures	29/10/1982
44		S. 44 - documents affecting the national economy	05/11/1982
45	[1]	Levels of decision makers	07/12/1984

MEMO NO	PART NO	TITLE	DATE ISSUED
46		S. 46 documents subject to orders of Courts, Tribs, Royal Commissions, or Parl. Privilege	12/11/1982
47		DELETED	
48		S. 33 Defence, Security & International Relations	12/11/1982
49	-56	DELETED	
57		Consistency of argument before Tribunals & Courts	07/07/1983
58	- 60	DELETED	
61		Information Access Offices	25/11/1983
62	- 63	DELETED	
64		FOI Amendment Act 1983 (provisions)	14/02/1984
65		Disclosure of the existence of documents to the AAT	13/03/1984
66	- 75	DELETED	
76		AAT Practice Direction: filing affidavits and schedule of documents in FOI Act matters	03/06/1985
77		Government directions on administration of FOI Act	01/06/1985
78	- 79	DELETED	
80		Change of address of Sydney Information Access Office	04/09/1985
81		DELETED	
82		S. 37(1)(c) - documents affecting enforcement of the law & protection of public safety	14/05/1986
83		DELETED	
84		FOI Laws Amendment Act 1986	01/11/1986
84A		Clarification of FOI Memorandum No. 84	01/8/1987
85	-88	DELETED	
89		Archive Act Decision Summaries	01/09/1987

90	- 91	DELETED	
92		Freedom of Information Amendment Bill 1991	01/10/1991
93		FOI and the Privacy Act	01/02/1992
94		Amendments to the FOI Act 1982 since the FOI Amendment Act 1991	30/06/1994
95		Freedom of Information (Miscellaneous Provisions) Regulations – Government Guidelines on Administration of the FOI Act - List of Current FOI Memorandums	30/06/1995
96		Freedom of Information Time Limits	30/06/1995
97		FOI and amendments to Administrative Appeals Tribunal Act 1975 – Amendments to FOI legislation – other matters including List of Current FOI Memorandums	30/06/1996

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## ATTACHMENT C

### Freedom of Information ACT

#### What are my rights under the Freedom of Information Act

- Briefly, the FOI Act gives you the legal right to:

—see documents (including those containing personal information about yourself) held by Commonwealth Ministers, their Departments and some statutory authorities. In this pamphlet these bodies are called agencies;

—see documents held by a non-government agency if the agency is accredited by the Employment Services Regulatory Authority for the purpose of assisting persons to find employment (this is limited to services and functions performed by the agency in accordance with its accredited purpose);

—ask for information concerning you to be changed, if it is incomplete, out of date, incorrect or misleading;

—appeal against a decision not to grant access to a document or amend or annotate a personal record.

- The FOI Act also requires agencies to make available detailed information about the:

—way they are organised;

—functions they have;



- kinds of decisions they make;
- arrangements they have for public involvement in their work;
- documents they hold and how you can see them;
- rules and practices which are used in making decisions which affect you.

- You can look at and, if you wish, buy copies of manuals and guidelines which agencies use in making decisions which affect you.
- For more information on how you can see these documents talk to the FOI Contact Officer in the relevant agency

### **Employees and former employees of agencies**

- If you are an employee or former employee of an agency which has established procedures to allow employees or former employees access to their own personnel records and you wish to see your own personnel records you must first use those procedures.
- If you are dissatisfied with the result of using those procedures or you are not notified within 30 days of the outcome of the request for your records you may then make a request under the FOI Act.

### **What other documents may I see?**

- The Act gives you a right to see:
  - documents, no matter how old, containing personal information about yourself;
  - documents, no older than 1 December 1977, relating to anything else (they can be older if you need them to understand another document you already have).
- Documents include files, reports, computer printouts, tapes or disks, maps plans, photographs, microfiche, tape recordings, films or videotapes.

### **Documents held by State and Australian Capital Territory agencies**

- The States and the Australian Capital Territory have their own FOI legislation. Requests for documents held by State or Australian Capital Territory agencies should be directed to the appropriate State or Australian Capital Territory authority.
- Police services in the Australian Capital Territory are provided by the Australian Federal Police. Inquiries concerning documents held by the police

in the Australian Capital Territory should be directed to the Australian Federal Police.

## **How do I make an FOI request?**

- Identify the document you want and which agency has it. (Government agencies have special FOI officers who can assist you in making your request.)
- Write the request. (Some agencies have special forms for this — a sample form is attached to this pamphlet but you do not have to use it. You can also just write a letter.)
- Give an address in Australia at which notices under the FOI Act may be sent to you.
- Give as much information as you can about the document you want (for example, give a file number, a reference to a newspaper report about it or describe the subject matter in which you are interested).
- Enclose the \$30.00 application fee (in certain instances the fee is not required or can be remitted — see below).
- Post or deliver your request to the agency. You find its address by using the current telephone directory.

## **What must an agency do when it gets my request?**

- Tell you within 14 days that it has received the request.
- Deal with it as soon as possible.
- Talk to you about any difficulties in dealing with it.
- As soon as possible give you an estimate of the charges if any are applicable (see below).
- Within 30 days tell you the decision on giving you access. (Where an agency has to consult a third party, the agency may extend the time in which it is required to tell you its decision by another 30 days. Consultation is usually necessary where the document contains information about the third party.)

## **How much will it cost me?**

### Application fees

- There is an application fee of \$30 for FOI requests.
- There is a separate application fee of \$40 for internal review of a decision

## Processing charges

- The charge for locating documents is \$15 per hour.
- The charge for agencies' decision—making and consultation time is \$20 per hour.
- There are charges in relation to the provision of access (e.g. 10c per photocopy, \$6.25 per half hour supervised inspection and special rates for special services such as tape transcription or computer output).

Requests for personal information may incur a maximum charge of 2 hours for locating documents and a further 2 hours for decision making time. However, full rates for the provision of access apply.

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## Exemption and remission

- Fees or charges are generally not payable in respect of requests for access to personal income maintenance documents (e.g. pensions, unemployment benefits, student allowances).
- Remission of fees can be sought having regard to, amongst other factors, financial hardship or public interest.
- Agencies cannot impose a charge without first consulting you about the amount of the charge, your ability to pay the charge in full or at a reduced rate or whether there is a public interest in you being given access to the documents.

## Deposits

- Where an estimated charge exceeds \$25 a deposit may be required. Where a deposit has been sought or a charge imposed no further action need be taken by the agency until payment is received.

## **How will the documents be given to me?**

- The agency can let you see the documents, or give you a copy. In some cases another form may be more appropriate (e.g listening to a tape recording).
- If copies are not sent to you, the agency will let you know how, when and where you can see them. This may be at the agency's office, the Australian Archives Information Access Office nearest to where you live, or another Commonwealth agency's office nearest to where you live.
- Should you have a preference, say so when making your FOI request. Generally you will be given access in that form.

- Special procedures may apply if you want to see information which concerns your physical or mental health:

—the Minister or head of the agency concerned may decide to give it to an appropriate health care worker, social worker or marriage guidance counsellor (here called a "qualified person") of your choice rather than to you directly;

—this can be done where the Minister or head of the agency thinks that giving it to you directly might prejudice your physical or mental health or well-being;

—you can appeal against the decision to give it to a qualified person rather than to you directly, but what that person tells you or shows you is a matter for his or her judgement.

### **Can I see all official documents?**

- No. The Act sets out certain types of documents which you may not be able to see (called exempt documents). These types of documents are those which the Parliament believes should normally be kept confidential to protect essential public interests or the private or business affairs of others.
- If an agency decides not to give access to the document you asked for, it must identify the documents withheld, give you written reasons for the decision and advise you of your rights of appeal.
- In most cases an FOI request will be refused where it would lead to an unreasonable disclosure of someone else's personal information.
- Where you want to see documents containing your own personal information, the agency may ask to see some proof of your identity.

### **Can I have documents about me corrected?**

- Yes, providing you have had lawful access to the documents and they have been or are being used by the agency concerned for an administrative purpose.
- If after seeing your documents you believe the information they contain to be incomplete, incorrect, out of date or misleading, you have a legal right to ask that it be corrected, if one of these grounds is established.
- You can ask for corrections to be made by amending the record or adding an appropriate annotation, or both.
- Companies, incorporated associations and the like are not entitled to have records about their affairs corrected under the Act.

### **How do I ask for correction of documents about me?**

- Simply write and ask. No application fee applies.
- Identify what information is incomplete, incorrect, out of date or misleading.
- Explain with as much detail as possible:
  - what the facts are and what evidence there is to support them;
  - what changes you want made.
- Post or deliver your request to the agency which gave you access to your file or documents. Give your address for correspondence.

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### **What must the agency do when it gets my request for amendment of personal records?**

- The agency must deal with your request as soon as practicable and tell you within 30 days what it has decided.
- If it decides not to make the changes you asked for (or decides to make different ones), it must tell you why and advise you of your rights of appeal.

### **What FOI decisions can I appeal against?**

- Decisions not letting you see what you want when you want, in the form you want, or at all.
- Decisions relating to remission of an application fee.
- Decisions imposing a charge to see what you want.
- Decisions in respect of the amount of the charge imposed upon you.
- Decisions refusing to change or annotate documents about you which you think are incomplete, incorrect, out of date or misleading.
- Decisions letting others see documents which you say would unreasonably disclose:
  - your personal information;
  - your lawful business or professional affairs;
  - lawful business, commercial or financial affairs of your firm.
- Decisions to give you access to documents about your physical or mental health through a qualified person and not directly to you.

## What kinds of appeal do I have?

- You can:
  - require the agency to reconsider its decision ("internal review");
  - seek an independent review of the decision by the Administrative Appeals Tribunal ("AAT review");
  - complain to the Commonwealth Ombudsman about the agency's decision or action ('Ombudsman review').
- You also have a legal right to appeal if the agency does not tell you what decisions have been made on your request or delays telling you.

## Internal Review

- You can ask the agency to reconsider its decision as long as it was not made by the Minister or agency head concerned.
- Generally, you must apply for internal review within 30 days of being told of the decision, but you can ask for extra time.
- Simply write to the agency, enclosing the \$40 application fee, and ask for internal review — some agencies have a special form, but you can just write if you prefer. It will help if you say why you think the decision should be changed or what aspects of the decision are of concern to you.
- Someone other than the person who made the first decision will then make a fresh decision.
- You will be given the new decision within 30 days and written reasons if access or amendment is refused.
- You can then appeal to the AAT or complain to the Ombudsman if still dissatisfied with the decision given.

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## AAT review

- The AAT is an independent body responsible for reviewing administrative decisions by agencies. It decides whether the decision made on your FOI request was right.
- In almost all cases, the AAT can change the agency's decision.
- In special cases where a conclusive certificate has been issued, the AAT can only determine whether reasonable grounds exist for certain claims made in

the certificate. It is then up to the Minister to decide whether access should be given.

- You can appeal to the AAT if:

- your request was originally decided by a Minister or agency head;

- you are unhappy with an internal review decision;

- there has been agency delay (see "What about delays?" below).

- The AAT will tell you when and where your case will be heard, who will be there, what will happen, what you should bring with you, what happens at the end of the hearing and other things you should know.

- Generally, you must apply for AAT review within 60 days of being told the decision and enclose a \$368 application fee. (If your application is against another person being given access to documents containing information about you, you must apply within 30 days.)

- You cannot appeal to the AAT if:

- internal review was possible, but you did not ask for it (unless you are appealing against another person being given access to documents containing information about you);

- you have complained to the Ombudsman, but have not yet received the Ombudsman's report.

- If you think the AAT has made a mistake of law in its decision you can appeal to the Federal Court.

## **Ombudsman review**

- The Commonwealth Ombudsman has power to investigate agency actions under the FOI Act, including decisions, delays, and refusal or failure to act.

- The Ombudsman can review FOI decisions to make sure they were made in a fair and proper way. The Ombudsman can't change the decision, but can recommend that this be done.

- Before complaining to the Ombudsman, first try to solve your problem with the agency. Get in touch with the FOI Contact Officer in the agency. Explain your point of view clearly and ask for the action or decision concerned to be reconsidered. The Ombudsman usually won't investigate until internal review has occurred.

- If you complain to the Ombudsman, you can't appeal to the AAT until you have received the Ombudsman's report on your complaint.

## **Judicial review**

- As well as hearing appeals from the AAT, the Federal Court can review the original decision concerning an FOI request but it usually won't do so if you could appeal to the AAT first.
- In this process, called judicial review, the Court decides whether the decision or action taken by the agency was lawful. If it decides it was not, the agency usually makes a new decision taking account of any directions by the Court.
- However, the Court can't change the decision as the AAT can. Because the procedures may be complex and could be very expensive, you should not take an appeal to the Court or seek judicial review without first getting legal advice.

## **What about delays?**

- Agencies must tell you their decision within:
  - 30 days, in the case of a request to see a document;
  - 30 days, in the case of a request to amend personal records about you;
  - 30 days, in the case of a request for internal review;
  - 30 days, where you have lodged a contention that a charge should be reduced, or not imposed, or that an application fee should be remitted.
- If they do not, you can appeal to the AAT. In some circumstances an extension of time can be claimed by the agency, so it is advisable to check with it before lodging an appeal.

The FOI Contact Officer should advise you of likely delays which may occur in processing your request.

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## **What will it cost me to appeal?**

- No fees are payable for Ombudsman review.
- You will have to pay for your own legal representation (unless you represent yourself), witnesses expenses, and other costs connected with your AAT or Federal Court case unless:
  - you are given legal aid; or



—your case is successful and the Commonwealth pays them by order of the Federal Court or recommendation of the AAT.

- If your AAT case is unsuccessful, you won't have to pay the agency's costs (but you may have to if your Federal Court case is unsuccessful).

**Further Information**

- For detailed information on FOI matters in Government agencies **SPEAK FIRST TO THE AGENCY'S FOI CONTACT OFFICER**. In most cases, you will be able to get in touch through the agency's office nearest to where you live. You can find the address and telephone number in the telephone directory.
- If you still have queries after approaching a Government agency or do not receive adequate assistance from a non—government agency, you can also write to

Attorney—General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

- For further information about complaining to the Commonwealth Ombudsman or seeking AAT review, get in touch with the Ombudsman's representative or AAT Registry in your nearest capital city. The addresses and telephone numbers are in the telephone directory.

Sample application form

**APPLICATION FOR DOCUMENTS UNDER THE  
COMMONWEALTH FREEDOM OF INFORMATION ACT 1982**

Send to the address of the central or regional office of the agency or Minister in the current telephone directory.

You do not have to use this form. A letter containing the same information will do.

Name of agency or Minister

.....

Name of applicant

.....

Your address in Australia to which notices under the Act should be sent

.....  
Telephone number of applicant.....(W).....(H)

Fax number of applicant.....

(The Freedom of Information Act 1982 does not require an applicant to supply a telephone or fax number but doing so will make it easier for an agency to consult you about your application.)

I am applying for the following document/s. (Give as much information as you can about the document/s, for example the file number or date of the document/s if you have them or describe as accurately as you can what the contents of the document/s may be.)

.....

(If the space is insufficient attach a separate sheet.)

I enclose the \$30 application fee/ I am applying for remission of the application fee on the following grounds

.....

Signature of applicant.....Date.....