



## Australian Government

### Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT  
BARTON

Mr Stephen Palethorpe  
Committee Secretary  
Senate Standing Committee on Finance and Public Administration  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Mr Palethorpe

#### **Inquiry on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009**

I am writing in reply to the Committee's request that the Department of the Prime Minister and Cabinet confirm in writing the reason that the Freedom of Information Amendment (Reform) Bill 2009 proposes a different position relating to which review party bears the onus in a merits review proceeding conducted by the Administrative Appeals Tribunal (the AAT) than currently applies.

#### *Information Commissioner review*

2. The Bill will introduce a new level of external merits review for FOI applicants that will apply before review by the AAT. This review right will also be available to third parties who are affected by a decision to give access to a document. An FOI applicant will be able to apply to the Information Commissioner for review of an agency's or Minister's decision to refuse access to documents (IC review). An affected third party may also apply for IC review of a decision to give access to a document containing information concerning their affairs. If the FOI applicant or affected third party remains dissatisfied with an IC review decision, a further right of review to the AAT is still available. An applicant must apply for IC review before applying to the AAT. AAT review has been retained for highly contested matters and offers oversight for decisions by the Information Commissioner.

3. Where an FOI applicant applies for IC review, the Bill places the onus on the agency or Minister to defend their FOI decision (new subsection 55D(1), item 34 of Schedule 4). Where an affected third party applies for IC review, the Bill places the onus on the third party to establish that a decision should be given to refuse the FOI request (new subsection 55D(2)). Both these measures are analogous to the current position that applies when the AAT reviews an FOI decision of an agency or Minister (current section 61).

#### *AAT review*

4. As the Act currently stands the respondent in the AAT is always the Minister or the agency whose decision is under review. The introduction of IC review before AAT review means that the AAT will be reviewing the decision of the Information Commissioner not the

decision of the agency or Minister. The Information Commissioner will not be a respondent to AAT review proceedings and will not be defending his or her decision. It is for those reasons that the Bill places the onus on whoever applies for AAT review. If an agency or Minister applies for AAT review they will have the onus of establishing that the decision of the Information Commissioner is not justified. An affected third party will have the onus of establishing that a decision refusing access should be given whether they are the AAT applicant or a respondent.


5. Unlike civil litigation (including administrative law litigation) and criminal prosecutions, where concepts of onus and burden of proof are familiar, merits review involves an exercise of administrative power not judicial power. This means the AAT addresses the same administrative decision the original decision maker was required to address and can substitute its own decision on the material before the tribunal (see High Court decision in *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [36-38], [100], [140-142]; also section 43 AAT Act). For that purpose, for an FOI review application of an exemption claim, the AAT does not simply defer to prior reasons for decision, evidence or other contentions put forward by parties to the review proceedings. The AAT may require production of a document in order to be satisfied that an exemption claim is correct (sections 58E and 64 FOI Act). That power serves as a safeguard for an FOI applicant who does not have access to an exempt document in a review proceeding.

6. The Bill also preserves the obligation imposed on the agency or Minister who made the original decision to use their 'best endeavours' to assist the AAT to make its decision (subsection 33(1AA) AAT Act as proposed for amendment by item 2 in the table at new subsection 61A(1), item 42 of Schedule 4). The Bill does not change the existing obligation on the AAT to ensure every party is given a reasonable opportunity to present their case (section 39 AAT Act).

*Omission under new subsection 61*

7. In the course of reviewing new section 61, PM&C has identified an omission which has the effect that an FOI applicant would have the 'onus' of establishing that an FOI decision is not justified at the first level of external merits review. There is one circumstance where the AAT is the first level of external merits review. This will arise when the Information Commissioner exercises the power not to review an application because the Commissioner is satisfied that the interests of the administration of the Act make it desirable that the AAT review the decision (new section 54W (b), item 34 Schedule 4). While it is intended that the Information Commissioner undertake most reviews, this power might be exercised in limited cases such as where it is clear a matter will be highly contested. In this case, the AAT will be reviewing the decision of the agency or Minister at first instance and it would be consistent with the approach in the Bill (see new section 55D) to provide for the agency or Minister to bear the onus of establishing that the decision they made was justified.

Yours sincerely

 Glenys Beauchamp  
Deputy Secretary

 March 2010