

11 August 2009

Ms Sharon Grierson MP  
Chair  
Joint Committee of Public Accounts and Audit  
Parliament House  
CANBERRA ACT 2600

Dear Ms Grierson

At the Committee's hearing on Monday 22 June 2009, I undertook to provide a further submission to the Committee on the following matters:

- the Auditor-General's exemption from the FOI Act;
- the Auditor-General's exemption from the Privacy Act;
- legal professional privilege; and
- the Auditor-General's role in an APS whistleblower scheme.

### **Exemption from the Freedom of Information Act**

Schedule 2 of the *Freedom of Information Act 1982* (FOI Act) lists the Auditor-General as an exempt agency. This exemption means that none of the provisions of the Act apply to the Auditor-General. This exemption is long standing, having been in place since the FOI Act was first enacted in 1982.

In broad terms, the FOI Act gives members of the public, upon application, right of access to documents of Australian Government agencies and to official documents of Ministers. The FOI Act also provides avenues for individuals to access their personal records kept by Government. The FOI Act also requires agencies to publish a range of documents and information including manuals and like materials which agencies use in making decisions or recommendations affecting members of the public; details of documents held and how access can be sought; and details of functions and powers affecting members of the public.

The FOI Act includes a range of documents that are exempt from disclosure. These include documents relating to such issues as national security, defence or international relations and material obtained in confidence; and particular cases or kinds of documents such as Cabinet documents and those covered by legal professional privilege. Documents are also exempt if their disclosure would disclose information relating to the deliberative processes involved in the functions of agencies or would be contrary to the public interest.

The ANAO considers there are a number of reasons why it is appropriate that the Auditor-General is exempt from the operations of this Act. In summary, these reasons include:

- The Auditor-General, through the conduct of audits and related activities, is responsible for providing to the Parliament an independent assessment of the operations of public sector entities. The Auditor-General is an independent Officer of the Parliament, performs no executive functions, and makes no decisions or recommendations that directly affect members of the public. The outcome of all audit and related functions are publicly available, thereby achieving the objective of public accountability that is also an objective of the FOI Act.
- The majority of documents in the possession of the ANAO are obtained from agencies, or are generated by the ANAO for the purposes of producing an audit report or forming an audit opinion that is tabled in the Parliament. Requests to access agency documents are able to be made directly to the agency concerned. Where documents are provided to the ANAO in confidence, it is important that their confidentiality is maintained.
- The general principle of confidentiality of information obtained during the course of an audit is reinforced by the *Code of Ethics for Professional Accountants*<sup>1</sup> and by sub-section 36(1) of the *Auditor-General Act 1997*.
- The FOI exemption for the Auditor-General at the federal level is consistent with the position for Auditors-General in the majority of States and Territories.

These matters are discussed in more detail below.

The independence of the Auditor-General is central to the Auditor-General being able to undertake his or her responsibilities in an effective manner. As the Committee would be aware, the Auditor-General Act enshrines the independence of the Auditor-General in a number of ways, including:

- the Auditor-General is an independent officer of the Parliament (sub-section 8(1));
- subject to the Auditor-General Act and other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers (sub-section 8(4)); and
- the appointment of the Auditor-General provides that his or her appointment is subject to approval by the JCPAA (Schedule 1, section 2).

The independence of the Auditor-General places the Auditor-General, and by extension the ANAO, in a unique position within our system of government to provide the Parliament with an independent and objective assessment of the operations of public sector entities. The role of the Auditor-General is an important element of the accountability framework established by the Parliament, which involves the public reporting of his or her assessment of the performance of public sector entities. The Auditor-General performs no executive functions and does not make decisions or recommendations that directly affect members of the public.

The FOI Act is another element of that accountability framework that is designed to enhance the accountability of Government. The ANAO considers that the objective of public accountability is achieved through the public availability of audit reports and opinions, and there would be no demonstrable public benefit in requiring the Auditor-General to be subject

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<sup>1</sup> This Code is issued by the Accounting Professional and Ethical Standards Board and is applicable to all staff undertaking financial statement and performance audits.

to the FOI Act. The ANAO suggests that this course of action could adversely impact the audit process and therefore has the potential to impede the effectiveness of the Auditor-General's role. This in turn could adversely impact public accountability generally.

One of the 'cornerstone' documents that guides the conduct of the ANAO's audits is APES 320 *Code of Ethics for Professional Accountants*. The Code sets out five 'Fundamental Principles', one of which is confidentiality.<sup>2</sup> In broad terms, the Code reinforces the need to maintain the confidentiality of information obtained during the course of an audit. The need to maintain the confidentiality of information is reinforced by section 36(1) of the Act that prohibits the disclosure of information obtained in the course of performing an Auditor-General function.

The documents and records that are obtained or generated by the Australian National Audit Office (ANAO) in the course of performing an Auditor-General function<sup>3</sup> are in the nature of working papers and constitute the audit evidence to support the audit findings, conclusions and opinions expressed in our audit reports and audit opinions. As the Committee would be aware, performance audit reports are tabled in the Parliament; assurance reports are made public via the ANAO website; and audit opinions on entities' annual financial statements are included in each entity's annual report that is tabled in the Parliament by the responsible Minister. As such, the final reports from our audit processes are publicly available and open to community scrutiny, in addition to scrutiny by the Parliament. All material matters affecting any audit are required, by the ANAO Auditing Standards and professional standards, to be taken into account in reaching audit conclusions.

Audit working papers broadly comprise documents and records obtained from entities subject to audit that the ANAO has obtained using the information gathering powers contained in the Auditor-General Act as well as internally generated documents such as the analysis of audit evidence collected from entities, discussion papers and drafts of reports and opinions that are prepared for consideration by ANAO management and, in some cases, by entities as part of the process of preparing a final audit report. The views and opinions expressed in records or documents that are prepared by staff of the ANAO do not necessarily represent the final considered views of the Auditor-General. The considered views of the Auditor-General or delegate are those that are contained in the final audit report or audit opinion.

As noted earlier, the majority of the documents and records held by the ANAO are copies of documents and records owned by other Australian Government entities and have been collected for the purpose of performing an Auditor-General function. The ANAO considers that, should individuals wish to seek access to such documents and records, the appropriate course would be for them to submit a request under the FOI Act to the relevant entity rather than seeking to obtain access from the ANAO. Should the Auditor-General be subject to the FOI Act, he or she would be in a position of making decisions about documents that are the property of the Executive Government. The ANAO considers it would be inappropriate for the Auditor-General to be placed in such a position as he or she could not be expected to be aware of all the relevant considerations that may need to be taken into account in responding to an FOI request in respect of such documents and records.

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<sup>2</sup> The other principles are Integrity, Objectivity, Professional competence and due care, and professional behaviour.

<sup>3</sup> An Auditor-General function is defined in the *Auditor-General Act 1997* as 'a function that the Auditor-General has under this Act or any other Act, and includes any function that the Auditor-General has when acting as auditor under the *Corporations act 2001*'.

We have also obtained advice from State and Territory Audit Offices about the application of legislation equivalent to the FOI Act in their respective jurisdictions. With the exception of Tasmania and the Australian Capital Territory, all Auditors-General are exempt from their respective freedom of information regimes either in full or in respect of their auditing functions. The Tasmanian Audit Office has advised that the Tasmanian Government has agreed to include an exemption for the Tasmanian Auditor-General in amendments currently being made to the FOI Act. The ACT Audit Office has advised that the confidentiality provisions of their Auditor-General Act have precedence over the broader provisions of the FOI Act. A summary of the position in each State and Territory is set out in the attachment.

One option which the Committee may wish to consider would be for the FOI Act to apply to all non-audit related information and records. This would mean that the FOI Act would apply to the ANAO's administrative functions.

### **Exemption from the *Privacy Act 1998***

We have received legal advice that concludes that the Auditor-General is also largely exempt from the provisions of the *Privacy Act 1998* (the Privacy Act) by virtue of the Auditor-General's exemption from the FOI Act. The advice notes, however, that the application of the Privacy Act to the Auditor-General and the ANAO is in some respects uncertain, and legislative clarification would be warranted.

The ANAO's understanding, confirmed by advice from the Australian Government Solicitor, is that in broad terms the access and confidentiality provisions of the Auditor-General Act would take precedence over the majority of the provisions of the Privacy Act that relate to the activities of agencies that collect or receive personal information. The ANAO therefore considers that there would be little, if any, public benefit in changing the existing position.

As with the FOI Act, the ANAO acknowledges that one option would be for the ANAO, in the context of its administrative functions, to be subject to the Privacy Act.

### **Legal professional privilege**

We were also asked to consider an amendment of the Auditor-General Act that, while putting beyond doubt that legal professional privilege does not prevent access by the Auditor-General to documents and records, it would ensure the provision of documents or records to the Auditor-General would not result in the waiver of legal professional privilege by persons providing them to the Auditor-General.

Based on legal advice we have received, the ANAO suggests that this could be achieved through the inclusion in the Act of a specific power that allows the Auditor-General to access material over which entities claim legal professional privilege but this access does not amount to a waiver of this privilege by the entities concerned. While the wording of such a provision would need to be developed in consultation with the Office of Parliamentary Counsel, a provision along similar lines to one that is included in the *Inspector-General of Taxation Act 2003* would seem to satisfy this objective. The relevant section, together with the relevant extract from the Explanatory Memorandum to the *Inspector-General of Taxation Bill 2002*, is reproduced below.

## **8 No loss of legal professional privilege**

Information or a document does not cease to be the subject of legal professional privilege merely because it is:

- (a) included or referred to in a submission made in response to an invitation under section 13; or
- (b) given or produced in response, or included or referred to in a response, to a request or requirement made under section 14 or 15; or
- (c) referred to in answering a question asked pursuant to a request or requirement made under section 14 or 15.

### Clause 18 — No loss of legal professional privilege

3.58 The purpose of this clause is to ensure:

- that the Inspector-General can have access to all legal advice obtained by the Commissioner of Taxation that is relevant to inquiries into systemic tax administration issues; but
- that future administration of the tax laws by the Commissioner of Taxation is not compromised by unintended waiver of legal professional privilege resulting from disclosure of legal advice to the Inspector-General.

3.59 A further purpose is to enable the Inspector-General to see legal advice obtained by parties in the private sector relevant to matters under consideration by the office. Clearly, it is more likely that such advice will be provided if parties can be provided with some assurance that such actions will not result in a waiver of client legal privilege.

3.60 This clause provides that client legal privilege in a piece of information or a document is not waived simply by the act of disclosure to the Inspector-General. The clause applies to all voluntary or compulsory disclosures of information to the Inspector-General by tax officials and other persons.

It would also be necessary for any amendment to recognise the Auditor-General's discretion, subject to S37 of the Act, to include information subject to legal professional privilege in a public report.

### **The Auditor-General's role in an APS whistleblower scheme**

The Committee also sought my views on a potential role for the ANAO in a whistleblower scheme.


Under current arrangements, responsibility for administering the scheme rests with the Public Service Commissioner. As such, the scheme is part of the responsibilities of the Executive Government. To preserve the Auditor-General's independence, it is generally accepted that it is not appropriate for the Auditor-General to perform executive functions. In the past, the Auditor-General has been involved from time to time in performing executive functions such as in relation to electoral redistribution committees and tax agents' registration boards. Previous governments, with the strong support of the ANAO, have removed these executive responsibilities from the Auditor-General.

In this regard, the ANAO notes that the House of Representatives Legal and Constitutional Committee, in its report *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, canvasses options for providing the central oversight function and general administration of the proposed new legislation, as well as the roles that could be taken by other APS agencies in a new whistleblower scheme. No role for the ANAO is identified in the Committee's report.

The ANAO considers it is important that any consideration by the Committee concerning a role that the Auditor-General could have in an expanded whistleblower scheme ensures that the independence of the Auditor-General is not compromised.

The ANAO suggests that, apart from the ability to conduct a performance audit of the administration of a scheme by relevant Australian Government entities as part of its annual audit work program, any specific role for the ANAO would, potentially at least, be incompatible with the ANAO's central auditing responsibilities.

Yours sincerely



Ian McPhee

## Freedom of Information Act

### Position of State and Territory Auditors-General

State	Exempt	How long exempt?	Comments
Tasmania	No	N.A.	During a recent review of the FOI Act, automatic exemption from the Act has been agreed to. However, legislation is still to be drafted.
South Australia	Yes – Auditor-General	Since 1991	
Western Australia	Yes – Exemption applies to both the Auditor-General and the Office of the Auditor-General	Since 1992	
NSW	Yes – Exemption applies to the Audit Office of New South Wales	Since 1989	The New South Wales Audit Office exemption relates to its investigative, audit and reporting functions.
Victoria	Partial exemption	Since 1997	Any audit related material is exempt. All other material is subject to FOI access. Section 20B(2)(c) also provides specific exemption relating to documents which disclose information about any function of any agency carried out under the <i>Gambling Regulation Act 2003</i> .
Queensland	Partial exemption		Section 53 of the Auditor-General Act prevents an authorised auditor from disclosing “protected information” which is defined as information, other than information that is publicly available, that: (a) is disclosed to, or obtained by a person to whom this section applies in relation to an audit that has been, is being or will be conducted under this Act; and (b) is relevant to the audit. Schedule 3 of the <i>Right to Information Act 2009</i> identifies that information is not exempt information under sub-section 1. in relation to an access application if it is personal information for the applicant.

ACT	No		However, the confidentiality provisions of the Auditor-General Act that make it an offence to disclose 'protected information' other than in accordance with the Act have precedence over the disclosure requirements of the FOI Act.
NT	Yes - Exemption applies to the Auditor-General	Since 2006	