

Australian Security Intelligence Organisation

Supplementary Submission to the Parliamentary Joint Committee on ASIO

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Access to ASIO's archival records

*“An inquiry into the nature, scope and appropriateness of
the way in which ASIO reports to the Australian public on
its activities”*

2 August 2000

Submission by ASIO

This submission was prepared in response to questions raised about access to ASIO's archival records during the Committee's public hearing on 17 July 2000. It supplements information about ASIO's public reporting provided in a submission dated 5 July 2000.

Attached to this submission is a report on ASIO's progress in addressing recommendations made by Parliamentary Joint Committee following its April 1992 inquiry into the effect on ASIO of the operations of the access provisions of the Archives Act.

ASIO and the Archives Act

No Commonwealth department or agency, including ASIO, is excluded from the operation of the *Archives Act 1983*. Members of the public may apply for access to any ASIO records more than 30 years old.

ASIO, like the other Australian intelligence agencies, has elected to retain custody of its archival records. This is provided for in s.29 of the Archives Act. ASIO also takes responsibility for assessing its archival records for public release and providing advice on exemptions to National Archives of Australia.

There are no ASIO specific provisions in the *Archives Act 1983*.

Public access to ASIO's archival records

Members of the public seeking access to ASIO archival records can only do so through National Archives. Between 1,500 and 2,100 ASIO items are issued through the National Archives' reading room each year. Around 10% of applications are for records that are not already in National Archives' custody. In these cases, National Archives forwards applications for access to ASIO.

On receipt of a new application, members of ASIO's Public Research section check its subject or subjects against ASIO's name and file indexes. If relevant records exist and are in the 'open access period' (more than 30 years old), they are collated, assessed and forwarded to National Archives, who make them available to the applicant and anyone else seeking access to them. National Archives makes the final access decision in all cases.

ASIO received 157 new applications due for completion in FY 1999/00, covering 264 separate items or subjects. Seventy-three percent were completed within 90 days (the time period allowed for in the Archives Act).

The following table shows ASIO's performance over the last seven reporting periods.

FY	No. of new applications (items)	90 day completion rate	No. of staff working on archives matters.
93/94	241 (1633)	82.5%	12
94/95	221 (644)	85.0%	11.5
95/96	270 (1121)	89.6%	10.5
96/97	214 (731)	65%	5 to 7.4
97/98	166 (375)	86%	8.4
98/99	186 (328)	75%	8.4
99/00	157 (264)	73%	8.4 ¹

National Archives figures show that ASIO receives the third highest number of applications for access to archival records, behind the Department of Foreign Affairs and Trade (DFAT) and the Department of Defence. ASIO devotes a much higher percentage of its resources to archives work than either of those departments, or any other Australian intelligence agency.

The following table compares ASIO's workload and resource allocations to those of DFAT, the agency that receives the highest number of applications.

	DFAT	ASIO
Staff in agency in FY 1998/99	3,633	513
Number of Archives Act applications in FY 1998/99	521 applications (213 public; 258 official; 50 special access)	186 applications (for 328 subjects)
Staff working on examining files for release under the Archives Act	5.5 (0.15% of total staff)	8.4 (1.64% of total staff)

¹ ASIO staff working on Archives Act applications are being re-deployed to meet Sydney 2000 Olympic Games security intelligence priorities. Time spent to date on Olympics-related training and preparation accounts for much of the decline in the 90-day response rate in FY 99/00.

ASIO archival records require more extensive assessment for public release than those of other agencies. Many file series in other agencies contain little or no sensitive information and can be released without document-by-document, line-by-line examination. All ASIO files, however, contain classified or otherwise sensitive information.

ASIO officers must examine each document to determine whether release could affect confidential sources, liaison relationships, and methods of collecting intelligence. They must be aware that release of information can aid in building a comprehensive picture through a process we describe as 'mosaic analysis'. This is a method by which a persistent researcher can, for example, identify a confidential source by bringing together seemingly unconnected pieces of information on different documents and files.

Who seeks access to ASIO's archival records?

National Archives does not, as a matter of policy, provide ASIO with the names of individuals making applications for its archival records. National Archives withholds names on information privacy grounds.

National Archives does, however, invite applicants to indicate that they are seeking access to their own records, or those of close family members ('family requests'). If they do, the Archives includes the information with the application passed to ASIO. 'Family requests' are given priority and most are completed within 90 days. Many are from individuals who were members of the Communist Party of Australia in the 1950s and 1960s.

'Family requests' made up 36% of the new applications due for completion in FY 1990-00. Ninety percent of these were finalised within 90 days. A total of 2,820 folios or pages were assessed in response to these completed 'family requests'. Fourteen percent of the folios were released without exemption; 64% were partially released; and 22% were claimed as wholly exempt and not transferred to the Archives.

Some major researchers also choose to make themselves known to ASIO. Their requests typically absorb around 25% of the resources ASIO devotes to archives work.

What do they receive?

If members of the public lodge an application for ASIO archival records with National Archives – and the records they are seeking exist - they can expect to receive something in response. It is also true that virtually all files released to National Archives by ASIO contain some exemptions.

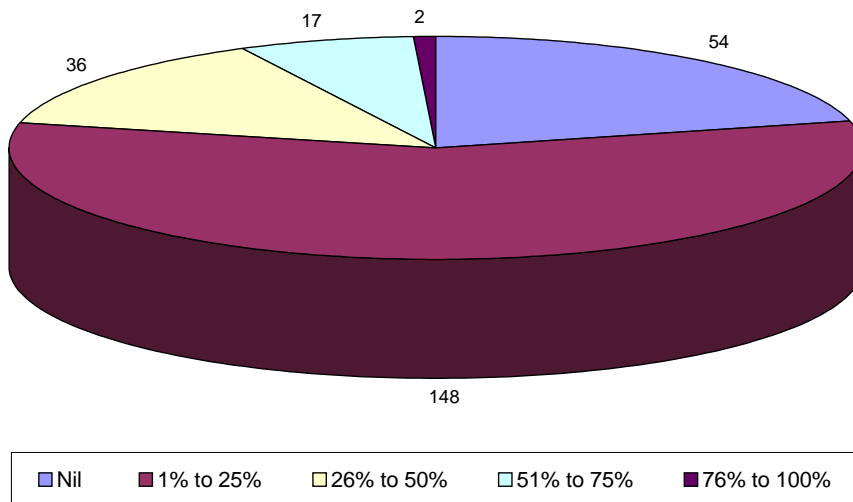
ASIO has not placed any class of its records outside the public access provisions of the Archives Act. We do, however, claim the personnel and security records of ASIO officers as wholly exempt on the basis of s.92(1) of the ASIO Act².

A proportion of the applications ASIO receives each year are for subjects that are either 'no trace' in our indexes, or for which there are no records in the open access period. ASIO gave a 'no trace' response to 22% of applications we received in FY 1999/00.

ASIO assessed more than 27,000 folios (pages) for public release in FY 1999-00. 21% were released without ASIO claiming exemption for any of the information they contained. Sixty percent were partially released. Nineteen percent were claimed as totally exempt because their disclosure could reasonably be expected to reveal the identity of a confidential source. These folios are not transferred to National Archives.

Two hundred and fifty-seven files containing wholly released and partially exempt folios were transferred to National Archives in FY 1999/00. Each file contained as few as one, or as many as 340 folios, depending on the number of records in the open access period. The following diagram and table show the distribution of totally exempt folios across those 257 files.

No. of Files released in 1999-2000 by the percentage of totally exempt folios they contain



² Section 92(1) of the *Australian Security Intelligence Organisation Act 1979* makes it an offence to make public that a person having a particular name is an officer or former officer of ASIO.

Files released to National Archives in FY 1999-2000	No. of files (folios)	% of total files (folios)
Category 1 – No totally exempt folios	54 (975)	21% (4%)
Category 2 - 1% to 25% totally exempt	148 (19,026)	58% (70%)
Category 3 - 26% to 50% totally exempt	36 (5,013)	14% (19%)
Category 4 - 51% to 75% totally exempt	17 (2,039)	7% (8%)
Category 5 - 76% to 100% totally exempt	2 (8)	1% (0%)

ASIO only claims exemptions where disclosure of the information could reasonably be expected to:

- Damage the security, defence or international relations of the Commonwealth [s.33(1)(a) of the Archives Act]; and/or
- Disclose or enable a person to ascertain the existence or identity of a confidential source [s.33(1)(e)(ii) of the Archives Act].

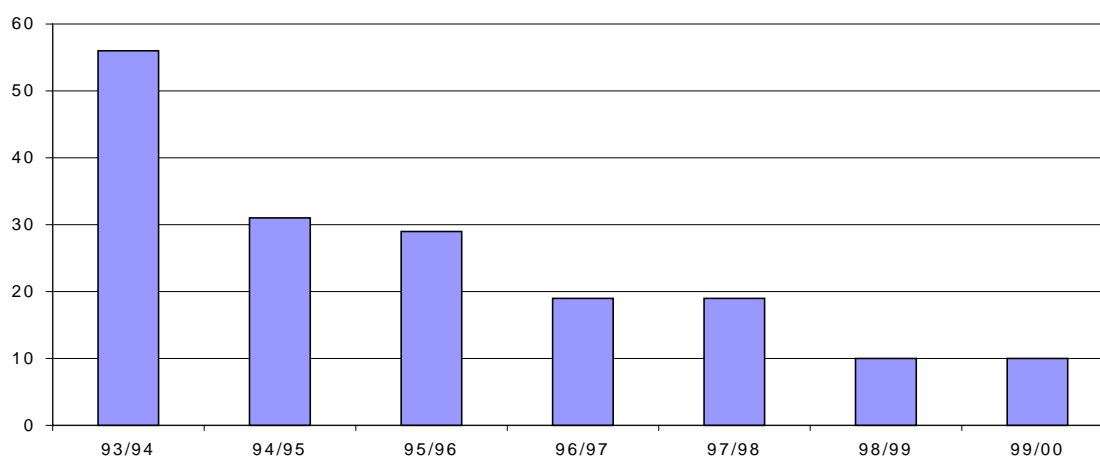
National Archives is responsible for claiming other exemptions in ASIO records [e.g. on personal privacy grounds, s.33(1)(g) of the Act].

Review of exemption decisions.

Applicants who are dissatisfied with the exemption claims can request an internal reconsideration under s.42 of the Archives Act. ASIO and National Archives officers jointly conduct internal reconsiderations. Because of the care put into the original decisions, most now result in minor or no change to the original decision.

The following graph shows the number of internal reconsideration applications received by ASIO in the last seven reporting periods.

Requests for Internal Reconsideration



The downward trend correlates with changes in ASIO's policy, designed to ensure that everything that can be released, is released at the initial assessment.

Further releases at the reconsideration stage are generally the result of approvals from ASIO's domestic and foreign liaison partners to release material provided by them. ASIO does not consult them at the initial stage, as the process is typically very slow and would delay researchers' access to other records.

Applicants dissatisfied with internal reconsiderations may then appeal to the Security Appeals Division of the Administrative Appeals Tribunal (AAT). The Tribunal may affirm the original decision to exempt or grant access to a record.

To date, there have been 30 AAT appeals concerning ASIO archival records, the first in February 1986. The following table shows their outcomes.

Exemption decision affirmed by the AAT	6
Exemption decision affirmed by AAT, with minor variations	7
Consent decision – mutually settled	6
Withdrawn by applicant	11
Exemption decision overturned by AAT	Nil

The cases that were resolved through negotiations between the parties ('consent decisions – mutually settled') resulted in either the release to the applicant of material previously claimed as exempt, or an explanation of the nature of the exempt material and the reasons for exemption sufficient to ameliorate the applicant's concerns.

Progress against PJC recommendations

“ASIO and the Archives Act: the effect on ASIO of the operation of the access provisions of the Archives Act” - April 1992

Recommendation 1: That guidelines be issued by the Minister to the Intelligence Agencies requiring that foreign material received in confidence should be exempted from disclosure for such period as that material is restricted from public access in the country of origin.

In practice, all information provided by foreign government agencies is claimed to be exempt unless the originating agency agrees to its release. The information is exempt because it could reasonably be expected to reveal the identity of a confidential source of information, and damage the security, defence or international relations of the Commonwealth. The AAT has consistently upheld our claim to exempt foreign-sourced information.

Recommendation 2. That the Archives Act should be amended to preclude any appeal to the Administrative Appeals Tribunal from a certification by the Inspector General of Intelligence and Security that the guidelines issued by the Minister respecting protection of foreign derived material has been properly observed.

Not actioned, legislative amendment required.

Recommendation 3. That the suppression of the identity of operatives, agents and sources, should be guaranteed in guidelines for a period of 30 years from the death of the operative, agent, or source.

In practice, all information that could reasonably be expected to disclose or enable a person to ascertain the identity of a confidential source of information is claimed as exempt from public release. The AAT has consistently upheld our claims to exempt such information.

Recommendation 4. That there should be no provision made to enable ASIO to exclude records from public access on the grounds of privacy unrelated to security.

ASIO only claims exemptions that are relevant to national security. National Archives claim privacy exemptions affecting ASIO records.

Recommendation 5. That ASIO records continue to be subject to the access provisions of the Archives Act. The open access period in respect of ASIO records should continue to be 30 years from the creation of the record. ASIO should continue to be obliged to make records in the open access period available save where the record is an exempt record under section 33 of the Archives Act.

ASIO records continue to be subject to these provisions of the Archives Act.

Recommendation 6. That Conclusive Certificates issued under the Archives Act should be subject to a 'sunset clause'. Section 34 of the Act should be amended to specify that a Conclusive Certificate issued by the Minister under the provision shall lapse after three years from the day it came into effect.

Not actioned, legislative amendment required. In its 1997 review of the Archives Act, the Australian Law Reform Commission (ALRC) recommended that Conclusive Certificates cease to have effect after 5 years, but be renewable. ASIO supported this recommendation.

Recommendation 7. That subsection 42(3) of the Archives Act relating to internal reconsideration of decisions should be amended to make it clear that the proper officer to make the decision on an application regarding access to records of ASIO should be the Director General of Security.

ASIO and National Archives staff jointly conduct Internal Reconsiderations and agree on a decision, although National Archives continues to be the formal respondent.

The ALRC recommended that this be altered so that the responsibility for reviewing a decision rests with the agency which has responsibility for making the initial decision - whether this is the National Archives or another responsible agency acting in accordance with an access agreement. ASIO supported this recommendation.

Recommendation 8. That an applicant for an internal reconsideration dissatisfied with the decision of the Director General of Security should be entitled to have that decision reviewed by the Inspector General of Intelligence and Security who should report his findings to the Minister who should determine the matter.

An applicant dissatisfied with the result of an Internal Reconsideration can appeal to the Administrative Appeals Tribunal (AAT). The AAT has affirmed, sometimes with minor amendments, ASIO/National Archives' decisions in all recent cases.

Recommendation 9. That there should be a right of appeal to the Administrative Appeals Tribunal from the decision of the Minister except in the circumstances referred to in Recommendation 8.

See the comment on Recommendation 8.

Recommendation 10. That the Government ensure that ASIO is provided with the necessary resources to enable it to discharge its statutory obligations under the Archives Act.

ASIO tripled resources in response to the 1992 PJC recommendations. In recent years, resources devoted to Archives issues have been reduced, as a result of further downsizing of the Organisation generally, but still remain well above 1992 levels. ASIO has a higher percentage of staff working on archives activities than any other agency of the Australian intelligence community. It also has a higher percentage of staff working on public access matters than either the Department of Defence or the Department of Foreign Affairs and Trade (DFAT).

Recommendation 11. That ASIO establish a special Archives Unit within the Organisation to manage applications for access to ASIO records in the open access period. The Unit should:

- a. be headed by a senior intelligence officer qualified as an historian/archivist whose identity should be capable of being known to the public and who should be authorised by ASIO to negotiate with researchers on behalf of the agency;**
- b. develop indices and finding aids that can be made available to the public without infringing national security;**
- c. devote some resources to preparing records, in advance, for release as they fall into the open access period.**

ASIO has established and maintained a Public Research section that responds to archives applications and manages all aspects of the Organisation's responsibilities under the Archives Act. A senior intelligence officer currently heads it. National Archives routinely provides researchers with the direct telephone number of ASIO's Director, Information Policy (D/IP) who has management responsibility for the Section. D/IP can negotiate on ASIO's behalf. Her name is made known to researchers once they have contacted ASIO.

Indexes and finding aids cannot be made available to the public without risking serious detriment to national security. ASIO's indexes and file registers provide very detailed evidence of the nature and scope of ASIO's activities. Whilst our activities are now broadly discussed in the unclassified Annual Report, the specific areas of intelligence interest, and the detail of ASIO's activities are not publicly known, and would cause damage to security if they become known.

ASIO realises that by not transferring our control records to National Archives, researchers will find it more difficult to access ASIO's records. We now actively seek to assist researchers in finding the records they want. Following the recommendations of the IGIS and the PJC in 1992, a policy of more open communication with researchers was adopted. ASIO officers will now help applicants refine and focus their applications, gain an understanding of their publishing schedules, and accommodate special requirements. However, ASIO's ability to do this is restricted by National Archives' policy of withholding the names of individuals making applications for ASIO records.

ASIO already commits a higher percentage of resources to archives-related activities than any other Australian intelligence agency, and, in fact, a higher percentage of resources than DFAT and Defence each commit to their public access responsibilities (Archives and Freedom of Information). We cannot afford to commit more resources to this function. Given the numbers of applications we receive each year, devoting resources to pro-active assessment of records would seriously damage our efforts to respond to new applications within 90 days and clear already back-logged applications.

Recommendation 12. That guidelines be developed under section 8A of the ASIO Act to facilitate spot checks by the Inspector General of Intelligence and Security and reviews of complaints as envisaged by the Committee in Recommendation 8.

ASIO now provides the Inspector General with detailed reports on our Archives activities.

Recommendation 13. That the proposed Archives Unit adopt a procedure that would categorise applications according to the following criteria:

- a. fast track: where the application is small in resource terms, eg, individuals requesting their own files or that of a family member. These applications should be met within the 90-day statutory deadline;**
- b. bulk access: for those applications of a more complicated nature where access to material over a broad spectrum is desired. The researcher should be able to negotiate with ASIO both in regard to the scale of the application and the time in which it can be provided.**

ASIO gives highest priority to applications from individuals seeking records relating to themselves or their immediate family. In most cases, these applications are completed within 90 days. However, we are aware that this approach could, if not managed carefully, see large applications from professional historians and other researchers 'slip to the bottom of the pile'. Consequently, during the last year, around 25% of the staff resources devoted to Archives work were used to meet this second category of application.

ASIO has adopted a policy of more open communication with researchers. We now seek to help them refine and focus their applications, gain an understanding of their publishing schedules, and accommodate special requirements. Our ability to do this is circumscribed by National Archives' policy of withholding the names of researchers making applications for ASIO records.

Recommendation 14. That in relation to current intelligence records, a person who wishes to ensure that information concerning himself/herself is accurate, may bring that information to the attention of the Inspector General of Intelligence and Security who will bring it to the attention of the responsible Intelligence Agency for appropriate action.

This facility now exists through the IGIS. ASIO has also negotiated an arrangement with National Archives whereby individuals who believe that ASIO archival records released to National Archives contain inaccurate or misleading information can apply to have a statement identifying and correcting these errors appended to the relevant file holdings.