CHAPTER 4

INTERPRETATION OF AND EXEMPTION FROM THE FOI ACT

4.1 The operation of the FOI Act is restricted both by its interpretation section (s.4), and the exemption of certain agencies (s.7). The Committee received little comment on the definitions contained in section 4 of the FOI Act. Those which the Committee considers require amendment or clarification are discussed in this chapter, as are the criteria for the exemption from the operation of the Act.

'Department'

4.2 The definition in section 4 excludes the five Parliamentary departments: Senate, House, Joint House, Parliamentary Library, and Parliamentary Reporting Staff. When the Committee examined this exclusion in 1979, it concluded that, in principle, the exemption of Parliamentary departments was not justified.[1] However, the Committee was unable to agree upon a formula which would remove the total exemption while preventing disclosure of matters which might be thought to have a detrimental effect on the position of members of Parliament.[2]

4.3 Notwithstanding the difficulty inherent in devising a suitable partial exemption to operate alongside the present sub-section 46(c) (disclosures which would infringe the privileges of the Parliament), the Committee is of the view that the Parliamentary departments should be subject to the operation of the Act.

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1. 1979 Report, para. 12.31.
2. 1979 Report, para. 12.32.

4.4 However, after again considering the matter, the Committee has reached the same conclusion as was expressed in the 1979 Report. Once again, the Committee recognises difficulties in distinguishing documents the disclosure of which will be detrimental to the position and activities of members of Parliament.

Need for an express definition of 'document'

4.5 A definition of 'document' was inserted into the Acts Interpretation Act 1901 in 1984 (s.25). As is noted below in chapter 13, the Privacy Bill 1986 also contains a definition of 'document'. The Committee questions whether the definitions in the FOI Act and the proposed privacy legislation are necessary.

4.6 In the Committee's view, it is undesirable to define words in particular Acts where those words are satisfactorily defined in the Acts Interpretation Act. In the Committee's view, the Acts Interpretation Act definition should apply to the FOI Act.

4.7 The Committee notes that the definition of document contained in the FOI Act excludes a certain class of documents: 'library material maintained for reference purposes'. The Committee has no objections to this limitation. In the Committee's view, this restriction should be retained.

4.8 **The Committee recommends that the definition of 'document' contained in the FOI Act be deleted, with the rider that the provision that 'document' 'does not include library material maintained for reference purposes' be retained.**

Access to 'documents'

4.9 The FOI Act provides for access to 'documents', not for access to 'information'. The single exception to this is

contained in section 17, which provides for access to information held on computers but not available in documentary form. (This section is discussed below in chapter 6.)

4.10 In its 1979 Report, the Committee accepted,[3] and it continues to accept that, in general, it would not be appropriate to require agencies to manipulate information so as to create new documents in order to meet FOI requests. The Committee considers that, in general, the right of access created by the FOI Act should be confined to information in the form of documents in an agency's possession.

4.11 During the inquiry which preceded the 1979 Report, concern was expressed about the requirement that access requests relate to 'documents', not simply 'information'.[4] There was some fear that requests for specific information would be treated as invalid even though the agency receiving the request possessed readily identifiable documents containing that requested information.

4.12 In its 1979 Report the Committee regarded this fear as unfounded.[5] Experience has confirmed this view. It seems that, where what is being sought is clearly identified, agencies usually treat requests for 'information relating to ...' as if they had been expressed in the form 'documents relating to ...'.[6]

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3. 1979 Report, para. 7.6.
4. 1979 Report, para. 7.4.
5. 1979 Report, para. 7.5.
6. E.g. see the submission from the Department of Foreign Affairs, p. 2 (Evidence, p. 1057). See also the case involving the Australian Taxation Office referred to in the submission from the Commonwealth Ombudsman, Attachment, p. 1 (Evidence, p. 1329); and the case referred to in the attachment to the submission from the Department of Defence.

A copy is a 'document'

4.13 The then President of the Administrative Appeals Tribunal, Justice Davies, drew the attention of the Committee to one aspect of the definition of 'document':

> Section 4(1) defines "document" to include a copy. I take this to mean that each copy is a separate document. Perhaps the operation of the Act with respect to copies should be clarified.[7]

4.14 The Committee understands that Justice Davies is concerned that, applying the FOI Act literally, an agency may be obliged to grant access to the document answering the description contained in the request plus every copy of that document in the agency's possession.

4.15 The Committee is not aware that any practical problems have arisen in this regard. The question is unresolved whether a copy of a document can still be said to be a copy if marginal annotations have been made to it, or whether the effect of the additions is to create a different document. The question is best regarded as one of fact to be determined in particular cases by the extent and substance of the annotations and by clarifying with the applicant precisely what is being sought.

4.16 Nonetheless, the Committee would not wish the Act to deny access (unless a relevant exemption applied) where an applicant seeks access to all the variously annotated copies of, say, a document containing a policy proposal in order to discover what annotated comments the proposal has attracted within the agency.

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7. Submission from Justice J.D. Davies, p. 2 (Evidence, p. 1365).

4.17 Alternatively, all the copies may be identical. By furnishing a copy of any one of these copies the agency will discharge its obligation to grant access (s.20(1)(b)). Where applicants insist on inspecting each copy, the Act permits agencies to refuse to allow inspection if to do so would unreasonably interfere with their operations (s.20(3)(a)).

'Prescribed authority': public funding

4.18 A small number of bodies created under the prerogative do not fall within the definition of 'prescribed authority' and therefore are not subject to the Act.[8] In some cases, these non-statutory bodies are vested with considerable responsibility. For instance, one of them, the National Health and Medical Research Council, was largely responsible for the $55.6 million in direct Commonwealth support for medical research during 1985-86.[9]

4.19 The Committee is not satisfied that bodies should be immune from the requirements of the FOI Act because they were created by Order-in-Council, independently of any enactment.

4.20 In reaching this conclusion, the Committee expresses no view upon whether any of the bodies created by Order-In-Council should be provided with either partial or total exemption by inclusion in the Schedule 2.

4.21 **The Committee recommends that the definition of 'prescribed authority' be amended so as to avoid the exclusion of bodies from the operation of the FOI Act only because they were created by Order-in-Council.**

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8. Re Wertheim and Department of Health (1985) 7 ALD 121 p. 137.
9. Commonwealth Department of Health, Annual Report 1985-86 p. 69.

Bodies in the Territories

4.22 Sub-paragraph (a)(v) of the section 4 definition of 'prescribed authority' implies that the Act as a whole extends to Norfolk Island.[10] The Department of Territories advised the Committee that the Act does not expressly provide for its 'application to all of the external Territories' of the Commonwealth.[11] The Committee understands that the Department's concern arises out of the omission from the Act of any reference to bodies such as the Christmas Island Assembly and corporations such as the Phosphate Mining Corporation of Christmas Island.

4.23 The Committee notes that from time to time it will be necessary to amend the FOI Act to reflect the varying degrees of independence exercised by the Australian territories, both external and internal. (For instance, there is no longer any body known as the Australian Capital Territory House of Assembly - see the sub-paragraph (a)(iii) of the section 4 definition of 'prescribed authority'.)

4.24 **The Committee recommends that the Attorney-General maintain a watching brief in respect of the inclusion in the FOI Act of appropriate references to the Australian territories and, when necessary, devise appropriate amendments.**

Bodies discharging both statutory and non-statutory functions

4.25 Some difficulty arises in respect of bodies created under enactment which discharge both public, statutory functions and private functions. For instance, the Law Society of the Australian Capital Territory has been held to be a prescribed authority within the terms of the Act.[12] As yet, it has not been determined conclusively whether the Law Society 'is subject to

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10. See also FOI Act, s.4(3)(a)(iii), s.46(c).
11. Submission from the Department of Territories, p. 17.
12. Re Brennan and the Law Society of the Australian Capital Territory (1984) 6 ALD 428.

the Act in relation to all of its functions, both public and private.'[13]

4.26 In the Committee's view, it is unreasonable to apply the FOI Act to the private functions of such bodies as the ACT Law Society. Nonetheless, the Committee is firmly of the view that the Act should apply to the documents relating to the public functions of such bodies.

4.27 Accordingly, **the Committee recommends that the FOI Act apply to documents relating to the public functions only of bodies which discharge a mixture of functions.**

Section 7: exemption of certain bodies

4.28 A number of bodies which would otherwise be subject to the FOI Act are exempted by section 7 either in entirity or in relation to certain categories of documents. Bodies wholly exempt are listed in Schedule 2, Part I. This includes security agencies such as ASIO and ASIS. Bodies partially exempt and the relevant categories of documents are listed in Part II of that Schedule. In almost all cases, the body is given exemption only 'in relation to documents in respect of its competitive commercial activities'.

4.29 In this inquiry, as during its 1979 review of the freedom of information legislation, the Committee received submissions from bodies which considered that they should be exempt from the operation of the legislation either in whole or in part.

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13. Submission from the Law Society of the Australian Capital Territory p. 6.

4.30 As in 1979, the Committee has not sought to resolve all of these claims but has chosen to focus upon the principles which should govern the exemption of bodies in whole or in part.[14]

4.31 The Committee was conscious that some of the bodies which petitioned the Committee to recommend exemption were, as Mr Lindsay Curtis of the Attorney-General's Department described them, 'persistent triers'.[15] The Committee considers that any decision upon these claims should bear in mind the principles expressed in this report and in the Committee's 1979 Report.

4.32 'The Age' urged the Committee to recommend the repeal of the exemption of all wholly exempt bodies. In support of this, 'The Age' informed the Committee that United States courts have 'never in 20 years' forced the Central Intelligence Agency or Federal Bureau of Investigation 'to disclose documents under FOI which revealed the source of confidential information'.[16] 'The Age' further suggested that:

> If the Australian intelligence community accepts the inevitability and desirability of the scrutiny which FOI brings, acknowledges the strength of safeguards and does not sensationalise imagined disasters for the country's security and all who deal with the agencies, there is no evidence to suggest that FOI will harm them. In fact, there is some evidence that it will help to improve intelligence agencies and their image.[17]

4.33 However, the Committee is conscious that the disclosure of ostensibly innocuous information by an intelligence body may have the potential to jeopardise national security or undermine international relations. The Committee discusses the difficulty presented by the so-called 'mosaic' or 'jigsaw' effect below in the context of the section 37 exemption.

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14. See also 1979 Report, para. 12.15.
15. Evidence, p. 170 (Attorney-General's Department).
16. Submission from 'The Age', p. 10 (Evidence, p. 195).
17. Ibid.

4.34 In 1979 the Committee was not unanimous as to the extent, if at all, that ASIO should be exempt from the freedom of information legislation.[18] The Committee recognises that otherwise innocuous information held by security agencies may be so integrally associated with legitimate security considerations that it is impossible to unscramble confidential information from routine information. For example, the disclosure of information about the recruitment, identity, training, salaries and locations of employees of a security organisation may significantly undermine the operation of a security agency.[19]

4.35 In this report, the Committee accepts the necessity of exempting intelligence agencies from the operation of the freedom of information legislation. The Committee further notes that the Inspector-General of Intelligence and Security is exempted from the operation of the FOI Act by the Intelligence and Security (Consequential Amendments) Act 1986, sections 16 and 17.

Means of exempting agencies

4.36 The Attorney-General's Department drew the Committee's attention to a technical difficulty relating to partial exemptions.[20] It is possible to declare a body to be a 'prescribed authority' by regulation pursuant to sub-paragraph (b) of the definition of 'prescribed authority' contained in sub-section 4(1) of the Act. However, if this is done, the agency is necessarily completely subject to the Act.

4.37 It is not possible to provide a prescribed authority with a partial exemption at the time of subjecting the agency to the Act by regulation. According to the Attorney-General's Department:

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18. 1979 Report, para. 12.22.
19. Evidence, p. 267-68 (Senator Puplick).
20. Submission from the Attorney-General's Department, p. 92 (Evidence, p. 97).

> Confronted with this 'all or nothing' choice it will sometimes be necessary not to make the body a prescribed authority even though it would be in accordance with policy for some of its documents to be subject to the FOI Act.[21]

4.38 Over a dozen bodies have been declared 'prescribed authorities' by regulation.[22]

4.39 The Committee recognises, as it did in 1979, that there are occasionally difficulties in finding time in the legislative timetable for amendments to legislation.[23] However the Committee does not consider that the power to make regulations should be expanded. Where bodies are subject to the Act by the 'prescribed authority' definition, they may be partially exempted (through the operation of sub-section 7(2)) by inclusion in Part II of Schedule 2 of the Act.

4.40 Bodies may be added to or deleted from Schedule 2 or their partial exemption may be varied by amending the Act. The Attorney-General's Department's proposal would provide for the de facto amendment of Schedule 2 of the Act by regulation in respect of bodies which are 'prescribed authorities' by virtue of having been prescribed by regulation. The Committee takes the view that it would be undesirable if some bodies are listed in Schedule 2 by statute, whilst others achieve the equivalent status by regulation.

4.41 In the Committee's view, no additional regulation-making power is necessary or desirable with regard to partial exemption of agencies. When required, the necessary amendment can be made to Schedule 2, Part II by statute. The Statute Law (Miscellaneous

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21. Submission from the Attorney-General's Department, p. 92 (Evidence, p. 97).
22. Freedom of Information (Miscellaneous Provisions) Regulations, Schedule 1.
23. 1979 Report, para. 12.5.

Provisions) Act which is normally passed in each session of Parliament could be used for this purpose if specific legislation were inappropriate or inconvenient.[24]

Criteria determining the exemption of agencies

4.42 One submission to the Committee described the list of agencies exempted under Schedule 2 as being 'something of a mystery'.[25] There is no readily ascertainable characteristic common to the agencies which enjoy total exemption under Schedule 2, Part I.

4.43 Mr Lindsay Curtis of the Attorney-General's Department provided his understanding of the criteria by which agencies were granted total or partial exemption:

> Agencies wholly engaged in commercial enterprises in competition with the private sector were included in Part I. If an agency was not wholly engaged in such a commercial enterprise but had other functions (for example, regulatory functions), the agency was generally included in Part II and protected only to the extent of documents in respect of its competitive commercial activities. The effect of inclusion of an agency in Part I of Schedule 2 was to ensure that it was not subject to the Act in the same way as its private sector competitors were not subject to the Act. The intention of including, in Part II of Schedule 2, an agency engaged only partially in commercial enterprises was to ensure that it would be subject to the Act in respect of 'public' activities (e.g. the

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24. But note the Proposed New Guidelines for Statute Law (Miscellaneous Provisions) Bills as incorporated into Hansard by Senator Evans in 1985 (Senate, Hansard, 30 May 1985, pp. 2784-85) which provide inter alia, that '(b) No matter that is contentious, or is closely related to a contentious matter, may be included', and '(d) Matters that involve substantial policy issues (including legal policy issues) must not be included'.

25. Submission from Mr Anton Hermann, p. 3 (Evidence, p. 330).

> regulatory functions of the primary industry marketing bodies), but otherwise not disadvantaged in relation to its private sector competitors.[26]

4.44 In principle, the Committee considers that these are appropriate criteria. However, the Committee has some doubts as to whether they have been applied consistently. For instance, there is no obvious reason why the Commonwealth Banking Corporation should receive total exemption, whilst the Australian Telecommunications Commission is exempt only 'in relation to documents in respect of its competitive commercial activities'.[27]

4.45 **The Committee recommends that the Attorney-General examine the agencies listed in Schedule 2 to determine whether their inclusion is appropriate.**

Total or partial exemption

4.46 **The Committee further recommends that this examination should pay particular attention to the question of total or partial exemption.**

4.47 The Committee considers that the Government response to the report should include a review of exempt agencies and the reasons why any of the bodies totally or partially exempted from the operation of the FOI Act should retain their exemption.

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26. Supplementary submission from the Attorney-General's Department, pp. 6-7.
27. FOI Act, Schedule 2, Part II. Cf. submission from the Commonwealth Bank Officers' Association, pp. 1-2.

Tertiary institutions

4.48 Mr Graham Greenleaf offered the following description of the position of higher education institutions which are subject to the FOI Act:

> Universities and colleges have many functions common to other agencies subject to FOI: management of property; recruitment and supervision of administrative staff; health and safety concerns; financial matters etc. All of these functions may result in the creation of documents which are subject to FOI requests. The problems that such requests raise will be little different from those faced by any large instrumentality, and just as various.
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> However, there are certain functions of universities and colleges which, while certainly not unique, are unusual enough to deserve special consideration. These include the maintenance of student educational records, student assessment methods, the promotion system for academic staff, the organs of academic government at all levels, and research activities (both applications and work in progress).[28]

4.49 The problem posed for tertiary institutions by the operation of the FOI Act revolves around four issues: the possibility of frivolous or vexatious requests, raw data of student assessment, confidentiality of referees' reports, and the confidentiality of research material.

4.50 As was noted in chapter 3, the Committee does not accept that agencies should rely upon their assessment of applicants' bona fides to refuse to process requests. In the Committee's

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28. Greenleaf, G., 'Freedom of Information and Universities - in the Courts', (1987) 30 Australian Universities' Review 16, pp. 16-17. Cf. the submission from Dr A. Ardagh, pp. 7-8.

view, it would be contrary to the object of the FOI Act to permit agencies to rely upon their assessments of the motives of applicants in seeking exclusion from the operation of the Act.

4.51 The Committee recognises that requests for access to the raw data of student assessments may pose some difficulties. These difficulties may be particularly acute where 'provisional assessments' constitute the 'raw marks' and these may be modified during the final assessment, which considers whether the totality of the marks 'fairly assess a student's performance'.[29] However, the Committee considers that the problem posed by these requests is analogous to that encountered by any other agency which receives a request for internal working papers and should be resolved under the appropriate specific exemption, such as section 36.

4.52 The possibility that requests for access may jeopardise the confidentiality of referees' reports was noted in the Committee's 1979 Report.[30] This concern is not restricted to tertiary education institutions, although, in the case of these institutions, it may be complicated by the circumstances surrounding the status of the reports - whether they are provided in a personal capacity or on behalf of the institution. However, the FOI Act makes specific provision for the exemption of confidential material (s.45). This section is discussed below in chapter 15.

4.53 The Australian National University informed the Committee that '[o]ne major area which is as yet untested from the point of view of FOI is confidentiality of research material'.[31] The Committee is aware that the premature disclosure of research proposals may be very damaging to its authors and may destroy an academic's research advantage. However, the absence of

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29. Evidence, p. 1301 (Professor I. Ross, ANU).
30. 1979 Report, paras. 3.41 and 25.13.
31. Submission from the Australian National University, p. 6 (Evidence, p. 1297).

any evidence of such damage having occurred after almost five years of operation of the FOI Act may indicate that the Act provides adequate protection.

4.54 It is not certain whether the FOI Act applies to research material such as academics' research notes. Such research notes may not be 'documents in the possession of an agency' for the purpose of the FOI Act, and may therefore not be subject to the operation of the Act.

4.55 The Commonwealth FOI Act differs from its Victorian counterpart in one significant respect in this context. The Victorian Act specifically exempts from disclosure some documents containing the results of scientific or technical research.[32] The provision has been criticised as being too narrow, and because it applies only to research results, and not to research proposals. As Renn Wortley commented:

> Research proposals often contain details of new ideas in projects about to be started. Whilst the release of the results of some scientific and technical research would be reasonably likely to expose ... [a university] or some of its officers to unreasonable disadvantage, the same is very often true of proposals for research which may exist in documentary form and be held by the university.[33]

The Committee recognises the force of this criticism.

4.56 **The Committee recommends that the FOI Act be amended to provide a ground of exemption similar to that contained in paragraph 34(4)(b) of the Victorian FOI Act. The Committee further recommends that this new provision should (i) not be**

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32. FOI Act, s.34(4)(b).
33. Wortley, R., 'Behind the FoI Desk at Monash', (1986) 3 FOI Review 30, p. 32 (author's emphasis).

confined to scientific or technical research; and (ii) not be confined only to the results of research.

4.57 In the Committee's view, the premature disclosure of proposals for research into non-scientific matters, such as literature may, in some circumstances, unfairly abrogate an academic research advantage.

4.58 As was stated earlier, the Committee is opposed to the wholesale exemption of bodies from the freedom of information legislation. In general, the Committee endorses Mr Graham Greenleaf's conclusions in respect of tertiary institutions:

> If universities have to expose their long-standing practices to external review, this may be very valuable. The test should be more whether the reviewing bodies (the AAT and the Courts) are proving themselves unsuited to the task by repeated bad decisions. There is no evidence of this, and ANU itself claims that the Tribunal has substantially upheld almost all of its claims for exemption. Besides, such disputed cases are only the tip of an iceberg of requests which are granted (or if refused, not contested). Unprompted by freedom of information legislation, universities and colleges would not have voluntarily adopted open access policies in relation to much of the information to which uncontested access is now given, any more than most other government agencies would have.
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> If there is evidence, as opposed to assertion, that disclosure of raw scores or referees' reports is <u>always</u> against the public interest, then there is little reason to believe that academic institutions will not get a fair hearing. The problem concerning research material is still only a possibility, but surely it would be more sensible to propose a specific exemption for the types of material that should not be disclosed.[34]

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34. Supra n. 28, p. 27 (author's emphasis). See also the submissions from Dr A. Ardagh, pp. 7-8; and Professor C. Manwell, p. 1.