CHAPTER 7

AGENCY RESPONSES TO REQUESTS

Transfers of requests - section 16

7.1 Section 16 provides for the transfer of requests. Sub-section 16(1) states:

> Where a request is made to an agency for access to a document and-
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> (a) the document is not in the possession of that agency but is, to the knowledge of that agency, in the possession of another agency; or
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> (b) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made,
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> the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.

Partial transfer

7.2 No provision is made for partial transfers. An agency may, for example, receive a request for several documents, some of which it holds and others which it knows are held by another agency. It cannot formally transfer the request in so far as it relates to the latter documents. As a matter of practice, agencies informally transfer parts of requests.[1]

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1. Submissions from the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Veterans' Affairs, para. 38 (Evidence p. 569); and the Department of Local Government and Administrative Services, p. 7. In 1986-87, 159 requests were transferred in part: FOI Annual Report 1986-87, p. 90.

7.3 The Committee considers that formal transfer of parts of requests should be possible, and the Act should be amended to permit this.

7.4 Accordingly, **the Committee recommends that the Act be amended to provide for the transfer of parts of requests.**

Ambit of transferred requests

7.5 Sub-section 16(1) contemplates that only requests for individually identified documents will be transferred. The request, however, may be for a category of documents - for example, 'all documents relating to ...'. Where such requests are transferred, transferee agencies are uncertain whether they should treat the requests in their terms, or treat them as relating only to the documents identified by the transferors as the basis of the transfer. In practice, the former, wider view is taken.[2]

7.6 Adopting this wider view creates difficulties for agencies, as the Department of Foreign Affairs pointed out:

> As each agency sorts through its files, it may turn up documents of another agency and transfer the request, until several departments may be handling it, and even processing duplicated material that is common to them all.[3]

7.7 From the perspective of applicants, adopting the wider view will often result in more documents being identified. Against this, processing times and charges will often be greater,

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2. Submissions from the Department of Foreign Affairs, p. 15 (Evidence, p. 1070); the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Local Government and Administrative Services, p. 7; and the Attorney-General's Department, p. 86 (Evidence, p. 91).
3. Submission from the Department of Foreign Affairs, p. 15 (Evidence, p. 1070).

and the extra documents identified may not be ones which the applicant actually wishes to see.

7.8 The Committee considers that adopting the wider view imposes potential burdens on applicants and agencies which together outweigh the potential benefits to applicants.

7.9 **Therefore, the Committee recommends that it be made clear, by amendment of the Act if necessary, that an agency to which an access request is transferred is not required to treat the request afresh, but rather to process only those individually identified documents which provided the basis of transfer.**

7.10 In making this recommendation the Committee relies upon agencies having due regard to sub-section 15(4). This provides that:

> Where a person has directed to an agency a request that should have been directed to another agency or to a Minister, it is the duty of the first-mentioned agency to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister.

7.11 It may be that some requests for categories of documents which are currently dealt with by transfer could be better dealt with by assisting applicants to re-direct their requests.

Transfer where document closely connected with another agency

7.12 In evidence to the Committee, representatives of 'The Age' advocated that an agency should not be able to transfer a request relating to a document in its possession.[4] A request by 'The Age' to the Australian Federal Police for a report written by them was transferred to the Department of the Special Minister of State on the ground that the report was more closely connected

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4. Evidence, pp. 263-64.

with the Department than the Police. 'The Age' suggested that the transfer had more to do with controlling information than assisting the requester.[5]

7.13 The Committee does not accept this proposal. No doubt there are occasions when agencies fail to observe the spirit of the Act. But even where this occurs the Committee regards it as preferable that a request is transferred so that the applicant is placed in direct contact with the agency which is really making the decisions. There is no merit in the requester having to negotiate with, or challenge the decision to refuse access of, an agency which is, in reality, only acting on the instructions of a second agency.

Transfer without consent of transferee

7.14 In its submission, 'The Age' recommended that the words in sub-section 16(1) 'may, with the agreement of the other agency' should be omitted and replaced by 'shall'.[6] The aim of introducing a requirement to transfer was to overcome a situation experienced by 'The Age' of agencies neither transferring under section 16 nor assisting applicants to re-direct their requests under sub-section 15(4). Instead the agencies simply did nothing.

7.15 The Committee does not consider that implementation of the recommendation would resolve the problem. If an agency is prepared to ignore its obligation to deal with a request, it would equally be prepared to ignore an obligation to transfer the request.

Transfer of requests for amendment

7.16 Responsibility for the accuracy of a document held by an agency may lie with a second agency. Several agencies suggested

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5. Evidence, p. 263.
6. Submission from 'The Age', p. 13 (Evidence, p. 198).

to the Committee that a request for amendment of a personal record made pursuant to section 48 should be able to be transferred to the agency responsible for the accuracy of that record.[7] The Committee agrees.

7.17 **The Committee recommends that the Act be amended to provide for the transfer of requests for the amendment of records. The Committee further recommends that provision be made requiring the transferee agency to notify the transferor of the outcome of the transferred request.**

7.18 To the extent that this recommendation rests upon the assumption that the transferee agency is responsible for the accuracy of the record, it follows that the transferor agency must defer to the former's decision as to amendment or annotation.

7.19 Accordingly, **the Committee also recommends that where a request for amendment is transferred, and the transferee agency makes and informs the transferor agency of a decision which results in the amendment or annotation of that record, the transferor agency must amend or annotate its record accordingly.**

Section 22: deletion of irrelevant material

7.20 In its submission, the Attorney-General's Department stated:

> It is not uncommon that only a portion of a document is relevant to a request for documents containing specified information. If the irrelevant balance contains sensitive material, exemptions must be claimed, and defended on any appeal. This tends to cause unnecessary concern to the applicant, who has

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7. Submissions from the Department of Veterans' Affairs, paras. 109-10 (Evidence, p. 580); the Department of Defence, p. 16; the Department of Local Government and Administrative Services, p. 15; and the Commonwealth Ombudsman, p. 12 (Evidence, p. 1319).

> no way of knowing whether the material is relevant. It also causes expense to the agency, and ultimately wastes time and money for all concerned with no benefit to the applicant.[8]

7.21 It is uncertain whether the Act permits the deletion of irrelevant material.[9]

7.22 **The Committee recommends that the Act be amended to permit agencies or Ministers to delete material that is irrelevant prior to granting access. The Committee further recommends that decisions to make such deletions on the grounds of irrelevance be reviewable in the same way as decisions to refuse access.**

Paragraph 22(1)(b): edited document not to be 'misleading'

7.23 Deletions may only be made if the resulting document 'would not by reason of the deletions, be misleading' (s.22(1)(b)). This test was criticised as being unnecessary and too favourable to agencies when the legislation was before the Senate in 1981.[10] The then Government agreed that it might be reconsidered when the operation of the legislation was reviewed by the Constitutional and Legal Affairs Committee.[11]

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8. Submission from the Attorney-General's Department, pp. 92-93, (Evidence, pp. 97-98). See also submissions from the Inter-Agency Consultative Committee on FOI, p. 4; the Australian Taxation Office, p. 10 (Evidence, p. 660); the Department of Defence, p. 14; and the Department of Territories, p. 15.
9. Contrast Re Swiss Alumunium Australia Ltd and Department of Trade (1985) 9 ALD 243, p. 245 with Re Anderson and Australian Federal Police (1986) 4 AAR 414, pp. 419-20 and Re Lordsvale Finance Ltd and Department of Treasury (No. 3) (30 June 1986) para. 20. See also submission from the Commonwealth Ombudsman, attachment pp. 3-4 (Evidence, pp. 1331-32).
10. Senate, Hansard, 29 May 1981, pp. 2370-71 (Senator Missen).
11. Ibid., p. 2371 (Senator Durack).

7.24 Users have argued that the imprecision of the test allows agencies too much discretion to withhold access,[12] although no actual cases have been drawn to the Committee's attention of agency abuse of the test. Agencies, however, do find the test difficult to apply:

> It is ... not clear whether it is intended that the document after deletions should be not misleading as to the whole of the original document or just in respect of what remains.[13]

7.25 In a passing reference, the Administrative Appeals Tribunal implied that an edited document had to be 'misleading when compared with the original' for section 22 to apply.[14] But the Tribunal and Federal Court have not yet had to give detailed consideration to the meaning of 'misleading'in this context.[15]

7.26 In the Committee's view the test should be repealed. It is inherently unclear, and it is unnecessary. The use of a concept such as 'misleading' is difficult because it requires the decision-maker to make assumptions about the reader. A casual or inexpert or hostile reader may be 'misled' by a document that would not mislead a careful or expert or sympathetic reader. An objective test - whether the reasonable reader would be misled - may be unhelpful where the agency is aware that the particular applicant is anything but reasonable.

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12. Submissions from Mr Anton Hermann, p. 2 (Evidence, p. 329); 'The Age', pp. 18-19 (Evidence, p. 203-4).
13. Submission from the Inter-Agency Consultative Committee on FOI, p. 4.
14. Re Dillon and Department of Treasury (No. 2) (1986) 10 ALD 66, p. 68.
15. Cf. Harris v Australian Broadcasting Corporation (No. 2) (1983) 5 ALD 560, p. 562; Re Waterford and Treasurer of Commonwealth of Australia (No. 2) (1985) 8 ALN 37, p. 47.

7.27 Propensity to mislead is not, in general, a ground of exemption for complete documents.[16] It should not be for parts of documents. For example, in 1985, the Tribunal considered a document containing statistics and an explanation of how the statistics were derived. The explanation was exempt. The Tribunal said it would be misleading to release the (non-exempt) statistics alone.[17] Yet there would have been no ground for refusing access to the statistics had they been contained in a document on their own, even if the explanation had been in a separate folio in the same file. It is notorious that statistics should not be relied upon unless the method of derivation of the statistics is understood. The Committee finds it difficult to understand how someone could claim to have been misled by the document containing the statistics when put on notice that an explanation of the basis for the statistics has been deleted from that document.

7.28 The Committee takes the view that a document from which deletions have been made can be misleading only where the reader makes assumptions about the deleted material. The assumptions, not the text of the edited document, will be the source of any misleading impression. This being so, the Committee regards the pre-condition for release that an edited document not be misleading as unnecessary. The Committee is encouraged in reaching this conclusion by the absence of any equivalent pre-condition in section 38 of the Archives Act 1983, or in the

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16. However, the Committee notes the line of decisions under section 36 in which it has been said that it tends not to be in the public interest to permit access to an internal working document where disclosure will lead 'to confusion and unnecessary debate': Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626, p. 635. See discussion below in paras. 11.6 to 11.13.

17. Re Waterford and Treasurer of Commonwealth of Australia (No. 2) (1985) 8 ALN 37, p. 47.

FOI legislation of Victoria,[18] Canada,[19] New Zealand,[20] and the United States.[21]

7.29 **The Committee recommends the deletion from paragraph 22(1)(b) of the words 'and would not, by reason of the deletions, be misleading'.**

7.30 Senator Stone dissents from this recommendation and paragraphs 7.26 to 7.28.

Section 23: delegation of decision-making

7.31 Concern has been expressed that section 23 does not authorise the delegation of decision-making powers in three situations where delegation ought to be possible.[22] At present, only principal officers may cause to be prepared an edited version of an otherwise exempt document for release pursuant to section 9 (s.9(4)), or may grant extensions of time for lodging requests for internal review (s.54(1)). Only principal officers or Ministers may decide to grant indirect access to medical information (s.41(3)). The Committee agrees that the power to

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18. Freedom of Information Act 1982 (Vic), s.25.
19. Access to Information Act 1982 (Canada), s.25 requires only that the non-exempt material 'can reasonably be severed' from the exempt.
20. Official Information Act 1982 (N.Z.), s.17(1): but note that this provides that a document 'may be made available by making a copy of that document with such deletions or alterations as are necessary' (emphasis added).
21. 5 USC 552(b) provides: 'Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.' This has been interpreted to mean that exemption is permitted only if exempt and non-exempt information are inextricably intertwined so that deletion of exempt information would impose significant costs on the agency and result in an edited document with little informational value. Mead Data Central Inc. v United States Department of the Air Force 566 F. 2d 242 (D.C. Cir. 1977); Wilkinson v FBI 633 F. Supp 336 (C.D. Cal. 1986).
22. Submissions from the Inter-Agency Consultative Committee on FOI, p. 4; the Department of Veterans' Affairs, para. 122, (Evidence, pp. 582-83), the Department of Health, pp. 18, 20 (Evidence, pp. 1238 and 1240); the Australian Taxation Office, p. 8 (Evidence, p. 658); the Department of Territories, p. 14; and the Australian Customs Service, p. 16.

make decisions on these three matters should be able to be delegated.

7.32 **The Committee recommends that the Act be amended to permit decision-making to be delegated with respect to matters arising under sub-sections 9(4), 41(3) and 54(1).**

Section 24: refusing requests on workload grounds

7.33 Sub-section 24(1) provides:

> Where-
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> (a) a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to specified subject-matter; and
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> (b) the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or of the office of the Minister,
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> the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken.

7.34 Sub-section 24(2) reduces agency obligations with respect to paragraph 24(1)(a) requests. If it is apparent from the nature of the documents as described in the request that all

would be exempt, the agency may refuse access without having to identify each document falling within the scope of the request.

7.35 The Attorney-General's Department informed the Committee that in its view there had been comparatively modest use of section 24.[23] In June 1985, the Government issued directions to agencies on the administration of the Act. One of these instructed agencies to rely on section 24 in appropriate cases.[24] Reliance on section 24 has more than doubled since then.

Unsuccessful attempt to amend section 24 in 1986

7.36 Clause 11 of the Freedom of Information Laws Amendment Bill 1986 was successfully opposed in the Senate.[25] The clause expanded the definition of a request which would fall within section 24 by including a request that related to a number of documents specified in the request or a request that was one of a series of 'related requests'. The expression 'related requests' was defined to include requests made by persons whom an agency believed on reasonable grounds to be acting in concert.

7.37 The clause also would have reduced the workload test of 'substantially and unreasonably' diverting agency resources to one of 'substantially' diverting those resources. The clause would have allowed the work involved in screening documents for exempt matter and consulting third parties to be considered in estimating the overall work involved in meeting the request. A 1986 decision of the Administrative Appeals Tribunal had not

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23. Submission from the Attorney-General's Department, p. 87 (Evidence, p. 92). The section was invoked 5 times in the 7 months to 30 June 1983, 28 times in 1983-84, 91 times in 1984-85 and 227 times in 1985-86. For illustrations of the reluctance of agencies to invoke section 24, see the submission of the Department of Local Government and Administrative Services, p. 3; and Evidence, pp. 486-87 (Australian Federal Police).
24. FOI Annual Report 1984-85, p. 181. For details about one agency's response to this direction by increasing its reliance on section 24, see Evidence, pp. 722-25 (Department of Immigration and Ethnic Affairs).
25. See Senate, Hansard, 15 October 1986, pp. 1359-64 for the debate.

permitted these items to be included in calculating the workload created by a request.[26] Finally, the clause would have amended section 24 with retrospective effect insofar as requests made prior to the amendment could have been linked to subsequent requests in order to determine what was a 'related request'.

Need for section 24

7.38 As in 1979,[27] the Committee accepts that there is a need for some provision under which an agency may refuse to process requests if doing so would impose an excessive burden upon its operations.[28] This remains true, even though the Committee would expect the increased charges applicable since November 1986 to play a significant role in reducing the incidence of extravagantly framed requests.[29] There is considerable disquiet, however, amongst both agencies and users over the operation of section 24 in its present form. The remainder of this chapter discusses the particular issues raised.

'Unreasonable' diversion of resources

7.39 One issue with any workload test is whether it should operate solely by reference to the cost to the agency of processing the request. In other words, should agencies be able to refuse all requests whose processing would cost more than a specified amount, or should they be required, once this threshold

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26. Re Timmins and National Media Liaison Service (1986) 9 ALN 196.
27. 1979 Report, para. 13.3.
28. The Committee notes that the Victorian FOI Act contains no equivalent to section 24. The Committee also notes the observation in Penhalluriack v Department of Labour and Industry (Vic. Cty. Ct., 19 December 1983) that the charging scheme acts as a check on extravagent requests: 'The less readily definable check is either some ultimate concept of impossibility or impracticality as a ground of refusal, or, if it be different, some residual discretion in the court to refuse an absurdly extensive request' (p. 4). See also Re Borthwick and University of Melbourne [1985] 1 VAR 33, pp. 35-36.
29. E.g. FOI Annual Report 1986-87, p. 115 (referring to Telecom).

is crossed, to take into account other factors, such as the resources available to it, the likely public benefit in the requested material being made available, etc?

7.40 The Committee takes the view that the wider test is more appropriate, although it acknowledges that the narrower test would be easier to apply.[30] For example, it seems clear that FOI requests to the Department of Defence relating to its land acquisition plans in New South Wales were burdensome to process.[31] Had the Department refused, or been able to refuse, access on workload grounds it would have been difficult to challenge the specific acquisition plans and a Senate Committee would have been misled.[32]

7.41 Requests should not be able to be refused solely on workload grounds, without regard being paid to the public interest in the documents being made public. The present test of 'substantially and unreasonably' diverting agency resources in paragraph 24(1)(b) seeks to achieve this. The Committee would oppose the removal of the words 'and unreasonably' from this test, unless other words were inserted in section 24 to achieve the same effect.

7.42 If factors additional to workload are to be treated as relevant by decision-makers, the question arises whether the Act should attempt to spell out what these factors are. The Administrative Appeals Tribunal has treated an applicant's motive as relevant.[33]

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30. Cf. submission from the Commonwealth Ombudsman, Attachment, p. 5 (Evidence, p. 1333).
31. Submission from the Department of Defence, p. 11.
32. Senate Standing Committee on Foreign Affairs and Defence, Land Acquisition in New South Wales by the Australian Army - First Report (Parliamentary Paper No. 180/1986) p. xviii. See also Senate, Hansard, 25 October 1986, p. 1359 (Senator Puplick).
33. Re Shewcroft and Australian Broadcasting Corporation (1985) 7 ALN 307, pp. 310-11; Re Swiss Aluminium Australia Ltd and Department of Trade (1986) 10 ALD 96, p. 101.

7.43 The Committee does not agree that the motive of an applicant ought to be a relevant factor in deciding if a request is 'unreasonably' burdensome.[34] The Committee appreciates that inability to rely upon triviality of motive may, in a few cases, leave agencies with no alternative but to process large requests. On balance, the Committee regards this as a lesser evil than allowing FOI decision-makers to pass judgment on the worthiness of particular applicants' motives.

7.44 **The Committee recommends that section 24 be amended to make clear that applicants' motives are not to be treated as relevant in applying the 'substantially and unreasonably' test in paragraph 24(1)(b).**

7.45 Senator Stone dissents from this recommendation and paragraph 7.43.

7.46 The Committee does not object to decision-makers considering the public interest in access being granted, independently of the motive of the actual requester. If there is no possible public interest in granting access to outweigh the burden of doing so, it would, in the Committee's view, be unreasonable to undertake the burden.

7.47 However, if there is a public interest in granting access, this should be considered without inquiry as to whether the particular applicant claims to be acting in that interest.[35] Subject to the above recommendation, the Committee does not regard it as necessary to include in section 24 any guidelines as to factors to be considered in deciding if processing a request would be 'unreasonably' burdensome.

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34. Cf. Evidence, pp. 153-55 (Attorney-General's Department); pp. 401-3 (Law Institute of Victoria).

35. Compare Minnis v United States Department of Agriculture 737 F. 2d 784 (9th Cir. 1984) (mailing list useful for both commercial purposes and to verify fairness of agency allocation of permits: both purposes treated as relevant although Minnis only interested in commercial use of list).

Types of requests falling within section 24

7.48 Section 24 operates with respect to requests 'expressed to relate to all documents, or to all documents of a specified class ...' (s.24(1)(a)). The effect of this is to focus upon the form in which the request is expressed, not the number of documents falling within it. This is an invitation to unnecessary legalism. Users complain that agencies treat as 'class' requests applications which, for example, are limited by dates and therefore arguably do not refer to all documents in the class.[36] Agencies complain that the astute applicant can avoid section 24 by wording the request to apply to all documents in a class plus or minus one document.[37]

Aggregation of requests

7.49 One method of avoiding refusal under section 24 is to break a large request into a series of smaller requests. The Administrative Appeals Tribunal has blocked this method by saying that in applying section 24 'the spirit of the Act' calls for related requests to be treated as a single request.[38]

7.50 There are a number of difficulties inherent in attempting to prevent the disaggregation of large requests. Some mechanism has to be devised to stop an applicant using friends or

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36. Submission from Political Reference Service Ltd, p. 13 (Evidence, p. 963). See also submission from 'The Age', pp. 21-24 (Evidence, pp. 206-09).
37. E.g. submissions from the Australian Taxation Office, pp. 11-12 (Evidence, p. 661-62); the Department of Territories, pp. 12-13.
38. Re Shewcroft and Australian Broadcasting Corporation (1985) 7 ALN 307, p. 308. One submission noted that s.24 could assist in dealing with vexatious FOI users if the agency were permitted to take into account not only the instant request but all previous requests made by that applicant in deciding what was an unreasonable diversion of resources: submission from Justice J.D. Davies, p. 2 (Evidence, p. 1365).

colleagues to each make one of the related requests.[39] It is difficult to devise an effective test that does not also catch people, such as journalists, who work for the same organisation but are making their requests independently.[40] Should, for example, the various groups and individuals who campaigned against army land acquisition in New South Wales be regarded as related for FOI purposes? If so, access by one will be determined by reference to the scope of applications lodged by others.

7.51 There are difficulties of definition in identifying how closely related the subject matter needs to be in order to be 'related'. In addition, it would need to be indicated how far apart in time a series of requests would have to be made to avoid being 'related'.

7.52 Further, it is questionable whether, in principle, agencies should be able to aggregate requests where applicants have paid separate application fees for each application, as is the case under section 15.

7.53 Rather than attempting to resolve these difficulties, the Committee takes the pragmatic view that the potential problems of disaggregation of large requests are largely met by the imposition of charges. Where a large request is broken into a series of smaller ones, application fees and charges will be payable in respect of each of the smaller requests. (The types of requests which do not attract fees and charges are typically not those which are most burdensome to process.)

7.54 The Committee is prepared to accept that, in general, application charges will discourage applicants from attempting to

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39. Cf. FOI Amendment Bill 1986, cl. 11: '... made by the same person or by persons whom the agency or Minister believes on reasonable grounds to have acted in concert in making the requests'. See also the submission of the Aboriginal Development Board, pp. 2-3 (a company, its manager and its solicitor making separate requests for documents relating to a particular matter).

40. Submission from Mr Paul Chadwick, p. 3.

lodge groups of requests for access to documents to which a single access request would otherwise be refused as too burdensome to process. Alternatively, the payment of multiple application and processing charges will go some way towards compensating agencies for the burdensome processing involved.

7.55 **The Committee recommends that section 24 be amended to prevent the aggregation of requests for the purposes of that section.**

7.56 Senator Stone dissents from this recommendation and paragraphs 7.49 to 7.54.

'Class' requests

7.57 As section 24 stands, it is difficult (if not impossible) to specify with any precision what constitutes a 'class' request. Further, the Committee can see no justification for treating the form of requests as critical. What matters is whether a request, however expressed, will be burdensome to process.

7.58 Prima facie, deleting paragraph 24(1)(a) will deprive section 24 of any objective limitation. However, in the Committee's view, this will not undermine the operation of the FOI Act. In the Committee's view, the workload test should operate by reference to the difficulty in processing particular requests, not the form in which they are expressed.

7.59 **The Committee recommends that paragraph 24(1)(a) be deleted and a consequential amendment be made to paragraph 24(1)(b).**

7.60 In recommending the deleting of paragraph 24(1)(a), the Committee emphasises that the workload test should operate by reference to the substantial and unreasonable diversion of

resources. In chapter 19 below, the Committee discusses the FOI charges, and records its view that the mere fact that the work involved in processing any request will exceed the maximum number of chargeable hours must not be taken into account for the purposes of section 24. (Senator Stone records his dissent from this last proposition.)

7.61 The Committee considers that what constitutes a substantial and unreasonable diversion of resources must be determined on the facts of each case.

Refusing requests without providing detailed reasons

7.62 The implementation of the above recommendation will have a consequential effect on the operation of sub-section 24(2). This sub-section permits 'class' requests, as defined in paragraph 24(1)(a), to be refused in specified circumstances without having either to identify all the documents falling within the terms of the request or to specify for each document the provision(s) under which exemption is claimed.

7.63 Two issues arise in this context. First, whether section 24 should empower agencies or ministers to refuse to grant access requests without actually inspecting the documents. Secondly, if so, to which types of requests should such a provision apply.

7.64 In its submission, 'The Age' argued that this provision should be removed: '[i]t is not reasonable to say anyone could apply the many and technical provisions of Part IV to a document he or she has not seen, or decide that all of it is exempt'.[41] The Committee disagrees.

7.65 The Committee agrees with the Australian Taxation Office that some 'requests relate to documents which by their very

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41. Submission from 'The Age', p. 20 (Evidence, p. 205).

nature appear to be exempt'.[42] A request for, say, Cabinet submissions on tax reform within a given period may cover only a category of documents which, as a category, is entirely exempt. No useful purpose is served by having to identify all the documents.

7.66 However, if paragraph 24(1)(a) is deleted, it will be necessary to amend sub-section 24(2). In the Committee's view, this sub-section should be available in respect of any request, however expressed.

7.67 Accordingly, **the Committee recommends that sub-section 24(2) be amended to delete references to the concept of 'class' requests.**

Appeals against sub-section 24(2)

7.68 The Australian Taxation Office noted that, in the event of review, the burden upon agencies in respect of a sub-section 24(2) refusal would be less onerous were agencies required to prove that it was 'apparent' that the documents would be exempt, rather than that the documents were actually exempt.[43]

7.69 In the Committee's view this less onerous interpretation is undesirable. Where an agency decides to refuse an application under sub-section 24(2) as amended in the manner recommended above, and the decision is then subject to review or appeal, the onus should be upon the agency to prove that the document or documents in question are exempt.

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42. Submission from the Australian Taxation Office, p. 11 (Evidence, p. 661).
43. Submission from the Australian Taxation Office, p. 12 (Evidence, p. 662).

7.70 The Committee recommends that the Act be amended to provide that, upon appeal from a refusal of access under sub-section 24(2), agencies be required to prove that the documents to which access was refused are exempt.

7.71 Senator Stone dissents from this recommendation and paragraphs 7.68 and 7.69.

Tasks to be included in assessing workload

7.72 The time spent by agencies in examining documents to determine if they are exempt, and in third-party consultation cannot be included in the estimate of workload for section 24 purposes.[44] A number of agencies criticised this, pointing out that the excluded tasks are frequently more onerous and time-consuming than the tasks of identifying, collating, copying etc. which form the basis for applying section 24.[45]

7.73 Users are opposed to allowing decision-making and consultation time to be counted. In part, this is because these items are regarded as too susceptible to inflation by agencies.[46] In part, including these items is seen as rewarding agencies for their inefficiency in the same way that a provision which operates by reference to volume of documents rewards agencies that unnecessarily generate excessive volumes of paper.[47] In part, no doubt, users are opposed because the net effect of including decision-making and consultation time will be to increase the number of requests to which section 24 can be successfully applied.

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44. Re Timmins and National Media Liaison Service (1986) 9 ALN 196.
45. E.g. submissions from the Inter-Agency Consultative Committee on FOI, p. 4; the Department of Health, p. 36 (Evidence, p. 1256); the Department of Primary Industry, p. 2; the Department of Defence, p. 11; the Department of Aviation, p. 3; and the Australian Customs Service, p. 17.
46. Submission from Mr Paul Chadwick, p. 3.
47. Submission from 'The Age', p. 21 (Evidence, p. 206).

7.74 The Committee does not accept that agencies regularly engage in unnecessary consultations or maintain inefficient filing systems to disadvantage FOI applicants. Consistent with its views on the items for which charges should be payable, the Committee considers that decision-making and consultation time should be able to be included in calculating the burden of processing a request.

7.75 **The Committee recommends that section 24 be amended to permit regard to be had to the resources likely to be spent in both consultation with third parties and in examining documents for exempt matter.**

Consultation with applicants

7.76 A number of users told the Committee that agencies frequently neglected to engage in consultation, with a view to narrowing the scope of requests.[48] Sub-section 24(3) provides that a request cannot be refused under section 24 'without first giving the applicant a reasonable opportunity of consultation with a view to the making of the request in a form that would remove the ground for refusal'.

7.77 Inducing a recalcitrant agency to consult with an applicant in a positive, co-operative spirit is not something readily achieved by amending the Act. The Committee considers, however, that the obligation to consult at present contained in sub-section 24(3) can be made more precise. The Committee would not wish to discourage oral consultation with applicants.

7.78 In this context, the Committee notes that the Report of the Sub-Committee on Efficiency established by the Inter-Agency Consultative Committee on FOI expressed the Sub-Committee's view

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48. Submissions from the Political Reference Service Ltd, p. 14 (Evidence, p. 964); the Law Institute of Victoria, p. 4 (Evidence, p. 377).

that

> the key to efficient handling of requests is early consultation with the applicant to define and narrow wide-ranging requests, and consultation within the agency as well as with other agencies.[49]

7.79 The Committee considers, however, that ultimately formal notification in writing should be required before an agency is permitted to refuse an application on section 24 grounds.

7.80 The Committee considers that the written notification should be drafted with an eye to the sub-section 15(3) obligation to assist people to make requests in compliance with sub-section 15(2), and the sub-section 24(3) obligation to provide applicants with a reasonable opportunity of consultation with a view to making the request in a form that would remove the grounds of refusal. Where practicable, the notification should: state that it is proposed to refuse access on section 24 grounds; explain why the request is too broad; offer positive suggestions as to how the request might be narrowed so as to remove from the basis for refusal; and/or provide sufficient information on the structure of the agency's file holdings to enable the applicant to re-formulate the request; and invite the applicant to contact a named person within the agency for assistance in narrowing the request if required.

7.81 The Committee accepts that the issuing notification along these lines will impose a burden on agencies. The Committee expects, however, that the prospect of this burden will give agencies an incentive to engage in prior, informal consultations. The Committee would expect that the formal procedure would seldom need to be used. The formal notification should be required only once for each matter. Where a narrower request is substituted in

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49. Report of the Inter-Agency Consultative Committee's Sub-Committee on Efficiency, dated February 1987, para. 3.

response to a formal notification it should be open to the agency to refuse that request without having to issue a further formal notification.[50]

7.82 **The Committee recommends that, before refusing requests under section 24, agencies be required to notify the applicant in writing of the intention to refuse to process the request, and to provide positive suggestions and information as to how the request may be narrowed, and identifying an agency officer with whom the applicant can consult with a view to narrowing the request.**

Role for Ombudsman or Tribunal

7.83 Suggestions were made to the Committee that what was seen as abuse by agencies of section 24 could be overcome if agencies had to seek leave of the Administrative Appeals Tribunal or the Ombudsman before invoking section 24.[51] The Committee does not think that section 24 is improperly invoked often enough to justify the extra cost of involving an independent arbitrator in all cases involving section 24. Insofar as the perceived abuse of section 24 is its use to delay access,[52] involving either the Tribunal or the Ombudsman is unlikely to expedite matters. Both lack the resources to respond quickly unless either FOI is given priority over other matters or extra resources are provided. The Committee does not regard the former as appropriate. The latter is not practical in the present economic climate.

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50. Cf. Re Swiss Aluminium Australia Ltd and Department of Trade (1986) 10 ALD 96, p. 102.
51. Submissions from the New South Wales Law Society, p. 3; 'The Age', p. 24 (Evidence, p. 209); and the Law Institute of Victoria, p. 4 (Evidence, 377).
52. E.g. submission from 'The Age', p. 25 (Evidence, p. 210).

Resource shortages

7.84 Because section 24 operates by reference to impact upon agency operations or Ministerial functions, the ability of an agency or Minister to rely upon section 24 depends in part on the resources available. It was put to the Committee that section 24 is open to abuse by agencies in that they could use their ability to allocate resources internally to starve FOI tasks. They would then be better placed to invoke section 24.[53] The Committee is not aware of any evidence that indicates that agencies have in fact allocated their staff so as to avoid responsibilities under the FOI Act.

Documents unable to be located

7.85 An agency may have good reason to believe that it has a particular document in its possession, although the document cannot be located. The Act makes no specific provision for the way in which an agency should respond to an access request for the document. In default, the agency has to be treated as having decided to refuse access.[54]

7.86 The Department of Health told the Committee:

> It is somewhat nonsensical for an official to have to make a formal decision refusing access to a document which cannot be located. There is, of course, no statutory guidance as to what efforts the agency should take to locate documents. The current framework in which the FOI Act operates makes it difficult to explain the situation to members of the public. The Department considers that it would be preferable to all concerned, and far more practical, to include a provision in the Act allowing an agency, after reasonable steps have been taken to locate the document, to

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53. Submission from the Political Reference Service Ltd, p. 13 (Evidence, p. 963).

54. E.g. Re Hancock and Department of Resources and Energy (2 June 1986) pp. 4-5.

> find that the particular document cannot be located, giving reasons for that finding. The finding could then be subject to review by the AAT.[55]

The Committee agrees.

7.87 Accordingly, the Committee recommends that the Act be amended to provide that an agency may formally respond to a request for access by stating that it has reason to believe it possesses the requested document, but is unable to locate the document having taken all reasonable steps to do so. The Committee further recommends that the decision to respond in this manner be able to be reviewed in the same ways as are decisions to refuse access.

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55. Submission from the Department of Health, pp. 32-33 (Evidence, pp. 1252-53). See also submissions from the Department of Territories, p. 17; the Attorney-General's Department, p. 95 (Evidence, p. 100).