CHAPTER 8

REVERSE-FOI

8.1 Applicants may request an agency to provide access to documents created by, or containing information relating to, a third party. In some cases, the third party's interests will be adversely affected if access is granted. The primary means of protecting third party interests is the availability of suitably worded exemption provisions in Part IV of the Act, under which access may be refused. (These provisions are discussed below in chapters 10, 13 and 14).

8.2 The Act provides a supplementary means of protection, often called 'reverse-FOI', linked to two of these provisions, section 33A (documents affecting relations with States) and section 43 (documents relating to business affairs, etc). Reverse-FOI involves the agency consulting with the third party affected before deciding whether to grant access.

8.3 If the agency decides to grant access, the third party has the right to apply to the Administrative Appeals Tribunal for review of the decision. The reverse-FOI process attempts to strike a balance by ensuring that the views of an affected third party are considered in arriving at a decision to grant access without, however, giving the third party any right to veto access.

8.4 The Committee continues to support the general concept of reverse-FOI as it applies to documents relating to States and business. Reverse-FOI provides a safeguard against the possibility that agencies will fail to give due weight to all relevant interests when deciding to grant access. However, the Committee is conscious that reverse-FOI has proved to be one of

the more expensive and time-consuming aspects of the operation of the Act.[1]

8.5 The Committee is aware of the need to preserve the voluntary flow of information to the Commonwealth. It is therefore important that the confidentiality of sensitive information which is supplied be not only preserved but that information-suppliers have confidence that this will be the case.

Mandatory consultation for business documents

8.6 Three conditions must be fulfilled before an agency is required to initiate reverse-FOI consultations in respect of documents for which exemption may be claimed under section 43 (documents relating to business affairs, etc.).

8.7 First, consultation is required only where the agency proposes to grant access. The practical problems arising out of the review processes are discussed below.

8.8 Secondly, agencies are only required to consult 'where it is reasonably practicable to do so having regard to all the circumstances, including the application of section 19'.[2] The Committee has not been informed that any agency has justified its failure to consult on the basis that the requirement to respond to the access request within the time limits imposed by section 19 left insufficient time to consult.[3]

8.9 In the light of this, the Committee considers that this qualification on the requirement to consult should remain. There

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1. E.g. IDC Report, p. C2, estimated that in 1984-85 the salary cost to the Commonwealth of reverse-FOI consultation with business was about $400,000. Reverse-FOI costs are also incurred by the Commonwealth in respect of consultation with States and non-salary costs. Business and the States also incur costs.
2. FOI Act, s.27(1).
3. Contrast the theoretical concern raised in the submission from the Confederation of Australian Industry, p. 3 (Evidence, p. 418).

will be exceptional situations when the absence of this qualification would result in permanent denial of access (e.g. where a sole trader has ceased trading and emigrated).

8.10 Thirdly, consultation is required only where 'it appears to the officer or Minister dealing with the request' that the third party 'might reasonably wish to contend that the document is an exempt document under section 43'.[4] This qualification on the requirement to consult attracted considerable criticism.[5]

8.11 There are two elements to the criticism. First, the officer may not have been aware that the document was of a type referred to in section 27. This is unlikely to happen (in the absence of negligence) in respect of documents which originated with a business. But it may occur where documents derive from other sources and it is not self-evident that they contain sensitive business information. Secondly, the agency may be aware of the nature of the document and address the issue of the impact of disclosure. However, the agency decision-maker may assume that the business or person affected would not reasonably wish to contend that the document is exempt under section 43.

8.12 In both cases, failure to consult arises because of the FOI decision-maker's lack of awareness of the impact of granting access:

> Information which on the face of it may appear to be innocuous to a government official may bear significance in a particular commercial environment which is unfamiliar to an agency. What is equally threatening is the 'mosaic'

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4. FOI Act, s.27(1)(b).
5. Submissions from the Business Council of Australia, p. 4 (Evidence, p. 774), the Confederation of Australian Industry, p. 3 (Evidence, p. 418); (endorsed by the Agricultural & Veterinary Chemicals Association, p. 1); and Alcoa of Australia Ltd, p. 6 (Evidence, p. 835). See also the submission from the Institute of Patent Attorneys of Australia, p. 3, which states that although the practice has now altered, in 1983 'there were instances of access being granted to documents believed by the supplier to be of a sensitive business nature without invoking Section 27 of the Act'.

> effect when small pieces of information, if disclosed, serve to complete the picture in the hands of a competitor who can place the selective release of information into context.[6]

But the remedies differ.

8.13 Lack of awareness at the threshold cannot be cured by amending the Act: it is the very lack of awareness which results in the failure to consider the reverse-FOI provisions at present in the Act. Education of FOI decision-makers is the only effective remedy.[7] On the evidence to date, the training of decision-makers has been adequate in this regard. The Committee expects that agencies will continue to take steps to ensure that their FOI decision-makers are alert to the potential impact upon business of granting access.

8.14 A legislative remedy is possible in the second situation. The decision-makers' awareness of the possibility of a section 43 exemption applying to the requested documents may activate the need for them to make assumptions about the attitude of a business or person to whom the documents relate. Consultation can be made mandatory in this situation.[8] To do so would increase the occasions for consultation and hence the cost to both the Commonwealth and to business.

8.15 The Committee is not in a position to estimate the size of the increase. However, it would appear to be very small. It seems there are very few requests for business-related documents in respect of which agencies advert to the question of

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6. Submission from Alcoa of Australia Ltd, p. 5 (Evidence, p. 834). See also, for example, the submission from the Institute of Patent Attorneys of Australia, p. 2.
7. Cf. Evidence p. 452 (Confederation of Australian Industry).
8. E.g. Freedom of Information Act 1982 (Vic), s.34.

reverse-FOI but do not initiate consultation.[9] All business representatives who appeared before the Committee expressed a preference for mandatory consultation rather than the present position.[10]

8.16 In view of this, and the apparently small extra costs involved, **the Committee recommends that sub-section 27(1) be amended to remove the requirement that, before engaging in reverse-FOI consultation with a business or person, an agency or Minister must decide that that business or person might reasonably wish to contend that a document is exempt under section 43.**

8.17 Consultation is to be required irrespective of whether it appears that the business or person would wish to object to access being granted.

8.18 One effect of this recommendation will be to increase the exposure of agencies and Ministers to actions for breach of statutory duty if they omit mandatory reverse-FOI consultation prior to granting access. In addition, the grant of access in these circumstances would not attract the protection against actions for defamation or breach of copyright given to the Commonwealth and its officers by section 91.

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9. The IDC Report states that, in 1984-85, 1372 'business' requests were received (p. A7) by agencies which together received nearly 95% of all requests made during that year. Not all requests are determined in the year of receipt. But in 1984-85 consultation with business occurred in respect of 1423 initial decisions to grant access and a further 12 decisions at the internal review stage (p. C20). It should be noted that mandatory consultation may increase scope of consultation even where it does not increase the occasions on which some consultation is required. A requested document may relate directly to one business but also refer in a peripheral way to others. At present only the one business may be consulted. Under mandatory consultation all would have to be contacted.

10. Submissions from the Business Council of Australia, p. 4 (Evidence, p. 774); the Confederation of Australian Industry, p. 4 (Evidence, p. 419); CRA Services Ltd, p. 7 (Evidence, p. 805); and Alcoa of Australia Ltd, p. 6 (Evidence, p. 835). For arguments against requiring mandatory consultation, see for example the submission from Dr A. Ardagh, pp. 8-9.

8.19 The Committee is of the view that this increased exposure is unacceptable.

8.20 Therefore, **the Committee recommends that section 91 be amended so that the protection otherwise conferred by that section against actions for defamation and breach of copyright or confidence will not be lost if a required reverse-FOI consultation is omitted. Further, the failure to consult should not, of itself, be sufficient to found an action against the Commonwealth or its officers.**

Access to edited documents

8.21 Agencies may grant access to documents after editing out matter the presence of which would have made the original document exempt. (It was recommended in paragraph 7.22 above that irrelevant matter should also be able to be edited out.) The original document may contain business information such that under paragraph 27(1)(a) reverse-FOI consultation would be required before access could be granted.

8.22 It has been put to the Committee that consultation should also be required in respect of the edited document.[11] Agencies may be unable to make an appropriate judgment about the commercial sensitivity of what remains after editing.[12]

8.23 Consistently with its view on the need for mandatory consultation, the Committee accepts that mandatory consultation is appropriate in respect of edited documents.

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11. Submissions from the Business Council of Australia, p. 6 (Evidence, p. 776); Alcoa of Australia Ltd, p. 7 (Evidence, p. 836).
12. E.g. the Commissioner of Taxation granted FOI access to a document containing commercially sensitive data on sales by alumina proceudres, after editing out the names of the companies. Industry experts, however, were still able to deduce from the data which figures applied to which company. See Evidence, pp. 838-41 (Alcoa of Australia Ltd); supplementary submission from the Attorney-General's Department, pp. 2-4.

8.24 The Committee recommends that where, but for the fact that a document contains exempt matter, the reverse-FOI process would be mandatory prior to granting access, that process also be mandatory where it is proposed to grant access to an edited version of the document.

Documents not supplied by the business

8.25 The reverse-FOI process in section 27 applies to all documents containing the relevant type of information, not only those supplied by the party to whom the information relates. The Business Council of Australia relied upon a single instance to suggest that this aspect of section 27 was not clear to all public servants.[13] The Council suggested that either FOI procedures must be improved or the legislation could be made more specific.

8.26 The Committee considers that the wording in the Act is sufficiently clear. The Committee has no reason to conclude that the instance cited by the Business Council was anything but an isolated case. However, the Committee draws the Council's point to the attention of the Attorney-General's Department as a point which should be stressed in any publicity or training material which is prepared on FOI.

8.27 The Business Council of Australia also pointed to the need to ensure that, where the document which it is proposed to release was not supplied by the party being consulted, sufficient information concerning the contents of the document is provided to enable that party to determine its attitude and make any necessary submissions.[14] The Department of Trade informed the

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13. Submission from the Business Council of Australia, p. 3 (Evidence, p. 773).
14. Ibid.

Committee that it was not always possible to separate information relevant to one reverse-FOI party from that relevant to others within the existing time constraints.[15]

8.28 The Committee considers that the extension of time that it recommended above (paragraph 5.45) should be available to respond to requests involving reverse-FOI will alleviate the problem identified by the Department of Trade and result in improved information being given to the reverse-FOI party. The Committee does not think any other amendment to the Act would be useful in this context.

8.29 The Committee has no reason to consider that agencies unnecessarily withhold relevant information when engaged in reverse-FOI consultation. If, in particular cases, the party consulted considers that it requires further information on the content of the document relating to it the matter is best resolved by negotiation with the agency.

Confidentiality of involvement

8.30 The Business Council of Australia informed the Committee that, in some cases, companies are reluctant to contest the release of information because the mere public knowledge that a company wishes to prevent access can be sufficient to disclose all that is sought to be kept confidential.[16] No examples were referred to, and the Committee is not aware of any specific cases where companies have declined to oppose release for this reason.

8.31 As far as the Committee is aware, agencies do not disclose to applicants the identity of parties consulted in the reverse-FOI process, although, of course, frequently the applicants would be able to guess the identity from the nature of

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15. Submission from the Department of Trade, p. 3.
16. Submission from the Business Council of Australia, p. 6 (Evidence, p. 776).

the request. If the matter reaches the Administrative Appeals Tribunal, the confidentiality of the identity of parties is a matter for the Tribunal.[17]

8.32 Accordingly, the Committee does not endorse the Business Council's suggestion that the FOI Act should be amended to provide that, where the identity of applicants or reverse-FOI parties is requested, the request should be treated as a separate application under the Act.[18]

Improving reverse-FOI with States

8.33 The Committee does not accept that States should be given the power to veto the release of documents under the FOI Act.[19] The Committee considers that a version of reverse-FOI is adequate to ensure that State interests are brought to the attention of FOI decision-makers.[20] Section 26A of the FOI Act makes reverse-FOI consultation with a State conditional upon arrangements having been entered into between the Commonwealth and a State with regard to such consultation.[21]

8.34 The Committee agrees that details of how consultations are to be conducted should be settled by agreement between the Commonwealth and the State. However, the Committee is concerned that sub-section 26A(1) might provide the means to evade the requirement of consultation under section 33A.

8.35 The Committee also notes that the section 26A requirement that consultation be in accordance with arrangements entered into between the Commonwealth and State may invite disputes as to whether the consultation does so conform.

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17. Administrative Appeals Tribunal Act 1976, s.35.
18. Submission from the Business Council of Australia, p. 6 (Evidence, p. 776).
19. See the discussion below, paras. 10.8 and 10.9.
20. Cf. 1979 Report, para. 17.18.
21. FOI Act, s.26A(1).

8.36 **The Committee recommends that the clauses 'arrangements have been entered into between the Commonwealth and a State with regard to consultation under this section, and', and 'in accordance with these arrangements', be deleted from sub-section 26A(1).**

8.37 The Committee recognises that this may raise definitional or mechanical problems as to between whom (ie. what officers) consultation should occur. If this is so, the Committee considers that the Act should be amended to provide to the establishment of an appropriate mechanism.

8.38 **The Committee recommends that sub-section 26A(1) be amended to refer to consultation between the relevant Commonwealth and State Ministers and/or their authorised delegates.**

8.39 Senator Stone records his view that, while third-party authors of documents and third parties to whom documents relate should not have the right to veto the release of documents under the FOI Act, all such third-parties should have full reverse-FOI rights, at present conferred only on businesses and the States. In accordance with this view, Senator Stone considers that the recommendations contained in paragraphs 13.32 and 13.41 below do not go far enough. (See also paragraphs 13.34 and 13.42 below.)

Reverse-FOI and release outside the FOI Act

8.40 The Act protects the position of a reverse-FOI party by preventing an agency giving effect to a post-consultation decision to release until the party has had an opportunity to seek review of that decision. With respect to business documents, paragraph 27(2)(b) provides that:

> access shall not be given to the document ... unless -
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> (i) the time for an application to the Tribunal ... has expired and such an application has not been made; or
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> (ii) such an application has been made and the Tribunal has confirmed the decision.

(Paragraph 26A(2)(b) makes similar provision with respect to documents relating to States.)

8.41 Concern has been expressed that sub-paragraph (ii) has the effect of creating a permanent bar to granting access outside the scope of FOI.[22] It may be desirable to grant such access in the future if circumstances have changed. The permanent bar would arise where an application has been made to the Tribunal and either is not pursued because the access-seeker has lost interest in obtaining access or the Tribunal does not confirm the decision to release. In the former case, the agency may feel obliged to contest the review application solely to preserve its ability to release the document in the future.[23]

8.42 The Committee is aware of concern by business that access can be given to sensitive business documents outside the FOI Act.[24] However, the Committee considers that it is anomalous to create a permanent bar upon access in this way. Such a permanent bar may serve to provide greater protection from disclosure to business and State documents than to, say, documents affecting law enforcement which are exempt under section 37.

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22. Submissions from Justice J.D. Davies, p. 1 (Evidence, p. 1364); the Attorney-General's Department, p. 94 (Evidence, p. 99).
23. Submission from the Attorney-General's Department, p. 94 (Evidence, p. 99).
24. Submission from the Confederation of Australian Industry, p. 2 (Evidence, p. 417).

8.43 The Committee considers that the FOI Act should be amended to demonstrate that this anomalous result is not intended, and that such documents receive no greater protection than documents exempted under provisions which do not require reverse-FOI consultation.

8.44 **The Committee recommends that the Act should be amended to ensure that documents do not acquire any greater protection from disclosure as a result of the reverse-FOI process than other documents which are exempt from disclosure under Part IV of the Act.**

Internal review - review of reverse-FOI decisions

8.45 Where a decision is made to refuse access, the access-seeker may, subject to some qualifications, seek internal review of the decision and must seek internal review before applying to the Administrative Appeals Tribunal for review.[25] Internal review is not available to a person consulted under reverse-FOI who wishes to contest an agency decision to grant access. Such a person has a right to apply direct to the Tribunal for review of the decision.[26]

8.46. The Committee considers that internal review should be used where practicable because it is cheaper and less time-consuming than Tribunal review.[27]

8.47 Therefore, **the Committee recommends that internal review be available to, and be required to be used by, parties consulted under reverse-FOI who wish to seek the review of decisions to grant access. The Committee further recommends that the availability of internal review and the requirement that it is**

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25. FOI Act, s.54.
26. FOI Act, ss.58F, 59.
27. Submission from the Confederation of Australian Industry, p. 5 (Evidence, p. 420), endorsed on this point by the Business Council of Australia (Evidence, p. 778).

used be subject to the same qualifications as apply to internal review of decisions to refuse access.

Reverse-FOI - review by the Administrative Appeals Tribunal

8.48 Provision of adequate review rights to a party with a right to be consulted under reverse-FOI has to cater for two broad situations. The agency may decide to grant access, in which case the party requires an opportunity to apply to the Tribunal for review of the decision. Alternatively, the agency may decide to refuse access. If the access-seeker seeks Tribunal review of this decision, the reverse-FOI party may wish to appear before the Tribunal to ensure that its views are considered.[28]

Review of decisions to grant access

8.49 Under the FOI Act, a State or business has a right to seek review of an agency decision to grant access only if it has been consulted under the reverse-FOI process.[29] This restriction has been criticised.[30] The Committee considers that its recommendation at paragraph 8.16 above to increase the range of situations in which consultation is required will remove much of the force of this criticism. However, a gap remains.

8.50 As noted above there are still some circumstances in which an interested third party will not be consulted. Due to failure to consult, the third party will be unlikely to be aware that a decision to grant access has been made. In general, therefore, such third parties will be unable to seek review in time to prevent access even if a right of review were available.

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28. It should be noted that independently of the review rights conferred by the FOI Act, review can be sought in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977, subject to that Court's discretion to decline to hear the matter because an adequate alternative avenue of review is available: AD(JR) Act s.10(2)(b)(ii).
29. FOI Act, s.58F(1) and s.59(1).
30. Submission from the Confederation of Australian Industry, p. 5 (Evidence, p. 420).

8.51 In some circumstances, such third parties may learn of a decision to grant access in sufficient time to seek the review of this decision. In the Committee's view, such third parties should have a right to initiate proceedings for either or both internal review and review by the Administrative Appeals Tribunal.

8.52 **The Committee recommends that the right to seek reverse-FOI review not be contingent upon the third party having been consulted, but instead rest upon the appellant being a party who/which should have been consulted under reverse-FOI.**

Review of decisions to refuse access

8.53 An agency can avoid the reverse-FOI process, where it would otherwise apply, by refusing to grant access. The access-seeker can then (ultimately) seek review of that decision in the Administrative Appeals Tribunal.

8.54 A State or business which would have been consulted had reverse-FOI applied may wish to become a party before the Tribunal in order to argue, together with the agency, that access should not be granted. Sub-section 30(1A) of the Administrative Appeals Tribunal Act 1975 provides that the Tribunal may, in its discretion, allow any 'person whose interests are affected by the decision' under review to become a party.

8.55 The Committee regards this provision as satisfactory, as long as the person affected is aware that the review has been sought. At present, there is no mechanism to ensure that this will happen,[31] though the Tribunal will itself, in some circumstances, notify a person who is clearly affected.

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31. Submission from Alcoa of Australia Ltd, p. 4 (Evidence, p. 833.

8.56 The Committee takes the view that the agency whose decision is under review is in the best position to determine who will be affected if the Tribunal overturns that decision.

8.57 Therefore, **the Committee recommends that an agency have a duty to notify a business or State that the agency's decision is under review by the Tribunal. The duty should only arise where the agency would have had an obligation to notify the business or State under reverse-FOI had the agency proposed to grant access.**

8.58 The Attorney-General's Department pointed out that there would be some reduction in costs to a business or State if it was not required to join at the outset of the proceeding before the Tribunal.[32] Instead the business or State could defer participation and join only where the Tribunal was not satisfied after hearing the evidence of the agency that the document was exempt.

8.59 The Committee accepts that there might be value in some cases in allowing deferred participation in this way. The Committee notes, however, that the savings to third parties may in some cases be outweighed by the extra costs imposed on the other parties by a two-stage proceeding. In addition, the third party might wish to be present at the first stage in order to cross-examine witnesses called by other parties.

8.60 The Committee has no objection to the Tribunal having a discretion to allow a third party to defer participation. The Committee is uncertain whether legislation is required to permit this, given the flexibility of Tribunal procedures, or, if legislation is required, whether the FOI Act or the Administrative Appeals Tribunal Act is the more appropriate Act to amend.

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32. Submission from the Attorney-General's Department, p. 88 (Evidence, p. 93). The point was supported by the Confederation of Australian Industry (Evidence, p. 445) and the Business Council of Australia (Evidence, p. 779).

8.61 Therefore, the Committee recommends that the Attorney-General should initiate whatever steps are required (including legislation if necessary) to ensure that a business or State that would be affected by a successful appeal against an agency's decision to deny access may defer its appearance before the Tribunal. The third party should be able to defer until the point where the Tribunal, after hearing the evidence of the agency, is still not satisfied that the document is exempt.

8.62 Implicit in this recommendation is the rejection of a suggestion made by the Department of Aviation.[33] The Department characterised reverse-FOI proceedings as involving essentially only the interests of the access-seeker and the third party. Both should be required to be parties before the Tribunal. In most circumstances, the agency should be allowed to withdraw, achieving a saving to it.

8.63 The Committee does not accept this characterisation of reverse-FOI proceedings. It is an agency decision that is under review. It would not be appropriate to leave it to others to defend that decision, even though, in a sense, they are beneficiaries of it.

Exemptions able to be claimed by a business or a State

8.64 A business or State which has been consulted under reverse-FOI can seek review of a decision by the agency to grant access. However, in doing so, it may only raise (and the Tribunal may only consider) the exemption provision with which its right to be consulted is linked (ie. s.33A for States, s.43 for

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33. Submission from the Department of Aviation, p. 3.

business).[34] It has been questioned whether this restriction is appropriate.[35]

8.65 Apart from the issue of fairness to the business or State, the restriction leads to an anomaly. There is no restriction upon the grounds of exemption which the Tribunal may consider in appeals other than reverse-FOI appeals brought under section 58F or section 59; grounds not relied upon by the agency may be considered.[36] It appears that a business or State joined with an agency in opposing access can raise exemption provisions other than section 43 or 33A respectively, even if the agency does not wish to do so.[37] If this is the case, the business or State is better placed when opposing access in an appeal brought by the access-seeker than when it brings the appeal itself under section 59 or section 58F respectively.[38]

8.66 The Committee accepts that the present restriction is anomalous. It also has the undesirable potential to increase litigation. The business or State denied the opportunity to raise other exemptions may seek review of the agency decision to grant access in the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. In this action it would not be restricted to the FOI Act exemption provisions upon which it could seek to rely.

8.67 **The Committee recommends that a State or business seeking review by the Administrative Appeals Tribunal of an agency's decision to grant access should not be restricted to**

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34. Mitsubishi Motors Australia Ltd v Department of Transport (1986) 68 ALR 626.
35. Submission from the Confederation of Australian Industry, p. 5 (Evidence, p. 420); [1987] Admin Review 10-11.
36. Austin v Deputy-Secretary, Attorney-General's Department (1986) 67 ALR 585; Re Bartlett and Department of Prime Minister and Cabinet (31 July 1987), para. 21.
37. Re Actors' Equity Association and Australian Broadcasting Tribunal (1984) 7 ALD 584, p. 595.
38. Submission from the Australian Broadcasting Tribunal, pp. 6-7 (Evidence, pp. 1016-17).

reliance upon the section 33A or 43 (as the case may be) grounds of exemption.

Onus of proof

8.68 Section 61 places upon the agency the onus of establishing that a decision adverse to the applicant should be given by the Tribunal. (Section 61 does not apply in reverse-FOI proceedings brought under sections 58F or 59.) It is not clear what effect this has where a party joins with the agency to oppose an applicant seeking review of the agency's decision to refuse access and the party joined raises a ground of exemption not relied upon by the agency.

8.69 Read literally, section 61 suggests that the arguments raised by the party joined would fail if they were not supported by the agency. The Committee regards this result as undesirable.

8.70 The result is not easily avoided. Placing the onus upon the third party will bring that third party into direct competition with access-seekers in some circumstances. Arguably, this is not appropriate. An alternative would be not to place an onus upon any third party in respect of arguments not raised or supported by an agency. However, the effect of this is to invite an agency to leave it to the third party to raise all arguments opposed to access and to raise none itself. This will increase the prospect that the case against access will succeed in those (very few) appeals where the onus of proof is of any practical consequence and where a third party joins with the agency.

8.71 On balance, the Committee prefers that the onus should rest upon the third party. That party is best placed to argue the effects that access would have on it.

8.72 **Therefore, the Committee recommends that the Act be amended to place the onus of establishing that the Tribunal give**

a decision adverse to the applicant upon any party (whether or not an agency) that argues against allowing access.

8.73 Senator Stone dissents from paragraph 8.71 and the recommendation contained in paragraph 8.72.

Costs

8.74 Representatives of business suggested to the Committee that a business should be able to recover at least some part of the cost to it of being drawn into reverse-FOI proceedings.[39] The Committee accepts that there should be some mechanism for cost-recovery by both business and States. Recovery should be from the Commonwealth rather than from the party seeking access to the documents. It would be unreasonable to expose applicants to the risk of having to bear the costs of the business as a result of having sought access. (Senator Stone dissents from this last proposition.)

8.75 Several restrictions appear to be necessary. First, recovery should be possible only in respect of costs incurred in appearing before the Administrative Appeals Tribunal, and should be awarded by the Tribunal. This reflects the ordinary rules applying in litigation. It will deny cost-recovery in respect of the consultation phase of reverse-FOI, thereby avoiding a large number of mostly small claims arising out of straightforward consultations. Costs related to internal review will not be recoverable.

8.76 Secondly, in line with the present provision on costs in section 66 of the FOI Act, costs should only be recoverable where the reverse-FOI party 'is successful, or substantially

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39. Submissions from the Confederation of Australian Industry, p. 5 (Evidence, p. 420); the Business Council of Australia, p. 5 (Evidence, p. 775); and Alcoa of Australia Ltd, p. 7 (Evidence, p. 836). See also Evidence, p. 810 (CRA Ltd).

successful' in the Tribunal.[40] Further, no costs should be recovered if in the opinion of the Tribunal intervention, though successful, was unnecessary or unreasonable. Where the agency opposes access and is arguing all relevant grounds there is no reason to reward a party joined with the agency by allowing that party to recover costs.

8.77 In summary, the Committee recommends that the Act be amended to provide that:

(a) the Administrative Appeals Tribunal be empowered to award costs in favour of a reverse-FOI party appearing before the Tribunal to oppose the grant of access;

(b) such costs be payable by the Commonwealth but not the applicant;

(c) costs recoverable be limited to costs relating to appearance, and not include costs relating to reverse-FOI consultations with an agency or internal review of an agency decision; and

(d) costs be awarded only where the party seeking costs was successful or substantially successful in opposing access, and its intervention was reasonable and necessary in the opinion of the Tribunal.

8.78 The Committee further recommends that where the reverse-FOI appellant fails to succeed in any of the contentions s/he advances, the Administrative Appeals Tribunal be empowered to award costs against the reverse-FOI appellant and in favour of both the applicant and the Commonwealth.

8.79 Senator Stone dissents from the recommendation contained in paragraph 8.77(b).

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40. FOI Act, s.66(1)(b).

8.80 The Committee is aware that the effect of the recommendation that the Administrative Appeals Tribunal be empowered to award costs against the Commonwealth will be to increase the expense of FOI to the Commonwealth. The Committee is unable to estimate with any precision the size of the increase.

8.81 It is possible that the recommendation may also have some effect on agencies' decisions, creating a reluctance to grant access in borderline cases. Faced with a certain reverse-FOI appeal if access is granted and an assessment that an applicant would not contest a decision to refuse access, an agency may opt for the latter in order to reduce the risk that the reverse-FOI appeal might succeed and costs be awarded against the agency. The Committee considers that, in practice, agencies are unlikely to be influenced by this reasoning.

Documents affecting personal privacy (section 41)

8.82 Frequently, agencies have regard to the wishes of people whose privacy would be interfered with were access granted to documents relating to them.[41] The Administrative Appeals Tribunal also takes steps, in some circumstances, to notify such people where applicants request access to relevant documents.[42] In neither case is either consultation or notification obligatory.[43]

8.83 The Committee agrees with the Law Institute of Victoria that reverse-FOI should be extended to documents containing information about the 'personal affairs' of individuals.[44] The

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41. Re Dyrenfurth and Department of Social Security (15 April 1987) para. 7.
42. E.g. Re Z and Australian Taxation Office (1984) 6 ALD 673, p. 677.
43. Re Dunn and Australian Federal Police (1986) 11 ALN 185, p. 187.
44. Submission from the Law Institute of Victoria, p. 5 (Evidence, p. 378). See also submission of Commonwealth Ombudsman, p. 11 (Evidence, p. 1318).

Committee notes that the Privacy (Consequential Amendments) Bill 1986 was intended to amend the FOI Act by applying reverse-FOI procedures to documents falling within section 41 of the FOI Act.[45]

8.84 The proposed section 27A is cast in terms similar to sections 26A and 27. Like those sections, it is complemented by a provision providing for the review of a decision to release a document which has been the subject of reverse-FOI consultation.[46]

8.85 The Committee supports the extension of reverse-FOI in this way, subject to the recommendations already made with respect to reverse-FOI and business documents.

8.86 **If the Privacy (Consequential Amendments) Bill 1986 is not enacted, the Committee recommends that the FOI Act be amended in the manner contemplated by clause 5 of the Bill, modified by the Committee's recommendations with respect to reverse-FOI and business documents. The Committee further recommends that where a person enters into reverse-FOI proceedings as a result of this amendment, that person possess the same capacities, rights and responsibilities as any other reverse-FOI party.**

8.87 The application of reverse-FOI to 'personal affairs' will increase the costs of FOI. The Committee is not in a position to give even an approximate estimate of the size of the increase.

8.88 In practice, it may be extremely difficult to locate individuals. In the Committee's view, the inability of locate an individual to whom a document relates should not of itself suffice to bar access to that document.

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45. Privacy (Consequential Amendments) Bill 1986, cl. 5, (proposed s.27A).
46. Privacy (Consequential Amendments) Bill 1986, cl. 8 (proposed s.59A).

8.89 The Committee recommends that agencies make reasonable efforts to locate individuals; but that agencies should not be precluded from exercising their own judgment where they are unable to locate individuals about whom documents contain relevant personal information, or they have died.

Breach of confidence

8.90 In some cases, information is provided to Commonwealth agencies upon the understanding that either the information or its source will not be disclosed. The Ombudsman noted that there is some question whether the informant's views should determine whether information of this type should be released.[47]

8.91 To the extent that section 45 operates by reference to the general law relating to breach of confidence, suppliers' interests are adequately protected by that law. A right of reverse-FOI consultation would be superfluous.[48]

8.92 The Committee considers that sections 33A, 41, and 43 provide an adequate list of the types of information about the disclosure of which agencies should necessarily be required to notify the interested third parties, and in respect of which third parties should be entitled to initiate proceedings. In practice, it is desirable that an agency should consult with the suppliers of information which, in the agency's view may have been supplied in confidence. However, if the agency disregards the suppliers' views, or elects to release the information without having consulted with the suppliers, it does so at its own peril: the suppliers may institute proceedings for breach of confidence.

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47. Submission from the Commonwealth Ombudsman, pp. 9-11 (Evidence, pp. 1316-18).
48. Where documents are disclosed which should have been exempted under section 45, there may be grounds for an action for breach of confidence.