CHAPTER 13

SECTION 41: PRIVACY

'Personal affairs'

13.1 The Act does not define the phrase 'personal affairs', which is used in sections 12 and 48 as well as section 41. Deputy President A.N. Hall of the Administrative Appeals Tribunal observed that the phrase is one

> that is inherently incapable of precise or exhaustive definition. Its meaning and application are, I think, best left to be worked out as fact situations arise, bearing in mind the dichotomy which the Act establishes between 'business and professional affairs', on the one hand, and 'personal affairs' on the other.[1]

13.2 The Committee shares this view. There is no merit in defining the phrase in the Act, although the Committee acknowledges that the imprecision of the phrase does sometimes cause difficulty in applying the sections in which it occurs.

13.3 As the Committee recognised in 1979, it is desirable to safeguard private information about individuals; but it is not necessary to prevent the circulation of all information about identifiable persons. Consequently, the Committee rejects the Queensland Government's suggestion that documents which 'relate to an individual should not be released to or access be given to a third party without the consent of the individual concerned'.[2] Treating all information about individuals as potentially

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1. Re Anderson and Department of Immigration and Ethnic Affairs (1986) 4 AAR 414, p. 430.
2. Supplementary submission from the Queensland Government, p. 2.

privacy-intrusive would undermine the operation of the freedom of information legislation.

13.4 In this context, the Committee notes that the definition of 'personal information' adopted in the proposed privacy legislation differs from the definition of information relating to 'personal affairs'.[3] Clause 6 of the Privacy Bill 1986 defined 'personal information' as

> information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

13.5 To the extent that the category of personal information is wider than is the FOI category of information relating to 'personal affairs', the Information Privacy Principles, particularly Information Principle 7 (alteration of records containing personal information), listed in the Privacy Bill are at variance with sections 41 and 48 of the FOI Act.

'Unreasonable disclosure'

13.6 In order to determine whether the disclosure of the document is 'unreasonable', the agency or Minister must decide whether it would be unreasonable to disclose the information generally, rather than whether it would be unreasonable to disclose it to the particular applicant.[4] This has the effect that information may be withheld from persons whose limited use of it would not constitute an 'unreasonable disclosure' of personal affairs.

13.7 The Administrative Appeals Tribunal has said that the 'reasonableness' of a given disclosure must be determined by

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3. E.g. see Young v Wicks (1986) 11 ALN 176.
4. Re Williams and Registrar of the Federal Court of Australia (1985) 8 ALD 219, p. 224.

reference to an objective evaluation of all the circumstances surrounding the application, and the weighing of the various interests, both personal and public involved. Accordingly, it is necessary to consider matters such as the nature of the information contained in the document; the circumstances in which it was obtained; the current relevance of the information; the wishes (or probable wishes) of the individual to whom the information relates; and the private or public status of that person.[5]

13.8 The Commonwealth Ombudsman has drawn attention to a need to balance the right of access to 'non-sensitive data' about identifiable individuals, such as mailing lists held by agencies, against the individuals' privacy interests.[6] The Committee recognises that this may present difficulties in practice, particularly in view of the imprecise nature of the personal information exemption in section 41: the 'unreasonable disclosure of information relating to the personal affairs of any person'.

13.9 In paragraph 8.86 above, the Committee recommended that agencies be required to consult with individuals to whose 'personal affairs' documents relate. From consulting with people to whom information relates, it is a short step to attempting to balance the use of requested documents FOI against information-subject's privacy concerns.

13.10 In Re Shewcroft and Australian Broadcasting Corporation, Sir William Prentice commented:

> in deciding whether disclosure of information relating to the personal affairs of another person would be 'unreasonable' (s 41(1)), one could envisage the necessity of setting the motivation or need of an applicant against the

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5. Re Williams and Registrar of Federal Court of Australia (1985) 8 ALD 219; Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN 257; Re Anderson and Australian Federal Police, (1986) 4 AAR 414; Re Brooker and Commissioner for Employees' Compensation (6 March 1986).
6. Commonwealth Ombudsman, Annual Report 1984-85, p. 171.

> right to privacy of the person whose 'personal affairs' were cited, in the attempt to weigh the 'reasonableness' or 'unreasonableness' of a requested disclosure. Indeed, the concept of 'unreasonableness' of an action, would seem to involve the requirement of a weighing of factors.[7]

13.11 Under the United States' Freedom of Information Act, the weight given to an applicant's need to know has been crucial in some cases. For example, courts have held that an applicant's interest in seeking a list of names and addresses from agency files for use in commercial direct mail advertising will not prevail over the privacy interest of those on the list.[8] However, where the applicant has sought such a list for the purpose of academic research, access has been granted.[9] Access has also been permitted where the applicant is a non-profit organisation seeking to serve the interests of those on the lists.[10]

13.12 In applying the Victorian FOI Act, section 33 (documents affecting personal privacy) the Victorian Administrative Appeals Tribunal has considered how applicants intend to use documents. In Re Simons and Victorian Egg Marketing Board, the Victorian Tribunal granted a journalist access to certain personal information in reliance upon the applicant's statement in evidence as to her intended use of the information.[11] In arriving at its decision, the Tribunal expressly relied upon United States case law, in particular upon Getman v National Labor Relations Board.[12] The Tribunal commented that disclosure of the documents

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7. AAT (1985) 7 ALN 307, pp. 310-11. See also Re Brooker and Commissioner for Employees' Compensation (6 March 1986).
8. E.g. Minnis v United States Department of Agriculture 737 F.2d 784 (9th Cir. 1984).
9. E.g. Getman v National Labor Relations Board 450 F.2d 670 (D.C. Cir. 1971).
10. Disabled Officers Association v Rumsfeld 428 F.Supp. 454 (D.D.C. 1977).
11. (1985) 1 VAR 54.
12. 450 F. 2d 670 (1971).

carried with it 'an implicit limitation that the information, once disclosed, be used only by the requesting party and for the public interest purpose upon which the balancing is based'.[13]

13.13 The Commonwealth FOI Act confers no power to exact any undertaking or impose any condition concerning the use which can be made of a document obtained under the Act.[14]

13.14 In some cases, the release of documents conditional upon undertakings as to the way in which the applicant will use the information will be sufficient to overcome the objections to the release of the information by the person to the information relates.

13.15 The introduction of a provision permitting the conditional release of documents by the Tribunal will only serve to increase the disclosure of documents. Before an applicant's proposal may be considered by the Tribunal, the agency must have decided the document should not be released to the world at large.

13.16 The Committee does not consider that there should be a general discretion to release otherwise exempt documents subject to undertakings by applicants. However, section 41 and paragraph 43(1)(c)(i) have as their controlling criterion the 'reasonableness' of the (ex hypothesi adverse) consequences of disclosure.[15] In many cases, this will turn upon the way the applicant will use the documents.

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13. (1985) 1 VAR 54, p. 58, quoting from Getman, ibid., p. 677 fn. 24.

14. Corrs Pavey Whiting & Byrne v Collector of Customs (Fed. Ct., 13 August 1987) p. 4 (Jenkinson J).

15. The 'reasonableness' criterion in these provisions differs from the use of 'reasonably' in a number of other exemption provisions (e.g. s.33A(1)(a) s.37(1), s.40(1)). In the latter, FOI decision-makers are required to assess whether it is reasonably likely that disclosure will affect a nominated interest. In the former case, it is assumed that disclosure will have some adverse impact on the person the subject of the record: the issue is whether this adverse impact is unreasonable in all the circumstances.

13.17 The Committee is of the view that only the courts and the Administrative Appeals Tribunal should be empowered to release to FOI applicants documents subject to undertakings as to how the applicants will use the documents and the information contained therein. The Committee considers that agencies should be precluded from granting access to documents in this way for three reasons.

13.18 First, if agencies were able to grant conditional access to documents they might do so in circumstances in which unrestricted access should be granted to documents. The Committee is of the view that a decision that a document is an exempt document should be a condition precedent to the grant of conditional access. This may be provided by requiring that agencies decide that documents are exempt and be prepared to defend this decision in courts or the Administrative Appeals Tribunal.

13.19 Secondly, agencies would only be able to enforce undertakings against applicants by actions for breach of contract. On the other hand, courts and the Administrative Appeals Tribunal are able to enforce undertakings by proceedings for contempt.

13.20 Thirdly, courts and the Administrative Appeals Tribunal are better equipped to balance applicants' interests against those of the people about whom records contain information.[16]

13.21 **Consequently, the Committee recommends that courts and the Administrative Appeals Tribunal (but not agencies) be empowered to release material which would be otherwise exempt**

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16. McCamus, J.D. 'The Delicate Balance: Reconciling Privacy Protection with the Freedom of Information Principle', (1986) 3(1) Government Information Quarterly 49, p. 53. See also Sonderegger v United States Department of the Interior, 424 F. Supp. 847 (1976).

under section 41, or sub-paragraph 43(1)(c)(i), in reliance upon specific undertakings as to how the documents and the information contained in these documents will be used.

Delegation of authority under sub-section 41(3)

13.22 The Committee's recommendation that the authority to make decisions under sub-section 41(3) should be able to be delegated, was discussed in paragraphs 7.31 and 7.32 above. If sub-section 41(3) is amended in this way, it will be possible for applicants to seek internal review of decisions to grant access to documents only through a nominated medical practitioner.

13.23 **The Committee recommends that, where internal review is available, this be a condition precedent to review in the Administrative Appeals Tribunal of a decision under sub-section 41(3).**

Qualifications of decision-maker under sub-section 41(3)

13.24 The Department of Health criticised sub-section 41(3), stating that it is 'unsatisfactory' to require non-medically qualified decision-makers to determine the likely effect upon the health of a person of the release of a particular document.[17] However, the Department of Veterans' Affairs advised the Committee that the availability of medical officers had rendered the assessment of the likelihood of prejudice to the applicant-patient's health no more difficult than was the assessment of what was an 'unreasonable disclosure' under sub-section 41(1).[18] Presumably, the Department of Health is at least as well served by medical practitioners.

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17. Submission from the Department of Health, p. 17 (Evidence, p. 1237).

18. Submission from the Department of Veterans' Affairs, para. 121 (Evidence, p. 582). See also the submission from the Department of Community Services, p. 2.

13.25 There is no reason why decision-makers under sub-section 41(3) may not seek the assistance from a medically qualified adviser, just as decisions-makers under section 43 may seek the advice of commercially skilled persons. However, the Committee rejects the suggestion that only medically qualified persons should be entitled to take decisions under sub-section 41(3).

Criteria for decision-making

13.26 In some cases, the disclosure of medical reports to the subjects of those reports has resulted in the harassment of the author of the report, and/or the author's family.[19] This does not appear to have occurred where the applicant has been granted only indirect access under sub-section 41(3). However, the only criterion for providing indirect access under sub-section 41(3) is the possibility that direct disclosure to the applicant may have a prejudicial effect upon the health or well-being of the subject/applicant.

13.27 The Department of Health objected to this, and suggested that decision-makers should be entitled to take into account 'any reasonable contention' by the author of a medical report that direct access should not be provided and the likelihood of substantial prejudice to the Commonwealth of the future supply of medical information.[20] The Committee does not accept this suggestion. In the Committee's view, the possibility of prejudice to the applicant's physical or mental health and well-being is the appropriate criterion.

13.28 The Committee considers that release to a nominated doctor provides a reasonable balance between the rights of the

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19. Submission from the Department of Health, p. 16 (Evidence, p. 1236).
20. Submission from the Department of Health, p. 17 (Evidence, p. 1237).

individual and the protection of the authors of the reports.[21] (In addition, the Committee notes that agencies may rely upon the exemption contained in paragraph 37(1)(c), to refuse any access where release would endanger the life or physical safety of any person, including the author of the document.)

13.29 The Department of Health informed the Committee that some medical practitioners have assumed that there is a 'relationship of confidentiality with the Commonwealth Medical Officer that would prohibit disclosure'.[22]

13.30 According to a representative of the Department of Health, medical practitioners are now 'made aware of the fact that any reports provided ... are subject to release under the Act, even in the face of complaint from them that they do not want them released'.[23] However, it appears that one of the result of this has been that certain doctors are not prepared to co-operate with the Department of Health.[24] (The Department conceded that this may not be as a result of the operations of the FOI Act only.)

13.31 In Chapter 8, the Committee expressed the view that the suppliers of information should not be entitled to veto the disclosure of that information. Although the Committee recognises that difficulty may arise where information is disclosed against its suppliers' wishes, the Committee does not accept this as a reason to amend sub-section 41(3). However, the Committee does recognise that this is a reason to consult with the author of such reports.

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21. See also submission from the Department of Health, p. 16 (Evidence p. 1236).
22. Ibid. Cf. submission from the Australian Medical Association, pp. 22-24.
23. Evidence, p. 1288.
24. Ibid.

13.32 **The Committee recommends that agencies consult with the authors of medical or psychiatric reports before deciding whether to disclose these reports to the subject/applicant either directly or indirectly under sub-section 41(3).**

13.33 In the Committee's view, this consultation should be 'first instance' only. Full scale reverse-FOI consultation rights should not be extended to the authors of such documents.

13.34 By analogy to the views noted in paragraph 8.39 above, Senator Stone has reservations about some of the views expressed in paragraph 13.31. Senator Stone dissents from paragraph 13.33 for the reasons noted in paragraph 13.42 below.

Non-medical records

13.35 There is some criticism of the restriction of sub-section 41(3) to 'medical or psychiatric' records.[25] Some applicants seek access to documents which are not directly classified as 'medical or psychiatric' reports but which contain highly sensitive information about the applicant, to which direct access might be prejudicial to the applicant's physical or mental health.

13.36 Thus far, agencies appear to have resolved any difficulties arising in these circumstances by applying a liberal interpretation of sub-section 41(3). According the Mr Lindsay Curtis of the Attorney-General's Department, agencies such as the Departments of Social Security, Community Services, Veterans' Affairs, and Health have been encouraged in training programs to take a wide view of what constitutes 'medical or psychiatric' information.[26] However, he said that the Administrative Appeals Tribunal may not take a similar view.

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25. First supplementary submission from the Attorney-General's Department, pp. 8-9.
26. First supplementary submission from the Attorney-General's Department, p. 9.

13.37 In the Committee's view it is desirable to provide only indirect access to some reports prepared by some para-medical workers such as psychologists, marriage guidance counsellors, social workers, and adoption agency staff where direct access to such reports might be prejudicial to the applicant's physical or mental health.

13.38 The Committee considers that sub-section 41(3) should be extended to apply to reports prepared by such para-medical workers. However, the Committee agrees with Mr Curtis about the difficulties inherent in any such extension:

> It would be necessary to confine the extension to information provided by professionals, that is to say, those whose vocation and training includes providing care for the mental health or well-being of a person. Otherwise, s. 41(3) would extend to ill-informed opinions by those unqualified to form them. The main difficulty with this approach is that the mere disclosure to an applicant of a s. 41(3) decision tends to induce the very mischief the sub-section is intended to prevent.[27]

13.39 The Committee is unable to provide any precise formula by which to extend the category of 'medical or psychiatric' information. In the Committee's view, any such formulation must take into account the statutory descriptions of reports such as those generated in respect of matrimonial disputes, child custody cases, probation and parole and the like.

13.40 **The Committee recommends that sub-section 41(3) be amended to extend the category of information to which indirect access may be granted to include para-medical reports by psychologists, marriage guidance counsellors, and social workers. The Committee further recommends that this extension be confined**

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27. First supplementary submission from the Attorney General's pp. 9-10.

to a professionally-trained and registered para-medicals whose training and vocation necessarily involves providing care for people's physical and mental health and well-being.

13.41 In addition, the Committee recommends that agencies consult with the authors of such para-medical reports before deciding whether to release these reports to the same extent as they consult with the authors of 'medical or psychiatric' reports.

13.42 Senator Stone records his view that all third parties consulted under reverse-FOI should have the right to appeal against decisions to grant access to documents in respect of the disclosure of which they have been consulted.