Chapter 9

Making the access decision

Duty and discretion in decision making (clauses 16 and 12)

9.1 The basic duty of the decision-maker is expressed in unmistakeable terms in clause 16 (1) of the Bill:

> 1. Subject to this Act, where—
>
> (a) a request is duly made by a person to an agency or Minister for access to the document of the agency or an official document of the Minister; and
>
> (b) any charge that, under the regulations, is required to be paid before access is granted has been paid,
>
> the person shall be given access to the document in accordance with the Act.

This mandatory 'shall' language is of course immediately qualified by sub-clause (2), which provides that 'An agency or Minister is not required by this Act to give access to a document at a time when the document is an exempt document'. But we regard the layout of clause 16—the way in which the duty to grant access is first stated more or less absolutely, and only then subjected to qualification—as more than simply a matter of convenient drafting form. We see it as a clear statutory direction to decision-makers to approach their task on the basis that there is a presumption in all cases in favour of disclosure, with the onus being squarely on the decision-maker to establish that the document in question is in fact exempt, rather than being on the applicant to establish that it is not. In this sense, clause 16 may be regarded as extending and reinforcing the basic underlying theme of the Bill, expressed in clause 9 (and discussed by us in Chapter 8), that access to information is a matter of right, and not something that has to be established by the applicant on any basis of interest or need to know.

9.2 The bias of the Bill in favour of disclosure is further demonstrated by clause 12, which makes it clear that even if the decision-maker is satisfied that a particular document comes within one or other of the exemptions specified by the Bill, that is by no means the end of the matter. The absolute duty to disclose a non-exempt document is not accompanied by the duty *not* to disclose a document which is exempt. The decision-maker still has a residual discretion to disclose, conferred upon him by clause 12 in the following terms:

> 12. Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.

It is to be noted that this clause refers not only to other competing statutory obligations to disclose, but allows the agency to grant access to an exempt document simply where it believes it can 'properly' do so. 'Properly' here is not a term of legal art: we read it rather as a invitation, which we wholly support, for decision-makers to apply a commonsense rather than narrowly technical approach to the application of the Bill's exemption provisions, and to confine their refusals to disclose only to those cases where there would be almost universal consensus that good government demanded it.

9.3 The question arises, however, as to whether the Bill should not be even more explicit on these matters than it is already. Does the language of clauses 9, 12 and 16, to which we have referred, clearly convey to the ordinary reader the

principles we have suggested are embodied in them? Is there a need for some more explicitly stated incentive for officials to carry out these principles? Should there, indeed, be sanctions of some kind incorporated in the Bill creating penalties for those who do not?

9.4 There were several individuals and organisations who argued that the legislation should contain, as the Women's Electoral Lobby (Victoria) put it 'a clear statement of the intent of the legislation . . . [or a] stated philosophical commitment to the right of the individual to obtain access to information'.[1] The Freedom of Information Legislation Campaign Committee (FOIL) similarly wanted the legislation to contain 'a general exhortation embodying the spirit of the Act', to the effect that it 'shall be administered with a view to making the maximum amount of government information promptly and inexpensively available to the public'.[2] We are persuaded of the merits of the Bill containing some more explicit provision of this kind. The logical place for its inclusion would be as a supplement or extension to clause 9. We note that there has been an increasing tendency in recent years for Commonwealth Acts to embody statements of general guiding principle, not necessarily justiciable in themselves, but important insofar as they constitute a clear legislative direction as to the spirit in which the Parliament wants to see the Act administered. Recent examples of this kind appear in the *Family Law Act* 1975 (s. 43); the *Administrative Appeals Tribunal Act* 1975 (s. 36 (4)); and in the 1977 amendments to the *Broadcasting and Television Act* 1942 (s. 19 (3)); and the Australian Security and Intelligence Organization Bill 1979 (cl. 20).[3] A provision of the kind we are suggesting for the present Bill would be neither unique nor revolutionary.

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[1] Submission no. 7, incorporated in *Transcript of Evidence*, p. 367.

[2] Submission no. 9, incorporated in *Transcript of Evidence*, p. 166.

[3] The relevant provisions are as follows:

Family Law Act 1975

43. The Family Court shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to—

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;

(c) the need to protect the rights of children and to promote their welfare; and

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.

Administrative Appeals Tribunal Act 1975

36. . . (4) In considering whether information or the contents of a document should be be disclosed as mentioned in sub-section (3), the President shall take as the basis of his consideration the principle that it is desirable in the interest of securing the effective performance of the functions of the Tribunal that the parties to a proceeding should be made aware of all relevant matters but shall pay due regard to any reason specified by the Attorney-General in the certificate as a reason why the disclosure of the information or of the contents of the document as the case may be, would be contrary to the public interest.

Broadcasting and Television Act 1942

19. . . (3) In considering whether any directions should be given under sub-section (2), the Tribunal shall take as the basis of its consideration the principle that it is desirable that proceedings before the Tribunal at an inquiry should be held in public and that evidence given before the Tribunal and the contents of documents lodged with, or received in evidence by, the Tribunal should be made available to the public and to all the persons having an interest in the proceedings, but shall pay due regard to any reasons why any such directions should be given.

Footnote 3 contined on page 113]

9.5 Recommendation: The Bill should contain an additional clause specifically exhorting agencies, when processing requests for documents, to do so with a view to making the maximum amount of information promptly and inexpensively available to the public.

9.6 We were urged by a number of witnesses, however, to go further than this, and create various specific incentives and sanctions to encourage officials to observe both the letter and spirit of the Bill. In Chapter 8 of this report we emphasised the need for training and development programs to ensure that officers understand the legislation and learn to adopt a positive attitude towards it. But it has been put to us that recommendations of this kind may be empty words unless there are ways in which inadequate practice can be penalised. The Women's Electoral Lobby (Perth) referred to the need to create 'sanctions to discourage unjustified withholding of information'.[4] The Australian Journalists Association said that the Bill 'does not provide any penalties for officials who ignore the time limit on providing information' and commented 'this is . . . incredible because of the 60 days allowed under the Bill to provide such information.'[5] The Victorian Committee for Freedom of Information thought that 'failure to include disciplinary proceedings . . . means that (the) Bill does not take account of the likely level of administrative resistance' inside the Public Service.[6] The FOIL Campaign Committee argued similarly that 'insofar as an official can face disciplinary or criminal penalties for disclosing information (even non-exempt information), it is highly inequitable that the Tribunal does not have express power to draw to the attention of the relevant personnel authorities evidence that an officer has acted arbitrarily or capriciously in withholding information'.[7] Mrs G. McGilligan, who made an individual submission, argued that 'if this Bill is to be effective it should have penalties. If an officer of the Department violates any of the clauses then penalty should apply. It applies to the ordinary taxpayer if he breaks the law in sending a late return etc., and yet in something as important as freedom of information, there isn't one penalty clause included. As a citizen of Australia I object to this'.[8]

9.7 The United States experience, again, has been relevant to our deliberations. In 1974, the United States Freedom of Information Act was amended to provide for the disciplining of officers responsible for withholding information 'arbitrarily or capriciously'.[9] Such a provision in Australia was supported by a number of submissions. The Australian Journalists Association, for example, argued that 'there should be a similar provision in the Australian Bill'[10] and the FOIL Campaign Committee also thought that 'deterrent powers of this nature are needed to make

Continued from page 112

Australian Security and Intelligence Organization Bill 1979

20. The Director-General shall take all reasonable steps to ensure that—
(a) the work of the Organization is limited to what is necessary for the purposes of the discharge of its functions; and
(b) the Organization is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

[4] Submission no. 71, p. 2.
[5] Submission no. 81, incorporated in *Transcript of Evidence*, p. 309.
[6] Submission no. 44, incorporated in *Transcript of Evidence*, p. 398.
[7] *Transcript of Evidence*, pp. 170–71.
[8] Submission no. 64.
[9] United States, Department of Justice, *Attorney-General's Memorandum on 1974 Amendments to Freedom of Information Act*, Washington, February 1975, p. 23.
[10] *Transcript of Evidence*, p. 309.

officials individually accountable for the decisions which they make'.[11] The United States system is, in brief, that if a court orders the production of withheld documents and assesses costs against the government, and also issues a written finding that agency personnel acted in this way, then the United States Civil Service Commission is required to decide whether disciplinary action should be taken against the officer who was primarily responsible for the withholding. The Commission is required, after investigating and considering evidence, to submit its findings and recommendations to the agency concerned and to send copies of its findings and recommendations to the officer concerned or his representative. The agency concerned is then required to take the corrective action recommended by the Commission.

9.8 Congress did not expect this provision to be invoked often, but only in 'unusual circumstances'.[12] This has turned out to be so. By the end of 1976—the latest date for which we have information—only one employee of an agency had undergone investigation for allegedly having 'acted arbitrarily or capriciously with respect to the withholding' of records under the United States FOI Act. A Civil Service Commission determination of January 1977 dismissed the charges of impropriety in this particular case.[13] It may still be the case, of course, that disciplinary provisions have a salutary effect in restraining abuses of freedom of information law in the United States, though on this point we have no evidence.

9.9 The Australian departments and authorities which made submissions or gave evidence to the Committee did not address the issue of disciplinary provisions or penalties at all, and appear to have assumed that the question was not a real one. The 1976 Interdepartmental Committee Report said merely that 'it would be inappropriate to make provision of this kind in the Freedom of Information legislation'[14], without giving any reason in support other than to refer to the role of the Ombudsman, a point we take up below. Some reasons can be articulated, though neither separately nor in combination are they especially conclusive. Disciplinary provisions were introduced in the United States only after experience had shown that evasion of the legislation did occur, and to follow the example in Australia might be seen as prejudging the issue of administrative resistance here. In addition, such disciplinary provisions are rare in Australian legislation, and might invite resistance from a Public Service which feels itself under attack in other ways. And further, the Administrative Appeals Tribunal is not, as an adjudicatory and inquisitorial body, in the same position as the United States courts.

9.10 This is not to say that there are no legislative sanctions already applicable to public servants who fail to properly carry out their duties, or that these should never be employed in a freedom of information context. For public servants subject to the *Public Service Act* 1922, regulations 32 (d) and (e) to that Act provide respectively that every officer shall 'carry out all duties appertaining to his office' and shall 'give effect to all enactments'. Failure to observe these instructions would be a breach of section 55 (1) (b) of the Act, which makes it an offence for an officer to be 'negligent or careless in the discharge of his duties', or

[11] *Transcript of Evidence*, p. 171.

[12] United States Attorney-General's *Memorandum* cited footnote 9, p. 23.

[13] *See* H. C. Relyea, *The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1976*. Library of Congress, Congressional Research Service, Committee Document no. 61, CRS-24.

[14] Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Inter-departmental Committee*. Parl. Paper 400/1976, Canberra, 1977, para 23.8.

of section 55 (1) (c) making it an offence for an officer to be 'guilty of any disgraceful or improper conduct'. The penalties for an offence are disciplinary measures, a fine, reduction in salary or rank, or dismissal. We acknowledge, however, that these sanctions are a somewhat blunt instrument to apply in the present context, and are likely—and properly so—to be employed only in the most exceptional circumstances.

9.11 We are inclined to believe that, here as elsewhere, the most useful means in practice of pressuring officials into compliance with both the letter and spirit of the Freedom of Information legislation may be to rely on the authority of the Ombudsman. We have placed a good deal of emphasis elsewhere in this Report (see especially Chapter 29) on the variety of functions the Ombudsman—now established and operating under the *Ombudsman Act* 1976—can usefully perform in relation to the Freedom of Information legislation, and do so again in the present context. As the 1976 Interdepartmental Committee noted:

> The Ombudsman would be competent to investigate complaints about delays or other instances of maladministration in connection with the freedom of information legislation, and there is a procedure in the Ombudsman Bill for the Ombudsman to report instances of misconduct that come to his attention.[15]

The Ombudsman has power to report on particular cases of administrative recalcitrance however these cases may come to light and whether or not they have been referred to his office in the first place. We believe that departmental management will take notice of any such public report by the Ombudsman. Indeed the possibility of this should provide a more effective incentive to agencies to inculcate good information practices than the possibility of action by the Administrative Appeals Tribunal, as such action would necessarily be remote and in the nature of a last resort. The Ombudsman's report in such cases should be referred also to the Public Service Board as the agency responsible for personnel management in the Service as a whole. While we are confident that reliance on the Ombudsman will in practice serve the objectives we have indicated, we do believe that the whole question of incentives and sanctions should be kept under review, and in particular be given close attention by the parliamentary review we recommend in Chapter 32 to take place three years after the Act commences operation. If it becomes clear that the essentially informal role we have proposed for the Ombudsman is proving ineffective, then renewed consideration should be given to incorporation in the legislation of an explicit disciplinary sanction along United States lines.

9.12 Recommendation: The Ombudsman should, where appropriate, draw public attention to misbehaviour or maladministration by particular officers in relation to freedom of information matters in his annual reports or in special reports, and such reports should be referred to the agency concerned and to the Public Service Board.

Authority to make decisions (clause 21)

9.13 Clause 21 allows agencies very broad scope to make their own arrangements for the implementation of the legislation:

> 21. A decision in respect of the request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or,

[15] ibid.

subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

It is clear to us that the way in which agencies organise their decision-making, and in particular the nature and extent of the delegations which apply, will have a crucial impact on the efficiency and economy with which the legislation operates in practice. In our inquiry we have been concerned to establish both how agencies are approaching this problem in their present thinking and whether there is any place for amending the Bill itself to establish more precise guidelines as to who should exercise authority under it.

9.14 It may assist in understanding what follows for us to briefly describe the basic decision-making structure of the Australian Public Service as it is presently constituted. Public servants generally are classified into one or other of four Divisions: the First Division, comprising only permanent heads, usually designated 'Secretaries', of departments; the Second Division, which has six internal 'levels', comprising in descending order Deputy Secretaries, First Assistant Secretaries and Assistant Secretaries (the last-mentioned of which, at levels 1 or 2, have salaries in the range $25-27 000); the Third Division, which consists of 'classes' numbered from 1 (salary level around $8000) up to 11 (salary level around $22 000), containing the vast bulk of administrative and professional officers; and the Fourth Division, comprising the support staff of manual, secretarial and technical workers. Individual departments of government are themselves organised under their Minister and Permanent Head into 'divisions', which have responsibility for the major functions of the department. There are usually some five or six divisions in a department, each under the charge of a First Assistant Secretary, of which there are some 350 in the Australian Public Service as a whole. Divisions are made up of 'branches' (usually three or four) under the charge of an Assistant Secretary. These officers (totalling some 1000 in the Public Service) have responsibility for supervising the day to day operations of the vast bulk of public servants, who are organised into 'sections' of various size and functional scope. 'Sections', in turn, are headed by senior Third Division officers in the class 10-11 range. Where regional offices exist, as is particularly the case with the service-delivery departments, supervisory authority at the section level and below tends, by and large, to be exercised by officers at slightly less senior classifications than at the central office. It is to be noted that Assistant and First Assistant Secretaries together form the general management and policy-advising echelons of the public bureaucracy, and would not normally have a close involvement in routine decision-making. Their hierarchical position corresponds roughly to the Assistant Secretary level and above in the British Civil Service and to Grade 16 and above in the United States Federal Government Service. The organisation and structure of Australian statutory authorities is, in general, comparable to that described for departments.

9.15 In the survey conducted on our behalf by the Public Service Board (the returns from which are summarised as Appendix 4 to this Report) one of the questions put to departments and authorities was:

> What consideration, if any, has been given to the staff levels at which officers will be delegated power to grant and/or deny access to information under FOI legislation?

The answers typically revealed great uncertainty about what delegations, and administrative arrangements generally, they would need to adopt. Few agencies distinguished between the different kinds of decisions they would be required to

make (in particular, precedent-setting, as compared with precedent-following, decisions), and fewer still sought to distinguish in any way between the appropriate officer level for, on the one hand, granting requests, and on the other hand, refusing them. The survey showed that much thinking on this whole subject remains to be done.

9.16 To the extent that any kind of consensus emerged, it was that decisions to grant or refuse would be made at around the branch head level, i.e. by a Second Division, level 1 or 2, Assistant Secretary. Some departments clearly appreciated that their working arrangements would be likely to alter with growing experience of the legislation. Thus the Department of Primary Industry, for example, said that 'initially . . . decisions would need to be taken at no less than Branch Head level', but that 'once experience is gained on the volume, handling and nature of freedom of information requests and grounds which constitute public interest become clearer, decisions on access for routine requests could probably be delegated to Section Head . . . level.[16] Some other departments had a fairly clearly worked out view as to the kinds of delegation level that would, right from the outset and thereafter, be appropriate for different kinds of decision. Thus the Department of Veterans' Affairs, for example, said that:

> In the regions, group leaders (Class 5-8) should be given the authority to grant access to information. And the authority to deny access should be vested in Regional Managers or Assistant Managers (Class 9-11). At Central Office the granting of access would be at Section Leader level (Classes 8-11). The denial of requests would be vested in Divisional Heads.[17]

But responses as precisely expressed as these were most uncommon.

9.17 One of the things that makes any kind of generalisation about appropriate administrative arrangements very difficult in this area is that not all decisions—whether they be to grant or refuse access—will be of equal substance, complexity or difficulty. In the first place, it is bound to be the case in many different spheres of government activity that certain kinds of requests are made with monotonous frequency. It may be that the initial decisions relating to each such kind of request will be quite difficult to make; but once the precedent has been set, the decision in each individual instance thereafter can, as a practical matter (we return below to the issue of principle) be made at a much more junior level. On the other hand, there will continue to be, in most departments (and in 'policy' departments probably more than others), a succession of essentially 'one-off' requests, raising complex or difficult issues requiring the time and thought of senior officers, and for which there will be no easy way of providing clear-cut structures in advance. Because of these considerations, and because the nature and quantity of various kinds of decisions which will need to be made under the legislation will also vary considerably from agency to agency, it is obviously pointless to try and stipulate in any kind of detail—in legislative form or otherwise —the kind of administrative arrangements which should apply.

9.18 We believe, however, that there is at least one over-riding principle which does apply universally, and which ought to govern all the detailed arrangements

[16] Reply by Department of Primary Industry to Public Service Board Survey on resource implications of Freedom of Information Bill (PSB Survey), incorporated in Committee Document no. 41, para 6.

[17] Reply of 16 February 1979 by Department of Veterans' Affairs to PSB Survey, incorporated in Committee Document no. 41, (p. 3).

that agencies proceed to make. This is the principle that while authority to *grant* requests should be delegated as far as realistically possible down the line, authority to *refuse* requests should be confined to a much smaller group of senior officers. The main support for this principle, which has been urged upon us by a number of individuals and organisations, derives from the United States experience which, it has been argued persuasively, establishes that 'the fewer the people who can deny a request, the better the operation of the Act'.[18] There is in the United States no statutory obligation upon agencies to organise their decision-making in this way, and practice varies. Where authority to refuse has been delegated to quite junior levels (as was the case in the Department of the Interior), timidity —and a very large rejection rate—has tended to prevail. Where, as has been the case in some regulatory commissions, not only has the authority to refuse been delegated to junior officials but the authority to release confined simultaneously to agency head level, the result has been an almost complete frustration of the legislation's purpose. By contrast the experience of one of the largest United States agencies, the Department of Health, Education and Welfare (with over 130 000 employees), where the units responsible for administering freedom of information requests may only grant requests, and denial authority has been confined to just four senior officers, has been that this kind of arrangement is both administratively workable and more generally productive of decisions in accordance with the spirit of the legislation. We note that the United States Attorney-General has specifically directed that 'it is . . . incumbent upon an agency to fix . . . responsibility clearly in its regulations by confining authority to deny, both on initial determinations and on appeals, to specified officials or employees'.[19]

9.19 We see no practical barriers to the adoption of this approach in Australia and recommend accordingly. It should not, in particular, be assumed that it will necessarily imply the imposition of enormous additional workloads on already hard-pressed senior officials. Many denial decisions will undoubtedly prove to be of a fairly routine character once initial precedent-setting decisions have been made. While this consideration might be thought to justify the delegation downward, accordingly, of such decisions, a majority of us nonetheless believe it to be important—given the infinite variety of particular fact situations—that there be at least some review of each such decision at a senior level before the final denial is made. It is true that in a handful of agencies, which we identified in Chapter 6, the workload created by the Freedom of Information legislation will probably be such as to justify the appointment of a Second Division officer with more or less full-time responsibility for such matters. But across the general run of agencies we believe that the additional workload involved will be manageable without undue strain.

9.20 Recommendations:

(a) In the decision-making arrangements adopted by agencies for the handling of freedom of information requests, the general principle to be applied should be that authority to grant requests be delegated downward as far as realistically possible, while authority to deny requests should be confined to a small group of officers of at least Second Division status.

[18] Australia, Parliament, Royal Commission on Australian Government Administration, (H. C. Coombs, Chairman), *Appendix Volume Two*, Parl. Paper 187/1976, Canberra, 1977, p. 69.

[19] United States Attorney-General's *Memorandum* cited footnote 9, pp. 14–15.

(b) Officers who are delegated authority to deny access requests should be specifically identified by title in annual departmental reports and in the material required to be published or made available under Part II of the Bill.

Giving reasons and other particulars (clause 22)

9.21 *The obligation to notify.* Clause 22 states broadly, and in terms generally acceptable to this Committee, the obligation to notify in writing an applicant whose request for information has been refused or deferred. It is expressed as follows:

> (1) Where, in relation to a request for access to a document of an agency or an official document of a Minister, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred, the agency or Minister shall cause the applicant to be given notice in writing of the decision, and the notice shall—
>
> (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision;
>
> (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
>
> (c) inform the applicant of his right to apply for a review of the decision.
>
> (2) An agency or Minister is not required to include in a notice under sub-section (1) any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

9.22 A good deal of guidance as to what is likely to be required in practice, if agencies and their officers are dissatisfied with this provision, has now been given by the Administrative Appeals Tribunal in its decision in *Re Palmer and Minister for the Capital Territory*.[20] Although a quite different subject matter (an ACT rating appeal) was involved and the requirement to give reasons was imposed by a different piece of legislation, section 37 of the *Administrative Appeals Tribunal Act* 1975, this legislation closely parallels in its requirements clause 22 of the Freedom of Information Bill. The Tribunal in *Palmer* explicitly acknowledged the reality of the decision-making process in pointing out that the decision-maker frequently acts on 'recommendations, reports and results of investigations carried out by subordinate officers or appropriately qualified experts',[21] and stated that in giving reasons those considerations 'which have actuated the mind of the expert in making his recommendation or giving his opinion, if material to the decision of the decision-maker, should be included'.[22] It added that:

> If it was permissible for the decision-maker merely to indicate that he had relied upon the advice of a named expert, the intent of the section could be by-passed. Additionally, the benefits to the citizen in the obtaining of reasons, which in our view are fundamental to the whole scheme of administrative review embodied in the Act would be set at nought.[23]

The Tribunal stated the rationale for the clause in question in the following terms:

> the citizen's entitlement to be fully informed is not merely an incident arising in the course of and for the purpose of a review by this Tribunal. It is a right which arises

[20] (1979) 23 A.L.R. 196.
[21] ibid., p. 205.
[22] ibid.
[23] ibid.

consequent upon a decision being made which is capable of being so reviewed, and the reasons, when properly given, ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the Minister, proceed in the appropriate court of law or to seek a review by this Tribunal.[24]

In stating reasons, 'elucidation in plain language intelligible to a layman' would be required.

9.23 A representative of the Department of the Capital Territory, which department has had a good deal of experience with appeals to the Administrative Appeals Tribunal, suggested the likely effect of clause 22 will be to require the Department:

> to advise the applicant of all of the findings on the questions of fact that (the decision-maker) considered. If it is an eligibility question to go to appeal, you would have to state just what you have decided in terms of the person's income, family situation and go through the exercise and set down what you had in your mind. You would have to state what weight you placed to various criteria and how you finally reached that decision. Having set that statement out you then give the person—and this is the whole idea of the Administrative Appeals Tribunal context—the grounds on which he can decide whether he wishes to appeal. Having disclosed the reasons for the decision, he may then believe that you have not taken into account certain factors that should have been taken into account and that therefore he would have a ground of appeal. It would seem to me that in the same context for freedom of information similar logic would apply; the Department would be forced to set out, subject to some constraints in the Bill, why it decided to claim an exemption for a particular type of document. It would have to give to the applicant, and eventually then to the Tribunal, a statement setting out those reasons. That is a test which is not easily met. You cannot just give the AAT, or the applicant in the Administrative Appeals Tribunal Act, a short statement which does not contain a great deal of information. The decision requires a great deal of information.[25]

To similar effect the Department stated in its submission to the Committee, 'much of the criticism of the Bill appears to ignore the role to be played by the Tribunal in determining whether the departments have properly refused or deferred access to documents or have otherwise acted unreasonably'.[26]

9.24 It is clear that under clause 22 the obligation to give proper reasons for decisions is going to be a reasonably onerous one. However, the whole trend of Australian administrative law, accepted and advanced by governments of different complexions in recent years, is against those who would—for reasons we can understand in practice, if not approve in principle—resist this kind of requirement. The *Administrative Decisions (Judicial Review) Act* 1977—if and when it is ever proclaimed—will add even further to the need for public servants to give reasons for their decisions in a full, plain and careful way. We believe this is as it should be.

9.25 Although we have, then, no general objection at all to clause 22 as it is presently drafted, there is one matter of some importance, omitted from the list of matters required to be notified, which we believe ought to be included. Applicants should, in our view, be informed not only of their right to apply for a review of the decision against them, but also the procedures by which they might initiate

[24] ibid., p. 206.
[25] *Transcript of Evidence*, pp. 2263–6.
[26] Submission no. 149 incorporated in *Transcript of Evidence*, p. 2224.

such a review, including the availability of internal review, intervention by the Ombudsman and an appeal to the Administrative Appeals Tribunal. It may be that this is a matter of detail which could be dealt with in regulations, but we believe it is of sufficient importance to justify inclusion in the Bill itself.

9.26 Recommendation: Clause 22 should be amended to specifically include, among the matters of which the applicant must be notified, the procedures by which he might secure a review of the decision.

9.27 *Disclosing the existence of sensitive documents.* A particular problem that arises in relation to the giving of reasons and particulars, but which is not addressed at all in the present Bill, is the position of the decision-maker when he is confronted with a request for a document which is manifestly exempt from disclosure, but where the character of the document is such that the mere acknowledgement of its existence, albeit accompanied by a denial of access, will itself cause the damage against which the exemption provision is designed to guard. One obvious example would be a request for a Cabinet paper recommending a devaluation of the currency; another might be a request for a criminal intelligence record disclosing the activities of a particular police informant.

9.28 In the United States, it is considered permissible to deny the existence of a document in relation to national defence or foreign policy because the relevant exemption there concerns 'matters that are specifically authorised . . . to be kept secret in the interest of national defence or foreign policy'. The United States Court of Appeals in *Phillippi* v. *Central Intelligence Agency*[27] held that the CIA could answer a particular request in the following terms:

> In the interests of national security, involvement by the US Government in the activities which are the subject matter of your request can neither be confirmed nor denied[28]

and that the Agency should not be required, as was sought, to provide a public affidavit explaining in as much detail as possible the basis for that response. The other area where this question has been controversial is in relation to law enforcement documents. It has been argued that because the relevant clause of the United States Act focuses on 'matters that are investigatory records', this does not permit an agency to conceal the very existence of the document in question, however sensitive. We understand that an amendment to the law enforcement clause to enable a *Phillippi*-type denial has been foreshadowed.

9.29 We agree that there will, on occasion, be a need for an agency to refuse to acknowledge the very existence of a document. However, although it might be argued that there are a number of other contexts in which this response might conceivably be justified in particular instances, we believe that the power to respond in the way suggested is so open to potential misuse that it ought to be confined to a very narrow set of exemptions, namely, those relating to classes of documents which by their very nature are likely to be widely accepted as especially sensitive. We accordingly confine our recommendation to documents subject to exemption under clause 23 (or at least so much of that clause as applies to security, defence and international relations: we exclude Commonwealth-State relations for the kinds of reasons discussed generally in Chapter 17); clauses 24 and 25 (Cabinet and Executive Council documents); and clause 27 (law enforcement documents: discussed further in paragraphs 20.14-16).

[27] 546 F.2d. 1009 (D.C. Cir. 1976).
[28] ibid., p. 1011.

9.30 We acknowledge further that, in the contexts mentioned, it must be open to the agency concerned to exercise its power of neither confirming nor denying the existence of a document, not only in relation to those documents for which this response is peculiarly appropriate, but also in respect of all documents for which an exemption is claimed. If an agency normally merely denies access to a document and only occasionally takes the further step of refusing to confirm or deny its existence, then this inconsistency of response may well be revealing in itself. We do not go so far as to suggest that the agency *should* give a 'no confirmation or denial' response in respect of all documents for which it claims exemption; we say only that this power should be available in the event that the agency wants to take advantage of it.

9.31 Lest there be any possibility of being misunderstood, we make the further point that nothing we have said should be taken as in any way encouraging an agency to make a 'no confirmation or denial' response in respect of documents for which it cannot properly claim any exemption: these should of course be released in the normal way.

9.32 For the purposes of enabling an appeal to the Administrative Appeals Tribunal, a 'no confirmation or denial' response should be treated as a refusal to grant access. Although this result would probably follow from a proper reading of the Bill as it presently stands, we recommend an amendment to it to put the matter beyond doubt. We take up in Chapter 30 the question of what the obligation of the Tribunal itself should be when confronted with cases of this kind, and there recommend, for consistency, that the Tribunal should itself have the same power, in appropriate cases, to neither confirm nor deny the existence of a document as has the original ministerial or agency decision-maker.

9.33 We acknowledge that there is a potential for some abuse of the power we have recommended in that a 'no confirmation or denial' response is likely to be somewhat disheartening to an applicant who might otherwise, faced with a straightforward denial of access to a document acknowledged to exist, take that refusal to the Administrative Appeals Tribunal. He will still be able to appeal such a response to the Tribunal, but may be in a position of contributing less by way of substantive argument than would otherwise be the case. There will, accordingly, perhaps be a temptation for agencies to rely on this form of words in respect of a greater number and variety of documents than it strictly should. We can say here only that we hope that the Ombudsman (whose proposed general role we spell out in detail in Chapter 29) will exercise a significant informal restraining role in this respect.

9.34 Recommendations:

(a) The Bill should be amended to provide that where an agency relies upon an exemption relating to security, defence or international relations (clause 23), Cabinet or Executive Council documents (clauses 24 and 25) or law enforcement (clause 27), it should be entitled to respond in a form of words which denies access to the document without confirming or denying the existence of that document.

(b) A response in these terms should be treated for the purposes of appeal to the Administrative Appeals Tribunal as a refusal to grant access.

Protecting the information-giver

9.35 Situations will arise from time to time where material to which access is sought will be defamatory in character, or of such a kind that its release involves breach of confidence, breach of copyright or even breach of the criminal law. If the Bill contained no specific statutory protections against liability, the situation could thus arise that those officials involved in the release of such information, even when acting bona fide and with proper delegated authority, could find themselves on the receiving end of civil or criminal proceedings. Clauses 46 and 47 purport to deal with this problem, at least so far as defamation, breach of confidence and criminal offences are concerned. The question arises, however, as to whether these clauses—admirable as they may be in intent—are in fact adequate to protect not only those officials immediately involved in the granting of access to material but also others—in particular the original authors of the documents in question—whose interests arguably ought to be protected.[29]

9.36 *Defamation.* Clause 46, which relates to both defamation and a breach of confidence, is in the following terms:

> 46. (1) Where access has been given to a document and—
> (a) the access was required by this Act to be given; or
> (b) the access was authorised by a Minister, or by an officer having authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,
>
> no action for defamation or breach of confidence lies, by reason of the authorizing or giving of the access, against the Commonwealth or an agency or against the Minister or officer who authorized the access or any person who gave the access.
>
> (2) The giving of access to a document (including an exempt document) in consequence of a request shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorization or approval of the publication of the document or of its contents by the person to whom the access was given.

9.37 This would appear sufficiently far reaching to exclude any possibility of liability in defamation for those involved, in one way or another, in the circumstances specified, in actually authorising or giving access to the material in issue. They would appear to be liable neither for the 'publication' involved in the initial grant, nor for the subsequent re-publication of the material by the person to whom access is so granted. It is possible, on one view of the general common law of defamation, that if an official could in fact foresee that the material might be republished he would be liable for any defamatory imputation contained in it. Although this matter may require further examination, we are inclined to believe that clause 46 as presently drafted does in fact preclude any such liability.

9.38 It certainly does not appear, however, that clause 46 in itself does anything to protect the interests of the original *authors* of documents to which access is granted, whether those authors come from inside or outside the Public Service. While the byzantine complexities of the present law of defamation make almost any summary statement dubious,[30] the common law position seems to be that an author of a document is liable for any defamatory imputations it may contain so far as any subsequent publication of that document is concerned which he might reasonably have foreseen or anticipated (subject of course to any specific defences

[29] See analysis by Mr R. E. Lucas, submission no. 110.
[30] cf. Australia, Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report no. 11, 1979.

of privilege and so forth on which he may be able to rely). With the enactment of the Freedom of Information legislation, so the argument would go, publication and re-publication of such documents must now be regarded as matters of generally foreseeable likelihood. While it is true that the defences of absolute and qualified privilege will between them protect nearly all conceivable forms of communication made within the Public Service, and probably most communications directed to the Public Service from persons, businesses and organisations outside it, it does not seem to us to be beyond doubt that such communications would continue to enjoy that privilege when they are published—under the Freedom of Information legislation procedures—to persons outside the Public Service who may well have no discernible interest (i.e. an interest of a kind regarded as relevant in defamation law) in receiving them.

9.39 It may be that, on an extended reading of clause 46, the original authors of documents would be regarded as implicitly covered by its terms. We believe, however, that it would be desirable for the Bill to be amended to put the matter beyond doubt. Provided material is not exempt under the Bill, or is reasonably believed to be not exempt, then the public interest demands that it be released. There is no reason in principle why persons immediately involved in the granting of access should be afforded greater protection than the original authors of the documents in question. We hasten to add, lest we be misunderstood, that there is nothing in the Bill or in anything we have recommended which would extend any similar immunity to those successful applicants under the Freedom of Information legislation (or anyone else who might subsequently come into possession of the material) who choose to republish the material in question. They would do so at their own risk; they would be subject in their own right, as publishers, to the law of defamation, and properly so. In other words, the extension of clause 46 immunity to original authors would not in itself be likely to open the floodgates to the circulation in the community at large of a mass of hitherto unpublished—because defamatory—material.

9.40 Recommendation: Clause 46 should be amended to place beyond doubt the principle that the original authors of defamatory material, whether within or outside the Public Service, should not incur liability merely by virtue of its being published under, or as a result of, the Freedom of Information legislation.

9.41 *Breach of confidence.* We discuss in some detail in Chapter 25 the meaning of the legal concept of 'breach of confidence', as it appears in clause 34, and there recommend its deletion as adding nothing (apart from confusion) to the exemptions relating to personal privacy in clause 30 and business privacy in clause 32. It has to be acknowledged that the adoption of this recommendation might conceivably result in more information being released that would potentially constitute an actionable breach of confidence than might otherwise be the case, although we reiterate our view that the clause 30 and 32 exemptions are likely to afford quite ample protection for deserving cases. Under these circumstances, it is that much more important—if the legislation is to serve its purpose—that officials be protected by clause 46 from actions against them for breach of confidence arising out their release of material in good faith.

9.42 Clause 46, as drafted, seems to serve this intended purpose. The officials involved in the release of the information are clearly protected and the question of protecting original authors in these matters does not arise in the same obvious way as it does in defamation cases. The Bill is silent as to protection for subsequent re-publication by persons granted access, but we believe that—as with

defamation—that is as it should be. We consider, however, that the question of protections applicable in the breach of confidence area should be subject to further consideration by the parliamentary draftsman to ensure in particular that there are no realistic circumstances in which an original author might find himself the subject of a breach of confidence action in respect of material released by an official acting in good faith in reliance on the Freedom of Information legislation.

9.43 *Criminal offences.* Clause 47 deals with this matter in the following terms:

> 47. Where access has been given to a document and—
> (a) the access was required by this Act to be given; or
> (b) the access was authorized by a Minister, or by an officer having authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,
>
> neither the person authorizing the access nor any person concerned in the giving of the access is guilty of a criminal offence by reason only of the authorizing or giving of the access.

This appears to sufficiently cover all realistic contingencies, and we recommend no alteration to this clause.

9.44 *Copyright.* There is no clause in the Bill similar to clauses 46 and 47 to protect an official against an action for breach of copyright when he provides access to a document pursuant to the Freedom of Information legislation. The question does not arise in relation to documents originating within the government, because under section 176 of the *Copyright Act* 1968 the copyright in any literary work 'made by or under the direction or control of the Commonwealth' resides in the Crown: accordingly the Crown can provide access to such documents in any form it wishes, and no copyright problems arise. Potential problems do, however, arise for documents originating outside government.

9.45 Presumably it was thought unnecessary to confer specific copyright protection, along similar lines to clauses 46 and 47, for externally-originated documents primarily because of the provision made elsewhere in the Bill empowering agencies to handle requests without breaching any private copyright that may subsist in a document in the possession of an agency: clause 18 (3) (c) provides that access may be given in a form different to that requested by an applicant if access in that form 'would involve an infringement of copyright (other than copyright owned by the Crown) subsisting in the document'. This provision in a sense confers a dual protection: on the agency officer handling requests and also on the original private author of the document in question.

9.46 There is also the provision in section 183 of the *Copyright Act* 1968 which allows the Commonwealth or a person authorised by it in writing to perform an act which would otherwise be an infringement of copyright, if that act is done 'for the services of the Commonwealth'. Under section 183 (4) the Commonwealth must notify the copyright owner of such act, or determine that such notification is contrary to the public interest. It appears that this provision is widely ignored in the Public Service, and copyright owners are, by and large, none the wiser for that. However the enactment of freedom of information legislation might conceivably make them more alert to the need for self-protection, and more aware of their statutory rights under this provision. It would appear that, if section 183 is to be relied upon as the basic mode of protection against officers' liability for breach of copyright suits, then all officers granting access to documents must be specifically authorised under section 183. It might be argued, however, that section

183 provides no protection in this respect because the provision of copies of documents to freedom of information applicants may not be capable of being regarded, strictly speaking, as being 'for the services of the Commonwealth'.

9.47 We discuss the whole matter of copyright law in greater detail in Chapter 10. We there conclude that clause 18 of the Freedom of Information Bill should be amended to provide less protection for private authors than paragraph 18 (3) (c) presently appears to envisage. The nature of the change proposed is that an agency should have power, in some instances at least, to reproduce a document in which private copyright subsists without the express permission of the copyright owner. We believe this change only nominally prejudices the present legal position of the copyright owner, as the government would already have power to permit inspection of the work without copyright being thereby broken. Moreover, the reproduction by the agency would not confer any implied authority upon the applicant to further reproduce the work; for him to do so would constitute a breach of copyright by him. Nevertheless, it may be prudent, to assure copyright owners that their rights have not been overridden, to include a clause in the Bill (similar to clause 46 (2)) to the effect that:

> The giving of access to a copy of a document (including an exempt document) in consequence of a request shall not be taken, for the purposes of the law relating to copyright, to constitute an authorisation or approval of the doing of any copyright act in relation to the document or its contents by the person to whom the access was given.

9.48 Strictly speaking it is probably unnecessary, in consequence of the changes we recommend in Chapter 10, to confer any protection upon an officer providing access to a document under the Bill against an action for breach of copyright. If access is given in a form approved by the Freedom of Information Bill, then the action is lawfully done; the Bill, as a later statute, would override any earlier provisions of the *Copyright Act* 1968 providing otherwise. However we appreciate the danger in relying upon statutory presumptions of this nature, recognising that a variety of interpretations can often be reached as to the respective scope or operation of two overlapping items of legislation. For abundant caution it would therefore appear prudent to give protection to officers similar to that extended to officers under clauses 46 and 47 in respect of actions for defamation or breach of confidence and prosecutions for criminal offences.

9.49 Recommendation: Further to our recommendations in paragraph 10.19, the Bill should be amended to provide:

(a) that no action for breach of copyright shall lie against an officer for providing access to a copy of a document pursuant to the Bill; and

(b) that the giving of access to a person to a copy of a document shall not be taken for the purposes of the law relating to copyright to constitute an authorisation or approval of any 'copyright act' (as referred to in section 31 of the *Copyright Act* 1968) in relation to the document or its contents by the person to whom access was given.