

Refusal of access on administrative grounds (clause 13)

13.1 An agency may, by virtue of clause 13 (3), refuse to comply with a request if that request relates to all documents on a specified subject matter and if identification, location or collection of the requested documents would interfere unreasonably with the operations of the agency or the performance by the minister of his functions. Clause 13 (3) provides:

(3) Where a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter, compliance with the request may be refused if it would interfere unreasonably with the operations of the agency or the performance by the Minister of his functions, as the case may be, having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information within the filing system of the agency or of the office of the Minister.

13.2 It is apparent at the outset that the words provide considerable scope for agencies to refuse access to documents. The provision has, not surprisingly, attracted a great deal of criticism. It is equally apparent, however, that immense burdens could be imposed on an agency by categorical requests (that is, requests for all documents of a particular type or category, or all documents on a particular subject matter).¹ One United States case involved a request for 'all unpublished manuscript decisions' held by the Patents Office which would have required searching through well over three and a half million files built up over more than a century. Senator John Knight,² in evidence to the Committee, referred to the difficulties confronting United States agencies in complying with a request for 'the papers of Dean Rusk'. Compliance with such a request would literally involve granting access to truckloads of documents. It is not inconceivable, as the Department of Foreign Affairs maintained,³ that deliberate campaigns could be undertaken by extreme groups formulating requests of similar magnitude to disrupt the operations of agencies whose practices they found offensive.

13.3 For these reasons we accept that agencies must on occasion be able to refuse requests which would impose extreme burdens on their operations. It is important, however, that the exemption be used sparingly and only when the agency concerned is subject to considerable interference with its operations. In our view it is the magnitude of the interference with an agency's operations that should determine whether a categorical request should be complied with or not. Accordingly, it is necessary to insert in the exemption some quantitative measure of the interference which would be considered unacceptable. As presently drafted, clause 13 (3) focuses on 'unreasonable' interference with the operations of an agency. While it is difficult to find sufficiently precise language which conveys the appropriate flavour, we believe the sub-clause would be improved by the addition of a quantitative requirement that the interference be 'substantial' as well as unreasonable.

¹ *Irons v. Schuyler* 465 F.2d 608 (D.C. Cir. 1972)

² *Transcript of Evidence*, p. 2102

³ Submission no. 150, incorporated in *Transcript of Evidence*, p. 2378

13.4 Recommendation: Clause 13 (3) should be amended so that compliance with a categorical request can be refused only if it would 'impose a substantial and unreasonable burden on the operations of the agency or the performance by the minister of his functions'.

13.5 Clause 13 (3) is not the appropriate clause on which an agency should rely when the burden arises because of the need to identify, locate and collate the relevant documents within the sixty-day time limit. Instead, recourse should be had to clause 39 (6) which provides that an agency or a minister may apply to the Administrative Appeals Tribunal for an extension of time to deal with requests which invoke the sixty-day time limit. It can be expected that when an agency has acted diligently such applications in the case of categorical requests would rarely be refused.

13.6 Neither could agencies resort to sub-clause 13 (3) without fulfilling their obligations under sub-clauses 13 (4) and 13 (5). These sub-clauses require an agency to assist a person to make a request in a manner which complies with clause 13. A request could accordingly be voluntarily narrowed in scope. On the other hand, a categorical request may on occasion be more appropriately directed to the Australian Archives. Professor Neale, Director-General of the Australian Archives, informed the Committee that where requests were broadly stated and were for a prescribed purpose, a person may qualify for special access to documents under thirty years old by virtue of clause 39 (3) of the Archives Bill.⁴ We assume, however, that access by virtue of clause 39 (2) of the Archives Bill would only be available in exceptional circumstances and the vast majority of categorical requests would have to rely on clause 13.

13.7 In addition to these existing provisions, we make two series of recommendations elsewhere in this report which also have a bearing on the scope of the exemption in clause 13 (3). The first are our recommendations in Chapter 7 for more detailed indexes to be prepared by agencies as to their 'internal law'. As emphasised in submissions received by the Committee, the greater the indexing requirements imposed on agencies the easier it will be for them, as well as members of the public, to locate speedily the documents to which access is sought. Furthermore, the incidence of categorical requests, to the extent they reflect a person's ignorance of the documents possessed by an agency, can be expected to diminish as the degree of indexation of agency records is increased.

13.8 Perhaps an even greater safeguard against the too frequent use by agencies of the clause 13 (3) exemption is to be found in our recommendations in Chapter 29 for the conferral of additional powers on the Ombudsman for the purposes of freedom of information. At this stage it is sufficient to note that, armed with these additional powers, the Ombudsman would play a central role in overseeing agencies' compliance with the requirements of clauses 6 and 7 as amended. We envisage that persons experiencing difficulties in obtaining information described simply by subject matter might invoke the assistance of the Ombudsman. The Ombudsman might lessen the frequency with which the clause 13 (3) exemption is invoked by agencies by persuading them to make reasonable efforts to provide the material. He might also be in a position to lessen the frequency of appeals against agency decisions to invoke this exemption by persuading certain applicants that their requests exceeded the limits beyond which it was unreasonable to expect agencies to go in identifying, locating or collating documents.

⁴ *Transcript of Evidence*, p. 712.

13.9 Refusals of categorical requests would be subject to review by the Tribunal in accordance with clause 37 of the present Freedom of Information Bill. This, as well as review by the Ombudsman, would among other things ensure that the undue burden which an agency asserts is not a burden of its own making. A poor information retrieval system or unwise delegation of authority may be the cause of the burden of which it complains. Agencies would realise soon enough that reliance on clause 13 (3) for reasons of their own ineptitude would not be considered a legitimate invocation of the exemption.

13.10 With the provisions presently occurring in the Bill, and the recommendations we have proposed here and elsewhere in the Report, we believe that clause 13 (3) can be a useful and necessary exemption, and one which we hope will be invoked sparingly by agencies. The notion of unreasonable interference with the operations of an agency also forms part of clause 15 which provides for requests involving the use of computers and other equipment. The similarity between clauses 15 (2) and (13) (3) leads us to propose that the amendment recommended in relation to clause 13 (3) also be considered in relation to clause 15 (2).

13.11 Recommendation: Clause 15 (2) should be amended so that compliance with a request under clause 15 (1) for information not in discrete form in documents of the agency can only be refused if it would 'impose a substantial and unreasonable burden on the operations of the agency'.