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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

FREEDOM OF INFORMATION BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,
Senator the Honourable P.D. Durack, Q.C.)

FREEDOM OF INFORMATION BILL 1981

Outline

The Freedom of Information Bill 1981 is based upon the Freedom of Information Bill 1978, which was introduced into the Senate on 9 June 1978. That Bill was subsequently referred to the Senate Standing Committee on Constitutional and Legal Affairs. The Report of the Committee recommended a number of changes to the 1978 Bill. The present Bill includes such of the recommendations of the Senate Committee as were accepted by the Government - see the Statement in the Senate by the Attorney-General on 11 September 1980 - and some other amendments.

The Bill will give members of the public an enforceable right to access, subject to specified exceptions, to documents in the possession of Departments, other than the Parliamentary Departments, and of statutory authorities and other Commonwealth agencies and to official documents in the possession of Ministers.

The Bill will also require the publication or making available of information concerning the functions of Departments, authorities and agencies, and of procedural manuals, and other similar material, which may affect persons in their dealings with an agency.

The access provisions do not apply to certain classes of documents (principally documents more than 30 years old, documents in existence prior to the Act, and documents published for sale). Further, access may be refused to documents where disclosure would be contrary to the public interest on one or more of the grounds set out in the Bill. Except in certain cases, refusal of access is reviewable by the Administrative Appeals Tribunal.

NOTES ON THE CLAUSES OF THE BILLPART I - PRELIMINARY

The first two clauses of the Bill provide for the short title and commencement of the legislation. Clause 2 provides, in particular, that the several Parts shall come into operation on such respective dates as are fixed by Proclamation. This provision will enable the legislation to come into operation in a series of stages, if necessary.

Clause 3 - Object

2. Comparison with 1978 Bill - this clause is a new clause.

3. Sub-clause 3(1) sets out the object of the Act as being to extend the right of the Australian community to access to official information in the possession of the Commonwealth Government.

4. Sub-clause 3(2) seeks to establish guidelines for the interpretation of the Act. The sub-clause seeks to aid the judicial interpretation of the intention of the Parliament in the legislation by expressly providing that it is the intention of the Parliament that the provisions of the Act shall be interpreted to further the object set out in sub-clause 3(1) and that discretions conferred by the Act shall be exercised so far as possible to facilitate and promote the disclosure of information.

Clause 4 - Interpretation

5. Comparison with 1978 Bill - This clause corresponds with clause 3 of the 1978 Bill. There are no changes of substance. Amendments have been made to bring up to date references to organs of government in the Territories to take account of constitutional developments in the Northern Territory,

Norfolk Island and Cocos (Keeling) Islands, and to bring under the Department of Defence for the purposes of the Act the various Cadet Corps established under Defence legislation. The clause also omits the specific reference to the Commonwealth Police Force and the A.C.T. Police Force as a consequence of the formation of the Australian Federal Police. This body is now comprised within the general definition of 'prescribed authority'.

6. Sub-clause 4(1) sets out definitions of a number of words and expressions for the purpose of the legislation. The more important are detailed below:

- . 'agency' is defined as a Department or prescribed authority.
- . 'Department' is defined as a Department of the Australian Public Service other than the Parliamentary Departments. The present Bill is concerned with access to information about the activities of the Executive Government and the exclusion of the Parliamentary Departments is therefore appropriate.
- . 'document' is widely defined to include any written or printed matter; any map, plan or photograph; and any sound recording, cinematograph film, microfilm, computer and other means by which information may be stored or retrieved. It does not include library material maintained for reference purposes.
- . 'exempt document' is defined as meaning (a) a document that is an exempt document by virtue of one or more of the provisions of Part IV; (b) a document in respect of which an agency is exempt from the operation of the legislation by virtue of Clause 6 or of regulations made under that clause; or (c) an official document of a Minister that contains matter

that does not relate to the affairs of an agency or of a Department of State.

'official document of a Minister' is defined as a document in the possession of a Minister that relates to the affairs of an agency or a Department of State. It does not include documents of a party political or personal kind, or that relate to a Minister's activities as a Member of Parliament.

'prescribed authority' is defined in wide terms so as to bring all statutory bodies and other agencies performing functions of the Commonwealth Government within the scope of the legislation on as wide a basis as possible. The A.C.T. House of Assembly and the Legislative Assembly of the Northern Territory are excluded, as are also the organs of government of the external territories. This definition of prescribed authority must be read in conjunction with the sub-clause 6(1) and Part I of the Schedule. The bodies there listed are deemed not to be prescribed authorities for the purpose of the legislation. Other bodies may be excluded by regulation see paragraphs 6(5) (a).

6. Sub-clause 3(2) to 3(4) are supplementary to the definition of 'prescribed authority'.

Clause 5 - Act not to apply to courts and certain tribunals

7. Comparison with 1978 Bill - This clause corresponds with clause 4 of the 1978 Bill. There are no changes.

8. Clause 5 provides in effect that the Act does not apply to the Courts, to holders of a judicial office in that capacity or to Court registries. It also provides that the Act does not apply to the Conciliation and Arbitration Commission and other arbitral bodies. The exclusion is based on the ground

that Courts and their registries are not agencies of the Executive Government, and the Conciliation and Arbitration Commission and the other arbitral bodies listed are treated as likewise independent of the Executive Government.

Clause 6 - Exemption of certain bodies

9. Comparison with 1978 Bill - This clause corresponds with clause 5 of the 1978 Bill. There have been substantial changes. Whereas that clause provided for exemptions from the operation of the legislation to be made by regulations, clause 6 now provides directly for exemptions from the legislation. This follows a recommendation by the Senate Committee. The provision for further exemptions to be made by regulation is retained.

10. Sub-clause 6(1) provides that the bodies listed in Part 1 of the Schedule and the person holding the office specified in that Part are not prescribed authorities for the purposes of the Act. That is, the Act will not apply in those cases, and will not entitle a request to be made to them for access to documents.

11. Sub-clause 6(2) provides that the agencies listed in Part II of the Schedule are exempt from the operation of the Act in relation to the documents referred to in that Part in relation to them. The effect of this is that documents so referred to are exempt documents, irrespective of the contents of those documents (see the definition of 'exempt document' in sub-clause 4(1)).

12. Sub-clause 6(3) defines the term 'competitive commercial activities' for the purposes of Part II of the Schedule.

13. Sub-clause 6(4) provides an interpretative provision for the purposes of references in Part II of the Schedule to documents in respect of particular activities of agencies.

14. Sub-clause 6(5) provides for the making of regulations to supplement, if necessary, the exemptions made by clause 6.

The sub-clause empowers the making of regulations to exempt specified bodies from the operation of the legislation or to exempt specified bodies in respect of documents relating to specified functions or activities of an agency or in respect of documents of a specified description.

PART II - PUBLICATION OF CERTAIN DOCUMENTS
AND INFORMATION

15. Part II comprises clauses 7 to 9, which impose obligations on agencies to publish, or otherwise make available to the public, documents of certain kinds about agency functions and activities. These provisions are intended to ensure that a member of the public who has or wishes to have dealings with the Commonwealth can obtain information enabling him to ascertain what agency or part of an agency he should approach and what procedures he should follow. The establishment of a body of 'secret' agency practice is thereby to be avoided. In particular these provisions will require many departmental manuals to be made available to the public, a practice already followed by a number of Departments.

Clause 7 - Publication of Information concerning functions and documents of agencies

16. Comparison with 1978 Bill - This clause corresponds with clause 6 of the 1978 Bill, with one change. That change is the insertion of sub-paragraph 7(1)(a)(iii), to ensure the publication of information about procedures of an agency relevant to requests for access to documents under the Freedom of Information Act. This accords with a recommendation of the Senate Committee.

17. Sub-clause 7(1) requires the publication by the responsible Minister of an agency of a statement which sets out particulars of its organisation and functions and which indicates, as far as practicable, those of its decision-making and other powers affecting members of the public. The statement must also include the categories of documents in the possession of the agency and set out any information which will assist members of the public in making an application for access to

a document under Part III. The publication is to be made in a form approved by the Minister administering the Freedom of Information Act and is to be made as soon as practicable but, in any event, not later than 12 months after the commencement of Part II. The information contained in the statement must be brought up to date once in each year.

18. Sub-clause 7(2) requires the Minister, when approving the form of the statement published under sub-clause 7(1), to consider whether the manner in which the information is set out is, amongst other things, such as to assist members of the public to exercise effectively their rights under the legislation.

19. Sub-clause 7(3) permits the obligation to publish a statement required by sub-clause 7(1) to be fulfilled by inclusion in the Commonwealth Government Directory rather than by publishing it as a separate document.

20. Sub-clause 7(4) provides that this section does not require the publication in the statement of any matter that would be exempt from disclosure under the legislation. Hence, an agency is not required to publish information about functions the existence of which is to be kept confidential on grounds, for example, of defence or national security.

21. Sub-clause 7(5) applies to agencies which come into existence in the future. Such an agency will be required to publish statements under sub-clause 7(1) within 12 months of the day on which it comes into existence.

Clause 8 - Certain documents to be available for inspection and purchase

22. The purpose of this clause is to make available to the public documents which have sometimes been described as 'hidden law' that agencies apply in making decisions. Members of the public will be able to gain access to this information, and

will not be prejudiced by lack of knowledge of agency requirements and procedures.

23. Comparison with 1978 Bill - This clause corresponds with clause 7 of the 1978 Bill, with two changes. In the first place, the Minister administering the legislation is empowered to extend the time within which an agency must comply with the requirement of the clause to make its manuals and other like material available to the public. Secondly, the Minister is empowered to direct modification of the obligation to publish material in respect of an agency if complete compliance by that agency with the provisions of the clause would unreasonably divert its resources from its other operations. The Annual Report to Parliament required by clause 58 is to contain particulars of any such extensions of time or directions.

24. Sub-clause 8(1) provides that the clause applies to manuals and other documentary material provided by an agency for use by its officers in making decisions or recommendations relating to enactments or schemes administered by the agency. It does not apply to documents which are available to the public and which are published otherwise than by the agency concerned. Consequently, it does not apply, for example, to law reports published by a private publishing organisation. Similarly, it does not apply to documents published by another agency.

25. Sub-clause 8(2) requires an agency to make available for inspection and purchase copies of the documents referred to in sub-clause 8(1) above, and to publish in the Gazette not later than 12 months after the commencement of Part II, details of those documents and the places where copies may be inspected and purchased. The details published in the Gazette must be brought up to date at least each 12 months.

26. Sub-clause 8(3) provides that the obligation to cause manuals and the like to be available for inspection and purchase - see paragraph 8(2)(a) - is not required to be complied with in full before the end of 12 months after the commencement of Part II of the Act. Nevertheless, the sub-clause requires that before the expiration of that period the obligation shall be complied with as far as is practicable. The effect is to require a progressive implementation of the clause.

27. The effect of sub-clause 8(4) is that the public is not to be denied access to a manual merely on the ground that it contains some exempt matter. If it is practicable to do so, the manual must be re-written so as to exclude that exempt matter and the re-written manual made available to the public. For example, in the case of an agency responsible for making grants of money to organisations, a manual may describe both the conditions that an organisation must comply with to be eligible for a grant and instructions on checks to be made on the activities of the organisation to ensure that the money is properly applied. To describe the latter may well defeat the purpose of making the checks. In such a case, the sub-clause would require the manual to be re-written to delete this latter material.

28. Sub-clause 8(5) permits the Minister administering the Freedom of Information legislation to take into account any special circumstances which may make it unreasonable for an agency to list details of all its manuals or to make copies of them available within the 12 months' time limit. Should he be satisfied, after consultation with the Minister responsible for the agency, that such circumstances exist, he may give a written extension of time.

29. Sub-clause 8(6) permits the Minister to give written directions modifying the requirements of this clause in so far as it applies to a particular agency. He may only do so, however, where he has consulted the Minister responsible for that agency and is satisfied that, as a result of the form or nature of documents within the agency's control at the date the Part comes into operation, compliance with the clause would unreasonably divert the resources of the agency from its normal operations.

30. Sub-clause 8(7) requires that the details of any extensions or modifications which are permitted pursuant to sub-clauses 8(5) and 8(6) are to be included in the Minister's annual report tabled in Parliament. That report must also show the extent to which agencies have complied with this clause during the previous year.

31. Sub-clause 8(8) applies the obligations of sub-clauses 8(2) and 9(3) to agencies which come into existence in the future.

Clause 9 - Unpublished documents not to prejudice public

32. Comparison with 1978 Bill - This clause corresponds with clause 8 of the 1978 Bill

33. Sub-clause 9(1) provides that where a document referred to in clause 8 contains a rule, guideline or practice (not being a provision of an enactment) affecting the manner of exercise of an agency function and an agency fails to make available the document as required by the clause, a person who was not aware of the rule, guideline or practice is not to be prejudiced by the application of that rule, guideline or practice if he could have lawfully avoided the prejudice had he been aware of the rule, guideline or practice.

34. The intention of clause 9 is that a person should not be in a worse position through not knowing an agency's rule or practice than he might have lawfully put himself in had he known of the rule or practice. Thus, for example, suppose that an agency administering a scheme under which grants are made to voluntary organisations has a rule that applications must be made in a certain form and be lodged by a certain date. The agency would not be entitled to refuse a grant to an application that came in late and was not in the proper form on these grounds only unless the rule had been published in accordance with clause 8.

35. Sub-clause 9(2) has the effect that sub-clause 9(1) does not apply until the expiration of the period provided by sub-clause 8 for making the relevant material available.

36. It should be noted that clauses 8 and 9 deal only with administrative rules and practices. In so far as Commonwealth rules and regulations are concerned, Commonwealth legislation requires the publication of subordinate legislation.

PART III - ACCESS TO DOCUMENTS

37. This Part establishes the right of access to documents to be conferred by the Bill, and specifies the procedural requirements to be followed in applying for access. It also sets out procedural matters to be followed by agencies in dealing with requests, including the time limits for responding to requests.

Clause 10 - Right of Access

38. Comparison with 1978 Bill - This clause corresponds with clause 9 of the 1978 Bill.

39. Clause 10 gives every person a legally enforceable right of access to agency documents and to official documents of Ministers, other than exempt documents. This clause embodies the basic principle of the legislation which is that an agency must justify the withholding of a document, instead of the person seeking access having to justify his request. There is no requirement that the person seeking access be required to show any interest.

Clause 11 - Part not to apply to certain documents

40. Comparison with 1978 Bill - The clause corresponds with clause 10 of the 1978 Bill, subject to one modification. Paragraph 10(1)(a) of that Bill excluded from access under the Freedom of Information Bill documents more than 30 years old. The intention of that provision was that access to documents more than 30 years old would be governed by the provisions of the Archives legislation. There are, however, classes of documents which are excluded from the access provisions of the Archives Bill 1981. Accordingly, clause 11 now excludes from the operation of the Freedom of Information legislation only those documents to which the access provisions of the Archives Bill 1981 apply.

41. Sub-clause 11(1) provides that Part III does not give a right of access to documents which are otherwise available to the public. The sub-clause specifies three main classes of such documents:

The first comprises Commonwealth records that are in the custody of the Archives or of a Commonwealth institution, that are not exempt documents within the meaning of Division 3 of Part V of the Archives Bill 1981 and that are more than 30 years old. Access to these documents is governed by the Archives Bill;

The second class comprises documents that are open to public access, as part of a public register or otherwise, in accordance with another enactment, where that access is subject to a fee or charge. Thus, present procedures for inspection of land title records, company records, the Register of Patents and patent specifications that are open to public inspection in accordance with the provisions of other enactments will not be affected by the Freedom of Information legislation.

The third class comprises documents that are otherwise available for purchase by the public, for example, from the Australian Government Publishing Service.

42. The rationale of this clause is that, where statutory provisions or other arrangements exist that provide for other means of access to particular documents, it would be inappropriate for access to be granted under the Freedom of Information legislation rather than under those statutes or arrangements.

43. Sub-clause 11(2) has the effect that there is no general right of access under the Bill to documents already in existence when the Bill comes into force. It will, therefore, apply only to documents brought into existence or coming into the possession of agencies or Ministers in the future. But if a previous document is necessary to the understanding of a document to which a person has lawfully had access, that previous document will be subject to access under the Bill. This clause does not, however, affect the provisions of Part II relating to access to departmental manuals and the like.

Clause 12 - Documents in certain institutions

44. Comparison with 1978 Bill - This clause corresponds with clause 11 of the 1978 Bill, but has been extended to take account of the creation of the Museum of Australia.

45. Sub-clause 12(1) deals with documents in the collections of the War Memorial, the National Library, the Museum of Australia and the Australian Archives. The sub-clause provides that such documents are not to be deemed to be documents of an agency, for the purposes of the legislation, if they were placed in the collection or custody of the institution concerned by or on behalf of a person (including a Minister or former Minister) other than an agency. Because these institutions are agencies for the purposes of the Act, this provision is necessary to ensure that private collections of papers deposited with these institutions are not available for access under the Freedom of Information Act. This protection extends to collections of ministerial papers placed in one of these institutions. The exception does not, however, apply in the case of ministerial papers where the Minister continues to hold

ministerial office and retains a right of access to those papers - see the definition of 'official document of a Minister' in sub-clause 4(1).

46. Sub-clause 12(2) provides that a document that has been placed in one of the institutions referred to in sub-clause 11(1) by an agency shall be deemed to be in the possession of that agency.

47. The effect of sub-clause 12(2) will be to make it impossible for an agency to avoid the obligation to grant access to documents by depositing its documents with the Australian Archives.

48. Sub-clause 12(3) contains special provisions relating to records of a Royal Commission in the custody of the Australian Archives. While a Royal Commission is in existence, it is not an agency for the purposes of the legislation. If, on the termination of the Commission, however, its records are placed in the custody of the Australian Archives, sub-clause 12(3) deems that they are then in the possession of the agency administering the Royal Commissions Act 1902, i.e. the Department of Prime Minister and Cabinet. For the purposes of Freedom of Information legislation, they are then treated as a document in the possession of that Department.

49. Sub-clause 12(4) ensures that the Freedom of Information legislation does not in any way affect the provision by the Australian Archives of access to documents under the Archives legislation.

Clause 13 - Access to documents apart from Act

50. Comparison with 1978 Bill - This clause corresponds with clause 12 of the 1978 Bill.

51. Clause 12 declares that the Act is not intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by the Act, where they can properly do so or are required by law to do so. The Freedom of Information legislation is not intended to be a statutory code for the provision of access to documents to the exclusion of other legislation, legal requirements or proper practices under which access may be provided.

Clause 14 - Requests for access

52. Comparison with 1978 Bill - This clause includes the matters dealt with in sub-clauses 13(1), 13(2) and 13(4) of the 1978 Bill.

53. Sub-clauses 14(1) and 14(2) provide that a person may make a written request for access to a document which contains such information as is necessary to enable a responsible officer or the Minister concerned to identify the document. There are no provisions that special forms be used.

54. Sub-clauses 14(3) and 14(4) direct that an agency take reasonable steps to assist a person who wishes to make a request to it. For example, the agency is under a duty to provide reasonable assistance to a person to enable him to provide sufficient information to identify the document to which he seeks access. Similarly, a person may approach the incorrect agency seeking a document. In that case, the agency must take reasonable steps to see that he directs his request to the appropriate agency or Minister.

Clause 15 - Transfer of requests

55. Comparison with 1978 Bill - Sub-clauses 15(1), (4), (5) and (6) correspond with clause 14 of the 1978 Bill,

subject to the qualification that the transfer of a request provided by sub-clause 15(1) now requires the agreement of the agency to which the transfer is made. Sub-clauses 15(2) and (3) are new provisions.

56. Sub-clause 15(1) enables an agency to which a request is made to transfer the request to another agency in two circumstances. The first is where the requested agency does not have the document concerned but knows that it is in the possession of the other agency. The second is where the subject matter of a document concerned is more closely connected with the functions of the other agency.

57. Sub-clause 15(2) deals with the case where a request is made for access to a document which originated with or has been received from an agency exempt from the operation of the Act by virtue of clause 6 or of regulations made under that clause, and the subject matter of the document is more closely connected with the functions of that exempt agency. In such a case, the request is to be transferred to the department whose Minister is responsible for administering the legislation under which the exempt agency is established.

58. Sub-clause 15(3) provides for the case where a request is made to an agency for access to a document that originated with or has been received from another agency and the subject matter of the document is more closely connected with functions of that other agency in respect of which that other agency is exempt from the provisions of the legislation by virtue of clause 6 or regulations made under clause 6. In that case the request is to be transferred to that other agency.

59. Sub-clause 15(4) provides for the person seeking access to be informed of the transfer of his request to another agency. It also provides for the agency transferring the request to transfer the document in question to the other agency if that is necessary.

60. Sub-clause 15(5) has the effect, first, that the transfer of a request to another agency imposes on that other agency the obligation to deal with the request and, secondly, that the time for dealing with the request runs from the date on which the request was received by the transferring agency. This ensures that the person seeking access is not disadvantaged by any delay in making the transfer.

Clause 16 - Requests involving use of computers, etc.

61. Comparison with 1978 Bill - This clause corresponds with clause 15 of the 1978 Bill.

62. Sub-clause 16(1) provides that where a request is made for information stored in computer and similar systems, the request is to be treated as a request for a document or documents if the information can be produced in written form by using a computer or other equipment normally available to the agency. If the information is stored on a sound recording, a request for access to it must also be treated in the same way if a transcript of the recording can be made.

63. Sub-clause 16(2) enables an agency to refuse a request that would require the production of a document under sub-clause 16(1) where the production of the document would interfere unreasonably with the operations of the agency. An appeal lies to the Administrative Appeals Tribunal against such a refusal.

Clause 17 - Access to documents to be given on request

64. Comparison with 1978 Bill - This clause corresponds with clause 16 of the 1978 Bill.

65. Sub-clause 17(1) provides that where a request for access to a document is duly made, and payment is made of any charge that is required under the regulations to be paid before access is granted, access to the document is to be given in accordance with this legislation.

66. The term "duly made" means that the request must comply with the provisions of sub-clauses 14(1) and 14(2), i.e. that it must be in writing and provide such information as is reasonably necessary to enable a responsible officer of the agency to identify the document.

67. Sub-clause 17(2) provides that access is not required to be given to a document at a time when the document is an exempt document. That a document is an exempt document at a particular period in time does not mean that it always remains an exempt document. Where access to a document is denied, the document must be an exempt document at the time when that denial is made.

Clause 18 - Time within which formal requests to be decided

68. Comparison with 1978 Bill - Sub-clause 18(1) corresponds with clause 17 of the 1978 Bill, but with the addition of a provision requiring an address for service to be provided. Sub-clause 18(2) is new, and is in partial response to a recommendation of the Senate Committee.

69. Sub-clause 18(1) specifies the requirements that must be observed in making a request if the Minister or agency to which the request is made is to be obliged to respond within the time limits specified in the sub-clause. The request must be made in writing, be expressed to be made in pursuance of this

legislation, contain an address for service in Australia and be sent either by post or personally to an address prescribed under the regulations in relation to the agency or Minister concerned. On receiving such a request, the agency or Minister must take all reasonable steps to make a decision and to notify the applicant of it as soon as practicable and, in any event, not later than 60 days after the receipt of the request.

70. Sub-clause 18(2) allows for the 60 day time limit to be reduced by regulation. It, therefore, takes into account that experience in the operation of the legislation may enable agencies to respond to requests in a shorter period than the 60 day limit set in the legislation.

Clause 19 - Forms of access

71. Comparison with 1978 Bill - This clause corresponds with clause 18 of the 1978 Bill

72. Sub-clause 19(1) sets out the various forms in which access to a document may be given. The applicant may be allowed to inspect the document, he may be provided with a copy of it, he may be provided with the means of viewing a film or hearing a sound recording or he may be provided with a transcript of a sound recording or of shorthand notes. In the case of information stored in a computer, access is to be given to a print-out from the computer - see clause 16. The forms of access are not mutually exclusive and he may be given access in more than one form.

73. Sub-clauses 19(2) and 19(3) require that access shall be given in the form requested by the applicant unless to do so would interfere unreasonably with the agency's operations or the Ministers' functions, as the case may be, would be detrimental to the preservation of the document, would be inappropriate having regard to the physical nature of the document or would involve an infringement of copyright (other than that owned

by the Commonwealth) in respect of a matter not relating to the affairs of an agency. Sub-clauses 19(2) and 19(3) must also be read in conjunction with clause 21 which provides for exempt matter to be deleted where that is possible and for access to be given, where it is reasonably practicable to do so, to a copy from which that exempt matter has been so deleted.

74. An appeal lies to the Administrative Appeals Tribunal against a decision to give access in a form other than that requested by the applicant - see sub-clause 45(1).

Clause 20 - Deferment of access

75. Comparison with 1978 Bill - Sub-clauses 20(1) and 20(2) correspond with clause 19 of the 1978 Bill. Sub-clauses 20(3) and 20(4) are new provisions.

76. Sub-clause 20(1) specifies that where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices, access may be deferred until the happening of a specified event or the expiration of a specified time.

77. Sub-clause 20(2) requires the agency or Minister to inform the applicant of the reasons for the deferment and, if it is practicable to do so, to inform him of the period of the deferment.

78. Sub-clause 20(3) provides for the situation in which there may be statutory or other reasons for a document to be tabled in Parliament. In these cases, the Minister responsible for the agency may, by written direction, defer access until it has been so tabled. The period of the deferment is limited by the terms of sub-clause 20(3) itself, which provides that if the document is not tabled within the first five sitting days of either House of Parliament after the day on which the written direction was given, that written direction ceases to have effect

79. There is a right of appeal to the Administrative Appeals Tribunal under clause 45 against a decision to defer access other than a decision made under sub-clause 20(3).

Clause 21 - Deletion of exempt matter

80. Comparison with 1978 Bill - This clause corresponds with clause 20 of the 1978 Bill, with some redrafting to clarify the intention of that clause.

81. Although, generally speaking, the purpose of the Bill is to give a right of access to documents already in existence and not to require agencies to re-write documents or to produce new documents to supply information, there will be many cases where a document is an exempt document because only part of the document contains exempt matter and that matter may be deleted. Sub-clause 21(1) accordingly provides that where it is possible and reasonably practicable to prepare a copy of the document with the exempt matter deleted, and the copy document so prepared is not thereby rendered misleading, the applicant shall be given access to such a copy unless it appears that he would not wish to have access to such a copy.

82. Sub-clause 21(2) provides that an applicant provided with such a copy is to be informed that deletions have been made and the grounds for the deletions. Under clause 25, an applicant must be given reasons for a decision to refuse access in accordance with a request. This sub-clause provides, however, that reasons need not be given for refusing access to the original document unless the applicant specifically requests that they be given.

83. An appeal lies to the Administrative Appeals Tribunal under clause 45 from a refusal to grant access in accordance with a request. Thus, the Tribunal would have power to review a decision that it is not possible or reasonably practicable to prepare a copy of a document with exempt material deleted.

Clause 22 - Decision to be made by authorized persons

84. Comparison with 1978 Bill - This clause corresponds with clause 21 of the 1978 Bill.

85. Clause 22 provides that a decision on a request made to an agency may be made either by the Minister responsible for that agency, the principal officer of the agency or, subject to any regulations limiting delegation, to an officer of the agency who is properly authorised to do so.

Clause 23 - Requests may be refused in certain cases

86. Comparison with 1978 Bill - Sub-clauses 23(1) and 23(4) correspond, with some changes, with sub-clauses 13(3) and 13(5) of the 1978 Bill. Sub-clauses 23(2) and 23(3) are new.

87. Sub-clause 23(1) provides that a request for access to documents identified only by reference to subject matter may be refused if the work involved in giving access to the documents to which the request relates would unreasonably divert the resources of the agency from its other operations or would interfere unreasonably with the performance by the Minister of his functions, as the case may be. In determining this matter, regard is to be had to the number and volume of the documents concerned and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or the Minister's office.

88. The criterion for refusal, in the case of an agency, differs somewhat from that specified in sub-clause 13(3) of the 1978 Bill. The change is intended to accommodate, to some extent, the view of the Senate Committee that in refusing a request for documents identified by subject matter, it should be necessary to have regard to the amount of work involved in complying with the request.

89. Sub-clause 23(2) permits a refusal of a request for access, without having searched for or identified the

documents to which the request is directed, if it is apparent from the description of the documents in the request that they would be exempt documents.

90. If, however, the agency or Minister concerned has reason to believe that any of the documents to which the request relates contain matter which is not exempt, that it would be practicable to grant access to a copy of such a document with the exempt matter deleted and that the applicant would wish to have access to that copy, then the effect of sub-clause 23(3) is to exclude the application of sub-clause 23(2), so that the agency or Minister must examine the documents covered by the request.

91. Sub-clause 23(4) provides that a request for access may not be refused on the ground that it does not sufficiently identify the documents to which access is sought or that it is directed to documents identified only by subject matter unless the applicant has first been given a reasonable opportunity for consultation with a view to his making the request in a form that would remove the ground for refusal.

Clause 24 - Information as to existence of certain documents

92. Comparison with 1978 Bill - This clause is new. It gives effect to a recommendation of the Senate Committee.

93. Sub-clause 24(1) entitles an agency or Minister to withhold information as to the existence or non-existence of a document if disclosure of that information would be prejudicial to the public interest for a reason specified in sub-clause 28(1) or would affect law enforcement for a reason specified in sub-clause 32(1).

94. Sub-clause 24(2) deals with the case where a request is made for access to a document and the document is or, if it existed, would be of such a kind that information about its

existence might be withheld under sub-clause 24(1). In such a case, the agency or Minister dealing with the request may notify the applicant that the existence of the document is neither confirmed nor denied but that, if the document existed, it would be an exempt document. Reasons for giving such a notice must be furnished in accordance with clause 25, and the giving of such a notice is to be treated for the purpose of internal review under clause 44 or appeal to the Administrative Appeals Tribunal under clause 45 as if it were a decision refusing access to a document.

Clause 25 - Reasons and other particulars of decisions to be given

95. Comparison with 1978 Bill - This clause corresponds with clause 22 of the 1978 Bill, subject to an expansion of paragraph 25(1)(c) to give effect to a recommendation of the Senate Committee.

96. Sub-clause 25(1) requires that where access in accordance with a request is refused or deferred written notice of the decision is to be given to the applicant, setting out the findings on material questions of fact and the reasons for the decision and including (in the case of an agency document) the name and designation of the officer who made the decision. The notice must also inform the applicant of his right to apply for a review of the decision.

97. Sub-clause 25(2) provides that exempt matter is not required to be included in a notice given under sub-clause 25(1).

Clause 26 - Procedure in respect of documents relating to business affairs, etc.

98. This clause applies where a request is made for access to a document containing information relating to the business or professional affairs of a person, or the business, commercial or financial affairs of an organisation or undertaking

and that information may be of a confidential character. It provides a procedure by means of which the person to whom or the undertaking to which this information relates may object to access being given to the document. It also provides a procedure for informing that person or undertaking if a decision is made to give access to the document and allowing that person or undertaking to appeal to the Administrative Appeals Tribunal against such a decision.

99. Comparison with the 1978 Bill This clause is new. It gives effect to recommendations of the Senate Committee.

100. Sub-clause 26(1) directs that, where it is reasonably practicable to do so, the agency or Minister concerned must not make a decision on such a request before the person or undertaking has been given a reasonable opportunity to argue that the document is exempt under clause 38 and the argument put forward has been considered. In considering whether it is reasonably practicable to consult that person or undertaking, regard must be had to the time limits imposed by clause 18.

101. Sub-clause 26(2) provides that written notice of a decision that a document in respect of which submissions have been made under sub-clause 26(1) is not exempt under clause 38 is to be given both to the applicant and to the person or undertaking concerned. The sub-clause also provides that access may not be given in such a case until the period for lodging an appeal to the Administrative Appeals Tribunal has expired or, if any appeal is made, that appeal has been heard and the decision to grant access confirmed.

PART IV - EXEMPT DOCUMENTS

Clause 27 - Interpretation

102. Comparison with 1978 Bill - This clause is new.

103. Clause 27 provides a rule of interpretation for Part IV, to ensure that the scope of an exemption clause, or the application of an exemption clause to a document, is not limited by the existence of any other exemption provision.

Clause 28 - Documents affecting national security, defence, international relations and relations with States

104. Comparison with 1978 Bill - This clause corresponds with clause 23 of the 1978 Bill, subject to certain changes.

The criterion provided in paragraph 28(1)(a) is brought into line with that applicable for the classification of a document as a confidential document in accordance with the Protective Security Handbook. Provision is made for the case where information about the existence or non-existence of a document is sensitive information. These two changes are consequent upon recommendations of the Senate Committee. In addition, the constitutional development of the Northern Territory since 1978 is recognised by equating it with a State for the purposes of the clause.

105. Sub-clause 28(1) provides that a document is an exempt document if its disclosure would be contrary to the public interest for the reason that the disclosure could reasonably be expected to cause damage to the security or defence of the Commonwealth, international relations or relations with the States or the Northern Territory. A document is also exempt under this sub-clause if it would disclose information obtained in confidence from the Government of another country or of a State or the Northern Territory.

106. Sub-clause 28(2) provides that where a Minister is satisfied that disclosure of a document would be contrary to the public interest for a reason referred to in sub-clause 28(1), he may give a certificate to that effect. That certificate establishes conclusively that the document is an exempt document so long as the certificate remains in force. The decision to give such a certificate is not subject to review by the Administrative Appeals Tribunal (sub-clause 46(4)) and the Tribunal may not require the production of the document referred to in that certificate (sub-clause 52(3)).

107. Only some parts of a document may contain matter of a kind such that the document is an exempt document under this clause. In such a case, sub-clause 28(3) requires the certificate to identify the relevant parts. The whole document remains an exempt document, but if a copy of the document is made omitting those parts identified by the certificate then the giving of the certificate in relation to the original document does not prevent the Administrative Appeals Tribunal requiring an in camera inspection of the copy of the altered document to consider whether the remaining part or parts may be exempt on some other ground (sub-clause 54(4)).

108. Sub-clause 28(4) provides for the situation in which mere disclosure of whether or not a document exists would be contrary to public interest for a reason referred to in sub-clause 28(1). In that situation, the Minister may sign a certificate to that effect. The decision to give such a certificate is not reviewable by the Administrative Appeals Tribunal - sub-clause 48(5).

109. Sub-clauses 28(5) to 28(6) empower the responsible Minister of an agency to delegate to the principal officer of the agency his powers under clause 28.

Clause 29 - Cabinet Documents

110. Comparison with 1978 Bill - This clause corresponds with clause 24 of the 1978 Bill, with the addition of a provision enabling a request to be refused on the ground that a document is an exempt document under the clause without disclosing whether or not that document exists. This is consequential upon a recommendation of the Senate Committee.

111. Sub-clause 29(1) provides that each of the following documents is an exempt document:

- (a) a document brought into existence for the purpose of submission to the Cabinet which has been, or is proposed by a Minister to be, submitted to Cabinet;
- (b) an official record of the Cabinet;
- (c) a copy of or an extract from a document in
 - (a) or (b); and
- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially disclosed.

112. Sub-clause 29(2) provides that a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is of a kind referred to in sub-clause 29(1) establishes conclusively that it is such a document. The decision to give such a certificate is not subject to review by the Administrative Appeals Tribunal (sub-clause 48(4)). A document that is the subject of such a

certificate is not required to be produced to the Tribunal (sub-clause 54(3)).

113. Sub-clause 29(3) provides that where a document is an exempt document because a particular part of the document contains matter that discloses deliberations within the Cabinet or a decision of the Cabinet the certificate given in respect of the document shall identify that part. The effect of this provision is that the document as whole would remain an exempt document under sub-clause 29(1). If, however, it were practicable to delete in accordance with clause 21 matter identified in the certificate, access must be given to a copy of the document containing the remainder of the matter, unless that matter is itself exempt under some other provision of the Bill. The giving of a certificate in relation to the original document does not prevent the Administrative Appeals Tribunal requiring an in camera inspection of the altered document to consider whether the remaining part or parts may be exempt on some other ground (sub-clause 54(4)).

114. Sub-clause 29(4) provides that a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document as described in the request for access would, if it existed, be a document referred to in sub-section (1) establishes conclusively that, if such a document exists it is an exempt document.

115. Sub-clause 29(5) provides that a reference to Cabinet in this clause is to be read as including a reference to a Committee of Cabinet.

Clause 30 - Executive Council documents

116. Comparison with 1978 Bill - This clause corresponds with clause 25 of the 1978 Bill, subject to the addition of a provision enabling a request to be refused on the ground that

a document would be an Executive Council document without disclosing whether or not the document existed. This is consequential upon a recommendation of the Senate Committee.

117. This clause contains provisions concerning Executive Council documents analogous to the provisions of clause 29 concerning Cabinet documents. The appropriate certificate is, under sub-clause 30(2), to be given by the Secretary to the Executive Council, and where a document is exempt from mandatory access because in part it discloses deliberations within or a decision of the Executive Council, the Secretary is required, under sub-clause 30(3) to identify in the certificate the part or parts of the document that disclose such deliberation.

118. Sub-clauses 30(4) and 30(5) make similar provision for requests for Executive Council documents as are made for requests for Cabinet documents where it is apparent from the information supplied in the request that the document, if it existed, is exempt. If the Secretary of the Executive Council signs a certificate to this effect, a request for access may be refused on the grounds that, if such a document existed, it would be a document referred to in sub-clause 30(1) and, therefore, exempt.

Clause 31 - Internal Working Documents

119. Comparison with 1978 Bill - This clause corresponds with clause 26 of the 1978 Bill.

120. Sub-clause 31(1) exempts a document from mandatory access:

- (a) if that access would involve the disclosure of matters in the nature of, or relating to, an opinion

advice or recommendation or consultation or deliberation that has taken place for the purposes of the deliberative functions of an agency, a Minister or the Commonwealth Government; and

- (b) if that access would be contrary to public interest.

121. The class of documents which is so defined is intended to cover all documents that reflect the deliberative or policy-forming process of an agency or of Government. The class of documents will include, in so far as they are concerned with the deliberative or policy-forming processes:

- . communications between Ministers;
- . communications between Ministers and their Departmental and other advisers, including the briefing of Ministers on Cabinet Submissions;
- . communications between officers of Departments, whether within the same Department or between Departments; and
- . communications between Ministers or officers and persons outside Government with respect to advice or opinions given to Ministers or officers.

The material covered by this clause also includes such documents as drafts prepared for the purpose of discussion, drafts submitted to more senior officers for settling, drafts of Cabinet Submissions, correspondence and other documents submitted to Ministers for settling and material of a similar kind. It will also include records of discussions, such as the records of discussions of inter-departmental and other committees.

122. It does not, however, cover manuals and documents which are used in a decision-making process and which are of a type referred to in clause 8 - sub-clause 31(2). Nor does it apply to a document by reason only of purely factual material contained in the document - sub-clause 31(3).

123. Sub-clause 31(4) excludes from the operation of the clause reports of scientific and technical experts, reports of a prescribed body or organisation established within an agency and the records of final decisions, or the statements of reasons for those decisions, made in the exercise of a power or of an adjudicative function. Provision is made by this sub-clause for the exclusion by regulation from the clause of reports of bodies established within agencies, on the basis that it is thought that experience may show that reports of an advisory kind from expert bodies established within departments and authorities may be excluded from the exemption notwithstanding that those reports may otherwise be within the broad category of documents defined by sub-clause 31(1).

124. That a document is an internal working document does not of itself make the document an exempt document under clause 31. To justify refusal of access to a document under this clause, the agency concerned must also form a view that it would be contrary to the public interest to give access to the document and specify the ground of public interest involved. The clause recognises that, within the wide class of documents defined in paragraph 31(1)(a), there will be many that can be made public without harm to the public interest, e.g. they may be documents of a routine or predominantly factual character, or they may contain information which has already been made public.

125. Accordingly, sub-clause 31(5) ensures that where access is refused to a document on the ground that the document is exempt under this clause, the statement of reasons provided to the applicant under clause 25 specifies the ground of public interest on which the decision to refuse is based. This is intended to require an agency refusing access on the basis of this clause to focus on the particular harm that would result from the disclosure of the document. Although the decision that disclosure would be contrary to the public interest may not be reviewed by the Administrative Appeals Tribunal (see sub-clause 48(3)), the requirement that the ground be stated does allow consideration of it elsewhere, e.g. in Parliament, or in the Federal Court pursuant to an application made under the Administrative Decisions (Judicial Review) Act 1977. An appeal may, however, be brought to the Administrative Appeals Tribunal on the ground that a document does not fall within the class of documents specified in sub-clause 31(1).

Clause 32 - Documents affecting enforcement of the law and protection of public safety

126. Comparison with 1978 Bill - This clause differs from the equivalent clause - clause 27 of the 1978 Bill - in a number of respects. First, it divides the categories of documents covered by that clause into two parts, separating out the more sensitive of those documents into a separate sub-clause, sub-clause 32(1). Secondly, there are some drafting changes to clarify the intention of the earlier clause. Thirdly, the protection given by the clause to methods or procedures for preventing or detecting breaches of the law - paragraph 32(2)(c) - is now limited to lawful methods or procedures, in accordance with the recommendation of the Senate Committee. Fourthly, the clause has been extended to protect information relating to

the maintenance or enforcement of lawful methods for the protection of public safety - paragraph 32(2)(d) - there being no clear protection for material of this kind in the 1978 Bill.

127. Sub-clause 32(1) exempts documents the disclosure of which would or could reasonably be expected to prejudice the investigation of offences, the evasion of taxation laws or the enforcement of the law in particular cases. It also exempts documents the disclosure of which might lead to the disclosure of confidential sources of information or the identification of informants, or endanger the lives or physical safety of law enforcement officers.

128. The cases covered by sub-clause 32(1) concern the more sensitive areas of law enforcement. The Senate Committee had recommended that where disclosure of information about the existence or non-existence of a document might prejudice law enforcement, as covered by clause 27 of the 1978 Bill, an agency should be entitled to refuse a request for access without disclosing the existence or non-existence of documents covered by the request. Given the very broad scope of clause 27 of the 1978 Bill, it was thought that such a power in respect of the whole range of matters covered by that clause was not justified, but that it was justified in respect of the more sensitive matters, which have now been defined in sub-clause 32(1).

129. Sub-clause 32(2) exempts documents the disclosure of which would prejudice general investigations concerning breaches or evasions of the law (i.e., other than investigations into specific breaches), prejudice the fair trial of a person or the impartial adjudication of a case, disclose lawful methods or procedures for preventing, detecting, investigating or dealing

with breaches or evasions of the law which would thereby impair the effectiveness of those methods or prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

130. Sub-clause 32(3) makes it clear that the protection accorded by the clause extends to investigations, etc. carried on under State and Territory laws as well as Commonwealth laws.

Clause 33 - Documents to which secrecy provisions of enactments apply

131. Comparison with 1978 Bill - This clause corresponds with clause 28 of the 1978 Bill, but it has been substantially re-drafted.

132. Clause 33 provides that a document is exempt if a secrecy provision in some other enactment covers the information contained in the document. Such a secrecy provision must be one which applies specifically to information of the kind contained in the document. It must also be one which prohibits persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or subject to exceptions or qualifications.

133. It is not intended that the freedom of information legislation should override specific secrecy provisions in other enactments. The 1978 Bill would have required secrecy provisions in other laws which were not to be overridden to be specified in regulations. It has been decided to adopt the approach of making a general provision of the kind in clause 33, which is the way in which this matter is dealt with in the United States Freedom of Information Act.

Clause 34 - Documents affecting financial or property interests of the Commonwealth

134. Comparison with 1978 Bill - This clause corresponds to part of the subject matter covered by clause 29 of the 1978 Bill, to the extent that that clause made exempt documents the disclosure of which would adversely affect the financial or property interests of the Commonwealth or an agency.

135. Clause 34 provides that a document is an exempt document if the disclosure of the document under the Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

Clause 35 - Documents concerning certain operations of agencies

136. Comparison with 1978 Bill - Clause 29 of the 1978 Bill would have made exempt documents the disclosure of which would have had a substantial adverse effect on the staff management interests of the Commonwealth or an agency, or which would otherwise have had a substantial adverse effect on the efficient and economical conduct of the affairs of an agency. Clause 35 is intended to identify more precisely the interests which were sought to be protected by the provisions of clause 29 of the 1978 Bill just referred to. The change is in response to a recommendation of the Senate Committee.

137. Clause 35 is intended to protect information which must remain confidential for the proper conduct of various operations of agencies. The protection extends to information relating to tests, examinations or audits conducted by agencies, procedures for the supervision or review of agency operations for the purpose of ensuring the proper and efficient conduct of those operations, and personnel management and industrial

relations policies of the Commonwealth or of an agency. The protection against mandatory disclosure extends only in so far as disclosure of the information concerned would prejudice an interest referred to in the clause.

Clause 36 - Documents affecting personal privacy

138. Comparison with 1978 Bill - This clause corresponds with clause 30 of the 1978 Bill.

139. Sub-clause 36(1) exempts from mandatory access documents the disclosure of which would involve the unreasonable disclosure of information relating to the affairs of any person (including a deceased person).

140. Sub-clause 36(2) makes it clear that sub-clause 34(1) does not apply where a document contains matter relating to the personal affairs of the person making the request for access. This sub-clause is to be read subject to sub-clause 34(3).

141. Sub-clause 36(3) enables documents containing information of a medical or psychiatric nature about a person to be made available to a medical practitioner nominated by that person instead of to the person directly where the view is taken that direct access may be prejudicial to the physical or mental health or well-being of that person.

142. The Australian Law Reform Commission has had referred to it certain matters relating to privacy, including the need to balance the protection of privacy with the interests of the community in the development of knowledge and information. This clause may need to be reviewed when the Commission's report is available.

Clause 37 - Documents affecting legal proceedings or subject to legal professional privilege

143. Comparison with 1978 Bill - This clause corresponds with clause 31 of the 1978 Bill.

144. Clause 37 exempts from mandatory access a document the disclosure of which would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or an agency in relation to pending or likely legal proceedings or which is subject to legal professional privilege.

145. Sub-clause 37(3) is intended to make it clear that a document referred to in sub-clause 8(1) must be made available under sub-clause 8(2) notwithstanding that it contains legal advice that would be exempt matter under this clause, but other matter exempt under this clause may be deleted from such a document.

146. This clause will prevent freedom of information legislation being used to compel the Commonwealth to disclose its hand in pending or likely litigation or to circumvent the ordinary rules of discovery applied by the Courts.

Clause 38 - Documents relating to business affairs

147. Comparison with 1978 Bill - This clause is the counterpart of clause 32 of the 1978 Bill, but it has been substantially re-written to take account of evidence given before the Senate Committee as to the nature of the material which ought to be protected and Government undertakings that confidentiality of commercial information would be protected, and to define more precisely what is to be protected.

148. Sub-clause 38(1) provides that a document is exempt if its disclosure would disclose trade secrets or other information having a commercial value where the commercial value of that information would be diminished or destroyed

by that disclosure. The sub-clause would also make exempt a document which contains information concerning the business of professional affairs of a person or the business, commercial or financial affairs of an organisation or undertaking where the disclosure of that information would adversely affect the lawful conduct of the person, organisation or undertaking involved. It is also a ground of exemption under the sub-clause if the disclosure of information of this kind would prejudice the future supply of information required by the Commonwealth or an agency for the purpose of administration of a law of the Commonwealth or of a Territory or other matters administered by an agency.

149. Sub-clause 38(2) makes it clear that the exemption does not apply where the access is sought by the person or organisation concerned.

150. Sub-clause 38(3) makes it clear that the protection of commercial privacy given by the clause extends to commercial undertakings carried on by the Commonwealth, a State or the Northern Territory.

Clause 39 - Documents affecting national economy

151. Comparison with 1978 Bill - This clause corresponds with clause 33 of the 1978 Bill, but has been substantially re-drafted to define more clearly the nature of the interests intended to be protected. The re-drafting has been done in response to criticism by the Senate Committee of clause 33 of the 1978 Bill.

152. Sub-clause 39(1) exempts from mandatory access a document the disclosure of which would be contrary to the public interest for one or other of two reasons; first, that the disclosure would have a substantial adverse effect on the

ability of the Commonwealth to manage Australia's economy and, secondly, that it could reasonably be expected that premature knowledge of any action or inaction proposed by the Government or by Parliament would unduly disturb the ordinary course of business in the community or result in an undue benefit or detriment to any person or class of persons.

153. Sub-clause 39(2) sets out examples of the kinds of documents which may be covered by sub-clause 39(1).

Clause 40 - Documents containing material obtained in confidence

154. Comparison with 1978 Bill - This clause corresponds with clause 34 of the 1978 Bill.

155. Clause 40 exempts from mandatory access a document the disclosure of which would constitute a breach of confidence.

156. This clause is intended to protect confidential relationships which would not be within the specific protection afforded by such clauses as clause 36 (personal privacy) and clause 38 (business confidences).

Clause 41 - Documents disclosure of which would be contempt of Parliament or contempt of court

157. Comparison with 1978 Bill - Subject to an amendment to take account of the establishment of the Legislative Assembly of Norfolk Island since 1978, this clause corresponds with clause 35 of the 1978 Bill.

158. This clause enables a document to be withheld from access where its release would otherwise be in contempt of court or contrary to the order of a Royal Commission, tribunal or similar body or would infringe the privileges of the Commonwealth or a State Parliament or the Legislative Assembly of the Northern Territory or of Norfolk Island.

Clause 42 - Privileged Documents

159. Comparison with 1978 Bill - This clause corresponds with clause 36 of the 1978 Bill, but has been re-drafted to take account of recent judicial decisions regarding privilege and to clarify the intention of clause 36 of the 1978 Bill.

160. Sub-clause 42(1) provides for the Attorney-General to give a certificate in respect of a document where he is of the opinion that a ground exists on which a court would hold that it would be contrary to the public interest to order the discovery or production of the document in proceedings in the court. While such a certificate is in force, the document in respect of which it is given is an exempt document. Such a certificate may be given in respect of documents included in a class of documents specified in the certificate. An appeal may be made to the Administrative Appeals Tribunal against such a certificate.

161. Sub-clause 42 (2) deems such a certificate given in relation to a particular document to refer to documents substantially identical to that document.

162. One purpose of the clause is that a litigant would not be entitled to use the freedom of information legislation to circumvent the discovery rules applying in the courts to obtain documents in the possession of Commonwealth agencies that he could not obtain by an order of the court.

Clause 43 - Certain documents arising out of companies and securities legislation

163. Comparison with 1978 Bill - There was no equivalent clause in the 1978 Bill. The National Companies and Securities Scheme has been developed since that Bill was drafted.

164. Sub-clause 43(1) provides that certain documents are exempt if they fall within specified categories, if they are copies of documents falling within those categories or contain an extract from such a document. The categories are:

(1) In relation to the Ministerial Council for Companies and Securities

- . documents for the purposes of the Council either prepared by a State or a State authority or received by an agency or Minister from a State or State authority;
- . documents which disclose deliberations or decisions of the Council other than a document which officially publishes a Council decision;

(2) In relation to the National Companies and Securities Commission

- . documents furnished to the Commission relating solely to the functions of the Commission in relation to the law of a State or to the laws of two or more States;
- . documents possessed by the Commission which relate solely to the exercise of the Commission's functions under the law of a State or the laws of two or more States.

165. The effect of sub-clause 43(2) is to treat the Northern Territory as a State for the purposes of the clause.

PART V - REVIEW OF DECISIONS

Clause 44 - Internal Review

166. Comparison with 1978 Bill - Sub-clauses 44(1), 44(2) and 44(3) correspond with sub-clauses 38(1) and 38(3) of the 1978 Bill, subject only to minor drafting changes. Sub-clause 44(4) is new.

167. Sub-clause 44(1) provides that where a decision is made by a person other than a Minister or principal officer of an agency in relation to a request, the applicant may apply to the principal officer for a review of the decision. The application must be made within 28 days of the date on which notice was given or within such further time as the principal officer allows. Should an extension not be granted, the applicant may have the decision to refuse an extension reviewed by the Tribunal - sub-clause 45(1).

168. Sub-clause 44(2) provides that the review is to be conducted either by the principal officer himself or by a person whom he has authorised to conduct such reviews (provided that person is not the person who made the original decision). The review makes a fresh decision on the original application.

169. The effect of sub-clause 44(3) is that a decision given on a review cannot itself be reviewed under this clause. Nor does the provision for review apply where, pursuant to clause 46, a request is deemed to have been refused because the agency did not make a decision within 60 days of receiving the request or because the Ombudsman has certified that, in his opinion, there has been unreasonable delay in answering the request.

170. Sub-clause 44(4) provides for a statement of reasons, as required by clause 25, to be given in respect of a decision on review.

Clause 45 - Applications to Administrative Appeals Tribunal

171. Comparison with 1978 Bill - Sub-clauses (1) to (3) of this clause correspond with sub-clauses 37(1), 38(2) and 38(4) of the 1978 Bill. Sub-clause (4) of this clause is new, and gives effect to a recommendation of the Senate Committee.

172. Sub-clause 45(1) provides for the review by the Administrative Appeals Tribunal of decisions refusing the grant of access to a document in accordance with a request, deferring the provision of access to a document or refusing to allow a further period for making an application to review a decision.

173. Sub-clause 45(2) provides that a person who is entitled to apply under clause 44 for an internal review of a decision may not make an application to the Tribunal in respect of that decision. He may apply to the Tribunal in respect of the decision made on the review.

174. Sub-clause 45(3) provides for the situation in which the person has applied for an internal review but has not been informed of the result of the review within 14 days of the date on which he made the application. An application may then be made to the Tribunal in respect of the original decision. The Tribunal may treat such an application as having been made within the time limits stipulated in sub-clause 45(4) if the applicant does not delay unreasonably in making his application.

175. Sub-clause 45(4) stipulates the time periods within which an application may be made to the Tribunal in respect of a decision. These are:

- . 60 days from the day on which notice of a decision is given in accordance with clause 25 if notice is so given;
- . 60 days from the day on which a decision is deemed to have been made by virtue of sub-clauses 46(1) and 46(3) if no decision has in fact been made and notified to the applicant; or
- . where an applicant has made a complaint to the Ombudsman about a decision, 60 days from the day on which the Ombudsman informs the applicant of the result of his complaint.

The Tribunal may extend these time limits.

176. The extension of the time limit from 28 days to 60 days is in accordance with a recommendation of the Senate Committee.

Clause 46 - Application to Tribunal where decision delayed

177. Comparison with 1978 Bill - This clause corresponds with clause 39 of the 1978 Bill, subject only to changes consequential upon other changes in the present Bill.

178. Sub-clause 46(1) applies when a written request for access is made, the request is expressed to be made in pursuance of the Act, it is sent by post or delivered personally to a Minister or an agency at a prescribed address

and 60 days have elapsed without the applicant having been notified of a decision on his request. In such a case the principal officer or Minister shall be deemed to have refused access to the document and the applicant may apply to the Administrative Appeals Tribunal for a review under clause 45.

179. Sub-clause 46(2) provides that where a complaint is made to the Ombudsman concerning a failure to decide on a request, whether made within the period specified in sub-clause 46(1) or not, an application may not be made to the Tribunal before the Ombudsman has notified the result of his investigation to the complainant.

180. Sub-clause 46(3) provides that if the Ombudsman, following an investigation, certifies that there has been an unreasonable delay in reaching a decision on a request, an application may be made to the Tribunal as if, on the day on which the Ombudsman gave his certificate, a decision had been made by the Minister or principal officer refusing to grant access in accordance with the request.

181. Sub-clause 46(4) excludes the Ombudsman from intervention by giving a certificate under sub-clause (3) while a matter is awaiting decision by a Minister.

182. Sub-clause 46(5) provides that a decision refusing or deferring access made after an application has been made to the Tribunal but before the Tribunal has finally dealt with the application may, at the request of the applicant, be reviewed as part of the proceedings before the Tribunal.

183. Sub-clause 46(6) enables the agency or Minister concerned to apply for further time to deal with a request and for the Tribunal to grant further time.

184. The clause is intended to encourage agencies to act expeditiously in meeting requests, a matter which is regarded as important for the operation of the legislation as a whole. The provisions of sub-clause 46(6) will enable the Tribunal to grant further time to an agency that has been making proper efforts to reply to a request within the 60 day period.

Clause 47 - Complaints to the Ombudsman

185. Comparison with 1978 Bill - The clause is new, and gives effect to a recommendation of the Senate Committee.

186. Sub-clause 47(1) has the effect that the Ombudsman's powers to investigate a person's complaint about a decision will not be restricted merely because that person has a right to make an application to the Tribunal in respect of that decision.

187. Sub-clause 47(2) provides that where a complaint has been made to the Ombudsman about a decision, a person may not make an application to the Tribunal for review of that decision before he has been informed of the result of his complaint.

188. Sub-clause 47(3) provides that any report made by the Ombudsman in respect of a complaint must not contain any information as to the existence or non-existence of a document if such information, were it included in a document of an agency, would cause that latter document to be exempt

either because it affects national security, defence, international relations or relations with the States, or because it affects certain aspects of law enforcement - see sub-clause 24(1).

189. The removal of the restrictions imposed on the Ombudsman by section 6(3) of the Ombudsman Act in cases where a person has a right to apply to the Tribunal, is in accordance with a recommendation made by the Senate Committee.

Clause 48 - Powers of the Tribunal

190. Comparison with 1978 Bill - Sub-clauses 48(1) to (4) and 48(6) correspond with sub-clauses 37(2) and (6) of the 1978 Bill. Sub-clauses 48(5) and (7) are new. Sub-clause 48(5) is consequential upon other amendments.

191. Sub-clauses 48(1) and 48(2) provides, in effect, that the Tribunal may review any decision made in respect of a request (including a decision of the Attorney-General to give a certificate under clause 42) and to decide any matter that could have been decided by an agency or Minister, but may not decide to grant access to an exempt document. That is, once it has been decided that a document is properly an exempt document, the Tribunal has no power to review a discretion to deny access to that document. The powers of the Tribunal under sub-clause 48(1) are, however, subject to certain exceptions set out in sub-clauses 48(3), 48(4) and 48(5).

192. Sub-clause 48(3) provides that the Tribunal has no power to review a decision that the disclosure of an internal working document would be contrary to the public interest. The Tribunal is not, however, prevented from reviewing the characterisation of the document as an internal working document as defined in sub-clause 31(1).

193. Sub-clause 48(4) provides that the Tribunal has no power to review a decision to give a certificate under clauses 28, 29 and 30 which establishes conclusively that a document is an exempt document or to review the existence of proper grounds for giving such a certificate.

194. Sub-clause 48(5) provides that the Tribunal has no power to review a decision to give a certificate under sub-clause 28(4), i.e. that disclosure of information as to the existence or non existence of a document would be contrary to the public interest. Nor may the Tribunal review whether there are proper grounds for giving the certificate.

195. Sub-clause 48(6) provides that the Tribunal may review matters relating to charges payable under the legislation in relation to a request.

196. Sub-clause 48(7) provides that either a President or Deputy President of the Tribunal sitting alone shall review a decision by the Attorney-General to certify that a ground exists on which a court would hold that it would be against the public interest to order discovery or production of a document. This accords with analogous situations under the Administrative Appeals Tribunal Act.

Clause 49 - Review of certain decisions in respect of documents relating to business affairs etc.

197. Comparison with 1978 Bill - This clause is new and is consequential upon clause 26, which itself gives effect to a recommendation of the Senate Committee.

198. Sub-clause 49(1) provides that a person may apply to the Tribunal for a review of a decision to give access to a document containing information concerning his business and financial affairs if he, having made submissions to the agency concerned in accordance with clause 26, is advised by that agency that it has made a decision that the document is not exempt under clause 38 in so far as that information is concerned.

199. Sub-clause 49(2) provides that the provisions of Part V of the Bill (other than clauses 45 and 51) apply to an application for review under this clause as they do to an application for a review of a decision refusing to grant access. Clauses 45 and 51 are applicable to applications made by persons who are seeking access and not by persons who are seeking to limit access.

200. Sub-clause 49(2) also provides that the agency or Minister concerned must forthwith inform the person seeking access of an application to the Tribunal under this clause.

201. Sub-clause 49(3) provides that, where an application is made to the Tribunal to review a decision not to grant access to a document in respect of which submissions have been made under clause 26, the agency or Minister must notify the person who made those submissions of the application.

Clause 50 - Parties

202. Comparison with 1978 Bill - This corresponds with clause 40 of the 1978 Bill.

203. The purpose of this clause is to ensure that the appropriate agency or Minister is the party to a proceeding before the Tribunal, and not the individual officer who made the decision under review.

Clause 51 - Onus

204. Comparison with 1978 Bill - This clause corresponds with clause 41 of that Bill.

205. Clause 51 places the onus of establishing that a decision given in respect of a request was justified on the agency or Minister to whom the request was made. This is because the applicant does not have access to the document concerned, and so is not necessarily in a position to argue that the decision was wrong.

Clause 52 - Application of section 28 of the Administrative Appeals Tribunal Act

206. Comparison with 1978 Bill - This clause corresponds with clause 42 of that Bill.

207. This clause provides that section 28 of the Administrative Appeals Tribunal Act 1975 is not to apply where a notice under clause 25 has been given. Section 28 of the Administrative Appeals Tribunal Act requires that a person who is entitled to apply to the Tribunal for a review of a decision be given a written statement of the reasons for a decision. The purpose of clause 52 is to avoid a double obligation to give reasons for a decision since

clause 25 of the Bill imposes such an obligation.

Clause 53 - Tribunal to ensure non-disclosure of certain matters

208. Comparison with 1978 Bill - Sub-clause 53(1) corresponds with clause 43 of the 1978 Bill, subject to a consequential amendment upon clause 24 of this Bill. Sub-clause 53(2) is new.

209. Sub-clause 53(1) requires the Administrative Appeals Tribunal to exercise its powers under sub-section 35(2) of the Administrative Appeals Tribunal Act so as to avoid disclosing to an applicant, in proceedings under the Bill, information which is exempt or which relates to the existence or non-existence of a document and which is protected by clause 24. The powers given to the Tribunal under sub-section 35(2) of the Administrative Appeals Tribunal Act enable the Tribunal to make orders directing that a hearing or part of a hearing take place in private and directing who may be present at such a hearing, and prohibiting or restricting the disclosure of evidence given or documents produced to the Tribunal.

210. Sub-clause 53(2) directs the Tribunal not to include any exempt matter or information protected by clause 24 in its reasons for a decision.

211. Sub-clause 53(2) further provides that the Tribunal may hear evidence or argument in the absence of the applicant or his representative if that is necessary to prevent the disclosure of exempt matter or information protected by clause 24. This provision has been included to remove any doubt about the power of the Tribunal to hear evidence or argument in the absence of the applicant.

Clause 54 - Production of exempt documents

212. Comparison with 1978 Bill - This clause corresponds with clause 44 of the 1978 Bill, subject to a change consequential upon sub-clause 28(4) of this Bill.

213. Sub-clause 54(1) limits the requirement under section 37 of the Administrative Appeals Tribunal Act that documents relevant to an appeal must be lodged with the Tribunal. A document claimed to be an exempt document is not required to be produced to the Tribunal unless the Tribunal is not satisfied, by affidavit or other evidence that the document is exempt or, in the case of the Attorney-General's certificate given under clause 42, that the giving of the certificate was justified.

214. Sub-clause 54(1) also requires that, where such a document is produced to the Tribunal and is held to be an exempt document, the document is to be returned to the person who produced it without permitting it to be disclosed to any person other than a member of the Tribunal or the staff of the Tribunal.

215. The sub-clause is subject to the provisions of sub-clause 54(3).

216. Sub-clause 54(2) provides that the Tribunal may require the production of an exempt document for the purpose of determining whether it would be practicable for a Minister or agency to grant access to a copy of the document after deleting the exempt material from the document. The sub-clause contains provisions similar to those in sub-clause 54(1) requiring the return of a document without permitting its disclosure to any person other than a member of the Tribunal or the staff of the Tribunal. This sub-clause is subject to sub-clause 54(3).

217. Sub-clause 54(3) provides that, notwithstanding the provisions of sub-clauses 54(1) and 54(2), and subject to clause 54(4), the Tribunal cannot require the production of a document which is the subject of a certificate under clauses 28, 29 and 30 which establishes conclusively that a document is an exempt document.

218. The sub-clause further provides that the Tribunal may not require the giving of information as to the existence or non-existence of a document in respect of which a certificate is in force under sub-clause 28(4).

219. Sub-clause 54(4) provides that where a certificate referred to in sub-clause 54(3) identifies a part or parts of a document (as provided under sub-clauses 28(3), 29(3) and 30(3)), sub-clause 54(3) does not prevent the Administrative Appeals Tribunal from requiring the production of a copy of the document from which the identified parts have been deleted.

220. Sub-clause 54(5) applies the provisions of sub-clauses 54(1) and 54(2) to a document in the possession of a Minister which the Minister claims is not an official document of a Minister. That is, where a Minister refuses a request made to him for access to a document in his possession on the ground that it is not an official document of a Minister (see definition of "official document of a Minister" in sub-clause 4(1)) then that document must be appropriately protected in proceedings before the Tribunal. It may only be required to be produced before the Tribunal if the Tribunal is not satisfied, by other evidence, of the nature of the document.

221. Sub-clause 54(6) regulates the sending of documents produced to the Tribunal under this clause to the Federal Court of Australia in the case of an appeal or a reference of a question of law to that Court. The non-disclosure requirements are similar to those that apply in the case of the Tribunal under sub-clauses 54(1) and 54(2).

Clause 55 - Evidence of certificates

222. Comparison with 1978 Bill - This clause corresponds with clause 45 of the 1978 Bill.

223. This clause provides that, in proceedings before the Administrative Appeals Tribunal under Part V, evidence of a certificate under clauses 28, 29 and 30, including evidence as to the identity or nature of the document concerned, may be given by affidavit or otherwise and is admissible without the production of the certificate or of the document in question. The provision would enable an officer of an agency who had knowledge of a document the subject of proceedings before the Tribunal and of the certificate made on or in relation to the document to give oral evidence or evidence on affidavit to the Tribunal on those matters. Such evidence would be admissible without the need to produce the document or the certificate.

PART VI - MISCELLANEOUS

Clause 56 - Protection against certain actions

224. Comparison with 1978 Bill - This clause corresponds with clause 46 of the 1978 Bill, subject to two changes. First, the clause now extends to give protection against an action for infringement of copyright that might otherwise arise in respect of the giving of access to a document under the Bill. Secondly, the clause now protects a person who has supplied a document to an agency or Minister against an action for defamation or breach of confidence in respect of any publication involved in or resulting from the giving of access to that document under the Bill. These changes are consequent upon recommendations of the Senate Committee.

225. Sub-clause 56(1) gives protection against certain causes of action which might otherwise arise out of the giving of access of a document under the Bill. The protection applies where access is required to be given or where access is authorised by a person having authority to make the decision to grant access in the bona fide belief that access was required to be given. In these circumstances, no action for defamation, breach of confidence or infringement of copyright lies by reason only of the authorising or giving of access. In addition, no action for defamation or breach of confidence lies against the author of a document or any other person by reason of such a person having supplied the document to an agency or Minister in respect of any publication involved in or resulting from the giving of access to it.

226. Sub-clause 56(2) makes it clear that the giving of access to a document does not authorise any further publication of the document by the person to whom access was given for the purposes of the law relating to defamation or breach of confidence.

Clause 57 - Protection in respect of offences

227. Comparison with 1978 Bill - This clause corresponds with clause 47 of the 1978 Bill.

228. This clause provides a defence in criminal proceedings for wrongful disclosure of a document or information where access to a document is required to be given under the legislation or is authorised to be given by a Minister or a person authorised to grant access in accordance with clause 22 or clause 44, in the bona fide belief that access is required to be given by the Act.

Clause 58 - Reports to Parliament

229. Comparison with 1978 Bill - This clause corresponds with clause 48 of the 1978 Bill, subject to a change requiring a report to be made in respect of a financial year instead of a calendar year.

230. Sub-clause 58(1) requires an annual report on the operation of the legislation to be made by the Minister administering it and laid before each House of Parliament.

231. Sub-clause 58(2) requires each agency and Minister to provide information to the Minister administering the legislation for the purpose of enabling him to make the report under sub-clause 58(1).

Clause 59 - Regulations

232. Comparison with 1978 Bill - This clause corresponds with clause 49 of the Bill, subject to a change to make clear that a regulation may be made to provide for a charge to be levied in respect of a request for access.

233. Sub-clause 59(1) contains the usual regulation-making powers and, in particular, provides for the making of regulations

relating to charges for access to documents and relating to the officers who may give decisions on behalf of an agency.

234. Sub-clause 59(2) provides that charges imposed by the regulations apply to the giving of access to exempt documents as though that access had been required by the legislation.

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