

EXPLANATORY STATEMENT

Australian Capital Territory  
Freedom of Information Ordinance 1989

No 46, 1989

The Freedom of Information Ordinance 1989 will commence on the day that Self-Government comes into effect. It is modelled on the Commonwealth Freedom of Information Act 1982 (the Act). The Ordinance essentially reproduces the Act subject to modifications which reflect different constitutional and institutional arrangements which are required as a result of the transfer of government responsibilities to the Territory. The principal differences between the provisions of the Act and the Ordinance are the Act provides for exemption of bodies and agencies in its Schedules whereas the Ordinance provides for exemptions to be made by regulation. The Ordinance also contains a new provision, section 33, which provides for the transfer of requests to "a Commonwealth agency" where there are reasonable grounds to believe that documents requested are exempt under the Act.

The Ordinance gives members of the public an enforceable right of access, subject to specified exceptions, to documents in the possession of agencies (Departments and statutory authorities) and to official documents in the possession of Ministers.

The Ordinance also requires 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 details of the Ordinance are set out in the attachment.

ISSUED BY THE AUTHORITY OF THE  
MINISTER OF STATE FOR THE ARTS AND  
TERRITORIES.

**PART I - PRELIMINARY**

Section 1 identifies the short title of the Ordinance as the Freedom of Information Ordinance 1989.

Section 2 provides that the Ordinance will commence on the same date as section 22 of the Australian Capital Territory (Self-Government) Act 1988.

Section 3 states the objects of the Ordinance as follows:

- Subsection (1) provides that the object of the legislation is to extend the right of the community to access to official information in the possession of the government.
- Subsection (2) provides that the legislation should be interpreted so as to further the object set out in subsection (1).

Section 4 deals with matters of interpretation.

Section 5 allows regulations to deem a tribunal, authority or body to be a prescribed authority, but only in respect of matters of an administrative nature.

Section 6 allows agencies, bodies and persons holding specified offices to be exempted from the operation of the Ordinance by regulation.

**PART II - PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION**

Section 7 requires agencies to publish statements concerning their functions and the categories of documents held by them.

Section 8 requires agencies to make available internal documents, used in the decision-making process, for inspection and purchase.

Section 9 prevents a rule or guideline, which was not made available under section 8 of the Ordinance, being applied to the prejudice of members of the public.

**PART III - ACCESS TO DOCUMENTS**

Section 10 states that everyone has a legal right to obtain access to the documents of agencies and official documents of Ministers which are not exempt documents.

Section 11 specifies certain documents to which access is not provided under the Ordinance:

- Subsection 11(1) provides that a person is not entitled to access under the Ordinance to certain documents which are otherwise available to the public.
- Subsection 11(2) provides that a person is not entitled to access to a document which became a Commonwealth document prior to 1 January 1977 unless it relates to the personal affairs of the requestor or it is reasonably necessary to enable a proper understanding of another document to which the requestor has lawfully had access.
- Subsections 11(3) and 11(4) allow the making of regulations to permit access to the documents referred to in subsection(2).

Section 12 deems Territory documents held in the Australian Archives to be in the possession of the most relevant agency.

Section 13 declares that the legislation is not intended to prevent or discourage the publication or granting of access to documents otherwise than under the provisions of the Ordinance.

Section 14 provides for the form of requests for access to documents and requires agencies to provide reasonable assistance to applicants.

Section 15 allows for a request, which has been addressed to the wrong agency or which is more closely related to the functions of another agency, to be transferred to the correct agency.

Section 16 allows for a request to be made for information held on computer or as a sound recording.

Section 17 imposes an obligation to grant access in accordance with the legislation.

Section 18 provides for requests to be acknowledged within 14 days and determined within 30 days unless it is necessary to consult the Commonwealth or a State Government or a person or organisation whose business affairs are affected.

Section 19 provides for the form in which access to documents may be granted.

Section 20 permits deferment of the provision of access in certain cases where it would be premature to grant access.

Section 21 requires access to be granted to an edited version of a document which contains exempt material unless it is not practicable to do so or the resultant document would be misleading.

Section 22 requires decisions to be made by the principal officer of an agency, the responsible Minister or an authorised officer of an agency.

Section 23 permits access to documents to be refused where to grant access would substantially and unreasonably divert the resources of an agency or interfere with the performance by a Minister of his or her functions.

Section 24 allows an agency or Minister to neither confirm nor deny the existence of a document which is exempt because it affects Commonwealth/State relations or law enforcement.

Section 25 requires the giving of a formal notice of reasons for the denial of access to a document including notice of rights of review of the decision to deny access.

Section 26 requires consultation with the Commonwealth or a State Government where a document that has been requested was received from that Government or might affect relations between the Territory and the Commonwealth or the State.

Section 27 requires consultation with a person or business organisation where a document that has been requested contains details of that person's or organisation's business, commercial or professional affairs and it appears to the decision-maker that the person or organisation might reasonably wish to contend that the document is exempt under the section 43.

Section 28 requires an agency or a Minister to notify applicants of their liability to pay charges.

Section 29 allows an agency or a Minister to remit a charge in whole or part.

Section 30 allows an agency or a Minister to remit an application fee in whole or part.

Section 31 extends the period within which a decision to grant or refuse access must be made so that it runs from the date the charge is paid or remitted or the date the Administrative Appeals Tribunal upholds an appeal against the charge.

#### PART IV - EXEMPT DOCUMENTS

Section 32 provides a rule of interpretation for Part IV to ensure that the scope or application of an exemption clause is not limited by the existence of any other exemption provision.

Section 33 is a new provision not modelled on the provisions of the Act:

- Subsection 33(1) allows a principal officer or Minister to transfer a document to which access has been requested, to an appropriate Commonwealth Agency if there are reasonable grounds to believe that, the document in the possession of the Commonwealth, would be an exempt document on certain grounds under the Act.

These grounds are:

- (i) that the document affects national security, defence or international relations;
- (ii) that the document affects relations between the Commonwealth and the States;
- (iii) that the document is a Cabinet document;
- (iv) that the document is an Executive Council document;
- (v) that the document affects the financial interests of the Commonwealth;
- (vi) that the document affects the national economy; or
- (vii) that the document arises out of companies and securities legislation.

Subsection 33(2) provides for the applicant to be notified of the transfer.

Section 34 exempts from disclosure documents affecting relations between the Territory and the Commonwealth or a State. A Minister may issue a conclusive certificate that a document is exempt under this section.

Section 35 exempts documents which disclose submissions, records, deliberations or decisions of the Australian Capital Territory Executive. The Head of Administration may issue a conclusive certificate that a document is exempt under this section.

Section 36 exempts from disclosure internal working documents. Internal working documents are documents disclosing the deliberative or policy-forming process of an agency or Minister. The exemption only applies where disclosure would be against the public interest.

Section 37 exempts from disclosure certain documents affecting enforcement of the law or protection of public safety. Such documents are exempt if they:

- (i) prejudice the conduct of investigations, administration of the law or enforcement of the law;
- (ii) disclose a confidential source of information;
- (iii) endanger the life or physical safety of a person;
- (iv) prejudice a fair hearing;
- (v) prejudice lawful methods of investigation and law enforcement; or
- (vi) prejudice lawful methods for the protection of public safety.

Section 38 exempts from disclosure a document if the document is subject to a secrecy provision.

Section 39 exempts a document if its disclosure would have a substantial adverse effect on the financial or property interests of the Territory and disclosure is not in the public interest.

Section 40 exempts from disclosure documents which would:

- (i) prejudice methods of conducting tests, examinations or audits;
- (ii) prejudice the attainment of the objects of particular tests, examinations or audits;
- (iii) substantially adversely affect personnel practices;
- (iv) substantially adversely affect the proper and efficient conduct of the operations of an agency; or
- (v) substantially adversely affect the conduct of industrial relations;

and the release of which is not in the public interest.

Section 41 exempts documents which unreasonably disclose the personal affairs of any person. The exemption does not apply where the person whose personal affairs are disclosed is the person requesting access. However, if necessary, medical or psychiatric information may be disclosed to a nominated medical practitioner instead.

Section 42 exempts from disclosure documents which are subject to legal professional privilege.

Section 43 exempts documents which disclose:

- (i) trade secrets;
- (ii) other information with a commercial value which would be diminished by disclosure; or
- (iii) other information about the business, professional, commercial or financial affairs of an organisation or undertaking which would:
  - (a) unreasonably adversely affect those affairs; or
  - (b) prejudice the future supply of information.

This provision does not apply to a request for access, by a person or a business, to information concerning his, her or its own affairs.

Section 44 exempts documents whose disclosure would be contrary to the public interest because they would:

- (i) substantially adversely affect the ability of the Government to manage the economy of the Territory; or
- (ii) result in undue obstruction to the course of business or undue benefit or detriment to persons by disclosing Government plans.

Section 45 exempts documents which cannot be disclosed without committing a breach of confidence.

Section 46 exempts documents, the disclosure of which would be contempt of court, in defiance of an order of a Royal Commission or would infringe privileges of the Parliament of the Commonwealth or a State or a Territory legislature.

Section 47 exempts documents which reveal the affairs of the Ministerial Council for Companies and Securities or the National Companies and Securities Commission.

#### PART V - AMENDMENT OF PERSONAL RECORDS

Section 48 permits Australian citizens and permanent residents to apply to have documents which are incomplete, incorrect, out of date or misleading corrected.

Section 49 specifies the form required for a request under section 48.

Section 50 sets out the procedures to be followed when a request is received for an amendment of records. A record may be amended by adding a notation or by alteration. The claimant is to be notified of the decision within 30 days and is entitled to a statement of reasons for a refusal.

Section 51 provides for review of decisions about requests for amendments of personal records as follows:

- Subsection (1) applies the provisions of Part VII, which allows appeals to the Australian Capital Territory Administrative Appeals Tribunal, to requests for amendments of personal records.
- Subsections (2) and (3) allow a claimant, who appeals unsuccessfully against a decision under section 48, to require the record to have a notation stating the respects in which the claimant disagrees with the information.
- Subsection (4) requires a notation under subsection (2) to be added to the record, and requires any disclosure of information in relation to the part of the record to which the notation relates, to be accompanied by a statement of the disagreement.

Section 52 makes it clear that nothing in Part V is meant to prevent details of notations on files being forwarded to persons who obtained information before the commencement of the Ordinance.

## PART VI - ROLE OF THE OMBUDSMAN

Section 53 is an interpretation provision referring to the Ombudsman Ordinance 1989.

Section 54 allows complaints to the Ombudsman about the actions of an agency in the exercise of powers or functions under the Ordinance. This right is independent of the right to apply to the Australian Capital Territory Administrative Appeals Tribunal for review. However, an applicant may not appeal to the Tribunal while a complaint to the Ombudsman is still outstanding.

Section 55 provides for the Ombudsman to make reports on investigations under section 54 to principal officers and the Head of Administration, and allows the Ombudsman's annual report to include details of such investigations and observations and recommendations about the operation of the Ordinance.

Section 56 allows the Ombudsman to require reasons for a decision made under the Ordinance notwithstanding that he or she has received a certificate under the Ombudsman Ordinance 1989 refusing access to the document.

Section 57 allows the Ombudsman to represent or arrange the representation of an applicant before the Australian Capital Territory Administrative Appeals Tribunal. The Ombudsman shall have regard to the significance of the matter and the circumstances of the applicant.

## PART VII - REVIEW OF DECISIONS

Section 58 is an interpretation provision allowing reference to documents where the existence of the documents has neither been confirmed nor denied.

Section 59 allows a person to seek an internal review of a decision by an agency that access should be deferred or denied or that a charge should be paid for the provision of access. The internal review is to be carried out by an officer other than the one who made the decision. Application must be made within 28 days of receipt of notification of the decision.

Section 60 allows the Australian Capital Territory Administrative Appeals Tribunal ("the Tribunal") to review decisions under the Ordinance as follows:

- (i) refusal or deferral of access to a document;
- (ii) refusal to extend the period of time to apply for the internal review of a decision; and
- (iii) a determination of a charge.

If a person has applied under section 59 for an internal review of a decision they may only apply for a review by the Tribunal of the original decision if 14 days have elapsed and he or she has not been informed of the result of the internal review. In any other case an application for review must be made within 60 days.

Section 61 allows an application to be made to the Tribunal where no response has been made to a request for access within 30 days. In such a case access is deemed to have been refused.

Subsections 61(2) - 61(4) provide that such an application may not be made if a complaint against the delay is still under investigation by the Ombudsman. Provision is also made for the Ombudsman to grant the applicant a certificate stating that the delay is unreasonable in cases where a complaint was made less than 30 days after the request for access was made.

Subsections 61(5) and 61(6) allow the Tribunal to extend the proceedings to a review of refusal or deferment of access where such a decision is notified after application is made to the Tribunal under this section. The Tribunal may also extend the time within which a decision may be made.

Section 62 specifies the powers of the Tribunal.

- Subsection 62(1) provides for the Tribunal to substitute its own decision for that of the agency or Minister.
- Subsection 62(2) prevents the Tribunal from granting access to a document if it determines that it is exempt.
- Subsections 62(3) - 62(6) provide that the Tribunal may not review a decision to issue a conclusive certificate of exemption in respect of documents which:
  - affect relationships with the Commonwealth or a State;
  - are Executive documents; or
  - are internal working documents.

However, the Tribunal may determine whether reasonable grounds exist for the issue of the certificate.

- Subsection 62(7) provides that the Tribunal may review charges payable in relation to a request.
- Subsection 62(8) provides that an agency or a Minister may elect not to rely on subsection 11(2), which limits the operation of the Ordinance to documents which come into existence after 1 January 1977. In such a case the Tribunal may review the matter as if there were no such limitation.

Section 63 provides that where the Tribunal determines that there are not reasonable grounds for the issue of a conclusive certificate, the relevant Minister must decide whether or not to

revoke the certificate within 28 days. If the certificate is not revoked then the Minister must give the applicant formal notice, in writing, of the reasons for the decision and cause a copy to be tabled in the Legislative Assembly.

Section 64 provides that where the Tribunal is considering an application for the review of the reasonableness of a conclusive certificate it must include the President either sitting alone or with other members.

Section 65 provides that where the Tribunal is considering an application for the review of the reasonableness of a conclusive certificate, evidence or submissions from Ministers or officials relating to the exemption are to be heard in private. The Tribunal may also give directions restricting the publication of evidence, documents or submissions. If necessary the Tribunal may make similar provisions for other parts of the hearing.

Section 66 provides that questions of law that arise are to be determined in accordance with the opinion of the President.

Section 67 makes provision for the production of a document to the Tribunal where a conclusive certificate has been issued. The Tribunal may only require production of such a document if it is not satisfied on the evidence that reasonable grounds exist for the claim. Upon completion of an inspection the Tribunal must return the document without permitting it to be seen by anyone who is not a member of the Tribunal or its staff.

Section 68 allows the Government of the Commonwealth or a State to apply to the Tribunal for review of a decision that a document is not an exempt document under section 34.

Section 69 allows a person who has submitted that, in accordance with subsection 27(1), a document ought to be exempt because it discloses information about his or her business affairs, to apply for a review of a decision that the document is not an exempt document.

Section 70 makes provisions for the relevant agency or Minister to be a party to the proceedings before the Tribunal.

Section 71 provides that, in proceedings under Part VII, the agency or Minister to whom the request was made bears the onus of proving that the Tribunal should find against the applicant.

Section 72 provides that section 26 of the Administrative Appeals Tribunal Ordinance 1989, which enables an applicant to obtain a statement of reasons for a decision, does not apply to a decision in respect of which a notice has been given pursuant to section 25 of this Ordinance. However, if the notice is not adequate, the Tribunal may make a declaration which entitles the applicant to further and better particulars.

Section 73 requires the Tribunal to take such steps as are necessary to avoid the disclosure to the applicant of exempt matter or information disclosing the existence of exempt matter. For that purpose the Tribunal is required not to include such information or matter in its reasons for decision, and is entitled to hear evidence or argument in the absence of the applicant or his or her representative where necessary.

Section 74 makes provision for the production of exempt documents to the Tribunal. The Tribunal may order the production of such a document under the following circumstances:

- (a) where the Tribunal is not satisfied, on the evidence, that the document is exempt;
- (b) where the Tribunal requires the document for the purpose of determining whether it is practicable to release a copy of the document with deletions so that the copy is not an exempt document; or
- (c) where a Minister claims that a document in his or her possession is not an official document of the Minister.

The Tribunal may not order the production of a document, or part of a document, which is subject to a conclusive certificate.

Where the Tribunal concludes that a document or part of a document is an exempt document it is required to return the document without it being seen by anyone except the members or staff of the Tribunal. However, the document may be forwarded to the Australian Capital Territory Supreme Court for determination of a question of law.

Section 75 provides that proof of a certificate under sections 34, 35 or 36 and evidence of the nature or identity of the document to which it relates, are admissible without the certificate or documents being produced.

Section 76 allows the Tribunal to recommend payment of costs in cases where an appeal, under section 60, is successful or substantially successful.

#### PART VIII - MISCELLANEOUS

Section 77 protects the Territory, an agency, a Minister or an officer from legal action for defamation, breach of confidence or infringement of copyright arising out of the grant of access to a document under the Ordinance where an authorised person grants access to the document under the bona fide belief that access was required to be given under the Ordinance. Granting of access does not constitute an authorisation or approval of publication or breach of copyright.

Section 78 provides protection from liability for criminal offences as a result of granting access under the Ordinance or under the bona fide belief that access was required to be granted.

Section 79 requires the production of an annual report on the operation of the Ordinance. The first such report is to cover the period up to 30 June 1990. Thereafter a report will be required for each 12 month period. Reports will be required to be prepared and tabled by the Chief Minister in the Legislative Assembly.

Section 80 allows the Minister to determine fees and charges by notice in the Gazette.

Section 81 allows the Executive to make regulations for the purposes of the Ordinance.