



Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009

No. 99, 2009

**An Act to amend the law relating to access to
information, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009

No. 99, 2009

**An Act to amend the law relating to access to
information, and for related purposes**

[Assented to 6 October 2009]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Freedom of Information (Removal of
Conclusive Certificates and Other Measures) Act 2009*.

Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009

No. 99, 2009 1

2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Freedom of Information Act 1982

1 Subsection 4(1) (paragraph (b) of the definition of *exempt document*)

After “agency”, insert “, person or body”.

2 After subsection 7(2A)

Insert:

(2B) A Minister is exempt from the operation of this Act in relation to a document that has originated with, or has been received from, any of the following:

- (a) the Australian Secret Intelligence Service;
- (b) the Australian Security Intelligence Organisation;
- (c) the Inspector-General of Intelligence and Security;
- (d) the Office of National Assessments;
- (e) the Defence Imagery and Geospatial Organisation;
- (f) the Defence Intelligence Organisation;
- (g) the Defence Signals Directorate.

3 Subsection 12(3)

Omit “part”, substitute “Part”.

4 Subsection 33(1)

Omit “(1)”.

5 Subsections 33(2) to (7)

Repeal the subsections.

6 Subsections 33A(2) to (4A)

Repeal the subsections.

7 Subsections 33A(6) to (8)

Repeal the subsections.

8 Subsections 34(2) to (5)

Repeal the subsections.

9 Subsections 35(2) to (5)

Repeal the subsections.

10 Subsections 36(3), (4), (8), (9) and (10)

Repeal the subsections.

11 Section 36A

Repeal the section.

12 Section 53

Repeal the section, substitute:

53 Interpretation

For the purposes of this Part, unless the contrary intention appears, a claim that a document would, if it exists, be an exempt document under section 33, 33A, 34 or 35 is to be deemed to be a claim that the document is an exempt document under that section despite the fact that the existence or non-existence of the document is not acknowledged.

13 Subsections 58(3) to (5A)

Repeal the subsections.

14 Section 58A

Repeal the section.

15 Subsection 58B(1)

Repeal the subsection, substitute:

- (1) If an application is made to the Tribunal for the review of a decision refusing to grant access to a document in accordance with a request, being a document that is claimed to be an exempt document under section 33 or 34, then the Tribunal must be constituted in accordance with subsection (2) for the purposes of any proceeding in relation to the application.

Note: The heading to section 58B is replaced by the heading “**Constitution of Tribunal for proceedings about certain exempt documents**”.

16 Section 58C

⁴ *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 No. 99, 2009*

Repeal the section.

17 Section 58E

Repeal the section, substitute:

58E Production to the Tribunal of certain exempt documents

- (1) In any proceedings before the Tribunal under this Act in relation to a document that is claimed to be an exempt document under section 33 or 34, the Tribunal is entitled to require the production of the document in accordance with this section and not in accordance with section 64, section 37 of the *Administrative Appeals Tribunal Act 1975* or otherwise.
- (2) If the Tribunal is not satisfied by evidence on affidavit or otherwise that the document is an exempt document under section 33 or 34, the Tribunal may require the document to be produced for inspection by the Tribunal as constituted for the purposes of the proceeding.
- (3) If, after an inspection of a document under this section, the Tribunal is satisfied that the document is an exempt document, the Tribunal must return the document to the person by whom it was produced without permitting a person to have access to the document or disclosing the contents of the document to a person, unless the person is:
 - (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
 - (b) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; or
 - (c) in the circumstances permitted under paragraph 60A(6)(a)—the Inspector-General of Intelligence and Security.

18 At the end of subsection 59(3)

Add “unless the Tribunal orders, on the application of the agency or the Minister concerned, that it would not be appropriate to do so in the circumstances”.

19 At the end of section 59

Add:

- (4) For the purposes of determining, under subsection (3), whether it would not be appropriate for the person or organisation, or the proprietor of the undertaking, to be informed under subsection (3), the Tribunal must have regard to whether informing the person or organisation, or the proprietor of the undertaking, would, or could reasonably be expected to:
- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance; or
 - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or
 - (c) endanger the life or physical safety of any person; or
 - (d) cause damage to the security, defence or international relations of the Commonwealth.

20 At the end of subsection 59A(3)

Add “unless the Tribunal orders, on the application of the agency or the Minister concerned, that it would not be appropriate to do so in the circumstances”.

21 At the end of section 59A

Add:

- (4) For the purposes of determining, under subsection (3), whether it would not be appropriate for the person, or if the person is deceased, the legal representative of the person, to be informed under subsection (3), the Tribunal must have regard to whether informing the person, or the legal representative of the person, would, or could reasonably be expected to:
- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance; or
 - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the

- non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or
- (c) endanger the life or physical safety of any person; or
 - (d) cause damage to the security, defence or international relations of the Commonwealth.

22 At the end of paragraph 60(a)

Add “and”.

23 Paragraph 60(b)

Omit “; and”, substitute “.”.

24 Paragraph 60(c)

Repeal the paragraph.

25 After section 60

Insert:

60A Inspector-General of Intelligence and Security must be requested to give evidence in certain proceedings

- (1) This section applies in any proceedings before the Tribunal under this Act in relation to a document that is claimed to be an exempt document under section 33.
- (2) Before determining that the document is not an exempt document under section 33, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:
 - (a) the damage that would, or could reasonably be expected to, be caused to:
 - (i) the security of the Commonwealth; or
 - (ii) the defence of the Commonwealth; or
 - (iii) the international relations of the Commonwealth;if access to the document were given in accordance with the request; or
 - (b) whether giving access to the document in accordance with the request would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an

international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

- (3) Before determining that an agency or Minister must grant access to a copy of the document with deletions, the Tribunal must request the Inspector-General to appear personally and give evidence on:
- (a) the damage that would, or could reasonably be expected to, be caused to:
 - (i) the security of the Commonwealth; or
 - (ii) the defence of the Commonwealth; or
 - (iii) the international relations of the Commonwealth;if the proposed deletions were not made; or
 - (b) whether giving access to the document without the proposed deletions would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.
- (4) Before hearing the evidence of the Inspector-General, the Tribunal must hear any evidence to be given or submissions to be made by or on behalf of the agency to which or the Minister to whom the request was made for access to the document.
- (5) The Inspector-General must comply with a request under subsection (2) or (3) unless, in the opinion of the Inspector-General, the Inspector-General is not appropriately qualified to give evidence on the matters in relation to which the Inspector-General has been requested to give evidence.
- (6) For the purposes of enabling the Inspector-General to comply with a request under subsection (2) or (3):
- (a) the Tribunal must allow the Inspector-General to take possession of, and make copies of or take extracts from, any document given to the Tribunal for the purposes of the proceeding; and
 - (b) the Inspector-General may require the production of the document that is claimed to be an exempt document under

- section 33 by the agency to which or the Minister to whom the request was made for access to the document; and
- (c) the Inspector-General may require the production of any document of an agency or official document of a Minister that relates to the document mentioned in paragraph (b) by the agency or Minister; and
 - (d) the Inspector-General may make copies of, or take extracts from, the documents mentioned in paragraphs (b) and (c); and
 - (e) after such period as is reasonably necessary for the purposes of giving evidence to the Tribunal, the Inspector-General must:
 - (i) return the original of any document to the Tribunal or to the agency or Minister; and
 - (ii) destroy any copies of or extracts taken from any document.
- (7) The Inspector-General must permit a person who would be entitled to inspect a document mentioned in paragraphs (6)(a) to (d) if it were not in the possession of the Inspector-General to inspect the document at all reasonable times as the person would be so entitled.
- (8) The Tribunal is not bound by any opinion of the Inspector-General expressed while giving evidence under this section.
- (9) The Tribunal must allow the Inspector-General a period within which to consider the documents mentioned in paragraphs (6)(a) to (d) that is reasonable having regard to:
 - (a) the nature of the evidence that the Inspector-General has been requested to give; and
 - (b) the time required by the Inspector-General to perform the Inspector-General's other functions.
- (10) The fact that a person is obliged to produce a document under subsection (6) does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that document.

26 Subsection 63(1)

Repeal the subsection, substitute:

- (1) In determining whether the Tribunal is satisfied that it is desirable to make an order or orders under subsection 35(2) of the *Administrative Appeals Tribunal Act 1975*, the Tribunal must:
- (a) have regard to:
 - (i) the necessity of avoiding the disclosure to the applicant of exempt matter contained in a document to which the proceedings relate; and
 - (ii) the necessity of avoiding the disclosure to the applicant of information of the kind referred to in subsection 25(1); and
 - (b) where the proceedings relate to a document that is claimed to be an exempt document under section 33—give particular weight to a submission made by an agency or a Minister that it is desirable to make the order or orders under subsection 35(2) of the *Administrative Appeals Tribunal Act 1975* because disclosure of the document:
 - (i) would, or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth; or
 - (ii) would divulge information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

27 Paragraphs 63(2)(a) and (b)

Omit “subsection (1)”, substitute “paragraph (1)(a)”.

28 Subsection 64(1)

Repeal the subsection, substitute:

- (1) Section 37 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to a document that is claimed to be an exempt document, but in proceedings before the Tribunal in relation to such a document, the Tribunal may, for the purpose of deciding whether the document is an exempt document, require the document to be produced for inspection by members of the Tribunal only.
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(1AA) If, upon the inspection, the Tribunal is satisfied that the document is an exempt document, the Tribunal must return the document to the person by whom it was produced without permitting a person to have access to the document, or disclosing the contents of the document to a person, unless the person is:

- (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
- (b) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; or
- (c) in the circumstances permitted under paragraph 60A(6)(a)—the Inspector-General of Intelligence and Security.

29 Subsection 64(2)

Omit all the words after “return the document to the person by whom it was produced without permitting”, substitute:

a person to have access to the document, or disclosing the contents of the document to a person, unless the person is:

- (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
- (b) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; or
- (c) in the circumstances permitted under paragraph 60A(6)(a)—the Inspector-General of Intelligence and Security.

Note: The Tribunal is not entitled, under this section, to require production of documents that are exempt under section 33 or 34, but is entitled to do so under section 58E if the Tribunal is not satisfied by evidence on affidavit or otherwise that the document is an exempt document.

30 Subsections 64(3) and (4)

Repeal the subsections.

31 Subsection 64(4A)

Omit “, (2) or (4)”, substitute “or (2)”.

32 Section 65

Repeal the section.

33 At the end of Part VI

Add:

67 Automatic stay of certain decisions on appeal

- (1) This section applies if:
 - (a) a person applies, under section 55, to the Tribunal for review of a decision by an agency or Minister refusing to grant access to a document in accordance with a request, being a document that is claimed to be an exempt document; and
 - (b) the Tribunal decides that a person may have access to the document; and
 - (c) the agency or the Minister institutes an appeal to the Federal Court of Australia from the decision of the Tribunal.
- (2) If this section applies to a decision of the Tribunal, the operation of the decision is stayed by force of this section from the time at which the appeal is instituted.
- (3) If the agency or the Minister appeals to the Federal Court of Australia from the decision of the Tribunal and the appeal in relation to the decision is determined by the Federal Court of Australia, the stay continues to have effect until the earlier of:
 - (a) the time at which the decision of the Federal Court of Australia on the appeal takes effect; and
 - (b) the time otherwise determined by the Federal Court of Australia.
- (4) If the agency or the Minister appeals to the Federal Court of Australia from the decision of the Tribunal and the appeal in relation to the decision is determined by the Federal Magistrates Court, the stay continues to have effect until the earlier of:
 - (a) the time at which the decision of the Federal Magistrates Court on the appeal takes effect; and
 - (b) the time otherwise determined by the Federal Magistrates Court.
- (5) Nothing in this section affects the power of the Federal Court of Australia or the Federal Magistrates Court to make orders under section 44A of the *Administrative Appeals Tribunal Act 1975* in relation to matters other than staying the decision of the Tribunal.

34 Application provision—items 4 to 32

- (1) The amendments made by items 4 to 32 of this Schedule apply for the purposes of determining whether access to a document of an agency or an official document of a Minister will be given in accordance with a request made under subsection 15(2) of the *Freedom of Information Act 1982* and received by the agency or Minister on or after the commencement of this Schedule.
- (2) A certificate issued in relation to a document under subsection 33(2), 33(4), 33A(2), 33A(4), 34(2), 34(4), 35(2), 35(4) or 36(3) of the *Freedom of Information Act 1982* (as in force immediately before the commencement of this Schedule) is, by force of this subitem, revoked in relation to the document on and from the time at which the first request for access to the document under the *Freedom of Information Act 1982* is made on or after the commencement of this Schedule.
- (3) To avoid doubt:
 - (a) subitem (2) does not affect anything done in relation to, or in reliance on, a certificate mentioned in subitem (2) before the commencement of this Schedule; and
 - (b) nothing prevents a person from making a request, on and after the commencement of this Schedule, for access to a document of an agency or an official document of a Minister under the *Freedom of Information Act 1982* if:
 - (i) before the commencement of this Schedule, the person made a request for access to the same document; and
 - (ii) the request was refused in reliance on a certificate mentioned in subitem (2).

35 Application provision—item 33

The amendment made by item 33 of this Schedule applies to a decision of the Tribunal made on or after the commencement of this Schedule.

Schedule 2—Archives Act 1983

1 Subsections 29(6) and (7)

Repeal the subsections, substitute:

- (6) A record that is in the open access period is not, by virtue of a determination under subsection (1), a record to which paragraph (1)(b) applies unless:
 - (a) the record is an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b); and
 - (b) a security classification applies to the record such that access by the Archives would not be appropriate.
- (7) A record that is in the open access period is not, by virtue of a determination under subsection (2), a record to which paragraph (2)(b) applies unless:
 - (a) the record is an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b); and
 - (b) a security classification applies to the record such that access by the Archives would not be appropriate.

2 Section 34

Repeal the section.

3 Section 41

Repeal the section.

4 Subsections 44(4), (5) and (6)

Repeal the subsections.

5 Section 45

Repeal the section.

6 Subsection 46(1)

Repeal the subsection, substitute:

- (1) If an application is made to the Tribunal for review of a decision refusing to grant access to a record in accordance with an application under section 40, being a record that is:
- (a) claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b); and
 - (b) not a record of the Australian Security Intelligence Organisation;
- then the Tribunal must be constituted in accordance with subsection (2) for the purposes of any proceeding in relation to the application.

Note: Section 21AB of the *Administrative Appeals Tribunal Act 1975* contains the requirements for constitution of the Tribunal in proceedings about a record of the Australian Security Intelligence Organisation that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b).

Note: The heading to section 46 is replaced by the heading “**Constitution of Tribunal for proceedings about certain exempt records**”.

7 Section 47

Repeal the section.

8 Section 49

Repeal the section.

9 Section 50

Repeal the section, substitute:

50 Parties

For the purposes of this Part and of the application of the *Administrative Appeals Tribunal Act 1975* in respect of proceedings under this Part, a decision given by the Archives is taken to have been given by the Director-General.

10 After section 50

Insert:

50A Inspector-General of Intelligence and Security must be requested to give evidence in certain proceedings

- (1) This section applies in any proceedings before the Tribunal under this Act in relation to a record that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b).
- (2) Before determining that the record is not an exempt record, the Tribunal must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:
 - (a) the damage that could reasonably be expected to be caused to the security, defence or international relations of the Commonwealth if the record were made available for public access; or
 - (b) whether making the record available for public access would constitute a breach of confidence by disclosing information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.
- (3) Before determining that part of, or a copy of part of, the record is to be made available for public access under section 38, the Tribunal must request the Inspector-General to appear personally and give evidence on:
 - (a) whether making that part, or a copy of that part, of the record available for public access could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth; or
 - (b) whether making that part, or a copy of that part, of the record available for public access would constitute a breach of confidence by disclosing information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

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- (4) Before hearing the evidence of the Inspector-General, the Tribunal must hear any evidence to be given or submissions to be made by or on behalf of:
- (a) the Archives; or
 - (b) the Commonwealth institution of which the record is property.
- (5) The Inspector-General must comply with a request under subsection (2) or (3) unless, in the opinion of the Inspector-General, the Inspector-General is not appropriately qualified to give evidence on the matters in relation to which the Inspector-General has been requested to give evidence.
- (6) For the purposes of enabling the Inspector-General to comply with a request under subsection (2) or (3):
- (a) the Tribunal must allow the Inspector-General to take possession of, and make copies of or take extracts from, any record given to the Tribunal for the purposes of the proceeding; and
 - (b) the Inspector-General may require the production of the record that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b); and
 - (c) the Inspector-General may require the production of any Commonwealth record that relates to the record mentioned in paragraph (b); and
 - (d) the Inspector-General may make copies of, or take extracts, from the records mentioned in paragraphs (b) and (c); and
 - (e) after such period as is reasonably necessary for the purposes of giving evidence to the Tribunal, the Inspector-General must:
 - (i) return the original of any record to the Tribunal or to the entity that produced the record; and
 - (ii) destroy any copies of or extracts taken from any record.
- (7) The Inspector-General must permit a person who would be entitled to inspect a record mentioned in paragraphs (6)(a) to (d) if it were not in the possession of the Inspector-General to inspect the record at all reasonable times as the person would be so entitled.
- (8) The Tribunal is not bound by any opinion of the Inspector-General expressed while giving evidence under this section.
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- (9) The Tribunal must allow the Inspector-General a period within which to consider the records mentioned in paragraphs (6)(a) to (d) that is reasonable having regard to:
- (a) the nature of the evidence that the Inspector-General has been requested to give; and
 - (b) the time required by the Inspector-General to perform the Inspector-General's other functions.
- (10) The fact that a person is obliged to produce a document under subsection (6) does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that document.

11 Subsection 52(1)

Repeal the subsection, substitute:

- (1) In determining whether the Tribunal is satisfied that it is desirable to make an order or orders under subsection 35(2) of the *Administrative Appeals Tribunal Act 1975* for the purposes of proceedings in relation to an application under section 43, the Tribunal must:
- (a) have regard to:
 - (i) the necessity of avoiding the disclosure to the applicant of matter contained in a record to which the proceedings relate, being matter by reason of which the record is an exempt record; and
 - (ii) the necessity of avoiding the disclosure to the applicant of information of the kind referred to in subsection 39(1); and
 - (b) where the proceedings relate to a record that is claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b)—give particular weight to a submission made by the Archives that it is desirable to make the order or orders under subsection 35(2) of the *Administrative Appeals Tribunal Act 1975* because the record contains information or matter of that kind.

12 Paragraphs 52(2)(a) and (b)

Omit “subsection (1)”, substitute “paragraph (1)(a)”.

13 Subsection 53(1)

Repeal the subsection, substitute:

- (1) Section 37 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to a record that is claimed to be an exempt record, but in proceedings before the Tribunal in relation to such a record, if the Tribunal is not satisfied, by evidence on affidavit or otherwise, that the record is an exempt record, it may require the record to be produced for inspection by members of the Tribunal only.
- (1A) If, upon the inspection, the Tribunal is satisfied that the record is an exempt record, the Tribunal must return the record to the person by whom it was produced without permitting a person to have access to the record, or disclosing the contents of the record to a person, unless the person is:
 - (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
 - (b) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; or
 - (c) in the circumstances permitted under paragraph 50A(6)(a)—the Inspector-General of Intelligence and Security.

14 Subsection 53(2)

Omit all the words after “return the record to the person by whom it was produced without permitting”, substitute:

- a person to have access to the record or disclosing the contents of the record to a person, unless the person is:
- (a) a member of the Tribunal as constituted for the purposes of the proceeding; or
 - (b) a member of the staff of the Tribunal in the course of the performance of his or her duties as a member of that staff; or
 - (c) in the circumstances permitted under paragraph 50A(6)(a)—the Inspector-General of Intelligence and Security.

15 Subsections 53(3) and (4)

Repeal the subsections.

16 Section 54

Repeal the section.

17 At the end of Division 4 of Part V

Add:

55A Automatic stay of certain decisions on appeal

- (1) This section applies if:
 - (a) a person applies, under section 43, to the Tribunal for review of a decision refusing to make a record that is claimed to be an exempt record available for public access; and
 - (b) the Tribunal decides that a person may have access to the record, or part of the record; and
 - (c) the Archives institutes an appeal to the Federal Court of Australia from the decision of the Tribunal.
- (2) If this section applies to a decision of the Tribunal, the operation of the decision is stayed by force of this section from the time at which the appeal is instituted.
- (3) If the Archives appeals to the Federal Court of Australia from the decision of the Tribunal and the appeal in relation to the decision is determined by the Federal Court of Australia, the stay continues to have effect until the earlier of:
 - (a) the time at which the decision of the Federal Court of Australia on the appeal takes effect; and
 - (b) the time otherwise determined by the Federal Court of Australia.
- (4) If the Archives appeals to the Federal Court of Australia from the decision of the Tribunal and the appeal in relation to the decision is determined by the Federal Magistrates Court, the stay continues to have effect until the earlier of:
 - (a) the time at which the decision of the Federal Magistrates Court on the appeal takes effect; and
 - (b) the time otherwise determined by the Federal Magistrates Court.
- (5) Nothing in this section affects the power of the Federal Court of Australia or the Federal Magistrates Court to make orders under section 44A of the *Administrative Appeals Tribunal Act 1975* in relation to matters other than staying the decision of the Tribunal.

18 Subsection 66(2)

20 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act*
2009 *No. 99, 2009*

Omit all the words from and including “, other than:”.

19 Application provision—item 1

The amendments made by item 1 of this Schedule do not apply to a Commonwealth record if:

- (a) the record is in the open access period; and
- (b) a determination has been made in respect of the record under subsection 29(1) or (2) of the *Archives Act 1983*; and
- (c) a certificate under section 34 of the *Archives Act 1983* (as in force immediately before the commencement of this Schedule) is in force in respect of the record.

Note: A certificate ceases to be in force if it is revoked by force of subitem 20(2).

20 Application provision—items 2 to 16

- (1) The amendments made by items 2 to 16 of this Schedule apply for the purposes of determining whether access, or an extension of partial access, to a record referred to in section 31 of the *Archives Act 1983* will be given in accordance with an application made under section 40 of that Act and received by the Archives on or after the commencement of this Schedule.
- (2) A certificate issued in relation to a Commonwealth record under section 34 of the *Archives Act 1983* (as in force immediately before the commencement of this Schedule) is, by force of this subitem, revoked in relation to the record on and from the time at which the first application for access to the record under the *Archives Act 1983* is made, on or after the commencement of this Schedule.
- (3) To avoid doubt:
 - (a) subitem (2) does not affect anything done in relation to, or in reliance on, a certificate mentioned in subitem (2) before the commencement of this Schedule; and
 - (b) nothing prevents a person from applying, on and after the commencement of this Schedule, for access to a Commonwealth record under the *Archives Act 1983* if:
 - (i) before the commencement of this Schedule, the person applied for access to the same record; and
 - (ii) the application was refused in reliance on a certificate mentioned in subitem (2).

21 Application provision—item 17

The amendment made by item 17 of this Schedule applies to a decision of the Tribunal made on or after the commencement of this Schedule.

22 Application provision—item 18

The amendment made by item 18 of this Schedule does not apply to a record, or a part of a record, if:

- (a) the record is in the open access period; and
- (b) one of the following applies:
 - (i) in relation to the record—a certificate issued under section 34 of the *Archives Act 1983* (as in force immediately before the commencement of this Schedule) is in force in respect of the record;
 - (ii) in relation to the part of the record—the part of the record is identified in accordance with subsection 34(2) of that Act (as in force immediately before the commencement of this Schedule) in a certificate issued under section 34 of that Act (as in force immediately before the commencement of this Schedule).

Note: A certificate ceases to be in force if it is revoked by force of subitem 20(2).

Schedule 3—Administrative Appeals Tribunal Act 1975

1 Subsection 21AA(1)

After “Security Appeals Division”, insert “(other than a proceeding to which section 21AB applies)”.

Note: The heading to section 21AA is altered by adding at the end “—general”.

2 After section 21AA

Insert:

21AB Constitution of Security Appeals Division—proceedings to review certain decisions under the *Archives Act 1983*

Scope

- (1) This section applies to a proceeding in the Security Appeals Division in relation to a review of a decision of the Australian Archives under the *Archives Act 1983* refusing to grant access to a record in accordance with an application under section 40 of that Act, being a record that is:
 - (a) a record of the Australian Security Intelligence Organisation; and
 - (b) claimed to be an exempt record for the reason that it contains information or matter of a kind referred to in paragraph 33(1)(a) or (b) of that Act.

Constitution of Security Appeals Division

- (2) Subject to this section, the Security Appeals Division is to be constituted by:
 - (a) 3 presidential members; or
 - (b) a presidential member alone.

When presidential member must not participate

- (3) A presidential member must not participate in the proceeding if he or she is, or has been, the Director-General of Security or an

officer, employee or agent of the Australian Security Intelligence Organisation.

Reconstitution of Division at the request of a party

- (4) At any time during the hearing of a proceeding before the Division, constituted by a presidential member alone, a party to the proceeding may apply to the Division as constituted for the purposes of the proceeding requesting that the Division be reconstituted for the purposes of the proceeding.
- (5) If an application is made under subsection (4), the Division as constituted for the purposes of the proceeding must, after receiving the submissions made in support of the application and any submissions made in opposition to the application, notify the President of the making of the application and give him or her particulars of those submissions.
- (6) The President may, after taking the submissions into account, if he or she considers that the matters to which the proceeding relates are of such public importance as to justify him or her in so doing, give a direction that the Division as constituted for the purposes of the proceeding be reconstituted by 3 presidential members.
- (7) If a direction is given under subsection (6), the Division as reconstituted in accordance with the direction must continue the proceeding and may either:
 - (a) complete the proceeding; or
 - (b) at any time remit the proceeding to the Division as previously constituted for completion by the Division as previously constituted.
- (8) If the Division as reconstituted remits a proceeding to the Division as previously constituted, the Division as reconstituted may give directions in relation to the proceeding to the Division as previously constituted and the Division as previously constituted must, in making a decision on the review, comply with those directions.

Member presiding

- (9) At the hearing of a proceeding before the Division at which the Division is constituted for the purposes of the proceeding by presidential members:
- (a) if the President is a member of the Division as so constituted—he or she is to preside; or
 - (b) if the President is not a member of the Division as so constituted, but only one presidential member who is a Judge is a member of the Division as so constituted—that presidential member is to preside; or
 - (c) if the President is not a member of the Division as so constituted, but 2 or more presidential members who are Judges are members of the Division as so constituted—the senior Judge is to preside; or
 - (d) if neither the President, nor a Judge is a member of the Division as so constituted—a Deputy President of the Division as so constituted who is directed by the President to do so is to preside.

What happens if member ceases to be available

- (10) If, before the proceeding has been completed, one of the members constituting the Division for the purposes of the proceeding has ceased to be available for the purposes of the proceeding the proceeding is to be reheard by the Division as reconstituted in accordance with this section.

Regard may be had to record of previous proceeding

- (11) If the Division:
- (a) is reconstituted in accordance with a direction under subsection (6); or
 - (b) is reconstituted because proceedings are remitted under paragraph (7)(b) to the Division as previously constituted; or
 - (c) is reconstituted under subsection (10) because a member ceases to be available;
- the members of the Division may have regard to any record of the proceeding in the Division as previously constituted, including a record of any evidence taken in the proceeding.

Schedule 4—Inspector-General of Intelligence and Security Act 1986

1 Paragraph 34(1)(a)

After “acquired”, insert “under this Act”.

2 After subsection 34(1)

Insert:

(1AA) Subject to subsection (1A), a person who is, or has at any time been, the Inspector-General or a member of the staff of the Inspector-General or who is acting, or has at any time acted, as the Inspector-General or as a member of the staff of the Inspector-General must not, either directly or indirectly, except in the performance of his or her functions or duties or in the exercise of his or her powers under section 60A of the *Freedom of Information Act 1982*:

- (a) make a record of, or divulge or communicate to any person, any information acquired under that section by reason of the person holding, or acting in, that office; or
- (b) make use of any such information.

Penalty: \$5,000 or imprisonment for 2 years, or both.

(1AB) Subject to subsection (1A), a person who is, or has at any time been, the Inspector-General or a member of the staff of the Inspector-General or who is acting, or has at any time acted, as the Inspector-General or as a member of the staff of the Inspector-General must not, either directly or indirectly, except in the performance of his or her functions or duties or in the exercise of his or her powers under section 50A of the *Archives Act 1983*:

- (a) make a record of, or divulge or communicate to any person, any information acquired under that section by reason of the person holding, or acting in, that office; or
- (b) make use of any such information.

Penalty: \$5,000 or imprisonment for 2 years, or both.

3 Subsection 34(1A)

Omit “Subsection (1) does”, substitute “Subsections (1), (1AA) and (1AB) do”.

4 Paragraphs 34(1A)(a) and (b)

Omit “subsection (1)”, substitute “the subsection”.

5 Subsection 34(2)

After “subsection (1)”, insert “, (1AA) or (1AB)”.

6 Subsection 34(3)

After “subsection (1)”, insert “, (1AA) or (1AB)”.

7 Subsection 34(4)

After “subsection (1)”, insert “, (1AA) or (1AB)”.

8 Subsection 34(5)

Repeal the subsection, substitute:

- (5) A person who is, or has at any time been, the Inspector-General or a member of the staff of the Inspector-General or who is acting, or has at any time acted, as the Inspector-General or as a member of the staff of the Inspector-General must not be required to:
- (a) produce in a court any document of which the person has custody, or to which the person has access, because the person is performing functions or duties or exercising powers under this Act, section 60A of the *Freedom of Information Act 1982* or section 50A of the *Archives Act 1983*; or
 - (b) divulge or communicate to a court any information obtained by the person because the person is performing those functions or duties or exercising those powers;
- except where it is necessary to do so:
- (c) if the information is obtained by the person because the person is performing functions or duties or exercising powers under this Act—for the purposes of this Act; and
 - (d) if the information is obtained by the person because the person is performing functions or duties or exercising powers under section 60A of the *Freedom of Information Act 1982*—for the purposes of that section; and
 - (e) if the information is obtained by the person because the person is performing functions or duties or exercising powers

under section 50A of the *Archives Act 1983*—for the purposes of that section.

9 Subsection 34(7)

Repeal the subsection.

[*Minister's second reading speech made in—
Senate on 26 November 2008
House of Representatives on 14 September 2009*]

(223/08)