

2008

The Parliament of the  
Commonwealth of Australia

THE SENATE

*Presented and read a first time*

**Freedom of Information (Removal of  
Conclusive Certificates and Other  
Measures) Bill 2008**

**No.     , 2008**

*(Cabinet Secretary)*

**A Bill for an Act to amend the law relating to access  
to information, and for related purposes**



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1     **A Bill for an Act to amend the law relating to access**  
2     **to information, and for related purposes**

3     The Parliament of Australia enacts:

4     **1 Short title**

5                     This Act may be cited as the *Freedom of Information (Removal of*  
6                     *Conclusive Certificates and Other Measures) Act 2008*.

7     **2 Commencement**

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

9     **3 Schedule(s)**

10                    Each Act that is specified in a Schedule to this Act is amended or  
11                    repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

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## **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.

1 **9 Subsections 35(2) to (5)**

2 Repeal the subsections.

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

4 Repeal the subsections.

5 **11 Section 36A**

6 Repeal the section.

7 **12 Section 53**

8 Repeal the section, substitute:

9 **53 Interpretation**

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

16 **13 Subsections 58(3) to (5A)**

17 Repeal the subsections.

18 **14 Section 58A**

19 Repeal the section.

20 **15 Subsection 58B(1)**

21 Repeal the subsection, substitute:

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

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

30 **16 Section 58C**

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1 Repeal the section.

2 **17 Section 58E**

3 Repeal the section, substitute:

4 **58E Production to the Tribunal of certain exempt documents**

5 (1) In any proceedings before the Tribunal under this Act in relation to  
6 a document that is claimed to be an exempt document under  
7 section 33 or 34, the Tribunal is entitled to require the production  
8 of the document in accordance with this section and not in  
9 accordance with section 64, section 37 of the *Administrative*  
10 *Appeals Tribunal Act 1975* or otherwise.

11 (2) If the Tribunal is not satisfied by evidence on affidavit or otherwise  
12 that the document is an exempt document under section 33 or 34,  
13 the Tribunal may require the document to be produced for  
14 inspection by the Tribunal as constituted for the purposes of the  
15 proceeding.

16 (3) If, after an inspection of a document under this section, the  
17 Tribunal is satisfied that the document is an exempt document, the  
18 Tribunal must return the document to the person by whom it was  
19 produced without permitting a person to have access to the  
20 document or disclosing the contents of the document to a person,  
21 unless the person is:  
22 (a) a member of the Tribunal as constituted for the purposes of  
23 the proceeding; or  
24 (b) a member of the staff of the Tribunal in the course of the  
25 performance of his or her duties as a member of that staff; or  
26 (c) in the circumstances permitted under paragraph 60A(6)(a)—  
27 the Inspector-General of Intelligence and Security.

28 **18 At the end of subsection 59(3)**

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

32 **19 At the end of section 59**

33 Add:

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

19 **20 At the end of subsection 59A(3)**

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

23 **21 At the end of section 59A**

24 Add:

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

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

6 **22 At the end of paragraph 60(a)**

7 Add “and”.

8 **23 Paragraph 60(b)**

9 Omit “; and”, substitute “.”.

10 **24 Paragraph 60(c)**

11 Repeal the paragraph.

12 **25 After section 60**

13 Insert:

14 **60A Inspector-General of Intelligence and Security must be**  
15 **requested to give evidence in certain proceedings**

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

- 1 international organisation to the Government of the  
2 Commonwealth, to an authority of the Commonwealth or to a  
3 person receiving the communication on behalf of the  
4 Commonwealth or of an authority of the Commonwealth.
- 5 (3) Before determining that an agency or Minister must grant access to  
6 a copy of the document with deletions, the Tribunal must request  
7 the Inspector-General to appear personally and give evidence on:  
8 (a) the damage that would, or could reasonably be expected to,  
9 be caused to:  
10 (i) the security of the Commonwealth; or  
11 (ii) the defence of the Commonwealth; or  
12 (iii) the international relations of the Commonwealth;  
13 if the proposed deletions were not made; or  
14 (b) whether giving access to the document without the proposed  
15 deletions would divulge any information or matter  
16 communicated in confidence by or on behalf of a foreign  
17 government, an authority of a foreign government or an  
18 international organisation to the Government of the  
19 Commonwealth, to an authority of the Commonwealth or to a  
20 person receiving the communication on behalf of the  
21 Commonwealth or of an authority of the Commonwealth.
- 22 (4) Before hearing the evidence of the Inspector-General, the Tribunal  
23 must hear any evidence to be given or submissions to be made by  
24 or on behalf of the agency to which or the Minister to whom the  
25 request was made for access to the document.
- 26 (5) The Inspector-General must comply with a request under  
27 subsection (2) or (3) unless, in the opinion of the  
28 Inspector-General, the Inspector-General is not appropriately  
29 qualified to give evidence on the matters in relation to which the  
30 Inspector-General has been requested to give evidence.
- 31 (6) For the purposes of enabling the Inspector-General to comply with  
32 a request under subsection (2) or (3):  
33 (a) the Tribunal must allow the Inspector-General to take  
34 possession of, and make copies of or take extracts from, any  
35 document given to the Tribunal for the purposes of the  
36 proceeding; and  
37 (b) the Inspector-General may require the production of the  
38 document that is claimed to be an exempt document under
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- 1 section 33 by the agency to which or the Minister to whom  
2 the request was made for access to the document; and
- 3 (c) the Inspector-General may require the production of any  
4 document of an agency or official document of a Minister  
5 that relates to the document mentioned in paragraph (b) by  
6 the agency or Minister; and
- 7 (d) the Inspector-General may make copies of, or take extracts  
8 from, the documents mentioned in paragraphs (b) and (c);  
9 and
- 10 (e) after such period as is reasonably necessary for the purposes  
11 of giving evidence to the Tribunal, the Inspector-General  
12 must:
- 13 (i) return the original of any document to the Tribunal or to  
14 the agency or Minister; and
- 15 (ii) destroy any copies of or extracts taken from any  
16 document.
- 17 (7) The Inspector-General must permit a person who would be entitled  
18 to inspect a document mentioned in paragraphs (6)(a) to (d) if it  
19 were not in the possession of the Inspector-General to inspect the  
20 document at all reasonable times as the person would be so  
21 entitled.
- 22 (8) The Tribunal is not bound by any opinion of the Inspector-General  
23 expressed while giving evidence under this section.
- 24 (9) The Tribunal must allow the Inspector-General a period within  
25 which to consider the documents mentioned in paragraphs (6)(a) to  
26 (d) that is reasonable having regard to:
- 27 (a) the nature of the evidence that the Inspector-General has been  
28 requested to give; and
- 29 (b) the time required by the Inspector-General to perform the  
30 Inspector-General's other functions.
- 31 (10) The fact that a person is obliged to produce a document under  
32 subsection (6) does not otherwise affect a claim of legal  
33 professional privilege that anyone may make in relation to that  
34 document.

35 **26 Subsection 63(1)**

36 Repeal the subsection, substitute:

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- 1 (1) In determining whether the Tribunal is satisfied that it is desirable  
2 to make an order or orders under subsection 35(2) of the  
3 *Administrative Appeals Tribunal Act 1975*, the Tribunal must:  
4 (a) have regard to:  
5 (i) the necessity of avoiding the disclosure to the applicant  
6 of exempt matter contained in a document to which the  
7 proceedings relate; and  
8 (ii) the necessity of avoiding the disclosure to the applicant  
9 of information of the kind referred to in subsection  
10 25(1); and  
11 (b) where the proceedings relate to a document that is claimed to  
12 be an exempt document under section 33—give particular  
13 weight to a submission made by an agency or a Minister that  
14 it is desirable to make the order or orders under subsection  
15 35(2) of the *Administrative Appeals Tribunal Act 1975*  
16 because disclosure of the document:  
17 (i) would, or could reasonably be expected to, cause  
18 damage to the security, defence or international  
19 relations of the Commonwealth; or  
20 (ii) would divulge information or matter communicated in  
21 confidence by or on behalf of a foreign government, an  
22 authority of a foreign government or an international  
23 organisation to the Government of the Commonwealth,  
24 to an authority of the Commonwealth or to a person  
25 receiving the communication on behalf of the  
26 Commonwealth or of an authority of the  
27 Commonwealth.

28 **27 Paragraphs 63(2)(a) and (b)**

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

30 **28 Subsection 64(1)**

31 Repeal the subsection, substitute:

- 32 (1) Section 37 of the *Administrative Appeals Tribunal Act 1975* does  
33 not apply in relation to a document that is claimed to be an exempt  
34 document, but in proceedings before the Tribunal in relation to  
35 such a document, the Tribunal may, for the purpose of deciding  
36 whether the document is an exempt document, require the  
37 document to be produced for inspection by members of the  
38 Tribunal only.

1 (1AA) If, upon the inspection, the Tribunal is satisfied that the document  
2 is an exempt document, the Tribunal must return the document to  
3 the person by whom it was produced without permitting a person  
4 to have access to the document, or disclosing the contents of the  
5 document to a person, unless the person is:

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

12 **29 Subsection 64(2)**

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

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

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

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

27 **30 Subsections 64(3) and (4)**

28 Repeal the subsections.

29 **31 Subsection 64(4A)**

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

31 **32 Section 65**

32 Repeal the section.

33 **33 At the end of Part VI**

34 Add:

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1           **67 Automatic stay of certain decisions on appeal**

- 2           (1) This section applies if:
- 3               (a) a person applies, under section 55, to the Tribunal for review
- 4               of a decision by an agency or Minister refusing to grant
- 5               access to a document in accordance with a request, being a
- 6               document that is claimed to be an exempt document; and
- 7               (b) the Tribunal decides that a person may have access to the
- 8               document; and
- 9               (c) the agency or the Minister institutes an appeal to the Federal
- 10              Court of Australia from the decision of the Tribunal.
- 11          (2) If this section applies to a decision of the Tribunal, the operation of
- 12          the decision is stayed by force of this section from the time at
- 13          which the appeal is instituted.
- 14          (3) If the agency or the Minister appeals to the Federal Court of
- 15          Australia from the decision of the Tribunal and the appeal in
- 16          relation to the decision is determined by the Federal Court of
- 17          Australia, the stay continues to have effect until the earlier of:
- 18              (a) the time at which the decision of the Federal Court of
- 19              Australia on the appeal takes effect; and
- 20              (b) the time otherwise determined by the Federal Court of
- 21              Australia.
- 22          (4) If the agency or the Minister appeals to the Federal Court of
- 23          Australia from the decision of the Tribunal and the appeal in
- 24          relation to the decision is determined by the Federal Magistrates
- 25          Court, the stay continues to have effect until the earlier of:
- 26              (a) the time at which the decision of the Federal Magistrates
- 27              Court on the appeal takes effect; and
- 28              (b) the time otherwise determined by the Federal Magistrates
- 29              Court.
- 30          (5) Nothing in this section affects the power of the Federal Court of
- 31          Australia or the Federal Magistrates Court to make orders under
- 32          section 44A of the *Administrative Appeals Tribunal Act 1975* in
- 33          relation to matters other than staying the decision of the Tribunal.

34           **34 Application provision—items 4 to 32**

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- 1 (1) The amendments made by items 4 to 32 of this Schedule apply for the  
2 purposes of determining whether access to a document of an agency or  
3 an official document of a Minister will be given in accordance with a  
4 request made under subsection 15(2) of the *Freedom of Information Act*  
5 *1982* and received by the agency or Minister on or after the  
6 commencement of this Schedule.
- 7 (2) A certificate issued in relation to a document under subsection 33(2),  
8 33(4), 33A(2), 33A(4), 34(2), 34(4), 35(2), 35(4) or 36(3) of the  
9 *Freedom of Information Act 1982* (as in force immediately before the  
10 commencement of this Schedule) is, by force of this subitem, revoked  
11 in relation to the document on and from the time at which the first  
12 request for access to the document under the *Freedom of Information*  
13 *Act 1982* is made on or after the commencement of this Schedule.
- 14 (3) To avoid doubt:
- 15 (a) subitem (2) does not affect anything done in relation to, or in  
16 reliance on, a certificate mentioned in subitem (2) before the  
17 commencement of this Schedule; and
- 18 (b) nothing prevents a person from making a request, on and  
19 after the commencement of this Schedule, for access to a  
20 document of an agency or an official document of a Minister  
21 under the *Freedom of Information Act 1982* if:
- 22 (i) before the commencement of this Schedule, the person  
23 made a request for access to the same document; and
- 24 (ii) the request was refused in reliance on a certificate  
25 mentioned in subitem (2).

### 26 **35 Application provision—item 33**

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

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**Schedule 2—Archives Act 1983**

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**1 Subsections 29(6) and (7)**

6 Repeal the subsections, substitute:

7 (6) A record that is in the open access period is not, by virtue of a  
8 determination under subsection (1), a record to which  
9 paragraph (1)(b) applies unless:

10 (a) the record is an exempt record for the reason that it contains  
11 information or matter of a kind referred to in paragraph  
12 33(1)(a) or (b); and

13 (b) a security classification applies to the record such that access  
14 by the Archives would not be appropriate.

15 (7) A record that is in the open access period is not, by virtue of a  
16 determination under subsection (2), a record to which  
17 paragraph (2)(b) applies unless:

18 (a) the record is an exempt record for the reason that it contains  
19 information or matter of a kind referred to in paragraph  
20 33(1)(a) or (b); and

21 (b) a security classification applies to the record such that access  
22 by the Archives would not be appropriate.

23  
24  
**2 Section 34**

25 Repeal the section.

26  
27  
**3 Section 41**

28 Repeal the section.

29  
30  
**4 Subsections 44(4), (5) and (6)**

31 Repeal the subsections.

**5 Section 45**

Repeal the section.

**6 Subsection 46(1)**

Repeal the subsection, substitute:

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1 (1) If an application is made to the Tribunal for review of a decision  
2 refusing to grant access to a record in accordance with an  
3 application under section 40, being a record that is:  
4 (a) claimed to be an exempt record for the reason that it contains  
5 information or matter of a kind referred to in paragraph  
6 33(1)(a) or (b); and  
7 (b) not a record of the Australian Security Intelligence  
8 Organisation;  
9 then the Tribunal must be constituted in accordance with  
10 subsection (2) for the purposes of any proceeding in relation to the  
11 application.

12 Note: Section 21AB of the *Administrative Appeals Tribunal Act 1975*  
13 contains the requirements for constitution of the Tribunal in  
14 proceedings about a record of the Australian Security Intelligence  
15 Organisation that is claimed to be an exempt record for the reason that  
16 it contains information or matter of a kind referred to in paragraph  
17 33(1)(a) or (b).

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

20 **7 Section 47**

21 Repeal the section.

22 **8 Section 49**

23 Repeal the section.

24 **9 Section 50**

25 Repeal the section, substitute:

26 **50 Parties**

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

31 **10 After section 50**

32 Insert:

1       **50A Inspector-General of Intelligence and Security must be**  
2               **requested to give evidence in certain proceedings**

3               (1) This section applies in any proceedings before the Tribunal under  
4               this Act in relation to a record that is claimed to be an exempt  
5               record for the reason that it contains information or matter of a  
6               kind referred to in paragraph 33(1)(a) or (b).

7               (2) Before determining that the record is not an exempt record, the  
8               Tribunal must request the Inspector-General of Intelligence and  
9               Security to appear personally and give evidence on:

10              (a) the damage that could reasonably be expected to be caused to  
11              the security, defence or international relations of the  
12              Commonwealth if the record were made available for public  
13              access; or

14              (b) whether making the record available for public access would  
15              constitute a breach of confidence by disclosing information  
16              or matter communicated in confidence by or on behalf of a  
17              foreign government, an authority of a foreign government or  
18              an international organisation to the Government of the  
19              Commonwealth, to an authority of the Commonwealth or to a  
20              person receiving the communication on behalf of the  
21              Commonwealth or of an authority of the Commonwealth.

22              (3) Before determining that part of, or a copy of part of, the record is  
23              to be made available for public access under section 38, the  
24              Tribunal must request the Inspector-General to appear personally  
25              and give evidence on:

26              (a) whether making that part, or a copy of that part, of the record  
27              available for public access could reasonably be expected to  
28              cause damage to the security, defence or international  
29              relations of the Commonwealth; or

30              (b) whether making that part, or a copy of that part, of the record  
31              available for public access would constitute a breach of  
32              confidence by disclosing information or matter  
33              communicated in confidence by or on behalf of a foreign  
34              government, an authority of a foreign government or an  
35              international organisation to the Government of the  
36              Commonwealth, to an authority of the Commonwealth or to a  
37              person receiving the communication on behalf of the  
38              Commonwealth or of an authority of the Commonwealth.

- 1 (4) Before hearing the evidence of the Inspector-General, the Tribunal  
2 must hear any evidence to be given or submissions to be made by  
3 or on behalf of:
    - 4 (a) the Archives; or
    - 5 (b) the Commonwealth institution of which the record is  
6 property.
  
  - 7 (5) The Inspector-General must comply with a request under  
8 subsection (2) or (3) unless, in the opinion of the  
9 Inspector-General, the Inspector-General is not appropriately  
10 qualified to give evidence on the matters in relation to which the  
11 Inspector-General has been requested to give evidence.
  
  - 12 (6) For the purposes of enabling the Inspector-General to comply with  
13 a request under subsection (2) or (3):
    - 14 (a) the Tribunal must allow the Inspector-General to take  
15 possession of, and make copies of or take extracts from, any  
16 record given to the Tribunal for the purposes of the  
17 proceeding; and
    - 18 (b) the Inspector-General may require the production of the  
19 record that is claimed to be an exempt record for the reason  
20 that it contains information or matter of a kind referred to in  
21 paragraph 33(1)(a) or (b); and
    - 22 (c) the Inspector-General may require the production of any  
23 Commonwealth record that relates to the record mentioned in  
24 paragraph (b); and
    - 25 (d) the Inspector-General may make copies of, or take extracts,  
26 from the records mentioned in paragraphs (b) and (c); and
    - 27 (e) after such period as is reasonably necessary for the purposes  
28 of giving evidence to the Tribunal, the Inspector-General  
29 must:
      - 30 (i) return the original of any record to the Tribunal or to the  
31 entity that produced the record; and
      - 32 (ii) destroy any copies of or extracts taken from any record.
  
  - 33 (7) The Inspector-General must permit a person who would be entitled  
34 to inspect a record mentioned in paragraphs (6)(a) to (d) if it were  
35 not in the possession of the Inspector-General to inspect the record  
36 at all reasonable times as the person would be so entitled.
  
  - 37 (8) The Tribunal is not bound by any opinion of the Inspector-General  
38 expressed while giving evidence under this section.
-

- 1 (9) The Tribunal must allow the Inspector-General a period within  
2 which to consider the records mentioned in paragraphs (6)(a) to (d)  
3 that is reasonable having regard to:  
4 (a) the nature of the evidence that the Inspector-General has been  
5 requested to give; and  
6 (b) the time required by the Inspector-General to perform the  
7 Inspector-General's other functions.
- 8 (10) The fact that a person is obliged to produce a document under  
9 subsection (6) does not otherwise affect a claim of legal  
10 professional privilege that anyone may make in relation to that  
11 document.

## 12 **11 Subsection 52(1)**

13 Repeal the subsection, substitute:

- 14 (1) In determining whether the Tribunal is satisfied that it is desirable  
15 to make an order or orders under subsection 35(2) of the  
16 *Administrative Appeals Tribunal Act 1975* for the purposes of  
17 proceedings in relation to an application under section 43, the  
18 Tribunal must:  
19 (a) have regard to:  
20 (i) the necessity of avoiding the disclosure to the applicant  
21 of matter contained in a record to which the proceedings  
22 relate, being matter by reason of which the record is an  
23 exempt record; and  
24 (ii) the necessity of avoiding the disclosure to the applicant  
25 of information of the kind referred to in subsection  
26 39(1); and  
27 (b) where the proceedings relate to a record that is claimed to be  
28 an exempt record for the reason that it contains information  
29 or matter of a kind referred to in paragraph 33(1)(a) or (b)—  
30 give particular weight to a submission made by the Archives  
31 that it is desirable to make the order or orders under  
32 subsection 35(2) of the *Administrative Appeals Tribunal Act*  
33 *1975* because the record contains information or matter of  
34 that kind.

## 35 **12 Paragraphs 52(2)(a) and (b)**

36 Omit "subsection (1)", substitute "paragraph (1)(a)".

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1 **13 Subsection 53(1)**

2 Repeal the subsection, substitute:

3 (1) Section 37 of the *Administrative Appeals Tribunal Act 1975* does  
4 not apply in relation to a record that is claimed to be an exempt  
5 record, but in proceedings before the Tribunal in relation to such a  
6 record, if the Tribunal is not satisfied, by evidence on affidavit or  
7 otherwise, that the record is an exempt record, it may require the  
8 record to be produced for inspection by members of the Tribunal  
9 only.

10 (1A) If, upon the inspection, the Tribunal is satisfied that the record is an  
11 exempt record, the Tribunal must return the record to the person by  
12 whom it was produced without permitting a person to have access  
13 to the record, or disclosing the contents of the record to a person,  
14 unless the person is:

- 15 (a) a member of the Tribunal as constituted for the purposes of  
16 the proceeding; or
- 17 (b) a member of the staff of the Tribunal in the course of the  
18 performance of his or her duties as a member of that staff; or
- 19 (c) in the circumstances permitted under paragraph 50A(6)(a)—  
20 the Inspector-General of Intelligence and Security.

21 **14 Subsection 53(2)**

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

24 a person to have access to the record or disclosing the contents of  
25 the record to a person, unless the person is:

- 26 (a) a member of the Tribunal as constituted for the purposes of  
27 the proceeding; or
- 28 (b) a member of the staff of the Tribunal in the course of the  
29 performance of his or her duties as a member of that staff; or
- 30 (c) in the circumstances permitted under paragraph 50A(6)(a)—  
31 the Inspector-General of Intelligence and Security.

32 **15 Subsections 53(3) and (4)**

33 Repeal the subsections.

34 **16 Section 54**

35 Repeal the section.

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1 **17 At the end of Division 4 of Part V**

2 Add:

3 **55A Automatic stay of certain decisions on appeal**

- 4 (1) This section applies if:
- 5 (a) a person applies, under section 43, to the Tribunal for review
- 6 of a decision refusing to make a record that is claimed to be
- 7 an exempt record available for public access; and
- 8 (b) the Tribunal decides that a person may have access to the
- 9 record, or part of the record; and
- 10 (c) the Archives institutes an appeal to the Federal Court of
- 11 Australia from the decision of the Tribunal.
- 12 (2) If this section applies to a decision of the Tribunal, the operation of
- 13 the decision is stayed by force of this section from the time at
- 14 which the appeal is instituted.
- 15 (3) If the Archives appeals to the Federal Court of Australia from the
- 16 decision of the Tribunal and the appeal in relation to the decision is
- 17 determined by the Federal Court of Australia, the stay continues to
- 18 have effect until the earlier of:
- 19 (a) the time at which the decision of the Federal Court of
- 20 Australia on the appeal takes effect; and
- 21 (b) the time otherwise determined by the Federal Court of
- 22 Australia.
- 23 (4) If the Archives appeals to the Federal Court of Australia from the
- 24 decision of the Tribunal and the appeal in relation to the decision is
- 25 determined by the Federal Magistrates Court, the stay continues to
- 26 have effect until the earlier of:
- 27 (a) the time at which the decision of the Federal Magistrates
- 28 Court on the appeal takes effect; and
- 29 (b) the time otherwise determined by the Federal Magistrates
- 30 Court.
- 31 (5) Nothing in this section affects the power of the Federal Court of
- 32 Australia or the Federal Magistrates Court to make orders under
- 33 section 44A of the *Administrative Appeals Tribunal Act 1975* in
- 34 relation to matters other than staying the decision of the Tribunal.

35 **18 Subsection 66(2)**

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

2 **19 Application provision—item 1**

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

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

11 Note: A certificate ceases to be in force if it is revoked by force of subitem  
12 20(2).

13 **20 Application provision—items 2 to 16**

14 (1) The amendments made by items 2 to 16 of this Schedule apply for the  
15 purposes of determining whether access, or an extension of partial  
16 access, to a record referred to in section 31 of the *Archives Act 1983*  
17 will be given in accordance with an application made under section 40  
18 of that Act and received by the Archives on or after the commencement  
19 of this Schedule.

20 (2) A certificate issued in relation to a Commonwealth record under  
21 section 34 of the *Archives Act 1983* (as in force immediately before the  
22 commencement of this Schedule) is, by force of this subitem, revoked  
23 in relation to the record on and from the time at which the first  
24 application for access to the record under the *Archives Act 1983* is  
25 made, on or after the commencement of this Schedule.

26 (3) To avoid doubt:  
27 (a) subitem (2) does not affect anything done in relation to, or in  
28 reliance on, a certificate mentioned in subitem (2) before the  
29 commencement of this Schedule; and  
30 (b) nothing prevents a person from applying, on and after the  
31 commencement of this Schedule, for access to a  
32 Commonwealth record under the *Archives Act 1983* if:  
33 (i) before the commencement of this Schedule, the person  
34 applied for access to the same record; and  
35 (ii) the application was refused in reliance on a certificate  
36 mentioned in subitem (2).

1 **21 Application provision—item 17**

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

4 **22 Application provision—item 18**

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

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

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

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1  
2 **Schedule 3—Administrative Appeals Tribunal**  
3 **Act 1975**  
4

5 **1 Subsection 21AA(1)**

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

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

9 **2 After section 21AA**

10 Insert:

11 **21AB Constitution of Security Appeals Division—proceedings to**  
12 **review certain decisions under the *Archives Act 1983***

13 *Scope*

- 14 (1) This section applies to a proceeding in the Security Appeals  
15 Division in relation to a review of a decision of the Australian  
16 Archives under the *Archives Act 1983* refusing to grant access to a  
17 record in accordance with an application under section 40 of that  
18 Act, being a record that is:
- 19 (a) a record of the Australian Security Intelligence Organisation;
  - 20 and
  - 21 (b) claimed to be an exempt record for the reason that it contains  
22 information or matter of a kind referred to in paragraph  
23 33(1)(a) or (b) of that Act.

24 *Constitution of Security Appeals Division*

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

29 *When presidential member must not participate*

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

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

3 *Reconstitution of Division at the request of a party*

4 (4) At any time during the hearing of a proceeding before the Division,  
5 constituted by a presidential member alone, a party to the  
6 proceeding may apply to the Division as constituted for the  
7 purposes of the proceeding requesting that the Division be  
8 reconstituted for the purposes of the proceeding.

9 (5) If an application is made under subsection (4), the Division as  
10 constituted for the purposes of the proceeding must, after receiving  
11 the submissions made in support of the application and any  
12 submissions made in opposition to the application, notify the  
13 President of the making of the application and give him or her  
14 particulars of those submissions.

15 (6) The President may, after taking the submissions into account, if he  
16 or she considers that the matters to which the proceeding relates  
17 are of such public importance as to justify him or her in so doing,  
18 give a direction that the Division as constituted for the purposes of  
19 the proceeding be reconstituted by 3 presidential members.

20 (7) If a direction is given under subsection (6), the Division as  
21 reconstituted in accordance with the direction must continue the  
22 proceeding and may either:  
23 (a) complete the proceeding; or  
24 (b) at any time remit the proceeding to the Division as previously  
25 constituted for completion by the Division as previously  
26 constituted.

27 (8) If the Division as reconstituted remits a proceeding to the Division  
28 as previously constituted, the Division as reconstituted may give  
29 directions in relation to the proceeding to the Division as  
30 previously constituted and the Division as previously constituted  
31 must, in making a decision on the review, comply with those  
32 directions.

1 *Member presiding*

- 2 (9) At the hearing of a proceeding before the Division at which the  
3 Division is constituted for the purposes of the proceeding by  
4 presidential members:  
5 (a) if the President is a member of the Division as so  
6 constituted—he or she is to preside; or  
7 (b) if the President is not a member of the Division as so  
8 constituted, but only one presidential member who is a Judge  
9 is a member of the Division as so constituted—that  
10 presidential member is to preside; or  
11 (c) if the President is not a member of the Division as so  
12 constituted, but 2 or more presidential members who are  
13 Judges are members of the Division as so constituted—the  
14 senior Judge is to preside; or  
15 (d) if neither the President, nor a Judge is a member of the  
16 Division as so constituted—a Deputy President of the  
17 Division as so constituted who is directed by the President to  
18 do so is to preside.

19 *What happens if member ceases to be available*

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

25 *Regard may be had to record of previous proceeding*

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

1  
2 **Schedule 4—Inspector-General of Intelligence**  
3 **and Security Act 1986**  
4

5 **1 Paragraph 34(1)(a)**

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

7 **2 After subsection 34(1)**

8 Insert:

9 (1AA) Subject to subsection (1A), a person who is, or has at any time  
10 been, the Inspector-General or a member of the staff of the  
11 Inspector-General or who is acting, or has at any time acted, as the  
12 Inspector-General or as a member of the staff of the  
13 Inspector-General must not, either directly or indirectly, except in  
14 the performance of his or her functions or duties or in the exercise  
15 of his or her powers under section 60A of the *Freedom of*  
16 *Information Act 1982*:

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

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

22 (1AB) Subject to subsection (1A), a person who is, or has at any time  
23 been, the Inspector-General or a member of the staff of the  
24 Inspector-General or who is acting, or has at any time acted, as the  
25 Inspector-General or as a member of the staff of the  
26 Inspector-General must not, either directly or indirectly, except in  
27 the performance of his or her functions or duties or in the exercise  
28 of his or her powers under section 50A of the *Archives Act 1983*:

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

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

34 **3 Subsection 34(1A)**

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1 Omit “Subsection (1) does”, substitute “Subsections (1), (1AA) and  
2 (1AB) do”.

3 **4 Paragraphs 34(1A)(a) and (b)**

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

5 **5 Subsection 34(2)**

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

7 **6 Subsection 34(3)**

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

9 **7 Subsection 34(4)**

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

11 **8 Subsection 34(5)**

12 Repeal the subsection, substitute:

13 (5) A person who is, or has at any time been, the Inspector-General or  
14 a member of the staff of the Inspector-General or who is acting, or  
15 has at any time acted, as the Inspector-General or as a member of  
16 the staff of the Inspector-General must not be required to:

17 (a) produce in a court any document of which the person has  
18 custody, or to which the person has access, because the  
19 person is performing functions or duties or exercising powers  
20 under this Act, section 60A of the *Freedom of Information*  
21 *Act 1982* or section 50A of the *Archives Act 1983*; or

22 (b) divulge or communicate to a court any information obtained  
23 by the person because the person is performing those  
24 functions or duties or exercising those powers;

25 except where it is necessary to do so:

26 (c) if the information is obtained by the person because the  
27 person is performing functions or duties or exercising powers  
28 under this Act—for the purposes of this Act; and

29 (d) if the information is obtained by the person because the  
30 person is performing functions or duties or exercising powers  
31 under section 60A of the *Freedom of Information Act 1982*—  
32 for the purposes of that section; and

33 (e) if the information is obtained by the person because the  
34 person is performing functions or duties or exercising powers

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

3 **9 Subsection 34(7)**

4 Repeal the subsection.