



Timing of Requests under section 50A of the *Archives Act 1983* or section 60A of the *Freedom of Information Act 1982*

This Direction is made under section 18B(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

1. About this Direction

Application

- 1.1 This Direction applies to proceedings relating to a document which is claimed to be an exempt document under section 33 of the *Archives Act 1983* (Archives Act) or section 33 of the *Freedom of Information Act 1982* (FOI Act).
- 1.1 This Direction has effect from 1 July 2015.

2. Introduction

- 2.1 Under s 50A of the Archives Act and s 60A of the FOI Act, the AAT, before determining that a document is not an exempt document under s 33 of the Archives Act or s 33 of the FOI Act, must request the Inspector-General of Intelligence and Security to appear personally and give evidence on the damage that would, or could reasonably be expected to, be caused to the security, defence or international relations of the Commonwealth if access is given to the document, or whether giving access to the document would divulge information communicated in confidence by a foreign government, authority or international organisation.
- 2.2 In October 2012 the AAT and Inspector-General entered a Memorandum of Understanding that sets out procedures to be followed in cases before the AAT in which s 50A of the Archives Act or s 60A of the FOI Act may apply. The Memorandum of Understanding deals with:
 - communications between the AAT and the Inspector-General;
 - notification to the Inspector-General of s 33 applications;
 - access for the Inspector-General to inspect submissions and documents;
 - notification by the Inspector-General on qualification;
 - notification to the Inspector-General of direction hearings;
 - requests to conduct hearings in private;

- notification by the Inspector-General if classified information is to be given in evidence.

3. Timing of requests under s 50A of the Archives Act or s 60A of the FOI Act

- 3.1 The Inspector General has requested that the AAT make such requests only after it has heard the parties and has formed a preliminary view that the documents are not exempt.
- 3.2 However, having regard to its charter to provide a mechanism of review that is fair, just, economical, informal and quick and its obligation to accord parties before it procedural fairness, the AAT may be obliged to make a request under s 50A of the Archives Act or s 60A of the FOI Act at an earlier stage of the proceeding.
- 3.3 In considering whether to make a request under s 50A of the Archives Act or s 60A of the FOI Act prior to, or at the time of, the respondent agency giving evidence or making submissions, the AAT will have regard to:
- the number and nature of the documents that are claimed to be exempt under s 33 of the Archives Act or the FOI Act;
 - the extent to which the AAT is able to limit the number of documents in relation which the Inspector-General will be requested to give evidence;
 - the likely time required by the Inspector-General to:
 - advise whether he or she is qualified to give the evidence; and
 - if qualified, to prepare the requested evidence;

Note: The current Inspector-General has indicated that in determining whether she is 'qualified' to give evidence she will have regard to her functions under the *Inspector-General of Intelligence and Security Act 1986*. Generally those functions pertain to the oversight of the Australian Secret Intelligence Service, Australian Security Intelligence Organisation, Defence Signals Directorate, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation and Office of National Assessments.
 - the procedural rights of the parties; and
 - whether directions for the management of the hearing can be made consistently with those rights so as to limit the time and resource demands on the Inspector-General and his or her office.

Justice Duncan Kerr
President

30 June 2015

For further information about the AAT, please call us on **1800 228 333** or go to www.aat.gov.au.

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