ADMINISTRATIVE REVIEW TRIBUNAL
MELBOURNE REGISTRY
INTELLIGENCE AND SECURITY JURISDICTIONAL AREA **ART 2025/4916**

BETWEEN

FRASER TWEEDALE
Applicant

CHIEF EXECUTIVE OFFICER
SERVICES AUSTRALIA
Respondent

APPLICANT'S REPLY TO THE RESPONDENT'S APPLICATON FOR CONFIDENTIALITY ORDERS

PART I INTRODUCTION

1. The applicant opposes the respondent's application for confidentiality orders under s 70(2) of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) over the confidential affidavit of Mr Garrett McDonal affirmed on 26 May 2026 (**Confidential McDonald Affidavit**).

2. The respondent's application arises in the context of a review of a decision to refuse disclosure of the source code of the Android version of the myGov Code Generator app (**exempt information**) pursuant to s 47E(d) of the *Freedom of Information Act 1982* (Cth) (**FOI Act**). On review in the ART, the respondent contends that the applicant's FOI request should be refused by the ART on the basis that it is exempt under ss 33(1)(a) and 47E(d).

3. The respondent relies on the Confidential McDonald Affidavit in addition to an open affidavit of Mr McDonald in this proceeding (**Open McDonal Affidavit**). The Open McDonald Affidavit was filed and served on 25 May 2026, and the respondent's statement of facts, issues and contentions (**RSFIC**) was filed and served on 26 May 2026.

4. The applicant's ability to make submissions in opposition to the application for the confidentiality orders sought by the respondent is necessarily constrained due to the fact that the information sought to be kept confidential by the orders has not been disclosed to the applicant or to the applicant's legal representatives. Therefore, the applicant's submissions are, for the most part, limited to setting out what the applicant considers to be the legal principles that must be applied by the Tribunal in considering whether to make the proposed confidentiality orders and the terms in which such orders should be made.

5. The respondent seeks orders under s 70(2) that access to the Confidential McDonald Affidavit in its entirety be limited to the Tribunal and relevant staff of the Tribunal, the respondent and his legal representatives.

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6. The respondent contends that the Tribunal should make the proposed confidentiality orders because disclosure of the Confidential McDonald Affidavit would result in the very harm that would arise if the exempt material were to be disclosed, namely that disclosure of the Confidential McDonald Affidavit would:

(1) disclose the very information that the respondent claims is exempt from disclosure under ss 33(1)(a) and ss 47E(d) of the FOI Act (the exempt information); and
(2) result in disclosure of other information that would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

PART II THE APPLICANT'S POSITION

7. The applicant does not dispute that the Tribunal has the power to make confidentiality orders under s 70(2) to prevent disclosure of the exempt information, or information that would be tantamount to disclosing the exempt information. Nor does the applicant dispute that the Tribunal has the power to make confidentiality orders under s 70(2) to protect Australia's national security. However, the applicant contends that confidentiality orders on such grounds may only be made by the Tribunal where the stringent requirements of the common law principle of open justice are complied with and, in exercising the discretion in s 70(2), only after the Tribunal has taken into consideration the adverse impact that the confidentiality orders will have on the applicant's right to procedural fairness. Part IV addresses the principle of open justice and Part V addresses the right to procedural fairness.

8. In applying the relevant principles, the applicant contends that it is difficult to conceive of circumstances that would justify the making of confidentiality orders in respect of the entirety of the Confidential McDonald Affidavit. Rather, the applicant argues that the respondent bears the onus of satisfying the Tribunal that confidentiality orders are necessary in respect of *specific identified parts* of the Confidential McDonald Affidavit. That requires the respondent to demonstrate, on the basis of material before the Tribunal, that the confidentiality orders are necessary because disclosure of the particular identified information would result in the disclosure of the exempt material, or would, or could reasonably be expected to, cause harm to Australia's national security.

PART III RELEVANT STATUTORY FRAMEWORK

Open justice in the ART and the power to grant confidentiality orders

9. Section 69(1) provides that the 'hearing of a proceeding in the Tribunal must be in public.' This section is, in all material respects, identical to s 35(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).

10. Section 70(2) of the ART Act provides that the Tribunal may, by order, give directions prohibiting the publication or other disclosure of information that:

(a) relates to a proceeding in the Tribunal; and
(b) is any of the following:

(i) information that comprises evidence or information about evidence;
(ii) information given to the Tribunal.

11. Section 70(3) of the ART Act provides that an order under s 70(2) may be made to prohibit or restrict the publication or other disclosure to some or all of the parties to a proceeding.

12. In exercising the power in s 70(2), the Tribunal must have regard to the following matters in s 71(2), as relevant:

(a) the principle that it is desirable that hearings of proceedings in the Tribunal are held in public;
(b) the principle that it is desirable that evidence given before the Tribunal is made available to the public;
(c) the principle that it is desirable that evidence given before the Tribunal and the contents of documents given to the Tribunal are made available to all parties to the proceeding;
(d) any reasons in favour of the making an order, including the following:
(i) in any case – the circumstances of the parties to the proceeding and other persons connected to the proceeding;
(ii) in any case – the harm (if any) that is likely to occur to a person if the order is not made;
(iii) …the confidential nature (if any) of the information;
(e) any other matters that the Tribunal considers relevant.

13. The Tribunal has observed that ss 70 and 71 are equivalent to the power of the Administrative Appeals Tribunal (**AAT**), the ART's predecessor, to restrict the prohibit or restrict the publication of evidence before the AAT under sub-ss 35(2)(b) and (c) of the AAT Act,[1] at least in the form that those sub-sections existed at the time that the AAT Act was abolished.

14. In relation to a proceeding in the Intelligence and Security Jurisdictional Area (**ISJA**), s 157(2)(a) of the ART Act relevantly provides:

(2) In considering whether to make an order under section 70 restricting publication or other disclosure of information, the Tribunal must:
(a) in any case – have regard to the necessity of avoiding disclosure of national security information;

15. Section 4 of the ART Act defines 'national security information' as having the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (**NSI Act**). 'National security information' is defined in s 7 of the NSI Act to mean information:

[1] See, eg, *Zartaloudis and Tax Practitioners Board (Practice and procedure)* [2025] ARTA 2477 at [40] (Senior Member Lye) referring to the *Explanatory Memorandum Administrative Review Bill 2023* (Cth) at [535]. See, also *Carter v Tax Practitioners Board (Practice and procedure)* [2005] ARTA 632, [8].

(a) that relates to national security; or
(b) the disclosure of which may affect national security.

'National security' is defined in s 8 of the NSI Act to mean 'Australia's defence, security, international relations or law enforcement interests'.

Section 9 of the NSI Act provides that 'security' has the same meaning as in the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act**).

16. Section 4 of the ASIO Act defines 'security' to mean:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;
(ii) sabotage;
(iii) politically motivated violence;
(iv) promotion of communal violence;
(v) attacks on Australia's defence system; or
(vi) acts of foreign inference;
whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Section 4 of the ASIO Act also defines 'acts of foreign interference' as meaning:

…activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:

(a) are clandestine or deceptive and:
(i) are carried on for intelligence purposes;
(ii) are carried on for the purpose of affecting political or governmental processes;
(iii) are otherwise detrimental to the interests of Australia; or
(b) involve a threat to any person.

17. In addition, in relation to a proceeding in the ISJA, s 156(2)(a) of the ART Act provides:

(2) It is the duty of the Tribunal, even though there may be no relevant certificate under this or any other Act, to ensure, so far as possible,

that information is not communicated or made available to a person if that communication or availability would prejudice:
(a) the security, defence or international relations of the Commonwealth; or
(b) law enforcement interests.

The right to procedural fairness in the ART

18. Section 55(1) of the ART Act provides the following 'general rule':

> (1) The Tribunal must ensure that each party to a proceeding in the Tribunal is given a reasonable opportunity to:
> (a) present the party's case; and
> (b) access any information or documents to which the Tribunal proposed to have regard in reaching a decision in the proceeding; and
> (c) make submissions and adduce evidence.

19. Section 55(3) provides that the general rule in s 55(1) is subject to 'section 70 (Tribunal may restrict publication or disclosure of information)'.

Relevant provisions of the FOI Act

20. Section 33(a)(i) of the FOI Act provides:

> A document is an exempt document if disclosure of the document under this Act
> (a) Would, or could reasonably be expected to, cause damage to:
> (i) the security of the Commonwealth.

21. Section 47E(d) of the FOI Act provides:

> A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, to any of the following:
> …
> (d) have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

PART IV THE OPEN JUSTICE PRINCIPLE

22. The common law principle of open justice gives rise to a number of substantive rules that must be followed by courts, subject only to strict common law exceptions and express statutory limitations. First, proceedings must be conducted in 'open court' – that is, in a forum to which members of the public have free access;[2] second, all aspects of judicial proceedings must be communicated publicly to those present in court, including all evidence and the

[2] *Scott v Scott* [1913] AC 417.

names of all participants;[3] and, third, nothing should be done to prevent the publication of fair and accurate reports of proceedings conducted in court.[4]

23. It is well established that the open justice principle, and the rules that flow from it, apply to proceedings in the Tribunal.[5] This arises from the fact that s 69(1) of the ART Act provides that proceedings in the Tribunal must be held in public[6] and that s 71(2)(b) requires that the Tribunal must, in considering whether to make a confidentiality order, take into account that it is desirable that evidence before the Tribunal is made available to the public. These provisions have been interpreted as reflecting and giving statutory recognition to the common law principle of open justice.[7] The consequence is that the ART must, subject to any clear limitations in the ART Act and/or other legislation, exercise its jurisdiction in accordance with the requirements of the principle. Moreover, flowing from the fact that the procedure in the ART is based on the judicial model,[8] it has been held that the principle of open justice applies to proceedings in the ART with the same force and significance as it does to proceedings in the courts.[9]

24. The public administration of justice is valued under the common law as a means to an end rather than an end in itself.[10] It ensures that the workings of the courts are subject to public and professional scrutiny, which acts as a safeguard against arbitrary, partial, and unlawful decision making.[11] This, in turn, fosters public confidence in the administration of justice[12] and is central to the operation of the rule of law.[13] These same rationales apply equally in the Tribunal,[14] which adopts the judicial model and requires that members act judicially.[15] As explained by Senior Member P French in *Scott (as Parent representative for GYSV and National Disability Insurance Agency (Practice and procedure)*:

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[3] *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock) ('all evidence communicated to the court is communicated publicly').

[4] *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock); *Hogan v Hinch* [2011] HCA 4, [22].

[5] See, eg, *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185; (2009) 113 ALD 449, [74]-[75] 465-466; *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 53-4; *Re An Applicant and Australian Prudential Regulation Authority and A Party Joined* (2005) 89 ALD 643, [2005] AATA 1294, 664 [56].

[6] *Raftery and Australian Securities and Investments Commission (Practice and procedure)* [2026] ARTA 282, [30]-[31].

[7] See, eg, *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 53-4; *Scott (as a parent representative for GYSV) v CEO, National Disability Insurance Agency* [2026] ARTA 571, [28].

[8] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 18; (1996) 138 ALR 220, 231-2 (per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[9] *Re An Applicant and Australian Prudential Regulation Authority and A Party Joined* (2005) 89 ALD 643, [2005] AATA 1294, 664 [56]; *Re Le and Secretary, Department of Education, Science and Training* [2006] AATA 208; (2006) 90 ALD 83, 93 [22], 95 [26]; *Re PTLZ and Australian Securities and Investments Commission* [2008] AATA 106, [115].

[10] *Hogan v Hinch* [2011] HCA 4, [20].

[11] *Hogan v Hinch* [2011] HCA 4, [20].

[12] *Hogan v Hinch* [2011] HCA 4, [20].

[13] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [48] (French CJ).

[14] See, eg, *Re an Applicant and Australian Prudential Regulation Authority* [2005] AATA 1294, [57].

[15] *Drake v Minister for Immigration and Ethnic Affairs* (1974) 24 ALR 577, 589.

> The ART is an administrative body, not a court. Nevertheless, it is established to provide an independent mechanism for the review of government decisions that, among other things, is fair and just, improves the transparency and quality of government decision-making and which promotes public trust and confidence in the Tribunal. The principle of open justice is facilitative of those objectives.[16]

25. In considering whether to make confidentiality orders under s 70(2), the principle of open justice is the 'starting point'.[17] Any departure from the principle is a 'serious step',[18] meaning that the Tribunal's powers to restrict open justice under s 70(2) must be exercised 'sparingly'[19] and only in exceptional circumstances.[20] Moreover, statutory powers authorising departures from open justice are to be strictly and narrowly construed[21] and, so far as the language of the statutory provision permits, in accordance with well-established common law principles.[22] As explained by French CJ in *Hogan v Hinch*, the principle of legality requires that:

> …a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle.[23]

26. In the context of the present application, the principles that govern the exercise of the power in s 70(2) to make confidentiality orders include the following:

    26.1. A confidentiality order may only be made where the Tribunal is satisfied that the order is *strictly necessary* to achieve its objective (in this case, to prevent disclosure of the exempt material or to protect Australia's national security).[24] Although s 70(2) does not specify the state of satisfaction that the Tribunal must reach in order to enliven the discretion to make a confidentiality order, the 'necessity test' is the relevant test under the common law[25] and has been accepted as the statutory test by the Tribunal[26] and its predecessor.[27]

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[16] [2026] ARTA 571, [28].
[17] *Raftery and Australian Securities and Investments Commission (Practice and procedure)* [2026] ARTA 282, [67].
[18] *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 53, cited with approval in *Tucker v Minister for Immigration and Citizenship* [2011] FCAFC 16, [33].
[19] *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185; (2009) 113 ALR 449, [74], citing *Re Pochi and Minister for Immigration and Ethic Affairs*(1979) 2 ALD 33. See, also, *Scott (as parent representative for GYSV) v CEO, National Disability Insurance Agency)* [2026] ARTA 571, [28] (the Tribunal 'will not lightly depart from the principle of open justice in its procedure').
[20] *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 56.
[21] See, eg, *Hogan v Hinch* [2011] HCA 4, [27]. See, also *Raybos v Jones* (1985) 2 NSWLR 47, 55 ('such statutes will usually be strictly and narrowly construed).
[22] *Hogan v Hinch* [2011] HCA 4, [27]; *Momcilovic v R* (2011) 245 CLR 1, 177 (Heydon J).
[23] *Hogan v Hinch* [2011] HCA 4, [27].
[24] *Hogan v Hinch* [2011] HCA 4, [26].
[25] *Scott v Scott* [1913] AC 417; *Hogan v Hinch* [2011] HCA 4, [26].
[26] *Carter v Tax Practitioners Board (Practice and procedure)* [2005] ARTA 632, [26].
[27] See, eg, *Hanieh and Tax Practitioners Board* [2024] AATA 3251, [46]; *Sasso and Australian Securities & Investments Commission* [2024] AATA 2617, [50]; *SYRL and Australian Securities & Investments*

Furthermore, the application of the necessity test under s 70(2) is consistent with the principle of legality, which provides that the common law principle of open justice may only be curtailed or modified by the use of clear and unequivocal statutory language.[28] In the absence of an express statutory state of satisfaction as a precondition to the exercise of the power, s 70(2) must be construed and applied consistently with the common law principle that departures from open justice are permissible only where they are *strictly necessary*.

26.1.1. Note: The adoption of 'necessity' as the relevant standard under s 70(2) is consistent with the legislative history of the AAT Act and the ART Act. Between 1975 and 2015, s 35 of the AAT Act empowered the Tribunal to make a confidentiality order where the Tribunal was 'satisfied that it is *desirable* to do so by reason of the confidential nature of any evidence or matter or for any other reason…' The Tribunal has held that the statutory test of 'desirable' was less stringent than the common law requirement of necessity.[29]

However, that position changed in 2015, when s 35 was substantially amended and the former 'desirable' test was removed. Section 35 was replaced with a provision that, in substance, reflects the current ss 70 and 71 of the ART Act, where no statutory state of satisfaction as a precondition to the exercise of the power is expressly stated. According to the Explanatory Memorandum to the 2015 amendments, the purpose of the amendment to s 35 of the AAT Act was to model the provision on the power to grant suppression orders under s 37AF of the *Federal Court of Australia Act 1976*,[30] which can only be exercised in circumstances of necessity under s 37AG of that Act. Accordingly, authorities decided under the pre-2015 version of s 35 of the AAT Act must be approached with caution. To the extent that those authorities rely upon the former statutory standard of 'desirable', they reflect a legislation framework that Parliament has since abandoned.

26.2. A confidentiality order must be clear in its terms and do no more than is necessary to achieve its objective.[31] This means that, as relevant to the present application, the scope of the confidentiality orders must cover no more information than is strictly necessary to: (a) prevent the disclosure of the exempt material; and (b) prevent disclosure of information the disclosure which would, or could reasonably be expected to, harm Australia's national security. In relation to the respondent's proposed orders, this requires that the respondent satisfy the Tribunal that confidentiality orders in respect of the entirety of the Confidential McDonald Affidavit are necessary. The applicant contends that it is inconceivable that the respondent could discharge that

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Commission [2024] AATA 2636, [29]; *TYGJ and Information Commissioner* [2017] AATA 1689, [11], citing *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465.

[28] *Momcilovic v R* (2011) 245 CLR 1, 46-7 (French CJ); 177 (Heydon J).

[29] See, eg, *Re Galanos and Department of Immigration and Citizenship* [2010] AATA 1004; (2010) 128 ALD 382, 392 [37].

[30] *Tribunals Amalgamation Act 2025 Revised Explanatory Memorandum*, [433].

[31] *Hanieh and Tax Practitioners Board* [2024] AATA 3251, [46]; *Sasso and Australian Securities & Investments Commission* [2024] AATA 2617, [50]; *SYRL and Australian Securities & Investments Commission* [2024] AATA 2636, [29]. See, also, *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477 (McHugh JA).

burden. Alternatively, the respondent must satisfy the Tribunal that confidentiality orders over specific identified parts of the Confidential McDonald Affidavit are justified according to the necessity test.

26.3. The Tribunal's conclusions must be based on some material before it that is capable of reasonably satisfying the Tribunal that confidentiality orders are necessary to prevent the disclosure of the exempt material or to protect Australia's national security.[32] Mere assertion by the party seeking the confidentiality order is insufficient, as is a mere belief on the part of the Tribunal.[33] Nor may a confidentiality order be made because it is convenient, prudent, or desirable.[34] Rather, the party seeking the order has the burden of demonstrating, by clear and convincing evidence and cogent reasoning,[35] that the proposed order meets the statutory requirement of necessity.

26.4. Finally, a confidentiality order which is futile cannot be considered necessary.[36] An order will be futile if the information is already in the public domain or can be readily ascertained. The burden is on the respondent to satisfy the Tribunal that the proposed confidentiality orders would not be futile either because the information over which confidentiality orders are sought is not already in the public domain or cannot be ascertained through the technical examination or decompiling of the myGov Code Generator app.

PART V PROCEDURAL FAIRNESS

27. The obligation imposed in s 55 that a party in a proceeding is given a 'reasonable opportunity' to present the party's case and to access any information or documents to which the Tribunal proposes to have regard in reaching a decision has been described as a statutory recognition of the obligation of procedural fairness that would otherwise be implied under the common law.[37] However, s 55 is not an exhaustive statement of the Tribunal's obligation to afford procedural fairness,[38] and the right to procedural fairness will vary with the circumstances of each case and statutory framework under consideration.

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[32] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477 (per McHugh JA); *Hanieh and Tax Practitioners Board* [2024] AATA 3251, [46]; *Sasso and Australian Securities & Investments Commission* [2024] AATA 2617, [50]; *SYRL and Australian Securities & Investments Commission* [2024] AATA 2636, [29].

[33] *Huikeshoven v Secretary, Department of Education, Skill and Employment* [2021] FCA 1359, [26]; *Singh and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 264, [10], citing *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477 (per McHugh JA).

[34] *Hogan v Australian Crime Commission* [2010] HCA 21, [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523 (Spigelman CJ, with whom Mason P and Beazley JA agreed).

[35] *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185; (2009) 113 ALR 449, [76]; *Hanieh and Tax Practitioners Board* [2024] AATA 3251, [42]; *Carter v Tax Practitioners Board (Practice and procedure)* [2005] ARTA 632, [15]; *Hmung v Minister for Immigration and Citizenship (Migration)* [2026 ARTA 416, [29].

[36] See, eg, *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 72 [76].

[37] *Kamal v Minister for Immigration, Citizenship & Multicultural Affairs* (2023) 300 FCR 106, 113-4 [15].

[38] *Warren v Chief Executive Officer, Services Australia* [2024] FCAFC 73, [117].

28. The ‘reasonable opportunity’ referred to in s 55 is not synonymous with ‘every possible opportunity’ or ‘every opportunity’; what it requires is to be determined objectively, having regard to all of the relevant circumstances of the case.[39] Nevertheless, the essence of the right to procedural fairness is that a party is entitled to know the case against them and be given an opportunity to respond. As explained by Brennan J in the foundational case of *Kioa v West*:

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interest which the repository of power proposes to take into account in deciding upon its exercise…[I]n the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is *credible, relevant and significant* to the decision to be made.’[40]

29. Further, Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs*, when sitting as President of the Administrative Appeals Tribunal, explained the serious consequences that the withholding information from a party will have on the party’s right to procedural fairness:

> Exclusion of the public from a hearing is a serious step…Serious though the exclusion of the public is, the exclusion of a party from a hearing which affects his interest is a much graver step. To exclude a party from such a hearing, even if his legal advisers are permitted to remain, is to deny him a full opportunity to cross-examine upon, to comment on or to controvert the case against him – a denial which, in the absence of statutory authority, would constitute an indefensible denial of fair treatment by the Tribunal.[41]

30. At paragraph 12 of the respondent’s Outline of Submissions in relation to the application for the confidentiality orders, the respondent asserts that the proposed confidentiality orders would make ‘only a narrow inroad’ into the application’s procedural fairness rights, relying upon cases where information has been withheld from a party in the context of determining public interest immunity claims.[42] The applicant does not agree. The cases relied upon by the respondent were decided in the context of resolving interlocutory matters rather than in the context of resolving a party’s rights and interests at a substantive hearing, as in the present case. Indeed, this point was directly made in *Donnelly v The King*, one of the cases relied upon by the respondent, where the South Australian Court of Appeal made clear that the withholding of the information from a party in the case would not affect that party’s procedural fairness rights at the substantive hearing of the matter. In the present case, the confidentiality order will significantly erode the applicant’s right to procedural fairness at the substantive hearing of the matter. This is because the applicant will be

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[39] *Jagroop v Minister for Immigration and Border Protection* (2014) 225 FCR 482, [33]; *FBLQ v Minister for Immigration, Citizenship and Multicultural Affair* (2025) 309 FCR 566, [2025] FCAFC 71, [6].
[40] (1985) 195 CLR 550, 628-9. See, also, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72.
[41] *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 53-4.
[42] *Donnelly v The King* [2022] SASCA 125, [134]; *National Crime Authority v Gould* (1989) 90 ALR 489, 497.

deprive of knowledge of, and the ability to respond to, key pieces of 'credible, relevant and significant' evidence contained within the Confidential McDonald Affidavit that will be relied upon by the respondent to argue in the substantive hearing that the myGov Code Generator app source code is exempt under s 33(1)(i) and/or s 47E(d).

31. The applicant does not dispute that the Tribunal may make an order that has the effect of withholding evidence from a party. Indeed, this is expressly recognised in s 70(3) of the ART Act. Nor does the applicant dispute that the right to procedural fairness under s 55(1) is, by virtue of s 55(3), significantly qualified when a confidentiality order is made pursuant to s 70(2). However, the applicant argues that these provisions should not be interpreted to mean that a party's procedural fairness rights are irrelevant when the Tribunal is considering making confidentiality orders. To the contrary, s 71(2)(c) requires that the Tribunal have regard to the principle that it is desirable that evidence given before the Tribunal and the contents of documents given to the Tribunal are made available to all of the parties to the proceeding. Furthermore, case law indicates that any order that has the effect of limiting a party's procedural fairness rights, including a confidentiality order under s 70(2), is a 'grave' step[43] and must be exercised with utmost caution and with heightened scrutiny regarding the impact on the party's right to procedural fairness.[44]

32. In *Warren v Chief Executive Officer, Services Australia* [2024] FCAFC 73, McElwaine J (with whom Katzmann and Kennett JJ agreed) held at [122] that the making of a confidentiality order that has the effect of withholding information or evidence from a party requires 'careful assessment and balance' with the Tribunal's procedural fairness obligations. Furthermore, as explained by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs*:

> An order excluding the public may be justified more readily than an order excluding a party, but strict criteria govern the making of such an order…
> …
> To exclude a party, a further criterion must be satisfied. As it must appear that the exclusion of the party is essential to preserve the proper confidentiality of the information needed to be determined in the application, it is necessary to show that the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party. This criterion is not easy to satisfy though it is possible to do so. This criterion is not easy to satisfy because an applicant's interest in a hearing fair to him can be over-ridden only by another and superior interest, and then only when reconciliation of the two interests is impossible. But the criterion may be satisfied when a public interest in confidentiality clearly appears.[45]

His Honour continued:

[43] *ABCD v Commissioner of Taxation* [2008] AATA 898, [157] (Deputy President F A Forgie).
[44] *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 54, 56.
[45] *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 56.

> …[I]f the applicant is not given a full opportunity to deal with confidential information adverse to his interests, *the probative force of the information must be particularly cogent if that information is to be acted upon*. There are notorious risks in failing to hear an opposing view – slender proofs may falsely seem irrefutable, and the scales of justice may falsely seem to be tipped by the weight of insubstantial factors.[46]

PART VI CONCLUSION

33. In light of principles set out above, the applicant contends that it is inconceivable that the respondent could establish that confidentiality orders are necessary in respect of the entirety of the Confidential McDonald Affidavit.

34. The applicant further contends that the respondent must identify with precision the specific parts of the Confidential McDonald affidavit in respect of which confidentiality orders are sought and must justify each proposed restriction by reference to the legal principles governing departures from open justice. In doing so, the respondent must demonstrate that each restriction goes no further than is strictly necessary to prevent disclosure of the exempt material and/or to avoid damage to the security of the Commonwealth. In determining whether to make such orders, the Tribunal must subject the respondent's application to particularly close scrutiny, having regard to the significant adverse impact that such confidentiality orders would have on the applicant's rights to procedural fairness.

Date: 10 June 2026

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Jason Bosland

Lawyer, Wise Law

[46] *Re Pochi and Minister for Immigration and Ethic Affairs* (1979) 2 ALD 33, 57 (emphasis added).