

FRASER TWEEDALE
Applicant

CHIEF EXECUTIVE OFFICER
SERVICES AUSTRALIA
Respondent

**APPLICANT'S REPLY TO THE RESPONDENT'S APPLICATION FOR THE
TRIBUNAL'S POWERS IN THIS PROCEEDING TO BE EXERCISED IN
THE INTELLIGENCE AND SECURITY JURISDICTIONAL AREA**

PART I APPLICANT'S POSITION

1. The applicant opposes the respondent's request that the President direct that the Tribunal's powers in relation to this proceeding be exercised in the Intelligence and Security jurisdictional area (**ISJA**) under s 134(2) of the *Administrative Review Tribunal Act 2024* (**ART Act**).
2. This is on the basis that the respondent's application does not meet the statutory precondition in s 134(2) of the ART Act that the President be satisfied that the proceeding before the Tribunal would involve national security information (see **PART II** below). In the absence of the statutory precondition being satisfied, the President's discretion to direct that the Tribunal's powers in the proceeding be exercised in the ISJA is not available.

PART II THE STATUTORY PRECONDITION

Relevant statutory provisions

3. To enliven the exercise of the statutory discretion in s 134(2) of the ART Act to direct that the Tribunal's powers in this proceeding be exercised in the ISJA, the President must first be satisfied that the proceeding 'would involve national security information': see *Director, Australian War Memorial and Patrick (Practice and procedure)* [2025] ARTA 540, [40].
4. 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:
 - (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)*.

5. 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.

The respondent's application does not address the statutory precondition in s 134(2) of the ART Act

6. For the statutory precondition in s 134(2) of the ART Act to be met, the President must be satisfied that the proceeding would involve national security information of one or both kinds identified in s 7 of the NSI Act: information that (a) relates to national security, or (b) the disclosure of which may affect national security.

7. The applicant submits that the respondent has not demonstrated that the proceeding would involve national security information of either kind.

The respondent does not claim that the proceeding will involve information the disclosure of which may affect national security

8. The respondent's application does not assert that the proceeding will involve information the disclosure of which may affect national security. The mere fact that the respondent will seek to demonstrate that disclosure of the source code of the 'myGov Code Generator' app would or could be expected to damage the security of the Commonwealth (Respondent's Application, [16]) is not sufficient to establish that the proceeding will involve information the disclosure of which may affect national security. This is because it is by no means clear, and the respondent does not assert, that the proceeding will require disclosure in evidence of the source code itself, or the disclosure in evidence of any information relating to the source code where such disclosure may affect national security.
9. Furthermore, the respondent's application does not assert that any evidence or submissions that the respondent may seek to rely upon will include information the disclosure of which may affect national security. The respondent claims that he is likely to seek to rely upon evidence from one or more of the Commonwealth's security agencies and/or evidence in relation to the threat environment faced by myGov as a critical government information system in order to address the expected effect on Australia's national security if the document in issue (the source code) were to be disclosed (Respondent's Application, [16]). However, the respondent does not assert that such evidence or submissions, in and of themselves, constitute information the disclosure of which may affect national security. The mere fact that such information may concern, refer to, or describe national security matters or the alleged national security consequences of disclosure of certain information is insufficient to meet the description of information the disclosure of which may affect national security.

The respondent does not demonstrate that the proceeding will involve information that relates to national security

10. The respondent asserts that the evidence and submissions on which he proposes to rely will constitute 'national security information' because 'they will address the expected effect on Australia's national security if the document in issue is disclosed' (Respondent's Application [16]). That assertion appears to proceed on the implicit premise that such material 'relates to national security' within the meaning of s 7(a) of the NSI Act. However, the respondent does not explain *how* the information identified in the application relates to 'national security' as that term is defined in the NSI and ASIO Acts. In particular, the respondent does not identify, with any degree of particularity, how the proposed evidence and submissions relate to any of the matters identified in s 8 of the NSI Act, including Australia's

defence, security, international relations or law enforcement. Nor does the respondent explain how the proposed evidence and submissions relate to 'security' as defined in s 4 of the ASIO Act. In particular, there is no indication that the proposed evidence or submissions will concern the protection of, and of the people of, the Commonwealth and the several States and Territories, from espionage, sabotage, political motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign inference. In failing to specify how the evidence and submissions constitute national security information within the meaning of 'national security' in the NSI Act and the meaning of 'security' in the ASIO Act, the applicant submits that the respondent's application cannot succeed.

11. It is important to note that the statutory precondition in s 134(2) of the ART Act cannot be found to be satisfied simply because the respondent seeks to rely upon the exemption from disclosure in s 33(a)(i) of the *Freedom of Information Act 1982* – that is, that disclosure of the source code would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

The respondent's application is unsupported by evidence

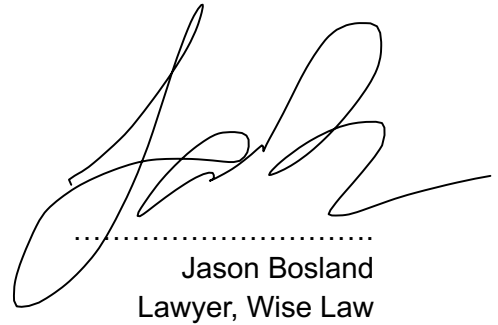
12. The respondent's application is unsupported by evidence or material upon which the President could be satisfied that the statutory precondition in s 134(2) of the ART Act is met.
13. Section 134(2) of the ART Act requires that the President be satisfied that the proceeding *would* involve national security information. The use of the term 'would' denotes a stringent threshold. It requires that the President be satisfied to a relatively high degree of predictive certainty that the proceeding will, in fact, involve national security information. It is not sufficient that the proceeding *could*, *might*, or *may possibly* involve national security information (see *Re Maksimovic and Australian Custom Services* [2009] AATA 28, at [28], distinguishing the different states of satisfaction conveyed by the terms 'would' and 'could'). The applicant submits that the high threshold requires a state of satisfaction grounded in clear and convincing evidence, and that it cannot be met by mere assertion, inference from submissions, or speculative claims about potential consequences.
14. In the absence of any evidence capable of satisfying the President that the proceeding would involve national security information, the applicant submits that the respondent's application cannot succeed.

PART III EXERCISE OF THE DISCRETION

15. If, contrary to the applicant's submissions in Part II, the President is satisfied that the statutory precondition to the exercise of the power in s

134(2) of the ART Act is met, the applicant concedes that the discretion may be exercised in favour of the respondent.

Date: 15 January 2026



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