

FREEDOM OF INFORMATION

Balancing the Public Interest

By Megan Carter and Andrew Bouris

Second Edition
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Authors' Details and Acknowledgments

The authors invite readers' comments on this material, including both corrections and suggestions for material to be included in future editions. Megan Carter may be reached via megan.carter@gmail.com; Andrew Bouris may be reached via abouris@wentworthchambers.com.au. Footnotes in this electronic version (Rev2) differ slightly from those in the first print run; link errors have been corrected.

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1 Introduction

Purposes of This Book

- 1.1 The aim of this book is twofold:
- to analyse the various aspects of the public interest as understood in a Freedom of Information context in numerous common law jurisdictions;
 - to assist Freedom of Information decision-makers to apply the public interest test in considering exemption provisions in legislation which incorporates that test in one form or another.
- 1.2 This book is not intended to convey legal advice in any specific context. Instead, its goal is to provide analysis and concrete examples of public interest test considerations.

Effective Determinations Are Specific and Precise

- 1.3 The FOI Acts discussed in this book require decision-makers to weigh the public interest in maintaining exemptions and the public interest in disclosing the information where the exemptions are not expressed in absolute terms. It is the decision-maker's responsibility to assess these competing public interests and weigh them against each other in making his or her determination.
- 1.4 None of the Acts defines the concept of "the public interest" – intentionally, so that determinations must be made with regard to the specifics of each request.
- 1.5 Case summaries should be read with care and an eye to distilling relevant principles because it is inherent in the public interest test that the application of the relevant principles will vary from case to case. However, the cases are essential references for decision-makers because they are examples of how the balancing of public interest considerations and the interests protected by an exemption can be weighed.
- 1.6 Decision-makers should give significant consideration to the public interest test when applying exemptions for which it is required, and identify in every case the specific public interest in releasing the particular information. Good practice focuses on the "micro level" of the document or information requested and whether that matter ought or ought not be released in accordance with the legislation. Questions of public interest (including whether release will or will not benefit that interest) are determined by a consideration of the specific subject matter and not by reference to the class or category to which the document or information may belong, nor by purely theoretical or asserted detriments.

Certain Factors May Be Disregarded

- 1.7 The authors also review irrelevant factors that a decision-maker should *not* take into account when applying the public interest test, including:
- public curiosity,
 - the fact that the applicant or the public may misunderstand the information, and
 - the class of information requested.

Review and Analysis of Public Interest Overrides In Westminster-Style Jurisdictions

- 1.8 Each of the following chapters examines the “public interest test” in the access to information legislation in the United Kingdom, Scotland, Ireland, Australia, New Zealand, and Canada. The experience of these jurisdictions and concrete examples from their case law are essential reference points for decision-makers in countries sharing a Westminster-style heritage.
- 1.9 The chapters summarise each jurisdiction’s legislative framework, identify the department with policy responsibility for the legislation, describe its enforcement mechanism, and review the most important public interest test cases. Where available, government guidance on the application of the test is also included. Web addresses for government departments, Information Commissioners, ombudsmen, courts, and tribunals in each country are included to enable readers to pursue their own research.
- 1.10 Many of the cases discussed are available from public archives; where a case’s full text is available at no charge, a direct web link has been provided in the footnotes. Web addresses are correct as of date of publication.
- 1.11 Australia and Canada have both federal and state or provincial level FOI legislation. This book does not attempt to consider exhaustively the application of the public interest test in every state or province. Instead, it reviews case law and government guidance which adds to the understanding of the test in selected major states and provinces.
- 1.12 For a variety of reasons, a particularly strong FOI jurisprudence developed in the body of decisions of the Queensland Information Commissioner beginning in 1993. The discussion of the public interest in one early Queensland decision, **Eccleston**, has been especially influential; it receives detailed analysis in chapter 7.

2 The Public Interest Test

What is a public interest test?

2.1 Most regimes which govern access to information held by government are based on the same building blocks:

- There is a general right of access to information held by public authorities.
- The right of access is subject to a range of exemptions covering issues such as security, international relations, formulation of government policy, commercial confidentiality, and personal affairs.
- Some of the exemptions are subject to a public interest test that requires the decision-maker to take public interest considerations into account when deciding whether to release information even where an exemption applies *prima facie*.
- This mechanism is referred to as a “public interest override” or “public interest test” because the public interest considerations in favour of disclosure may “override” the exemption.

2.2 Deciding in which aspects and to what extent the public interest is relevant involves the exercise of judgment and discretion by the decision-maker. Each jurisdiction’s chapter describes its specific laws and procedures. For example, in most jurisdictions, an Information Commissioner or Tribunal can overrule a public authority’s application of an exemption including the application of the public interest test.

What does “the public interest” mean?

2.3 There is clearly a public interest in access to government information *per se*. In **Eccleston** the Queensland Information Commissioner said:

It is implicit that citizens in a representative democracy have a right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them (whether or not they choose to exercise the right). The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.¹

2.4 It is a more complex process to identify the public interests in disclosure and non-disclosure of the particular information that has been requested.

¹ **Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs** (1993) 1 QAR 60, Decision of the QLD Information Commissioner No 93002 30 June 1993, page 25, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html> or <http://www.infocomm.qld.gov.au/indexed/decisions/html/93002.htm>; see also chapter 7

- 2.5 The “public interest” is an amorphous concept, which is typically not defined in access to information legislation. This flexibility is intentional. Legislators and policy makers recognise that the public interest will change over time and according to the circumstances of each situation. In the same way, the law does not try to define categorically what is “reasonable.”
- None of the Acts discussed in the book defines “the public interest.”
 - In a 1995 review of Australian legislation, the Australian Law Reform Commission recognised the difficulties in applying the public interest override but concluded that no attempt should be made to define the public interest in the FOI Act.² However, the Commission did recommend the creation of a new Commonwealth statutory office, “FOI Commissioner”, and further recommended that the new Commissioner issue guidelines on factors that should or should not be taken into account in weighing the public interest. Although the office was not established, in 2001 the Attorney General’s Department issued a memorandum on the exemption sections, and has continued to update it regularly. The current version contains lengthy guidance on the application of the public interest test.³
 - The Task Force that reviewed Canadian legislation in recent years also concluded that the public interest should not be defined in legislation.

The concept of “public interest” at general law

- 2.6 The concept of “public interest” at general law is wide-ranging and expansive. A classic dictum is that of Lord Hailsham that “the categories of public interest are not closed”.⁴ This principle is recognised in all jurisdictions; for example, it is often cited in the Australian courts.⁵
- 2.7 It is also well accepted in Australia in a non-FOI context that in many cases, the decision as to where the public interest lies will often depend on a balancing of interests, including competing public interests.⁶
- 2.8 In one particularly clear passage, a judge of the Australian Federal Court sought to analyse the various aspects of the term “public interest” in the following way:

² *Open Government: A review of the Federal Freedom of Information Act 1982*, ALRC 77, 1995, para 8.13; <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html>

³ Attorney General’s FOI Memoranda: *Memorandum No 98 Exemption Sections in the FOI Act*; <http://www.ag.gov.au/agd/WWW/agdHome.nsf/D2801B61EABE80A2CA256809001328BA/E2F1B66EC83C5834CA25709A0012EF32>, or go to <http://www.ag.gov.au/> and search for “FOI Memo 98”

⁴ **D v National Society for the Prevention of Cruelty to Children** [1978] AC 171 at 230

⁵ See **Sankey v Whitlam** (1978) 142 CLR 1 at 60 (Stephen J. at para 40), http://www.austlii.edu.au/au/cases/cth/high_ct/142clr1.html; see also **The Australian Doctors’ Fund Limited v the Commonwealth of Australia** [1994] 49 FCR 478 at para [34], http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep6761.html

⁶ **Re Queensland Electricity Commission, Ex parte Electrical Trades Union of Australia** [1987] 61 AJLR 393 at 395, <http://www.austlii.edu.au/au/cases/cth/HCA/1987/27.html>; **Australian Securities Commission v Deloitte Touche Tohmatsu** [1996] 70 FCR 93 at 123-4, http://www.austlii.edu.au/au/cases/cth/federal_ct/1996/753.html

*The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations.⁷*

- 2.9 The questions involved in identifying the “public interest” are complex and perhaps inevitably rather subjective. In a general statement of principle, the High Court of Australia said:

Indeed, the expression ‘in the public interest’, when used in a statute, classically imparts a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable.⁸

- 2.10 It is the function of FOI decision-makers to identify these “undefined” facts which make up the elements of the public interest in any particular request for access to information which involve a “public interest” test. In so doing, the decision-maker draws upon both local and international materials where relevant public interest elements have been identified in a variety of contexts.

- 2.11 In one well-known decision, the Appeal division of the Supreme Court of Victoria provided helpful comments on the public interest in general and also on particular facets of the public interest, when the Court said:

In the present case, the learned judge recognised the existence of the public interest in the proper and due administration of criminal justice. It seems he considered that to give effect to the interest it was necessary for the exempt documents to be made available for public scrutiny.

*There are many areas of national and community activities which may be the subject of the public interest. The statute does not contain any definition of the public interest. Nevertheless, used in the context of this statute, it does not mean that which gratifies curiosity or merely provides information or amusement: cf. **R v Inhabitants of the County of Bedfordshire** (1855) 24 L.J.Q.B. 81, at p.84, per Lord Campbell LJ. Similarly it is necessary to distinguish between “what is in the public interest and what is of interest to*

⁷ **McKinnon v Secretary, Department of Treasury** [2005] FCAFC 142, per Tamberlin J. at paragraph [12], <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/142.html>

⁸ **O’Sullivan v Farrer** (1989) 168 CLR 210 at 216; <http://www.austlii.edu.au/au/cases/cth/HCA/1989/61.html>

know”: *Lion Laboratories Limited v Evans* [1985] QB 526, at p.553, per Griffiths LJ ...

*The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals: Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473, at p.480 per Barwick CJ. There are ... several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest.*⁹

Who has the burden of proof?

- 2.12 An informed applicant for information will identify the relevant public interest considerations and argue that they outweigh the relevant exemption and that the information should be released. Other applicants will not identify the public interest considerations succinctly and accurately. The decision-maker typically has a responsibility under the legislation to make his or her own assessment of the public interest considerations in each particular case and weigh them against the public interest in maintaining the exemption.
- 2.13 The Irish FOI Act provides that in a review by the Information Commissioner, there is an onus on the agency claiming exemption to show to the satisfaction of the Commissioner that such a decision was justified, and there is a presumption in favour of disclosure which must be overcome: section 34(12).
- 2.14 The Commonwealth of Australia FOI Act (in section 61), the New South Wales Act (also in section 61), and the Queensland Act (in section 81) impose the onus on an agency to justify the decision which is under review by the Administrative Appeals Tribunal, the Administrative Decisions Tribunal, or the Information Commissioner (respectively), or demonstrate that a decision adverse to the applicant should be made on review.
- 2.15 The UK FOI Act does not state whether the applicant or the agency bears the onus of establishing where the public interest lies. It appears that there is no onus in the sense of a formal burden of proof in that regard; the task is one for determination by the decision-maker leaving aside any question of onus. The balance is ever so slightly given by the Act in favour of disclosure, because an exemption requiring application of a public interest test may only be invoked successfully if the public interest in maintaining the exemption outweighs the public interest in disclosing the information: section 2(2)(b). This has the effect that if the public interest in exemption is

⁹ *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at [75]

equal to the public interest in disclosure, (albeit, likely to be a very exceptional case), then the information is required to be disclosed.

- 2.16 The absence of an onus in respect of the public interest test is not to be confused with the question of an onus generally as to whether information should or should not be disclosed under the Act. Here too, however, the UK FOI act does not impose any onus. If the matter proceeds to an appeal to the Information Tribunal under section 57 of the Act (an appeal available both to a complainant and an authority), there is an onus upon the Information Commissioner to satisfy the Tribunal that the disputed decision should be upheld: clause 26 Information Tribunal (Enforcement Appeals) Rules 2005. The disputed decision may be one either in favour of or against disclosure, so there is no presumption in the process in favour of release.

What should not be taken into account in the weighing exercise?

- 2.17 A decision-maker should be aware of irrelevant factors when weighing the public interest.
- 2.18 The “public interest” does not mean “that which gratifies curiosity or merely provides entertainment or amusement.” The “public interest” is not the same as that which may be of interest to the public. This is well established in all jurisdictions and is often quoted by Ombudsmen and Commissioners. There is an argument that this distinction is blurring in the United Kingdom in light of recent court decisions relating to the disclosure of personal information of high profile public figures.¹⁰ This is a developing area and the principal case law to date, to the extent that it bears on FOI questions, is discussed in chapter 3.
- 2.19 The fact that an applicant or the public may misinterpret or misunderstand the information is not a factor weighing against disclosure. In **Eccleston**¹¹ the Queensland Information Commissioner said the view that possible misinterpretation is relevant is:
- ...based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it, and can judge what is necessary or unnecessary in democratic society. I consider that it is best left to the judgement of individuals and the public generally as to whether information is too confusing to be of benefit or whether debate is necessary.*
- 2.20 Equally, the fact that the information is overly technical is irrelevant in the weighing exercise. In a Queensland decision where a journalist requested access to information showing adverse outcomes from carotid artery surgery performed by the hospital, the Information Commissioner held that the fact

¹⁰ **Campbell v MGN Limited** [2002] EWHC 449 (QB) discussed in a conference paper by Simon Chalton, Bird and Bird, “Defining the Boundaries of Privacy in the UK”, July 2002. See also paragraphs 3.48 to 3.67.

¹¹ See also chapter 7

that a layperson may not fully comprehend a technical report was not a valid reason for denying public access to it.¹²

- 2.21 Embarrassment to the Government or loss of confidence is also irrelevant according to the case law. In some jurisdictions, including New South Wales¹³ and the Northern Territory¹⁴ of Australia, it is stated in the legislation that it is irrelevant, for the purpose of determining the public interest, that disclosure might cause embarrassment to or lack of confidence in government.
- 2.22 There will not automatically be a public interest in maintaining an exemption in relation to particular classes of information. For example, there is no presumption in favour of withholding “high level communications.” It may be that high level correspondence is more likely than lower level material to have characteristics which make its disclosure contrary to the public interest but that will not always be the case.¹⁵

Overview of Public Interest Issues Favouring Disclosure

- 2.23 In the jurisdictions covered by this study, certain issues have arisen repeatedly. In situations involving matters of public debate, public participation in political debate, accountability for public funds, and public safety, public interest considerations often favour disclosure. Most consideration of the public interest test has focused on a few exemptions, which will be discussed at a high level in the following paragraphs. The public interest test only comes into play when an exemption validly applies, *prima facie*, to the information concerned.
- 2.24 In Ireland, the Ombudsman required that the papers relating to the development of legislation be released. He expressed the firm view that it was in the public interest that views and representations which influence the legislative process should be open to public scrutiny.¹⁶ Where **documents related to the formulation of government policy** are concerned, the decision will vary from case to case depending on the strength of the respective public interests in disclosure and non-disclosure.

¹² **Coulthart and Princess Alexandra Hospital and Health Service District** (2001) 6 QAR 94, <http://www.austlii.edu.au/au/cases/qld/QICmr/2001/6.html>, discussed in chapter 8

¹³ Section 59A **Freedom of Information Act** 1989 (NSW)

¹⁴ Section 50 **Information Act** 2002 (NT)

¹⁵ The most developed jurisprudence on this topic is to be found in the Australian decisions of the Commonwealth Administrative Appeals Tribunal and the Queensland Information Commissioner; see chapters 6 and 8. See also the decision of the New South Wales Court of Appeal in **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales** [2006] NSWCA 84 (24 April 2006), <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/84.html>, and in the Tribunal below, the decision of the full Panel of the New South Wales Administrative Decisions Tribunal in **Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No 2)** (GD) [2005] NSWADTAP 33 (23 June 2005), <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>, at paragraph 7.2 and chapter 9.

¹⁶ **Mr. Phelim McAleer of the Sunday Times Newspaper and the Department of Justice, Equality and Law Reform** (Ireland Information Commissioner Decision 98058), <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1452,en.htm>, discussed in chapter 5

2.25 There may be a public interest in maintaining the frankness and candour of **official communications**, but it will be a high test. In **Eccleston**¹⁷ the Queensland Information Commissioner said:

Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of the deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could materially alter for the worse, by the threat of disclosure under the FOI Act.

2.26 Just because information is withheld to protect candour, does not mean that the factual information surrounding the advice cannot be released.¹⁸ By contrast, if a lot of information has already been made available then it is unlikely that further small details will be sufficiently in the public interest to outweigh other very strong public interests.¹⁹ However, even when much of the information which is sought has been released into the public domain, where the public interest in disclosure of that information is strong, the public interest will favour disclosure.²⁰

2.27 The public interest in disclosure is likely to be particularly strong where the information would assist the public to understand an issue that is the subject of current debate. In Canada, the public debate surrounding Quebec independence was seen as an issue of such unprecedented significance that the public interest in the issue overrode the necessity to maintain candour of internal advice.²¹ The UK Ombudsman has said that:

*The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate.*²²

2.28 A cross-jurisdictional review suggests that the **commercial interests** exemption is the hardest type of exemption to override in the public interest. Commercial interests will often be paramount even where there is an obvious public interest in the issue. A key issue in relation to commercial

¹⁷ See also chapter 7

¹⁸ UK Ombudsman decision 5/94

¹⁹ **Brack and Queensland Corrective Services Commission** (1994) 1 QAR 414, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/5.html>, discussed in chapter 8

²⁰ **Cardwell Properties Pty Limited & Williams and Department of the Premier, Economic and Trade Development** (1995) 2 QAR 671, <http://www.austlii.edu.au/au/cases/qld/QICmr/1995/19.html>, discussed in chapter 8

²¹ Order P1398 Ontario Information Commissioner, discussed in chapter 12; note that the test in Ontario refers to disclosure based on a “compelling reason” in the public interest.

²² Case No A.26/01, discussed in chapter 3

information is often the timing of its release. In one Irish case²³ the Commissioner held that despite the strong public interest, it was premature to release the commercial information concerned. However, in many cases commercial information will lose its sensitivity over time and may subsequently be released. In one Canadian case, the Commissioner noted that the only fair and reasonable way to balance public interest and corporate loss is to undertake some measure of fact finding with the company concerned.²⁴

- 2.29 Where the commercial interests of a public agency are concerned, the public interest is more likely to favour release because there is a clear public interest in accountability for public funds. In situations involving public safety (e.g. nuclear facilities) the public interest is more likely to be strong enough to override the competitive interests of the third party, depending on the nature of the information being sought and the degree of risk to safety.
- 2.30 In Canadian, Australian, New Zealand and Irish legislation, the release of **third party personal information** is subject to a public interest test that requires decision-makers to balance an individual's right to privacy with the public interest in release of the information.
- 2.31 In contrast, the UK FOI Act (section 40) provides that third party personal information is to be withheld if releasing it would contravene any of the data protection principles of the **Data Protection Act 1998**. For most, but not all, purposes this is an absolute exemption and not one requiring the application of a public interest test: see section 2(3)(f) of the UK FOI Act. However, some parts of section 40 do involve a public interest test.²⁵ The issue in the UK is the extent to which the consideration of the public interest is inherent in the balancing act required by the application of the data protection principles. To the extent that it is, case law from other countries will be useful. However, such an analysis is beyond the scope of the present book.
- 2.32 In most of the jurisdictions discussed, exemptions relating to confidential information are subject to the public interest test. In the UK the "breach of confidence" exemption (section 41) is not subject to a statutory public interest test, but the public interest test is incorporated into the test for breach of confidence at law and in equity. This matter is discussed in the UK chapter (commencing at paragraph 3.34).
- 2.33 The following tables show examples of situations where the public interest has favoured disclosure in each category. Many more case analyses and examples are to be found in the respective chapters dealing with the various jurisdictions.

²³ **Ms. Fiona McHugh, the Sunday Times newspaper and the Department of Enterprise, Trade and Employment**, Irish Information Commissioner case 98100, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1466,en.htm>, discussed in chapter 5

²⁴ **Weighing public interest**, Case 08 1994 of the Canadian Federal Information Commissioner, discussed in chapter 11

²⁵ See paragraphs 3.16 to 3.23

Matters of public debate and accountability for functions

- The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate (UK Ombudsman decision A.11/02)
- The issue has generated public or parliamentary debate (UK Ombudsman decision A.31/00)
- The issue affects a wide range of individuals or companies (UK Ombudsman decision A.21/99)
- Views and representations which influence the legislative process should be open to public scrutiny (**Mr. Phelim McAleer and Department of Justice, Equality and Law Reform**, Information Commissioner Ireland Decision 98058, chapter 5 below)
- Public interest in transparency and understanding the setting of school budgets: FS 50074589 (UK Information Commissioner)
- Public interest in transparency of an investigation process at a publicly funded university: FS 50080353 (UK Information Commissioner)
- Directory of staff contact details of Defence organisation: FS 50073980 (UK Information Commissioner)
- Interest in public being made aware of the reasons for delay in the commencement of legislation: Decision 057/2005 (Scottish Information Commissioner)
- Accountability and transparency of a public Tribunal: Case 000274 (Irish Information Commissioner)
- Information concerning closure of an educational institution: Case 031109 (Irish Information Commissioner), **Wilson v Department of Education** (District Court of NSW)
- Information concerning the identity of an FOI requester where suspicion of impropriety might otherwise attach: Case 030759 (Irish Information Commissioner)
- Details concerning settlement of a litigious employment dispute: Case 000528 (Irish Information Commissioner)
- Information concerning hospital practices: Case 03087 (Irish Information Commissioner)
- Information concerning housing policy: **Re Graham Downie** (Australia Commonwealth AAT)
- Information concerning possible misconduct in public office: **Smith and Aboriginal & Torres Strait Islander Commission** (Aus Commonwealth AAT)
- Assessment and advice on implications of a court decision for government policy: **Re Eccleston** (Queensland Information Commissioner)
- Disclosure concerning possible scientific fraud at a public university: **Pope and Queensland Health** (Queensland Information Commissioner), **McGuirk v University of NSW** (NSW ADT)
- Documents concerning a corrections facility: **Trustees of the De La Salle Brothers and Queensland Corrective Services Commission** (Queensland Information Commissioner)
- Documents of a concluded investigation into a solicitor so as to satisfy the public interest in accountability of the regulating body: **Myles Thompson and Queensland Law Society** (Queensland Information Commissioner)
- Documents relating to a Law Society's failure to take any action against a solicitor: **Queensland Law Society Inc and Legal Ombudsman** (Queensland Information Commissioner)
- Scrutiny of a department's activity in monitoring an important resource: **Vynque Pty Ltd and Department of Primary Industries** (Queensland Information Commissioner), **Webber and Toowoomba City Council** (Queensland Information Commissioner)
- Accountability in relation to the licensing and supervision of builders: **Kenmatt Projects Pty Ltd and Building Services Authority** (Queensland Information Commissioner)
- Non-legal advice as to the content of new regulations: **General Manager, WorkCover Authority of NSW v Law Society of NSW** (NSW Court of Appeal; NSW ADT, Appeal Panel)
- Information concerning a hospital investigation: Cases W38403, 39515, and 39584 (NZ Ombudsmen)
- Accountability for the escape of a psychiatric patient: Case W45650 (NZ Ombudsmen)

Public participation in political debate

- The public interest in a local interest group having sufficient information to represent effectively local interests on an issue (UK Ombudsman decision A.31/00)
- Facts and analysis behind major policy decisions (UK Ombudsman decision A.21/99)
- Knowing reasons for decisions (Australian Commonwealth AAT decision **Cosco Holdings**, chapter 6 below, and page 106, Irish Department of Finance manual)
- Political issue of virtually unprecedented importance (Ontario Information Commissioner, Order P1398, chapter 12 below)
- Interest in participation of the public in the local government planning process: Decisions 015/2005 and 060/2005 (Scottish Information Commissioner), **Cardwell Properties** and **Bouly and Department of Natural Resources** (Queensland Information Commissioner), **Gales Holdings Pty Ltd v Tweed Shire Council** (NSW ADT)
- Public interest in documents concerning development of policy: Case 98127 (Irish Information Commissioner)
- Strong public interest in investigations of nursing homes: Case 020533 (Irish Information Commissioner)
- Access to proposals concerning deployment of staff: **Re Ian McCarthy** (Australian Commonwealth AAT)
- Interest in participation by the public in the processes of a statutory Remuneration Tribunal: **Robinson and Department of Employment and Workplace Relations** (Australian Commonwealth AAT)
- Document recording community views on tax reform: **McKinnon and Commissioner of Taxation** (Australian Commonwealth AAT)
- Public interest in debate over corporatisation of the Forest Service: **Australian Rainforest Conservation Society Inc and Queensland Treasury** (Queensland Information Commissioner)
- Release of information for research purposes: **Humane Society International Inc. v National Parks and Wildlife Service** (NSW ADT)
- Contents of an old draft report concerning employment negotiations: **Simpson v Director General, Department of Education and Training** (NSW ADT)
- List of licensed clubs, relevant to public debate on regulation of clubs and poker machines: **Bissett v Director General, NSW Department of Gaming & Racing** (NSW ADT)
- Documents concerning a concluded sale of government assets: **Cianfrano v Director-General, Premier's Department of NSW** (NSW ADT)
- Documents concerning State land management policy: **National Parks Association of NSW Inc v Department of Lands** (NSW ADT)

Accountability for public funds

- Accountability for proceeds of sale of assets in public ownership (Decision A.5/96 UK Ombudsman)
- Accountability for legal aid spending (Decision A.5/97 UK Ombudsman)
- Openness and accountability for tender processes and prices (**Henry Ford**, Decision Irish Information Commissioner 98049, chapter 5 below)
- Availability of up to date cost estimates (Decision UK Ombudsman A.1/97)
- Exposing misappropriation of public funds (**A whistleblower**, Decision Canadian Information Commissioner, chapter 11 below)
- Accountability of elected officials whose propriety has been called into question (Order M710 Ontario Information Commissioner, chapter 12 below)
- Public interest in public bodies obtaining value for money (**Eircom plc and the Department of Agriculture & Food; Mark Henry and the Department of Agriculture & Food; Eircom plc and the Office of the Revenue Commissioners**, Decisions Nos. 98114, 98132, 98164 and 98183 of the Irish Information Commissioner, chapter 5 below)
- Interest in public having information concerning health expenditure trends and outcomes: Case 98078 (Irish Information Commissioner)
- Interest in details of the expenses of Members of Parliament: Case 99168 (Irish Information Commissioner)
- Accountability for use of public moneys in funding consultants: Case 98166 (Irish Information Commissioner)
- Accountability for public moneys provided under a business assistance scheme: **Pearce and Queensland Rural Adjustment Authority and Seeney MP and Department of State Development** (Queensland Information Commissioner)
- Payment of salary where no work performed: Case A6737 (NZ Ombudsmen)
- Details of staff salaries in Prime Minister's office: Case W41517 (NZ Ombudsmen)
- Information concerning missing public moneys: Case W43863 (NZ Ombudsmen)
- Accountability of agency for collecting public debts: Case W45412 (NZ Ombudsmen)

Public health and safety

- Air safety (**Reneging on a promise** Decision, Canadian Information Commissioner, 001 and 002, 2001, chapter 11 below)
- Nuclear plant safety (**Ontario Hydro**, P1190-1805, Ontario Information Commissioner, chapter 12 below)
- Public health (**Weighing public interest**, Decision Canadian Information Commissioner, 08, 1994, chapter 11 below)
- Contingency plans in an emergency (P901, P1175 Ontario Information Commissioner Decisions, chapter 12 below)
- Public knowing of potential risks from food products: Case 98198 (Irish Information Commissioner)
- Public being made aware of internal investigations into a youth worker against whom allegations of improper conduct had been made: **Burke and Department of Families, Youth and Community Care** (Queensland Information Commissioner)
- Documents concerning the stability of a canal wall: **Queensland Community Newspapers Pty Ltd and Redland Shire Council** (Queensland Information Commissioner)
- Information about potentially contaminated land: Case C5637 (NZ Ombudsmen)

Public interest in justice or fairness to an individual or corporation

- Company being made aware of reasons it was being investigated: Case FS 50068235 (UK Information Commissioner)
- Individual having access to records of a recruitment process in which he was involved: Case 98020 (Irish Information Commissioner), **Wallace** (Australian Commonwealth AAT)
- Individual having access to adverse comments used against him/her in a decision-making process: Case 000041 (Irish Information Commissioner), **Coventry and Cairns City Council and Shaw and the University of Queensland** (Queensland Information Commissioner)
- Individual knowing the basis of action being taken against him/her: **Re Barry Saunders** (Australian Commonwealth AAT)
- Where the interest of the applicant is greater than that of an ordinary member of the public by reason of the individual's participation in a process: **Re Burns and Australian National University (No 1)** (Australian Commonwealth AAT), **Re Pemberton and the University of Queensland** (Queensland Information Commissioner)
- Information concerning termination of an individual's employment: **Richardson and Queensland Corrective Services Commission** (Queensland Information Commissioner)
- Information concerning health treatment: **Circumcision Information Australia and Villanueva and Queensland Nursing Council** (Queensland Information Commissioner), Case W42031 (NZ Ombudsmen)
- Information concerning an unjustified criminal complaint (though not the identity of the informant): **Taylor v Chief Inspector, RSPCA** (NSW ADT)
- Fair treatment of a Ph.D candidate: **Bennett v Vice Chancellor, University of New England** (NSW ADT)
- Fair treatment in assessment of a worker's compensation claim: **Latham v Director General, Department of Community Services** (NSW ADT)
- Adverse conclusions drawn against an applicant: **H v Commissioner of Police, NSW Police Service** (NSW ADT), Case W40440 (NZ Ombudsmen)

Public interest in an individual being able to pursue a remedy

- Information as to official valuation of land: **Cairns Port Authority and Department of Lands and Little and Department of Natural Resources** (Queensland Information Commissioner)
- Information as to the identity of the owner of a dog to allow legal action: **Willsford and Brisbane City Council** (Queensland Information Commissioner)
- Information concerning an uneven footpath which caused injury: **Hobden and Ipswich City Council** (Queensland Information Commissioner)
- Name and address of a person proposed to be sued: Case W41600 (NZ Ombudsmen)
- Information permitting an applicant to pursue a private prosecution: Case W39631 (NZ Ombudsmen)

Practice Guidelines For Weighing The Public Interest

2.34 A useful description of the approach an agency should take in weighing the public interest appears in the following extract from Practice Guidelines issued by the New Zealand Ombudsmen.²⁶

²⁶ Extracted from a version available at <http://www.ombudsmen.govt.nz/guideB5.htm>; the comment not in italics has been added by the present authors.

...in order to determine whether good reason exists to withhold information, an agency must identify and weigh the competing considerations raised by the particular circumstances of the case.

In order to answer this question, an agency will need to take the following steps:

- i. *Identify whether one of the withholding grounds set out in section 9(2)3 applies to the information at issue.*

If it is considered that a particular withholding ground applies, the interest protected by that withholding ground is the relevant interest to weigh against other considerations favouring release.

- ii. *Identify the considerations which render it...in the public interest, for the information to be disclosed.*

Depending on the circumstances, there can be many considerations which may favour the release of information in the public interest.

...one of the factors which an agency should consider is whether the release of information would promote the accountability of Ministers and officials or promote the ability of the public to effectively participate in the making and administration of laws and policies.

However, these are not the only matters which an agency should bear in mind when considering whether it is desirable to make information available in the public interest. Considerations which favour disclosure of the information in the public interest are not limited to promoting accountability or encouraging effective public participation in law making.

The phrase "public interest" is not restricted in any way. Wider concepts, such as an individual's right to fairness and natural justice in respect of the actions of public sector agencies, should also be considered when assessing whether the overall public interest favours disclosure of certain information. This may often reflect the purposes for which the information is initially generated or supplied, the use to which it has been put and other uses to which it may also legitimately be put.

The following factors can often assist an agency in identifying those considerations which favour the release of information:

- *The **content** of the information requested*

What does the information requested actually say? Is the content of the information such that its release would, in some way, promote the public interest?

For example, does the information relate to the expenditure of public money or will it reveal factors taken into account in a decision making process? If so, would the release of such information serve to promote the accountability of Ministers or officials?

- *The **context** in which that information was generated*

What is the background to the generation of the information at issue? For example, was the information generated as part of a decision making process? What stage has been reached in that decision making process? Releasing background information, or information which sets out the options under consideration, will often enable the public to participate in the decision making process.

- *The **purpose** of the request*

Although a requester is not required to explain his or her purpose in requesting information, knowing why the information is required by the requester is often helpful in identifying the considerations favouring disclosure of the information and assessing whether those considerations outweigh the interest in withholding the information.

For example, a requester may seek background information from an agency in order to challenge certain allegations which have been made against him or her that the agency is investigating. In such cases, an agency may need to weigh certain considerations, such as promoting that individual's right to fairness or natural justice, against the interests in favour of withholding the information. Such a right to fairness or natural justice will arise usually when allegations or charges have been laid and not at an earlier stage of an investigation when disclosure might prejudice the outcome of the investigation.

- iii. *Assess the weight of these competing considerations and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information.*

There is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits.

3 United Kingdom

Legislative Framework

- 3.1 The **Freedom of Information Act 2000** (UK FOI Act or Act) received Royal Assent on 30 November 2000. It came into force in stages over the following years and was fully in force in January 2005.
- 3.2 The processing and use of personal information is regulated by the **Data Protection Act 1998**. Principles contained in that Act are also relevant to requests by third parties under the FOI Act for personal information and such requests are subject to the exemptions contained in the FOI Act.

Administration of the FOI Act

- 3.3 The Department of Constitutional Affairs (DCA) is responsible for the policy.²⁷ It prepares legislation, seeks to encourage an increase in openness in the public sector, has responsibility for monitoring the Code of Practice, and develops data protection policy which properly balances personal information privacy with the need for public and private organisations to process personal information.

Enforcement of the FOI Act

- 3.4 The FOI Act is enforced by the Information Commissioner. The Commissioner is responsible for good practice and determines reviews of decisions of public authorities under the FOI Act from dissatisfied applicants. The decision of the Commissioner may be appealed to the Information Tribunal by the applicant or the public authority.
- 3.5 The Information Commissioner has the power to overrule a public authority's application of the public interest test and form his or her own view of where the balance lies.
- 3.6 However, the relevant Minister has the power under section 53 to veto the Commissioner's ruling and issue a conclusive certificate that in his or her opinion the public interest does not outweigh the exemption claimed. The Minister's decision to issue a certificate under section 53 must be supported by "reasonable grounds." This leaves it open to the Commissioner or a complainant to seek judicial review of the Minister's decision on the basis that it was not made on reasonable grounds.

Official Guidance

- 3.7 The Department of Constitutional Affairs provides, on the official web site, information concerning the operation of the UK FOI Act.²⁸ The web site also contains a number of publications, including the Codes of Practice

²⁷ <http://www.dca.gov.uk/>

²⁸ <http://www.foi.gov.uk/index.htm>

under section 45 and section 46, implementation and annual reports, guides for authorities in implementing the Act, and research and policy papers.²⁹ There is also a section dealing with the history of and background to the Act.³⁰

- 3.8 The web site of the Information Commissioner³¹ contains the Commissioner's Decision Notes as well as Awareness Guidances, information for authorities concerning publication schemes, research on operation of the Act, and general information for the benefit of the public. Awareness Guidance No. 3 deals with the public interest test.

Relationship Between the FOI Act and the Code of Practice on Access to Government Information

- 3.9 The FOI Act came fully into force in January 2005. Prior to that time, the Code of Practice on Access to Government Information was in force for nearly 10 years. The decisions of the Ombudsman on the Code will be a useful reference point for all decision-makers until a body of decisions made by the Information Commissioner has come into existence. Each decision sets out the relevant public interest considerations and explains where the balance lies. Decision-makers who have read the relevant cases (summarised below) will be better equipped to apply the test under the FOI Act.
- 3.10 The Act was intended to be no less open than the Code. There is a presumption in favour of disclosure in the FOI Act created by the reverse emphasis in section 2 of the Act. This reversal of emphasis was a late amendment at the Lords stage of the bill when the bill was going through Parliament.³² This means that where the balance is even, the public interest in the particular disclosure should prevail.
- 3.11 The chapter summarises decisions of the UK Parliamentary Ombudsman in which the Ombudsman was required to consider the public interest test under the Open Government Code, and decisions of the UK Information Commissioner (since 1 January 2005) that deal with questions of public interest.

The Public Interest Test

- 3.12 Section 2(2)(b) of the FOI Act provides that information to which an exemption (not being an absolute exemption) applies can be withheld only if, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."
- 3.13 A similar test applies to the decision whether to confirm or deny the existence of information. **The section 2(2)(b) public interest test applies to the following seventeen exemptions:**

²⁹ <http://www.foi.gov.uk/pubs.htm>

³⁰ <http://www.foi.gov.uk/bkgrndact.htm>

³¹ <http://www.ico.gov.uk/eventual.aspx?id=33>

³² Birkinshaw, P. 2001, *Government and information: the law relating to access disclosure and regulation*, Butterworths, London, page 21

Section 22	information intended for future publication;
Section 24	national security, where the information was neither supplied by nor does it relate to a section 23 security body;
Section 26	defence;
Section 27	international relations;
Section 28	relations within the UK;
Section 29	the economy;
Section 30	investigations and proceedings by public authorities;
Section 31	law enforcement;
Section 33	audit functions;
Section 35	formulation of government policy, Ministerial communications and advice by Law Officers;
Section 36	effective conduct of public affairs;
Section 37	communication with Her Majesty, Royal Household, and conferral of honours;
Section 38	health and safety;
Section 39	environmental information;
Section 40(2)	personal information which falls within section 40(2) by reason of section 40(3)(a)(ii) or section 40(4);
Section 42	legal professional privilege;
Section 43	commercial interests.

3.14 If an “absolute” exemption applies the decision-maker does not need to consider the public interest in releasing the information. Section 41 is an exception to this rule; see the discussion commencing at paragraph 3.34. Otherwise, **the public interest test does not apply to the eight “absolute” exemptions:**

Section 21	information accessible by other means;
Section 23	information supplied by or relating to security bodies;
Section 32	court, inquiry and arbitration records;
Section 34	parliamentary privilege;
Section 36	in relation to conduct of public affairs in the House of Lords or House of Commons;
Section 40	personal information (except cases within s.40(2) by reason of s.40(3)(a)(ii) or section 40(4);
Section 41	disclosure of information amounts to an actionable breach of confidence;
Section 44	prohibited by another enactment, Community obligation, contempt of court.

3.15 Where a UK public authority claims that any information is exempt on the basis of an exemption subject to the public interest test, the notice of refusal must state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: section 17(3)(b) of the Act.

3.16 The application of section 40(2) is complex; see the section that follows.

Discussion of Section 40(2) and 40(3)(a)(ii)

3.17 In regard to the absolute exemption, section 40(2)(a), read together with section 40(3)(a)(i):

There will be absolute exemption where the information is personal data and disclosure would contravene any of the data protection principles in the Data Protection Act 1998.

Exemption in the Public Interest

3.18 The exemption constituted by section 40(2) and section 40(3)(a)(ii) when read together is not absolute and the public interest test will need to be applied where the information is personal data and disclosure would “contravene” the right of an individual to prevent processing of personal data likely to cause damage or distress.

3.19 Section 40(3)(a)(ii) is curiously drafted, since it refers to disclosure contravening section 10 of the **Data Protection Act 1998**. Section 10 gives an individual a right to object to certain processing, but under section 10(3) the data controller may either comply or disregard the objection notice. An application may be made to the court under section 10(4) if an individual wishes to contest a decision to disregard the notice.

3.20 In that context, it is a misuse of language to speak of “contravening” section 10. One normally speaks of contravening a rule of law, a statutory provision or a prescribed norm of conduct. One does not speak of “contravening” a provision which gives a right to an individual to object and to another the power to disregard the objection.

3.21 Awareness Guidance No. 1 expressly states in respect of section 40(3)(a)(ii), that where an authority has previously accepted an objection notice as valid, it must reconsider that acceptance where an FOI request is received for the same information.

3.22 The Briefing on section 38 by the Scottish Information Commissioner suggests that section 38(2)(a)(ii) (the equivalent in the Scottish FOI Act to section 40(3)(a)(ii)) will apply if the data subject has exercised the right to object under section 10.

3.23 Neither the UK Awareness Guidance nor the Scottish Briefing deals with the situation where the notice has been regarded by the data controller or the court as not justified. If that has occurred at the time of an FOI request, does it follow that section 40(3)(a)(ii) can no longer apply since, at least to some extent, there will have been a prior determination against the individual in respect of the objection notice lodged and the individual would, to that extent, have lost the right to prevent processing? That is a difficult question which will require a clear decision of the Information Commissioner or probably the Court to determine finally.

3.24 The difficulty is acute since section 40(2) requires as a condition of exemption, that the information is personal data and that the first condition is “satisfied”. Part of the first condition is that the data falls within the definition of “data” in section 1(1) of the *Data Protection Act 1998* and the

second part is that the condition to be satisfied is that disclosure would contravene section 10 of that Act (see section 40(3)). The better view, it is submitted, is likely to be that disclosure will be held to “contravene” section 10 only in circumstances where the right to prevent processing continues, not where it has been lost by the decision of a court which will be binding upon a public authority. Section 10, it is submitted, will not be “contravened” where the data subject has a right to lodge an objection notice, but has not done so.

3.25 However, perhaps curiously, if the data controller has previously decided to disregard the objection notice, there would in principle be nothing to prevent the data controller from reaching a different conclusion at a different time where the matter had not proceeded to a determination by the court. This would simply occur in a reconsideration by the public authority and while a decision to disregard the notice of objection will not itself lightly be overruled by the same authority, it is conceivable that this could occur from time to time.

Common Public Interest Issues for Decision-Makers

3.26 The UK adopted access to information legislation almost 20 years after other Westminster-style governments. Australia, New Zealand and Canada have all operated access to information legislation at a federal and provincial (in the case of Australia and Canada) level since the 1980s. Ireland’s Freedom of Information Act came into force in 1997. In all of these jurisdictions the legislation includes one or more public interest override provisions.

3.27 These countries operate Westminster-style parliamentary systems, their legislation is similar to the UK legislation, and jurisprudence on the application of the test has developed because the FOI regimes have been in operation for a number of years. For example, Australia has developed a significant body of jurisprudence and one case in particular, **Eccleston**, has been most influential³³.

3.28 Most consideration of the public interest test in overseas countries and in the UK Open Government Code cases has focused on a few exemptions, which will be discussed in the following sections. The precise drafting of the exemption is different in each country but the analogous UK FOI Act exemptions are in:

- Section 35 (formulation of government policy)
- Section 36 (effective conduct of public affairs)
- Section 40 (personal information)
- Section 41 (breach of confidence)
- Section 43 (prejudice to commercial interests)

³³ See chapter 7

Cross-jurisdictional experience suggests that these exemptions will often be claimed and that decision-makers therefore need to consider the public interest. The public interest test only comes into play when an exemption validly applies, *prima facie*, to the information concerned.

Section 35: Formulation of Government Policy

- 3.29 Subject to the public interest balancing test, section 35 allows a public authority to withhold information if it relates to:
- The formulation or development of government policy;
 - Ministerial communications (primarily communications between Ministers, and Cabinet proceedings);
 - The provision of advice by Law Officers;
 - The operation of any Ministerial private office.
- 3.30 Section 35 provides that once a decision on government policy has been taken, the background statistical information cannot be withheld. Even for the non-statistical information it is more likely that public interest considerations will outweigh the exemption if the decision has already been taken.³⁴

Section 36: Effective Conduct of Public Affairs

- 3.31 Subject to the public interest test, section 36 allows a public authority to withhold information if its disclosure would:
- prejudice the maintenance of the convention of Ministerial collective responsibility;
 - inhibit the free and frank provision of advice;
 - inhibit the free and frank exchange of views for deliberation;
 - otherwise prejudice the effective conduct of public affairs.
- 3.32 There may be a public interest in maintaining the frankness and candour of official communications but it will be a high test. In **Eccleston**³⁵ the Queensland Information Commissioner said:
- Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even*

³⁴ **Mr. Martin Wall, the Sunday Tribune newspaper and the Department of Health and Children**, decision 98078 of the Irish Information Commissioner, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1457,en.htm>, discussed in chapter 5

³⁵ See chapter 7

defamatory remarks are removed from the expression of the deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could materially alter for the worse, by the threat of disclosure under the FOI Act.

3.33 See further paragraphs 2.25 to 2.26 above.

Section 40: Privacy and Data Protection

3.34 Section 40 deals with personal information and channels subject access requests to the **Data Protection Act 1998**. Section 40 provides that third party personal information is to be withheld if releasing it would contravene any of the data protection principles. As previously stated, for most purposes, but not all, this is an absolute exemption and not one requiring the application of a public interest test: see section 2(3)(f).

3.35 See further paragraphs 3.17 to 3.25 above.

Section 41: Actionable Breach of Confidence

3.36 In the UK the “breach of confidence” exemption (section 41) is not subject to a statutory public interest test. However, the public interest test is incorporated into the test for breach of confidence in equity.³⁶

Section 41: The Law of Breach of Confidence In Equity

3.37 In the United Kingdom, the courts analyse the question of whether a person may bring an action successfully for breach of confidence by weighing up, on the one hand, the public interest factors in favour of protecting the

³⁶ The term *Equity* refers to a body of legal principles, originally developed in England in medieval times, and incorporated over centuries into the legal systems of all jurisdictions based on the English common law.

Equity developed alongside the principles of the common law, and was a creation of the English Lord Chancellors which qualified and sometimes ameliorated the stricter principles of the common law. At first, the Lord Chancellor received petitions but subsequently comprised a court separate from the King's Courts. The court became independent of the personality of the Chancellor over time and reached its apogee in the nineteenth century as the Court of Chancery, of which the Lord Chancellor was the pre-eminent member.

Today all superior courts in the common law jurisdictions, including the ones discussed in this book, apply both the rules of the common law and the principles of Equity within the same court structure; for example, the Chancery division of the UK High Court of Justice. Principles of law and of Equity together constitute “the law” as a generic description. Equity qualifies and supplements that part of “the law” which derives from the common law of England. The principles of Equity are made by judges handing down decisions and are not derived from statutes. In some areas the principles of Equity dominate, in particular in the law of trusts, wills and probate, and in providing some forms of remedies which the common law did not recognise, e.g. injunctions. Equity has no role in tort or criminal law.

For the purposes of the present analysis, it should be noted that if an obligation of confidence is imposed by a contract, the obligation is said to arise **at law**. If the obligation of confidence is not contractual, but the circumstances are such as to bind the conscience of a recipient of confidential information, this obligation is recognised as one **in equity**. This illustrates the point often made that Equity is a court of conscience and while that statement is misleading if read so as to suggest that Equity does not operate by reference to established principle, there is no doubt that relief against unconscionable conduct is a touchstone of Equity.

confidence, with, on the other hand, the public interest factors in favour of making available to the defendant or to the public the information in question.

- 3.38 This principle does not depend on any statute (including the UK FOI Act) but is an equitable principle of the law as developed in cases decided by the courts over the last century and a half. These cases deal with protection of confidential information in equity.
- 3.39 The existence of this principle means, in effect, that even though section 41 is not subject to a statutory public interest test, the question of public interest still forms part of the analysis as to whether disclosure of the information to the public would constitute an actionable breach of confidence under section 41(1)(b).
- 3.40 While the marginal note to section 41 refers to “Information provided in confidence”, it is important to understand that the requirements of section 41 are not satisfied simply by the fact that information is provided in confidence. The section requires that disclosure of the information be actionable, either at the suit of the person from whom the information was obtained or some other person. In this way the FOI Act preserves the effect of past cases decided by the courts.
- 3.41 In **Attorney-General v Guardian Newspapers (No. 2)**³⁷, Lord Goff said that the important general question of principle was whether in the view of a reasonable person, public disclosure would be “just in all the circumstances”. This view was accepted by Dame Elizabeth Butler-Sloss P. in **Venables & Thompson v News Group Newspapers Limited & Ors.**³⁸
- 3.42 In **Webster v James Chapman & Co**³⁹, Scott J. said:
- The court must, in each case where protection of confidential information is sought, balance on the one hand the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information. There is never any question of an absolute right to have confidential information protected. The protection is the consequence of the balance to which I have referred coming down in favour of the plaintiff.*
- 3.43 It is reasonable to say that in the case law the courts have usually required strong reasons for finding that the public interest in preserving confidences is outweighed by the public interest in disclosing the information.
- 3.44 One important factor is whether the information has been provided to the public authority under a valid and enforceable contract which contains a confidentiality or non-disclosure provision which applies to the information a requester may seek. Since contracts are in the normal event upheld at law as a matter of public interest, it is probable that the public interest test will

³⁷ **Attorney-General v Guardian Newspapers (No. 2)** [1990] AC 109 at 281

³⁸ **Venables & Thompson v News Group Newspapers Limited & Ors** [2001] EWHC QB 32 (8 January 2001) at para [10], <http://www.bailii.org/ew/cases/EWHC/QB/2001/32.html>

³⁹ **Webster v James Chapman & Co** [1989] 3 All ER 939 at 945

not apply to contractual obligations of confidence, but only to those arising apart from contract in equity. For example, in Australia the binding nature of contractual obligations of confidence has been recognised as preventing disclosure under FOI legislation: see the decision of the Queensland Information Commissioner in **Re Seeney**.⁴⁰

- 3.45 Where there is a contract between a public authority and the third party providing information, one should look to the contract to determine the rights between the parties (including the right to sue for breach of confidence), and principles derived from the cases in equity should be resisted: **Vokes v Heather** [1945] 62 RPC 135 at 142; **Re Seeney** at para [187]. The cases in contract will therefore be subject to different principles from the cases in equity, and this difference will therefore be required to be recognised when considering the exemption in section 41, depending on whether the obligation arises under a contract or not.
- 3.46 This may be one reason why public authorities have been advised not to agree to broad confidentiality clauses in agreements with suppliers. For more information, see the Statutory Code of Practice entitled *Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000*,⁴¹ and the comments of the Information Commissioner in Guidance No. 2 (at page 5) and in the Annexe to Guidance No. 5.⁴²
- 3.47 The cases in equity dealing with non-contractual obligations of confidence have considered various aspects of the public interest and applied a balancing test in a variety of non-FOI contexts. Principles which emerge from the decisions include the following:
- Where disclosure would provide information concerning actual or potential harm to the public, the public interest will usually require disclosure. In **Beloff v Pressdram Ltd** [1973] 1 All ER 241 at 260, Ungood-Thomas J. said
The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which ... must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.
 - Where an official inquiry is considering questions involving possible fraudulent financial practices, an obligation of confidence will not prevent an auditor providing information to the inquiry: **Price Waterhouse v BCCI** [1992] BCLC 583.

⁴⁰ **Re Seeney** [2004] QICmr 4 (29 June 2004), <http://www.austlii.edu.au/au/cases/qld/QICmr/2004/4.html> and <http://www.infocomm.qld.gov.au/indexed/decisions/html/04-2004.htm>

⁴¹ <http://www.dca.gov.uk/foi/codepafunc.htm#partV>

⁴² The Information Commissioner's web site is at <http://www.ico.gov.uk/eventual.aspx>, and the Guidance documents can be downloaded from <http://www.ico.gov.uk/eventual.aspx?id=9183>

- An employee may, without breaching confidence, disclose information to an official regulatory authority which involves possible breaches of the regulatory framework: **Re A Company's Application** [1989] Ch. 477; **Initial Services Ltd v Putterill** [1968] 1 QB 396.
- A doctor may “breach”, lawfully, a patient’s confidence where the doctor acts in the reasonably held belief that disclosure is necessary for the prevention of serious harm to others: **W v Egdell** [1990] 1 Ch. 359.
- A person will not breach confidence in disclosing dangers to public health contained in “quackery” semi-religious doctrines: **Hubbard v Vosper** [1972] 2 QB 84.
- However, it will not be lawful and will be a breach of confidence to disclose which Ministers of the Crown support particular aspirants to the Prime Ministership: **Beloff v Pressdram Ltd**.

3.48 This approach of balancing the public interests involved has now been overlaid by legislation such as the **Human Rights Act** 1998, in particular by the requirement contained in section 12(4) of that Act which requires courts to take into account the public interest prior to granting any relief which impacts upon freedom of expression.

3.49 Confidentiality obligations arise in many contexts, including governmental, commercial and personal ones. Section 41 of the UK FOI Act applies to all types of confidences, and it follows that in considering the scope of exemption under that provision, public authorities must consider not only the public interest test developed in the equity cases but the effect European law, as enacted in the UK under the **Human Rights Act** 1998, has upon the issue of breach of confidence.

Section 41: Impact of the Human Rights Act 1998 and European Law

3.50 Broadly speaking, the **Human Rights Act** 1998 has incorporated into UK law the protections found in the European Convention for the Protection of Human Rights and Fundamental Freedoms. For FOI purposes, the points which follow are important.

3.51 All UK public authorities, which includes a Court (see **Venables**), must recognise and give effect to the Convention principles: see sections 6 and 12 of the **Human Rights Act** 1998.

3.52 Most relevant to FOI are Articles 8 and 10.

3.53 Article 8(1) provides: “Everyone has the right to respect for his private and family life, his home and his correspondence”.

3.54 Article 10(1) provides: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

- 3.55 Section 12(4) of the **Human Rights Act 1998** provides: “The court must have particular regard to the importance of the Convention right to freedom of expression.”
- 3.56 Clearly, these human rights principles will have a significant impact on the availability of the exemption under section 41(1). Their impact will not be limited to individual rights or personal information. They are also likely to impact on confidential commercial information where there is a strong interest in freedom of expression with respect to such information.
- 3.57 However, it is important to note that breach of confidence is an exception within Article 10(2), and it has been said that, “the qualifications set out in Article 10(2) are as relevant as the right set out in Article 10(1)”: **Michael Douglas, Catherine Zeta-Jones and Northern & Shell Limited**⁴³, per Sedley LJ. at para [136], cited with approval in **Venables** at para [19].
- 3.58 It follows that there must be a balancing process or “juggling act” (**Venables** at para [20]) between rights available in an action for breach of confidence and the right to freedom of expression where both sets of entitlements are raised. In addition, there may be rights of privacy involved, often with a right to bring an action for breach of confidence. **Venables** itself was such a case and the newspapers were enjoined from publication.
- 3.59 The principles derived from European law and included in the **Human Rights Act 1998** will apply, more obviously and more often, to personal information as distinct from commercial information of third parties which may be held by public authorities.
- 3.60 **Venables**⁴⁴ is an important decision in which the court found that the right to freedom of expression under the **Human Rights Act 1998** was outweighed by the rights of the plaintiffs to protect their privacy by recourse to the law concerning breach of confidence. The process involved balancing, on the one hand, the Article 8 right to privacy (which the plaintiffs sought to enforce by the action for breach of confidence) and, on the other hand, the Article 10 right of freedom of expression (in that case, the claim being advanced by the press). The potential threat to the plaintiffs in that case was very serious, involving a potential threat to their lives (which made relevant the Article 2 right to life) and this outweighed the right of the press to freedom of expression.
- 3.61 Even within the Article 10 right, as pointed out in paragraph 3.55 above, the law of breach of confidence qualifies that right, requiring a further process of balancing of respective rights.
- 3.62 It has been said that:
- Although the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always*

⁴³ **Michael Douglas, Catherine Zeta-Jones and Northern & Shell Limited** [2000] EWCA Civ 353, <http://www.bailii.org/ew/cases/EWCA/Civ/2000/353.html>

⁴⁴ **Venables & Thompson v News Group Newspapers Limited & Ors** [2001] EWHC QB 32 (8 January 2001), <http://www.bailii.org/ew/cases/EWHC/QB/2001/32.html>

pay appropriate respect: **Michael Douglas, Catherine Zeta-Jones and Northern & Shell Limited** at para [49], per Brooke LJ

and

If freedom of expression is to be impeded, it must be on cogent grounds recognised by law: Michael Douglas at para [137], per Sedley LJ

3.63 The Court of Appeal made important statements in **A v B plc**⁴⁵ concerning the interrelationship between the relevant Convention Articles and between the Convention and the action for breach of confidence.

3.64 As to the relationship between the Articles, the Court said:

The manner in which the two articles operate is entirely different. Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which privacy is to be protected. Article 10 operates in the opposite direction. This is because it protects freedom of expression and to achieve this it is necessary to restrict the area in which remedies are available for breaches of confidence. There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles were designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account.: para [6].

3.65 As to the relationship between the Convention and the action for breach of confidence, the Court said:

These articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The Court's approach to the issues which the applications raise has been modified because under section 6 of the 1998 Act, the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.: para [4].

3.66 While the judgment deals with Article 8 issues, as does **Venables**, the balancing process will also apply to commercial confidences, though it is fair to say that the rights to freedom of expression will be less capable of successfully trumping rights of confidence in a commercial context. One effect however might be that in a commercial confidence case, the final approach, which will overlay the public interest test within the UK doctrine of confidence with Article 10 right in the “stronger and broader action” to

⁴⁵ **A v B plc** [2003] QB 195, <http://www.bailii.org/ew/cases/EWCA/Civ/2002/337.html>

which the Court of Appeal referred, will probably make it easier to withhold protection under s.41(1) to a commercial confidence.

3.67 It was also said by the Court of Appeal that:

*...where the protection of privacy is justified, relating to events after the Human Rights Act came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection.*⁴⁶

3.68 The approach of the Court of Appeal to the relationship between the Convention and the action for breach of confidence was endorsed by the House of Lords in **Campbell v MGN Limited**.⁴⁷

3.69 The House of Lords approached the **Campbell** case as also requiring a balance to be struck between Articles 8 and 10 and full regard being had to section 12(4) of the **Human Rights Act 1998**: per Lord Nicholls at para [17], Lord Hope at paras [103]-[111], Baroness Hale at paras [132]-[141], Lord Carswell at para [167]. The approach of the Court of Appeal was generally endorsed and Baroness Hale specifically cited the passage from the judgment of Lord Woolf appearing in paragraph 3.64 above: at para [132] of Her Ladyship's judgment.

Section 41: Summary of Approach to the Confidentiality Exemption

3.70 It follows that public authorities, when considering the exemption requirements of section 41(1), will have to consider:

- first, whether the requirements have been made out to classify the information as confidential in the first place. The three classic elements of breach of confidence are those identified by Megarry J. in **Coco v AN Clark (Engineers) Ltd.** [1969] RPC 41 at 47. The whole of what Megarry J. said was:

*Three elements are normally required if, **apart from contract**, a case of breach of confidence is to succeed. First, the information itself...must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances imposing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.*
(emphasis added)

These principles are accepted also in Ireland: **House of Spring Gardens Limited v Point Blank Limited**⁴⁸, **Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office for Public Works**⁴⁹ at para [35].

⁴⁶ **A v B plc** at para 11(vi)

⁴⁷ **Campbell v MGN Limited** [2004] 2 AC 457, <http://www.bailii.org/uk/cases/UKHL/2004/22.html>

⁴⁸ **House of Spring Gardens Limited v Point Blank Limited** [1984] IR 611 at 658-9

⁴⁹ Irish Information Commissioner Cases 98049 | 98056 | 98057, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1450,en.htm>

- secondly, whether the confidential information was provided under contract, in which case the principles relevant in equity will not apply, but the law looks to the terms of the contract to govern the relationship between the parties. This approach may be subject to the principle that the contract be *bona fide* (and not an attempt to circumvent the FOI laws) and that the information not be trivial or have entered the public domain. If any of those factors were to be present it is difficult to see how an action for breach of confidence would succeed.
- if the confidential relationship arises only in equity (and either the **Coco** elements are satisfied or the information is plainly confidential where not received in the course of a consensual relationship; e.g., if the information is appropriated or stolen), then the respective public interests in disclosure as against non-disclosure must be weighed up.
- as part of that process, the new principles under the European Convention and the **Human Rights Act** 1998 must also be weighed in the balance. The principles of freedom of expression (Article 10) will favour disclosure, though confidentiality will be given weight under Article 10(2). The protection of personal privacy will weigh against disclosure in almost all cases and where strong enough (as in **Venables**) will overcome the right to freedom of expression, which is itself recognised as a very strong right.

Section 43: Commercial Interests

- 3.71 Subject to the public interest test, section 43 of the UK FOI Act provides that information is exempt if:
- it constitutes a trade secret
 - disclosure would be likely to prejudice the commercial interests of any person including the authority which holds information.
- 3.72 Experience in other jurisdictions suggests that this will be a difficult exemption to override in the public interest. Commercial interests will often be paramount even where there is an obvious public interest in the issue (eg transport in London). The issue in relation to commercial information is often the timing of its release. In a number of cases commercial information has been held to lose its sensitivity over time, and while exempt at the time a request is made (or at an earlier time) it may not be exempt at a future date.
- 3.73 Where the commercial interests of a public agency are concerned, the public interest is more likely to favour release because there is a clear public interest in accountability for public funds.
- 3.74 In one Canadian case, the Commissioner noted that the only fair and reasonable way to balance public interest and corporate loss is to undertake some measure of fact finding with the company concerned.⁵⁰ The Code of

⁵⁰ **Weighing public interest** Case 08 1994 of the Canadian Federal Information Commissioner, discussed in chapter 11

Practice⁵¹ issued under section 45 of the UK FOI Act includes guidance for public authorities on entering into contracts. One early DCA recommendation was that public authorities should not include contractual provisions relating to confidence or commercially sensitive information that are inconsistent with the FOI Act.

- 3.75 In situations involving public safety (eg nuclear facilities) the public interest is more likely to be strong enough to override the competitive interests of the third party, depending on the nature of the information being sought and the degree of risk involved.

Decisions of the UK Parliamentary Ombudsman

- 3.76 The Open Government Code of Practice on Access to Government Information commenced operation in 1994 and was revised in 1997. It was a non-statutory code enforced by the Parliamentary Ombudsman. The Code was based on the presumption that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

- 3.77 The test set out in Part II of the Code provided:

In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

- 3.78 The Ombudsman took the application of the public interest test seriously. He commented in one decision:

The Information Code has, at the head of Part II, a general preamble of considerable significance relating to balancing the possible harm in disclosure against the public interest in obtaining information—an important element of a number of the Code exemptions.⁵²

- 3.79 The Ombudsman did not follow internal guidance on what constitutes a public interest but he did take account of the Cabinet Office guidance on the interpretation of the Code, although he did not consider himself bound by the guidance. In relation to the public interest test the Cabinet Office guidance states that:

The balance of the public interest in disclosure cannot always be decided solely on the basis of the effect of a specific disclosure. The exemption covering the proceedings of Cabinet and Cabinet Committees, for example, is based on the need for confidence in the confidentiality of such discussions, and not primarily on whether the disclosure of particular information would cause harm.⁵³

⁵¹ <http://www.dca.gov.uk/foi/codepafunc.htm#partV>

⁵² Case A.7/98, discussed later in this chapter

⁵³ Guidance on interpretation 1996, para 0.5

- 3.80 The FOI Act requires a decision-maker to balance the public interest in disclosure with the public interest in maintaining the exemption. Previously, the Code balanced the public interest in disclosure with the “harm caused by disclosure.” The public interest in maintaining an exemption is to avoid the harm which the exemption seeks to prevent.
- 3.81 The Ombudsman’s decisions are not legally binding on the Information Commissioner or the Courts. In due course, with the passage of time and the accumulation of experience of the decisions of the Information Commissioner, they will become less significant. However, the Ombudsman’s decisions on the public interest test in the Code are a good indication of the sorts of issues that a decision-maker should consider when applying his or her mind to the public interest test in the UK FOI Act.⁵⁴
- 3.82 An analysis of Code decisions between 1994 and 2005 shows the Ombudsman considered the public interest in 65 decisions. In the remaining cases it was not necessary to consider the public interest, usually because the Ombudsman held that the exemption or exemptions claimed did not apply, or because the exemption was not subject to the test.
- 3.83 In 44 of the 65 decisions (approximately 67%) where the public interest test applied, the public interest in disclosure did not outweigh the potential harm caused by disclosure and the Ombudsman upheld the department’s decision to withhold the information. In 16 cases (approximately 25%), the balance came down in favour of disclosure, while in 5 cases (approximately 8%) the decision was to release certain information and to withhold other information.
- 3.84 In the majority of these decisions the department had claimed that exemption 2 (internal discussion and advice) of the Code applied and that releasing the information would harm the frankness and candour of internal discussion. When weighing up the public interest with the potential harm, the Ombudsman considered the level of information already available to the public on the particular issue.
- 3.85 In the decisions, the Ombudsman was less likely to conclude that the public interest in disclosure outweighed the potential harm where the public already had enough information available to make informed decisions. For example, in a decision concerning a public works project, the public interest in releasing a small amount of extra analytical material did not outweigh the exemption.⁵⁵ Also, in a decision involving consumer advertising of medicines where some information was already available, the public interest in releasing additional analytical information did not outweigh exemption 2.⁵⁶
- 3.86 In 16 of the 65 decisions, the public interest in making the information available outweighed any harm caused by disclosure, and the Ombudsman

⁵⁴ The decisions summarised here are available at the Ombudsman’s web site at http://www.ombudsman.org.uk/improving_services/selected_cases/AOI/index.html

⁵⁵ Case A.2/98, discussed later in this chapter

⁵⁶ Case A.16/01, discussed later in this chapter

upheld the applicant's complaint and recommended the information be released.

- 3.87 It was clear from the Ombudsman's decisions that where the information requested related to a high profile issue that had been in the media and involved accountability for public funds, there was a strong public interest in releasing that information. For example, the public interest in having up-to-date information about cost estimates on a publicly-funded project outweighed any harm caused by disclosure.⁵⁷
- 3.88 In a small number of cases, although public interest considerations weighed in favour of disclosure, there was a potential actionable breach of confidence which prevented disclosure.

Decisions where the public interest in disclosure outweighed the harm likely to arise from disclosure

Case No. A.5/97 Failure to give full information about an exceptional granting of legal aid

The requester asked the Lord Chancellor's Department a series of questions about the granting of legal aid to families of victims of the "Marchioness disaster." The Department initially withheld details of fees paid to senior and junior counsel. During the investigation, the Department changed its view and advised the Ombudsman that the exemptions which may have applied did not outweigh the public's right to know how their money had been expended under the Legal Aid Scheme. The Ombudsman agreed.

Case No. A.1/97 Refusal to disclose information about the funding for a project to create a wetland habitat for birds

An interest group asked the Cardiff Bay Development Corporation for current cost estimates for the proposed wetland habitat. The Corporation refused to give a detailed breakdown of the overall £5.7 million budget citing exemption 7a (prejudice to competitive position of a public body) and exemption 10 (prematurity in relation to a planned publication). The Ombudsman accepted that disclosing estimates based on tender information might cause limited prejudice to the Corporation's position. However, he held that the public interest in having up-to-date information about cost estimates outweighed any prejudice likely to arise from disclosure and that the estimates should be disclosed.

Case No. A.31/99 Refusal to release internal advice about the closure of a fire station

The applicant asked the Home Office for reports about the proposed closure of a fire station. It refused citing exemption 2 (internal discussion and advice). The Ombudsman considered that exemption 2 applied to the decisions taken by Ministers in respect of the fire station. In assessing the public interest he said:

That, in any given case, is clearly a matter of judgement. There is no doubt that there is a public interest in the complainant and the local interest group having sufficient information in order to represent effectively local interests in the issue. This would seem to point towards disclosure. But, this is still very much a live issue. There are also within the reports comments made on matters relating to the provision of fire services within the area which range rather wider than the specific issues of this station. On that basis I do not think it appropriate for me to recommend the complete

⁵⁷ Case A.1/97, discussed later in this chapter

disclosure of information but I do think it possible to disclose some of it without undermining the effectiveness of the Home Office's internal considerative processes.

Case No. A.21/99 Failure by the Companies House to release information about their choice of personal identifiers as authentication for the electronic filing of documents by companies

The applicant asked the Companies House for information on their proposed system for authentication of electronically filed documents. The Companies House cited exemptions 2 (internal discussion and advice) and 4(d) (legal professional privilege). The Ombudsman agreed that exemption 4(d) applied to some of the information, but in relation to the rest said:

There was bound to be a public interest in this development. Paragraph 3 of Part 1 of the Code commits departments and public bodies within the Ombudsman's jurisdiction to publish the facts and analysis of the facts, which lie behind major policy decisions. In not answering the applicant's question the Companies House have failed to act in accordance with that principle.... The matter of the electronic authentication of documents is clearly, in my view, an area of public interest affecting a wide range of companies and individuals. It is therefore incumbent on the Companies House to explain to those with an interest in the matter why, as in this case, particular choices have been made and others not.

The Ombudsman recommended that information be released, subject to withholding the legally privileged information.

Case No. A.31/00 Refusal to release a copy of an application for export credit support

An interest group asked the Export Credits Guarantee Department for the export credit application submitted by company X in relation to the Ilisu Dam project in Turkey. The ECGD refused and cited exemptions 13 (third party commercial confidences) and 14A (information given in confidence) and also said that the information was protected by the law of confidence. The Ombudsman held:

In this instance, the harm referred to is the damage disclosure would do to the negotiating position of Company X and the other elements of the civil works joint venture led by them. In considering whether the public interest in this particular project outweighs the potential harm that Company X may face if the information contained in their application were to be released I have taken into account the following considerations:

The Ilisu Dam project has generated a good deal of public debate...much information is already in the public domain and it has been considered by Select Committee and full house. This shows that the project is regarded by both the government and parliament as a matter of legitimate public interest. It also seems to me reasonable to suppose that proper debate cannot take place without the wide availability of all relevant information. In my view, this is a case where the wider public interest in the release of the majority of the information sought should override the provisions of Exemption 13 if the matter were to be considered solely in terms of the code.

However, consideration of the public interest was complicated by the fact that the Code did not set aside statutory or other restrictions on disclosure. The Ombudsman considered that release could found an action for breach of confidence and that he could not therefore recommend disclosure.

Case No. A.29/00 Refusal to release a copy of an engineer's report

A vehicle testing station asked the Vehicle Inspectorate for the engineer's report on which the Inspectorate's decision to withdraw its status was based. It cited exemption 2 (internal discussion and advice). The Ombudsman agreed that exemption 2 applied and held that the public interest in having access to the additional amount of information in the engineer's report was strong enough to outweigh the potential harm to the frankness and objectivity of future advice.

Case No. A.26/01 Refusal to provide copies of correspondence between the Foreign and Commonwealth Office (FCO) and the Department of Trade and Industry (DTI) relating to human rights issues and the Ilisu Dam

Following exchanges between the then Minister for Europe and Mr Wells, the then Chairman of the House of Commons Select Committee on International Development concerning human rights issues and the Ilisu Dam project in Turkey, Mr Wells asked the Minister to provide him with copies of all relevant correspondence between the FCO and the DTI. The Minister refused citing exemption 2 (internal discussion and advice). The Ombudsman agreed that exemption 2 applied and was sympathetic to the government view that releasing correspondence between departments on such a sensitive issue might well affect the candour with which those debating similar issues in the future feel they can record their views. However he considered there were substantial counter arguments. There is a valid public interest in obtaining a clear answer to the question of the impact on human rights. The government itself had already recognised public interest in the project by placing its general assessments and judgements on the public record.

Case No. A.19/02 Refusal to release the minutes of a meeting and the responses to a consultation paper

The requester asked the Driving Standards Agency (DSA) for, among other things, a copy of the minutes of a meeting between representatives of the ADI Business Club, officials from the then Department of the Environment, Transport and the Regions, DSA and the authors of a consultation document entitled "Improving the Approved Driving Instructor (ADI) Scheme". The Agency declined to provide the information citing exemption 2 (internal discussion and advice). The Ombudsman found that the information contained in the minutes came potentially within the ambit of exemption 2. However, following the request, the DSA had advised external attendees at meetings that minutes would be released on request other than where attendees insisted that the meeting could not take place without an assurance of confidentiality. In applying the public interest test, the Ombudsman could not see how, in the light of this development, the disclosure of the particular set of minutes sought could possibly harm the frankness and candour of discussion of future meetings involving external parties. He therefore did not consider that exemption 2 had been correctly applied.

Case No. A.29/02 Refusal to release information relating to the Rendlesham Forest UFO incident

The requester asked the Ministry of Defence for any information they held regarding reported sightings of unexplained aerial phenomena near the twin United States Air Force complexes of RAF Bentwaters and RAF Woodbridge in late December 1980. The Department disclosed much anonymised documentation, but declined to release certain documents, citing exemption 2 (internal discussion and advice). The Ombudsman was satisfied that these documents were of the type covered, in principle, by exemption 2. However, given their age (nearly 20 years old) and the fact that they contained no information not already in the public domain, he found it difficult to envisage that any harm might arise from its disclosure. He found that there was nothing contentious or sensitive there which would merit the public interest being served by its continued protection.

Case No. A.05/03 Refusal to release a list of countries designated as priority markets for UK defence sales

The requester asked the Ministry of Defence for the list of countries designated as priority markets in the Defence Export Sales Organisation's 2000 strategic plan. The Department declined to release this information, citing exemption 1(b) (conduct of international relations). The Ombudsman found that Exemption 1(b) was, in principle, applicable. However, given the Government's stated commitment to greater transparency and responsible controls on UK arms exports, he found that the public interest would be best served by the information being disclosed. He pointed out that the Government already published an annual report putting into the public domain details (including

the overall value) of the export licenses granted to the UK defence industry for each individual country. He recalled the view previously expressed by the Ombudsman that the public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue currently the subject of public debate (see case A.11/02). He said that the whole question of UK arms sales was, in his opinion, such a subject. He pointed to the Government's commitment to greater transparency and responsible controls on British arms exports, and suggested that the information published by the Government made the UK one of the most transparent of arms exporting states. Against that background, and having regard to the fact that the information in question was, effectively, two years out of date and that the actual figures of the total value of arms exports for 2000, on a country by country basis, were already in the public domain, he found it difficult to envisage that any harm might now arise from the disclosure of the protected information.

Case No. A.12/03 Refusal to release information about accidents involving nuclear weapons

The requester asked the Ministry of Defence for several pieces of information relating to accidents and incidents involving nuclear weapons since 1960. The Department declined to release any more information than was already in the public domain, citing exemption 1 (defence security and international relations). The Ombudsman found that the information sought was covered, in principle, by the exemption. However, given that this was an issue of considerable public interest, she found that the public interest would best be served by the information being disclosed. In reaching this conclusion she took into account:

- the fact that the sensitivity of information generally reduces over time, and that it was difficult to envisage that the release of information about events that happened some time ago to weapons that no longer exist could cause harm if made more widely available;
- the fact that the Department had itself previously released information broadly of the type requested, that no harm had resulted, and that this showed that the Department accepted the public interest in this matter;
- the fact that the information now requested related to less serious incidents than that previously released.

She referred to the previous Ombudsman's finding in Case A.11/02 that the public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue currently the subject of public debate.

Case No. A.16/03 Failure to provide information relating to potential Ministerial conflicts of interest under the Ministerial Code of Conduct

This was a revival of an earlier and protracted case which had been to the Administrative Court and now returned to the Ombudsman's jurisdiction. Essentially, the requester sought answers to five questions from a number of departments (centralised in the Cabinet office):

1. How many times Ministers in each department had consulted the Permanent Secretary of the department concerned about potential conflicts between their interests and public duties?
2. On what dates they had so consulted?
3. Which Ministers had done so?
4. For what reasons did each Minister consult the Permanent Secretary?
5. What action was taken in each case and in which of them was it necessary to consult the Prime Minister?

The request was refused, the departments citing exemptions 2 (internal discussion) and 12 (invasion of privacy).

The Ombudsman considered that exemption 12:

- did not apply to the names of the Ministers, the purpose in general of the consultation and the action taken (a view accepted by the Lord Chancellor's department)
- did not apply to the detail of the request for advice where the subject matter could be said to potentially impinge on Ministerial duties
- could apply to a case where a Minister provided the Permanent Secretary with details of his financial and non-financial interests, all of which were of a personal nature and did not impinge on his Ministerial duties.

With respect to exemption 2, the Ombudsman accepted that there was a very considerable degree of public interest in the way in which Ministers conduct themselves and their business and that greater openness about Ministerial conflicts of interest was seen as an end desirable in itself for the purposes of good governance and to avoid any suspicion of improper Ministerial influence. She also found it difficult to see how answers to the five questions (in general terms) could inhibit future frankness and candour, particularly since the terms of the Ministerial Code of Conduct had, since 1997, made mandatory, disclosures of potential conflicts of interest. As to specific details of the consultations, she was of the view that the public interests in disclosure that she had identified outweighed any potential harm which might arise from disclosure.

Case No. A.22/03 Refusal to provide details of driving test routes

The requester asked the Driving Standards Agency for details of the driving test routes for both learner drivers and driving instructors in his local area. The Agency refused disclosure on the basis of exemption 7(b) (harm to the operation of a public body). The Agency argued that knowledge of the routes would lead to instructors training drivers exclusively over those routes, thus undermining the value of those routes as tests. The Ombudsman found that such information was already in the public domain since the Agency encouraged instructors to accompany their pupils on tests and it was always open to pupils to inform their instructors of the routes taken. In these circumstances, the Ombudsman found that the harm from disclosure would not outweigh the public interest in making the information available.

Case No. A.37/03 Refusal to release information about the construction of the Silverstone Bypass

The request concerned a Ministerial Direction accelerating the construction of the Silverstone Bypass. A Ministerial Direction is issued when a Minister authorises expenditure which does not represent value for money when considered against the conventional criteria. The requester, a Member of Parliament, asked the Department of Transport what advice Ministers had received, and from whom, that the wider national interest would be best served by the acceleration of the project. The Department provided the requester with an explanation of the wider national interest but declined to release two submissions made to the then Secretary of State, citing exemption 2 (internal discussion and advice). The Ombudsman commented:

There is no doubt in my mind that, on those rare occasions when a Ministerial Direction is issued and especially when that direction is justified as being in the wider national interest, there is a valid public interest in good governance which requires transparency in the decision-making process. I am strengthened in this view by the fact that, in response to this public interest, a copy of the Ministerial Direction itself has been placed in the House of Commons library, as has the submission from the Highways Agency Operations Director referred to in the Direction. It therefore seems to me difficult to argue that there is no public interest in this instance when the

Government has, to a very significant extent, already acknowledged that level of public interest and taken steps to respond to it.

Noting that two of the four key documents in the case had already been put in the public domain, referring to the two outstanding documents the Ombudsman continued:

Given that the documents contain virtually nothing not already in the public domain, I find it difficult to envisage that any harm might arise from their disclosure now: there is nothing contentious or sensitive within them which would merit, in my opinion, the public interest being served by their continued protection. As part of that consideration, indeed, it needs to be recognised that the events with which this direction are concerned are now in the past and that matters have moved on. While, therefore, continuing to support the general principle that information covered by Exemption 2 should be protected, I see no reason why, in this instance, the information concerned should not be released...

Case No. A.9/05 Refusal to release a Ministerial Direction

The requester sought access to information concerning a Ministerial Direction made in relation to the Millennium Dome in 1997. Exemption 2 (internal discussion) was cited in the refusal to supply the information, which consisted of a submission to the Minister for expenditure on the Millennium Exhibition, as well as the resulting Direction.

The Ombudsman accepted that there was a public interest in officials being able to provide candid advice to Ministers, but in this case, given that the information was eight years old (and therefore of less sensitivity), the public interest in disclosure outweighed any such potential harm. The Ombudsman also noted the departmental submission that disclosure would breach the convention under which current administrations are not permitted to see documents prepared by a previous administration of a different political complexion. She regarded this as potentially relevant, but not overriding in any case, and not decisive on the facts of this case.

Case No. A.16/05 Refusal to provide the date on which the Government first sought legal advice about the legality of military intervention in Iraq

The requester applied to the Foreign and Commonwealth Office for details of when the government had first sought legal advice about the legality or otherwise of a possible invasion of Iraq. The Office first relied on both exemptions 4(d) (legal professional privilege) and exemption 2 (internal discussion), but subsequently dropped the claim for exemption under 4(d).

The Ombudsman considered that exemption 2 could not apply to the date sought, because it was factual information. In coming to this view, she was reiterating previous Ombudsman decisions. The Office argued that if they were to release the date then they would have to release additional information, which would put the date into context, and that this further information would fall within exemption 2. This further information, consisting of an internal minute, would have been regarded by the Ombudsman as exempt in the public interest, but it had not been asked for.

She did not accept that release of the date in this case would inhibit the seeking of legal advice in a future case; such a response, she thought, would be “wholly disproportionate”. She recommended that the information be released and expressed disappointment that the Office did not accept this recommendation.

Decisions where the public interest in disclosure did not outweigh the harm caused by disclosure

Case No A.5/94 Failure to supply to a third party information about a Department's discussions with industry representatives

The requester asked the Department of Health for information relating to discussions between the Department and pharmaceutical industry on a proposed code of practice. The Department withheld the information citing exemption 7 (non-disclosure of information prejudicial to effective management and operations of public service) and exemption 14 (information given in confidence). The Ombudsman held that no exemption applied to details of where, when and what was discussed, but accepted that the names of industry representatives involved could be withheld. Although there was a public interest in the substance of the discussions, there was no public interest in releasing the names of the specific identities involved.

Case No A.12/95 Unwillingness to release information relating to the repeal of the Northern Ireland broadcasting restrictions

The requester asked the Department of National Heritage to release papers generated in the course of a review of the broadcasting restrictions about interviewing members of certain organisations in Northern Ireland. The Department withheld the information citing exemption 2 (internal discussion and advice). The Ombudsman agreed that exemption 2 applied to internal documents only and in relation to those internal papers he did not consider that the public interest in disclosure overrode the potential harm to frankness and candour of future discussion. It was important that the issues considered sensitive were still topical and might arise again in the future for consideration.

Case No A.5/96 Refusal to disclose sale proceeds of certain British Rail businesses

The requester asked the Department of Transport to disclose the prices at which 27 British Rail businesses were sold to buyers in the private sector. The Department refused on the basis that disclosure of prices would prejudice future negotiations on the sale of British Rail's remaining assets although it was acknowledged that all the requested information would be made public at some stage. The Department cited exemption 7 (effective management and operations of the public service) and exemption 13 (third party commercial confidences). The Ombudsman agreed that in the circumstances the Department could withhold some of the prices under exemption 7 but not exemption 13, noting:

It is common ground that the public interest requires the details of proceeds from the sale of assets formerly in public ownership should be made public. The question is: when? I appreciate the Department's argument that, where there remain to be sold businesses akin to those already sold, the premature disclosure of the selling prices achieved is capable of having a prejudicial effect on the negotiations for the sale of the remaining businesses.

He considered that where releasing the price would not prejudice future negotiations (ie where there was no similarity between the business sold and businesses yet to be sold) the exemption did not apply.

Case No A.29/95 Refusal to provide information about the economic viability of the thermal oxide reprocessing plant (THORP) at Sellafield

The requester asked the Department of the Environment for a complex technical report by an external consultant about the economic viability of THORP. The Department refused citing exemption 13 (commercial confidentiality). The Ombudsman found that the public interest in making information about THORP available did not outweigh the interest in maintaining the exemption. It was significant that the technical report was consistent with the published public

consultation paper and other than the fact it was more detailed, it did not make any further information available.

Case No A.15/96 Failure to disclose to a complainant an internal report into his complaint

The requester asked the Valuation Office Agency for an internal report into a complaint he had made to them about one of their district offices. The VOA refused citing exemption 2 (internal discussion and advice). The Ombudsman required the VOA to release purely factual information and in relation to the internal discussion, held that the public interest in making it available did not outweigh the potential harm to frankness and candour of internal discussion that might arise from disclosure.

Case No A.26/97 Refusal to disclose an internal report about matters raised in a complaint

A company was investigated by the Inland Revenue. The directors asked for the internal report made by the District Inspector concerning the investigation. The Inland Revenue refused citing exemption 2 (internal discussion and advice) and exemption 6 (effective management of the economy). The Ombudsman found that the public interest did not outweigh the harm that would result from disclosure. It was significant that the Inland Revenue had conducted the investigation in a "highly rancorous manner" and that there was a great degree of sensitivity on all sides. The directors already had the results of the investigation.

Case No A.13/97 Refusal to disclose information including telephone notes and internal legal advice from an individual's file

A family firm was in dispute with the Court Service about a default judgment entered in error against it. It asked to see all documents held by the Court Service about the case. The Court Service cited the legal privilege exemption. The Ombudsman held that exemption 2 (harm to frankness and candour of internal discussion) applied. He held that the public interest in making the information available did not outweigh the interest in maintaining the exemption.

Case No A.27/97 Refusal to disclose a report by a Board of Visitors

The applicant prisoner asked to see a copy of the prison Board of Visitors' annual report. The Northern Ireland Prison Service refused citing exemption 4e (law enforcement and legal proceedings) and exemption 7b (effective management and operations of the public service). Given the security situation in Northern Ireland, the Ombudsman agreed that the risk of harm if the reports were disclosed outweighed the public interest in making information available.

Case No A.2/98 Refusal to release details of an internal review of the Cardiff Bay Barrage Project

An interest group asked the Welsh Office to release the facts and analysis which the government considered relevant to the decision to allow the Barrage Project to go ahead. The Welsh Office refused citing exemption 2 (internal discussion and advice) and exemption 4(d) (legal professional privilege). A lot of information had already been made available both to the group and publicly so the case centred on a small amount of additional analytical material. The Ombudsman considered that the public interest in "having access to the additional (relatively small) amount of analytical detail was not strong enough to outweigh the harm to the frankness of discussion which might result from disclosure."

Case No A.23/99 Refusal to release information relating to the development of encryption policy

The requester, who was director of an organisation concerned with the interaction between information technology and society, asked the Department of Trade and Industry for information relating to the formulation of the government's policy on encryption. In particular he asked for

names of officials on the Cryptographic Policy Working Group (CPWG). The DTI refused to release policy advice citing exemptions 1 (defence, security and international relations), 2 (internal discussion and advice) and 4 (law enforcement and legal proceedings). The Ombudsman considered the public interest in releasing names of officials and said:

*“In general I consider that the balance of the public interest will normally favour disclosure of information regarding **which** organisations are represented on a body such as the CPWG; it is also likely to be reasonable to indicate the **seniority** of the representatives. However, it is less likely to be in the public interest to disclose the names of individual members if they are members of such bodies as representatives of their organisations: any suggestion for example that they should be held personally answerable for the views which they had expressed would clearly be misplaced. I am not persuaded that releasing the identities of those attending the meetings is required in the public interest.”* (authors’ emphasis)

Case No A.2/00 Refusal to release copies of four internal performance reports

The applicant asked the Ministry of Defence for four internal MOD reports relating to departmental performance. The MOD refused citing exemption 1 (defence, security and international relations) and exemption 2 (internal discussion and advice). In relation to information concerning nuclear capability and security and intelligence matters the Ombudsman held that the possible harm caused by release was not outweighed by the “considerable public interest that might justify making that information more widely known.”

Case No A. 2/01 Refusal to release information about a London Transport project

The applicant asked for the data that was available to the Department of Environment Transport and the Regions Ministers when making their decision to award the Prestige contract to an international consortium of companies known as TranSys. In particular the applicant requested the data that had been used in the evaluation that is known as the public sector comparator. DETR refused, citing exemptions 2, 7, 14 and also exemption 13 (harm to competitive position of third party). The Ombudsman held that exemption 13 had been correctly cited and that although there was a strong public interest in matters relating to public transport in London, it did not outweigh the potential harm that could be caused to TranSys’s present and future competitive position if the information were disclosed.

Case No A.16/01 Refusal to release information about direct to consumer advertising

The applicant asked the Medicines Control Agency for any information they held relating to the topic of direct to consumer advertising. MCA refused to release a discussion paper citing exemption 2 (internal discussion and advice). The Ombudsman agreed that exemption 2 applied and considered that it was not outweighed by the public interest because the government policy was still very much evolving. The public interest in having access to additional information which contains comment and opinion was not strong enough to outweigh the potential harm to frankness and candour of future discussion.

Case No A.11/02 Refusal to provide information about the constitutional implications of joining the European Economic and Monetary Union

The applicant asked HM Treasury for copies of any paper in which the government had set out the constitutional issues involved in joining the EMU and which stated why they considered that those issues raised no objection to joining. The Treasury cited exemptions 2 (internal discussion and advice), 6 (effective management of the economy and collection of tax) and 10 (premature publication). The Ombudsman agreed that only exemption 2 was relevant. In considering the public interest he said that:

The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate. The whole

question of whether Britain should join the EMU is a sensitive and contentious subject which is already a matter of considerable public debate. I am of the view therefore that there is a strong public interest in disclosing any information that would assist the public understanding of this issue. The question here is whether the particular information would assist the public in this way. I do not believe that it would.

On the basis that the documents in question were prepared as part of the internal deliberative process and did not constitute a Treasury view, the Ombudsman agreed that *in this instance* the public interest in disclosure did not override exemption 2.

Case No. A.22/02 Refusal to provide internal operating guidance

The requester asked DVLA for:

- their internal instructions relating to the acceptability of identity documents; and
- their internal guidance about how to deal with compensation claims in cases of maladministration.

The Agency initially withheld the information citing exemption 2 (internal discussion and advice). Following the Ombudsman's investigation, it agreed to release much of the information, with the exception of the minutes of a meeting of the Inter-departmental Identity Fraud Forum. The Ombudsman accepted that those minutes could be withheld under exemption 2. He said that the IIFF was set up to help Government departments prevent and detect identity fraud and that, in his opinion, the public interest was best served by preventing the disclosure of any information that would undermine the effectiveness of that forum.

Case No. A.22/02 Refusal to release two pages of an investigation report prepared by external consultants

The requester (Mr G) worked for a university against which he made a complaint to the Higher Education Funding Council for England. He subsequently made a complaint to the Council about the way in which his complaint against the university had been handled. Independent consultants appointed by the Chief Executive produced a 16 page report. The requester was only given 14 pages. In refusing to provide the remaining two pages, the Council cited exemptions 8 (public employment, public appointments and honours) and 14 (information given in confidence). The Ombudsman upheld the decision not to disclose the relevant two pages of the report. He found that some of the information clearly fell within the ambit of exemption 8 and, although he did not believe that exemption 14 applied to the remaining information, he considered that it could be withheld under exemption 7. In considering the harm test, he said:

While I recognise that matters of this nature involve sensitivities, on the part of both Mr G and the Council, it is my view that the public interest is best served by maintaining the efficacy of the Council's system of auditing. That system is intended to ensure that higher education institutions manage themselves more effectively and that better value for money is obtained from public funds. In addition, I am conscious that the Council have disclosed to Mr G the subject matter of this part of the consultants' report. With this in mind, I do not consider that any possible public interest in having access to this information is strong enough to outweigh the potential harm to the integrity of the Council's audit system which might result from its disclosure, nor do I consider that non-disclosure will cause any injustice to Mr G.

Case No. A.02/03 Failure to provide copies of progress reports on records released into the public domain under the Open Government initiative

The requester asked the Cabinet Office for copies of reports made to the Secretary of the Cabinet collating returns by government departments showing items which had been released into the public domain under the Open Government Initiative. The Department withheld the information

citing exemption 2 (internal discussion and advice). The Ombudsman did not consider that the factual elements of the reports could be withheld under Exemption 2. He did, however, find that release of some of the advice and comment contained in the reports could potentially harm the frankness and objectivity of future advice and that such information could be withheld under exemption 2. Considering the harm test, he said:

It may be argued that because, after the completion of the present exercise, the Cabinet Office have no immediate plans to prepare further reports on the release of records, no harm can be caused by making available information about the deliberative processes applied when reaching the conclusions expressed in the reports. I do recognise, however, that while this particular reporting exercise is close to completion, future exercises of this kind may be hampered if those involved are unable to comment freely without worrying that their views could be made widely available. With this in mind, I do not consider that the public interest in having access to all of the additional, non-factual, information in the reports is strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure.

Case No. A.24/03 Refusal to provide information relating to a decision to amend legislation relating to the Public Interest Disclosure Act 1998

A registered charity asked the Department of Trade and Industry for several pieces of information relating to the Department's consideration of a judgment made in a recent High Court case and for details regarding the Department's decision to amend the legislation covered by the judgment. DTI provided the charity with broad explanations of their actions but declined to release any of the information contained within the requested documents, citing exemptions 2 (internal discussion and advice) and 4 (law enforcement and legal proceedings). On exemption 4, the Ombudsman found that the request was covered by that part of the exemption which did not contain a prejudice test. On exemption 2, she said that a balance clearly had to be struck between preserving the integrity of the deliberative process, in an area that remained both live and sensitive, and ensuring that the charity were provided with an explanation of the reasons behind DTI's actions and decisions. Having looked at the explanations already provided to the charity she was satisfied that this balance had been achieved. She considered that further disclosure would, in what she said was a finely balanced case, affect the frankness and candour of advice offered in similar circumstances in the future.

Case No. A.25/03 Refusal to provide information contained in background briefing for Parliamentary Questions

The requester asked the Cabinet Office for information about briefing prepared by officials in response to certain Parliamentary Questions asked since September 1999. The Cabinet Office withheld the information citing exemption 2 (internal discussion and advice). The Ombudsman found that the advice and recommendations contained in briefing for Ministers relating to Parliamentary Questions were covered, in principle, by exemption 2. However, her report suggested that the Department should apply the harm test in relation to each individual item of briefing, rather than refusing to provide any of the information sought on the principle that it was information of a type which should not be released (**authors' note: an example of rejection of a class claim**). She accepted that the provision of candid advice by officials to Ministers might be hampered if their views were in all circumstances to be made widely available. With that in mind, she did not consider that the public interest in having access to all of the non-factual information in the briefing notes was strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. She accepted that some of the information should be withheld, but found that there remained comments which, if released, were unlikely to harm the quality of any future advice, and that they should be made available.

Case No. A.39/03 Refusal to provide information about a VAT officer's visit to a trader

The requester sought access to a visit report and the working notes of a VAT officer who had visited the former company of the requester's son. All but one part of the visit report was disclosed by Customs, that part being a section which dealt with the workings of Customs' assurance systems and credibility techniques. Customs relied on exemption 6(b) (prejudice to the assessment or collection of tax or duties) and submitted that this was an example of the type of information internal to the revenue which ought to be kept confidential. The Ombudsman agreed, taking the view that the public interest would not be served by the release of the particular information.

Case No. A.40/03 Refusal to release a Ministerial Direction

In answer to a Parliamentary Question, the Secretary of State for Trade and Industry declined to place details of a Ministerial Direction, requiring Regional Selective Assistance of up to £3.75 million to be issued to Company X, in the House of Commons library. She cited exemption 13 (third party's commercial confidences). The Ombudsman found that the Ministerial Direction contained much material which, if released, would be likely to harm the competitive position of Company X. She considered that exemption 13 applied to that information. She recognised that there was legitimate public interest in how grants of public money come to be made, in particular where, as in this case, there was no requirement for the grant in question to be repaid. However, she concluded that the potential harm to Company X which would be caused by the disclosure of the information requested would outweigh the public interest in its release. In reaching this conclusion, she had taken into account the fact that other Ministerial Directions had been published by other government departments. However, she was of the opinion that they could be distinguished from the one in question in that there had been no suggestion that the information they contained was of a nature likely to cause damage to a third party.

Case No. A.5/04 Refusal to provide information about a decision to discontinue a procurement exercise relating to the electronic registration of schools

The requester (Mr S.) asked the Department for Education and Skills for information relating to the circumstances in which the Department had decided to discontinue their exercise to procure a panel of approved suppliers for electronic registration systems in schools. The Department declined to release any more information than that already in the public domain citing exemption 7(a) (prejudice to competitive position of a public body). The Ombudsman found that the Department had correctly cited exemption 7(a) in relation to the names of the seven companies originally shortlisted as part of the procurement exercise. She commented:

It seems to me that those short-listed companies invited to tender in this procurement exercise did so in the quite reasonable expectation that DfES would not, unless their tenders were successful, release their identities to third parties. I believe that, were DfES to be required to make such information about the identities of unsuccessful tenderers available, it would undermine the necessary working relationship between DfES and those seeking to enter commercial and contractual activities to the extent that it would be damaging to the work of the department.

On the application of the harm test, she said:

"I do not believe that this is a case where the public interest is strong enough to call for the release of this information. Any company seeking to take part in a departmental procurement exercise must be able to do so in the reasonable expectation that their identity, unless successful, will remain confidential. While I recognise that Mr S may wish to know the identities of the other six short-listed companies, I do not believe that this outweighs the harm that might be caused to DfES's ability to conduct future procurement exercises if such information were disclosed."

However, the Ombudsman recommended release of the number of short-listed companies who were and who were not able to meet the terms of the tender contract.

Case No. A.6/04 Refusal to release a copy of a document relating to the sale and transfer of a property portfolio

The requester asked the Coal Authority for a copy of a document concerning the sale and transfer of the former British Coal Corporation's Yorkshire housing portfolio to a housing association. The Coal Authority refused to disclose the information requested citing exemptions 13 (third party's commercial confidence) and 14 (information given in confidence). The Ombudsman upheld the application of exemption 13 (but not exemption 14). She recognised that the requester had a personal interest in this information being made available and that he believed that there was a wider public interest in knowing the details of the sale of such a large property portfolio by the Government to a private company. However, in the light of that fact that there was an explicit confidentiality clause in the agreement between the Corporation and the housing association, and the housing association's express wish that details of the sale should not be released, she did not consider that the public interest outweighed the potential harm that might be caused by the release of this information.

Case No. A.9/04 Refusal to provide information relating to vehicles suspected of involvement in the production of weapons of mass destruction

The requester sought from the Ministry of Defence information about two vehicles in Iraq which were suspected of involvement in the production of weapons of mass destruction, specifically details of the components of the vehicles which were of British origin and which companies produced them.

The department relied on exemptions 1(b) and (c) in refusing to supply the information (information received in confidence from foreign governments and harm to international relations).

The Ombudsman thought that exemption 1(c) applied, which contained no harm test, but also went on to consider the harm test applicable to exemption 1(b). In her view, there was no doubt at all that there was a substantial public interest in the public knowing whether these vehicles were or were not involved in the production of weapons of mass destruction. However, in this case the following public interest factors outweighed the public interest in disclosure:

- the fact that the originators of the material (within the United States government) had conveyed, on more than one occasion, that they did not wish the information to be disclosed (even where it was unclassified);
- the fact that the provenance of the vehicles and their possible use remained, at the time of her consideration, an unresolved and highly sensitive matter.

Case No. A.10/04 Refusal to release a National Audit Office report and other information related to the Al Yamamah project

The requester asked the Ministry of Defence and the Foreign and Commonwealth Office for information related to a 1992 National Audit Office report into the Al Yamamah arms contract, including the report itself. The Departments refused to release the information, citing exemptions 1 (defence security and international relations) and 2 (internal discussion and advice). The Ombudsman found that the NAO report itself could be withheld under exemption 15 (statutory and other restrictions). She also found that most of the related information could also be withheld under exemption 15 as well as exemptions 1 and 2. In addressing the public interest test in relation to exemption 1 she said:

As I see it, of crucial importance is the fact that the Al Yamamah project is still very much a going concern. ...Although the information being sought...is over ten years old I recognise that it continues to remain sensitive today. In balancing the public interest against the harm caused by disclosure, I therefore need to consider not only the harm that would be caused to relations between the United Kingdom and Saudi Arabian Governments but also the harm that might be

caused to the Al Yamamah project itself and the wider implications of causing that harm. The benefits of the Al Yamamah project to the United Kingdom economy are unarguably significant and I accept that there is a risk that any disclosure of information that may harm relations with Saudi Arabia could prejudice those benefits. On balance, therefore, I accept that the public interest in disclosing the information covered by Exemption 1 is outweighed by the harm that would be caused by making it available....

She gave similar reasons in relation to exemption 2.

Case No. A.12/04 Refusal to provide information relating to the inspection of a school

The requester, who was the proprietor of a school that had been inspected, sought the individual inspectors' evidence forms showing the time they had spent inspecting classes and lessons and certain Notes of Visits relating to earlier inspections of the school. The Office for Standards in Education relied on exemption 2 (harm to frankness and candour of internal discussion) in refusing to supply the information.

The Ombudsman took the view that the information in the evidence forms as to the time spent by the inspectors was factual material and therefore not within exemption 2. As to the Notes of Visit, the Ombudsman was critical of the department for effectively advancing a "class claim" for exemption. However, upon considering the specific information, the Ombudsman considered that information concerning recommendations contained in the Notes of Visit relied on frankness and candour, the future objectivity of which would be affected by disclosure. The final decision did not rest with the inspectors but with the department in accepting or rejecting the recommendations. In the circumstances, the public interest in disclosure was not sufficiently strong to outweigh the potential harm of disclosure.

Case No. A.18/04 Refusal to release information about a nursery's application for registration

The requester sought information concerning why a registration application from another local child care organisation was afforded a higher priority than her own. She particularly wanted to see the action plan and a list of dates relating to the progress of the other organisation's application. The Office for Standards in Education supplied information concerning the public register of approved nurseries and the inspection reports prescribed by law, as well as the conditions attaching to the other organisation's registration, and told the requester why the other organisation had rated higher. Otherwise, the Office regarded itself as under a duty to keep the details of the action plan and handling of particular complaints confidential. The Commissioner found that exemption 7(b) applied (harm to operations) (but not 14 and 15) and that it would be contrary to the public interest to release any further information. To make further information available would be to provide information that the provider would not have expected to be passed on to third parties and would damage the work of the government by undermining its relationship with applicants for registration.

Case No. A.21/04 Refusal to release a copy of the London Resilience Team report

The requester asked the Office of the Deputy Prime Minister for a copy of the London Resilience Team report, which contained findings and recommendations for improving the emergency planning and response arrangements across London for coping with a catastrophic terrorist incident. The Department refused to provide the report, citing exemptions 1(a) (national security or defence) and 2 (internal discussion and advice). The Ombudsman accepted that the Department were justified in withholding the information under the two exemptions that they had cited. She recognised the very strong public interest in matters that had the potential to cause harm to the security of London, and that independent scrutiny of such matters was a necessary part of the process of holding the Government to account. However, she considered that the benefits of disclosure were outweighed by the potential harm that could be caused, particularly to the security

of London. She considered that release of the information could allow terrorist organisations access to information about weaknesses and vulnerabilities in the ability of London to respond to a terrorist attack. In reaching her decision she had taken account of the steps that the Department had taken to keep Parliament and the public informed of the work being undertaken in relation to London's resilience.

Case No. A.29/04 Refusal to provide access to briefing for Ministers

The requester asked the Department for Culture, Media and Sport (DCMS) for access to advice given to their Ministers relating to an application made by United Christian Broadcasters for a licence to broadcast from the Isle of Man. The Department refused to provide the information, citing exemption 2 (internal discussion and advice) and, later, exemptions 1 (defence, security and international relations) and 13 (third party's commercial confidences). The Ombudsman found that exemption 2 applied to some of the opinion and advice and all of the policy analysis and discussion contained in the briefing and background relating to future broadcasting arrangements between the UK and the Isle of Man. In considering the harm test, she accepted that the provision of candid advice by officials to Ministers might be hampered if their views were in all circumstances to be made widely available. With this in mind, she did not consider that the public interest in having access to all of the information was strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. In view of her decision in relation to exemption 2, she did not consider the application of exemption 1. However, she also found that exemption 13 could be said to apply to some of the material not covered by exemption 2 which contained commercial confidences, which, if released could harm a third party's competitive position. She did not see that the harm arising from disclosure would be outweighed by the public interest in the release of that information.

Case No. A.32/04 Refusal to release copies of documents relating to Myra Hindley

The requester sought access to a file held by the Home Office relating to Myra Hindley. The Office exempted all the information under exemption 2 (internal discussion and advice) and exemption 4(d) (legal professional privilege). The Ombudsman considered that most of the information had been properly withheld although she was critical of the Office for not specifying the particular information covered by each exemption.

In respect of the public interest test applicable to exemption 2, the Ombudsman noted that most of the material was over five years old and that Myra Hindley had passed away. These factors, together with the substantial public interest in the subject, favoured disclosure. On the other hand, the degree of public interest was a two-edged sword, as the subject remained highly sensitive and controversial. As well, some of the information related to Myra Hindley's accomplice, who was still alive.

In a difficult case of this kind the Ombudsman thought it particularly important for officials to consider a range of options with complete frankness and without fearing that their thinking will be exposed to the public gaze. In the result, the public interest in disclosure did not outweigh the potential harm from disclosure of the non-factual matter that remained in issue.

Case No. A.33/04 Refusal to supply information relating to allegations of corruption

The requester sought from the Ministry of Defence information relating to a meeting between the department and the US State Department containing details of a discussion about alleged corrupt practices in the Czech Republic by the company BAE Systems. The Ombudsman accepted that the information fell within exemption 1(b) (prejudice to international relations). She accepted that there was a clear public interest in allegations of corruption concerning a major UK company. She also accepted that the sensitivity of information of this kind would diminish over time. However, on balance she thought that the public interest in avoiding the harm that would be caused to the conduct of international relations outweighed the public interest in disclosure for the reasons that:

- the information remained sensitive at the time;
- the ability of the department to carry out assessments of this kind with frankness and candour would be affected adversely.

Case No. A.36/04 Refusal to supply information relating to allegations of corruption

The requester sought information from the Export Credit Guarantee Department concerning allegations of corruption against the UK company BAE Systems in South Africa. The public interest questions arose under exemptions 7(b) (effective operation of the public service) and 2 (internal discussion and advice) that were relied upon by the department in refusing to provide some of the information requested.

The Ombudsman was critical of the department for making claims for blanket exemption rather than applying specific exemptions to specific information. She accepted that there was a public interest in disclosure of information relating to the procedures put in place by the department to minimise fraud in business supported by the department, and went on to say that these procedures were precisely the kind of internal guidance that the Code envisaged as being made available to enhance public understanding. In addition, there was a public interest in ensuring that a department backed by taxpayers' money was carrying out its functions in a proper manner.

Against these factors, the Ombudsman considered that there was a public interest in the department being able to carry out discussions in a frank manner, without public exposure, in circumstances where the matter remained sensitive and the issues live. As to exemption 7(b), the Ombudsman considered that disclosure of the department's internal procedures would provide helpful information to those who would seek to circumvent the requirements. The case was finely balanced but she held the information ought not, in the public interest, be released.

Case No. A.39/04 Refusal to provide copies of internal correspondence relating to allegations of corruption

The requester sought copies of cables sent by the British High Commission in South Africa to the Foreign and Commonwealth Office referring to allegations of corruption, bribery, or malpractice by BAE Systems in connection with the sale of arms to the South African government. The Office provided some information, but withheld other information under exemptions 1(b) (harm to international relations) and 2 (internal discussions). Details of conversations between South African Ministers and the High Commissioner were exempted under the former provision, and details of communications in the cables were exempted under the latter.

The Ombudsman accepted that there was a clear public interest in allegations relating to possible corruption by one of the UK's major companies. Against this, she found that disclosure would damage the ability of the department to discuss the situation with the necessary degree of candour and openness. As to the 1(b) exemption, the Ombudsman noted that the telegrams involving the South African government were marked "restricted", indicating that they were intended only for a limited readership, and she considered that their disclosure would undermine frankness and candour in diplomatic communications and impair confidential communications and candour between governments. She found, on balance, that disclosure of the information would result in harm that outweighed the public interest in disclosure.

Case No. A.43/04 Refusal to provide information about contacts between the Foreign and Commonwealth Office and the Jersey Attorney General relating to the freezing of trust funds

The requester asked for copies of documents relating to meetings between the FCO and the Jersey Attorney General concerning the freezing of funds whose beneficiaries included the Foreign Minister of Qatar. In refusing to provide the information, the FCO relied on exemptions 1(b) (harm to international relations), 2 (internal discussion), and 4(c) (law enforcement and legal proceedings).

In the Ombudsman's opinion, most of the information sought fell within exemption 4(c), which contained no public interest test.

As to the internal discussion and advice documents within the terms of exemption 1(b), the Ombudsman found that disclosure would cause harm to relations with Qatar, which was noted by the Office as a concern soon after receiving the original request. The potential harm outweighed any public interest in the public knowing whether there was any truth in a suggestion that the British government had put pressure on the Jersey authorities to drop the investigation. There was no need to go on to consider the application of exemption 2.

Case No. 45/04 Refusal to provide information about allegations of corruption with regard to the Lesotho Highlands Water Project

The requester asked the Department for International Development for information about allegations of corruption concerning this project as well as any information about the possibility of providing financial support to the Lesotho Government to assist the prosecution of those allegedly involved in the corrupt practices. Some of the information was withheld under exemptions 1(c) (information received in confidence from foreign governments), 2 (internal discussion and advice), and 4(d) (legal professional privilege). The Ombudsman accepted that there were strong public interest arguments in favour of disclosure, namely:

- in knowing how the governments of countries, from which multinational companies charged with bribery originated (these being the first such trials held in a developing country), responded
- the fact that UK companies were implicated in the trials and some of them had received financial support through the department
- information would greatly assist public understanding of these matters, in particular how the UK government responded

Against these factors, the Ombudsman balanced the fact that the UK government had not yet made a policy decision as to whether or not to support financially the Lesotho government in prosecution of the trials, this being a sensitive matter still unresolved. In addition, she was of the view that there would be harm both to international relations and to the frankness and candour of internal discussion. At least some of the international communications were marked "restricted" and there was a reasonable expectation that confidentiality would be maintained in respect of them. As to the letter, she considered that the value of internal discussions of this kind would be substantially reduced by disclosure of the contents, which were sensitive and contentious. In the circumstances, the Ombudsman found that the exemptions had been properly applied in the public interest.

Case No. A.1/05 Failure to provide information relating to a Ministerial Direction about the ordering of Hawk 128 aircraft

The requester sought access to documents from three departments relating to a Ministerial Direction overriding the advice of the Permanent Secretary of the Ministry of Defence regarding the order of 20 Advanced Jet Trainer Hawk aircraft. Access was refused, principally in reliance on exemption 2 (internal discussion and advice) and 13 (third party's commercial confidences).

The Ombudsman agreed with the decision of the departments and did not uphold the complaint. She pointed out that a reasonable amount of information had already been released into the public domain. She noted the requester's arguments that the existence of a disagreement was already public knowledge by reason of the issue of the Ministerial Direction, and no harm would be caused by further disclosure, and that secrecy in this case would undermine public confidence in the decision-making process. However, she thought that these arguments were outweighed by the potential harm to the frankness and objectivity of future advice which might result from disclosure, the public interest in which was weaker, given the information that had already been released.

There were a number of opposing views in this case and it was desirable that they should be discussed in private.

With respect to exemption 13, the Ombudsman found that disclosure would harm the commercial interests of the company BAE Systems and that this prospect outweighed the public interest in establishing how substantial expenditure on a contract such as this from the public purse came about. She regarded this case as analogous to Case A.40/03 (see above).

Case No. A.2/05 Refusal to provide background briefing notes prepared in response to Parliamentary Questions about a National Audit Office report on the Al Yamamah project

The requester sought access to the briefing notes, as described. A number of exemptions were relied upon in refusing to provide any information, including exemptions 1(a) and (b) (harm to national security and international relations), 2 (internal discussion), and 7(a) (harm to the competitive position of a public authority). The Ombudsman accepted that the same considerations were present in this case as in her earlier decision A.10/04 (see above). The Al Yamamah project was an ongoing concern with unarguable and significant benefits to the economy of the United Kingdom. The 1986 Memorandum of Understanding between the Saudi Arabian and UK governments required confidentiality with respect to classified information (in this case details of the financial arrangements of the project and other aspects of the contractual relationship between the Saudi Arabian government, the Ministry of Defence, and the company BAE Systems). Disclosure of this material in the briefing notes was considered to be likely to impair international relations and undermine frankness and candour in diplomatic communications. Under exemption 7(a), the Ombudsman considered that information concerning certain management fees and expenses of the Ministry could be withheld, on the basis that disclosure would prejudice the department's competitive position and could also damage the UK economy. The Ombudsman also considered that disclosing information about certain security personnel in Saudi Arabia had the capacity to undermine their safety, and this information was exempt under exemption 1(a).

Case No. A.3/05 Refusal to supply information about the provision of military training assistance to Colombia

The requester sought access to details of military training assistance provided by the Ministry of Defence and UK Armed Forces to Colombia in the years 2000 and 2003. Some substantial material was provided, but some was withheld under exemptions 1(a) and 1(b) (harm to national security and international relations). Essentially, the decision was very similar to case A.2/05 (see immediately above). The Ombudsman regarded the following information as exempt:

- information detailing the precise nature of the assistance, because it would harm national security by putting UK personnel based in Colombia at an increased risk of terrorist action from anti-government forces
- the details of the assistance and background information as to why it was thought to be required, because it had a direct bearing on the relationship between the UK and Colombia and disclosure could damage the relationship and compromise any further assistance

These factors outweighed the other public interests, accepted by the Ombudsman, in the public having information about the relationship with Colombia and the question of human rights abuses. Particularly was this so since a substantial quantity of information had been released to the applicant.

Case No. A.10/05 Refusal to provide information relating to a complaint made against the trustees of a charity

The applicant requested the Charity Commission to provide him with copies of information on which the Commission had based its conclusion that his complaint against the trustees of a charity

was not justified. The Commission relied on exemption 4(b) (prejudice to law enforcement) in declining to provide any of the information.

The Ombudsman pointed out that prejudice to the administration of the law included prejudice to regulatory and enforcement procedures. She was of the view that because all of the information came from, or related to, dealings with third parties, that disclosure “would undermine the ability of the Commission to undertake comprehensive and probing evaluations of complaints”. This harm to the public interest outweighed the public interest in the complainant having access to the information.

Case No. A.17/05 Refusal to provide information relating to the cost of insurance premiums for detention centres

The requester sought information concerning the increase in premiums charged for insurance cover for centres in which asylum seekers had been detained. The Home Office cited exemption 7(a) (prejudice to the competitive position of a public body).

The Ombudsman agreed that the exemption applied since disclosure could have undermined the negotiating position of the department with its contractors.

The Ombudsman agreed that there was a public interest in ensuring that departments are accountable for the spending of public money, but in this case disclosure could lead to a rise in expenditure of public money by way of the department having to increase payments to contractors, which would undermine the aims of ensuring taxpayers’ money was spent wisely and achieved value for money. On balance therefore, the public interest in applying the exemption outweighed the public interest in disclosure.

Case No. A.20/05 Refusal to provide details of meetings with members of the Czech Republic in relation to the sale of supersonic jets

The requester asked for details of meetings between the Secretary of State for Defence and representatives of the Czech Republic concerning allegations of bribery by BAE Systems. The Ministry of Defence said that there had been only one such meeting and withheld details under exemption 1(b) (harm to international relations).

The Ombudsman regarded the arguments in this case as finely balanced. There was a legitimate public interest in the public knowing whether there was any substance to the suggestion of corruption in relation to arms sales. The Ministry argued that the details of the conversation in question between the Secretary of State and the Czech Defence Minister had been frank and open and the views expressed by the Czech Minister had been provided in confidence, and also pointed out that the allegations were unsubstantiated, and the Ombudsman accepted these contentions.

In the circumstances, the Ombudsman considered that relations with both the Czech Republic and the United States would be harmed by disclosure, given the confidential tenor of the discussion. She also pointed out that disclosure of the particular information would add little of substance to what had already been reported on the subject. In those circumstances, the public interest in upholding the exemption outweighed the public interest in disclosure.

Case No. A.26/05 Refusal to provide information about the failure of the Government to proscribe an organisation

The applicant requested information as to steps taken and not taken to proscribe and list the organisation known as the al-Aqsa Martyrs' Brigade as a terrorist group. The Home Office cited exemption 1 (harm to security and intelligence and to international relations).

The Ombudsman found that exemption 1(b) (harm to international relations) relevantly applied. She accepted that whether or not a particular organisation should or should not be proscribed was a

subject of great public interest and that a strong argument existed that disclosure of the particular information would help to inform public debate in this area. Against that, however, she accepted the department's arguments that disclosure would harm international relations by:

- impeding negotiations or weakening the government's bargaining position,
- undermining frankness and candour in diplomatic communications, for example, in the appraisal of personalities or political situations, and
- impairing confidential communications and candour between governments or international bodies.

On balance, the Ombudsman regarded exemption 1(b) applying in the public interest so as to exempt the information from disclosure.

Case No. A.31/05 Refusal to provide information about meetings between representatives of BAE Systems and the Secretary of State for Defence and other defence Ministers

The requester sought access to documents relating to meetings between BAE Systems and either the Secretary of State for Defence, the Minister for Defence Procurement, or the Minister of State for the Armed Forces. Certain information was provided by the Ministry of Defence but other information withheld under exemptions 1 (harm to international relations or security), 2 (internal discussion), 7(a) (prejudice to a department's position), 13 (third party commercial confidence), and 14 (information given in confidence).

The information falling within exemption 2 consisted of internal minutes containing briefings for Ministers for meeting with representatives of BAE Systems, subsequent internal reports of those meetings, minutes outlining proposals for future procurement strategies, and an internal "company overview" document concerning BAE Systems. The Ombudsman considered that disclosure of this information would have affected the frankness and candour of advice offered by officials in future, similar cases. Nor was it possible to release the factual information in a meaningful fashion, apart from the other matter.

The matter exempted under 7(a) dealt with internal Ministry considerations in relation to specific commercial dealings with BAE Systems and resulting opinions and proposals from meetings between Ministry officials and BAE Systems representatives.

The Ombudsman applied the same approach as in Case No. A.17/05 in considering the question of public interest, applicable to both of these exemptions. The public interest in accountability concerning the expenditure of public moneys would be potentially damaged by disclosure of the information. Damage could occur both to the frankness and candour of internal discussions between Ministers and officials, but also to the ongoing commercial activities of the Ministry and its business partners. She regarded the public interest therefore as supporting exemption under exemptions 2 and 7(a). She also stated, briefly, that certain other information was properly withheld in the public interest under exemptions 1 and 13, but did not therefore need to consider exemption 14.

Case No. A.35/05 Refusal to provide information relating to meetings between the Secretary of State for Trade and Industry and the chairman of British American Tobacco

The requester sought access to copies of documents relating to a meeting between the Secretary of State and the chairman of BAT. The Department of Trade and Industry declined to supply certain information, citing exemptions 2 (internal discussion), 12 (personal privacy), and 13 (third party commercial confidence), as follows:

- exemption 2 was applied to briefing materials prepared for the Minister prior to the meeting and a record of the meeting;

- exemption 12 was applied to a biographical note of BAT's chairman;
- exemption 13 was applied to notes of what were said to be confidential commercial discussions between BAT and the government.

The biographical note was exempt under exemption 12, to the extent that the material contained in it was not in the public domain, the Ombudsman considered.

The Ombudsman accepted that there was "a real and growing" public interest in public information concerning smoking-related issues and, consequently, in discussions between government and representatives of the tobacco industry. The relevant documents contained information concerning frank discussion as to the business relationship between government and an important UK company relating to future strategy and involvement. It was important that such matters could be frankly raised by such companies and that internal briefings on such topics be prepared without the potential inhibition upon frankness and candour which could result from disclosure. Even so, the department had released the correspondence leading up to the meeting.

The Ombudsman considered that for the purposes of exemption 2, the harm to future frankness and candour of internal discussions within departments, and between Ministers and their departments, outweighed the public interest in making the information available. Similarly, the Ombudsman said that disclosure of the commercial information of BAT could undermine the trust between such companies and government in having their legitimate interests protected and could harm the competitive position of BAT within the intent of exemption 13.

The Ombudsman therefore took the view that the Department had properly applied the exemptions, noting that a quantity of information had been supplied to the requester and that a small amount of further information could also properly be provided to him.

Cases of partial disclosure and partial exemption

Case No. A.28/02 Refusal to release information relating to the New Deal 25 plus pilot scheme and the employment details of one of the scheme's managers

The requester (Mr F) attended a course run by a contracted training company as part of the New Deal 25 plus pilot scheme. He asked the Employment Service, among things, how much the training company were paid for providing the course and the average cost of the course per head; and for employment details of the pilot scheme's project manager. The Employment Service refused to provide the information citing exemptions 12 (privacy of an individual) and 13 (third party's commercial confidences).

The Ombudsman agreed that the Employment Service were justified in refusing to provide the employment details of the project manager under exemption 12. He accepted that the information sought was covered by the exemption, but said that it might nonetheless be capable of being disclosed if the person concerned consented (which in this case she did not), or if there was an overriding public interest. He pointed to paragraph 12.18 of the guidance on the Code which makes it clear that any override of personal privacy on the grounds of public interest needs very careful consideration. He said that the fact that Mr F was interested in the information did not, in itself, make it a matter of public interest. In his view, the public interest override in this instance was not sufficiently clear to prevail against the project manager's clear wish that the information should not be released.

As to the request for information about the cost of the course, the Ombudsman said that it should be normal practice for departments and agencies to disclose the price that they had paid contractors for providing a service. The information that Mr F. sought was very much the sort of information that should be made publicly available unless there was evidence that such a disclosure would prejudice the competitive position of the contracting company and/or the position of the department

in their future tendering activities. The Employment Service had provided no such evidence and simply said that the training company believed that the information requested was commercial in confidence. The Ombudsman said that there must be an expectation that information of this type be made available and, given the principles outlined above and the lack of any specific reasons why the disclosure of that information would cause harm, he did not consider that exemption 13 applied.

Case No. A.33/02 Refusal to provide copies of papers relating to the development of the Human Rights Act 1998

The requester asked the Lord Chancellor's Department and the Home Office to provide him with copies of documents relating to the development of policy leading up to the making of the **Human Rights Act 1998**. The Departments refused, citing exemption 2 (internal discussion and advice). The Ombudsman concluded that, while some of the information sought was in the public domain, exemption 2 applied in principle to much of the remainder. However, in practice, there still remained a substantial amount of information which could be released because the public interest in doing so would outweigh any harm. The Ombudsman commented:

The incorporation of the European Convention on Human Rights into domestic law formed part of the Government election manifesto commitment: it was accepted that this could potentially affect and influence many aspects of public life in this country. Clearly, there is considerable public interest in the 1998 Act; and I find it difficult to envisage a convincing argument against the principle of providing information which might help public understanding of how it evolved and the issues which were under consideration during its legislative passage. It should also be borne in mind that much of the information is over four years old and is unlikely to be as sensitive now as it was when it was first produced...

In the event I accept that...it is reasonable to argue that Exemption 2 does apply: and, in some instances, I am satisfied that the harm arising from its disclosure could outweigh the public interest in making it available. This applies in particular to any information in documents which reflects the views of Ministers. Nonetheless, in my view, there remains a substantial amount of information which, although covered by Exemption 2, should be disclosed because the balance of the 'harm test' does not similarly apply - especially taking account of the issues set out...above.

Case No. A.14/03 Refusal to provide information about the awarding of a contract to supply a stock of smallpox vaccine

The requester asked the Department of Health (among other Government Departments) for a number of pieces of information relating to the awarding of a contract to PowderJect Technologies PLC to supply a stock of smallpox vaccine; and for other information relating to the work of the sub-group of the Joint Committee on Vaccination and Immunisation (JCVI), which had given advice on the choice of the particular smallpox vaccine strain. The DoH declined to release most of the information sought citing a number of exemptions. The Ombudsman considered different components of the requests in turn. Some raised the public interest test. One concerned a submission which contained information about companies shortlisted in a procurement exercise. In considering the application of exemption 13 (third party's commercial confidences) the Ombudsman said that it was clear that those shortlisted companies provided their 'tender' details to the Department in the quite reasonable expectation that they would not be made available to a wider audience. The information provided by each of the companies contained commercial details the release of which could harm their competitive position. The Ombudsman did not consider that the public interest outweighed the harm that would be occasioned by the disclosure of the protected information. Another component of the request related to the minutes of a meeting of a sub-group of the JCVI. The Ombudsman considered that the names of the organisations (but not the individuals) present at the meeting should be disclosed, but that the minutes should not be (as disclosure would be potentially harmful to national security or defence), while another document reflecting the conclusions in a final report should be released.

Case No. A.29/03 Refusal to provide copies of evidence which had led the former Permanent Secretary to conclude that the Department for Work and Pensions had not deliberately misled the Social Security Advisory Committee about the effect of a proposed amendment to legislation

The requester sought copies of evidence examined by the Permanent Secretary of the Department for Work and Pensions in reaching her conclusion that Departmental officials had not deliberately misled the Social Security Advisory Committee over the effect of the replacement of invalidity benefit by incapacity benefit. The Department refused to provide the information citing exemption 2 (internal discussion and advice). The Ombudsman found that, in principle, exemption 2 applied to the information sought. She recognised that the provision of candid advice by officials to Ministers might be hampered if their views were in all circumstances to be made widely available. That being so, she did not consider that the public interest in having access to all of the advice and other non-factual information in the brief and background documents was strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. She accepted that some of the information in the category of advice and opinion should be withheld. However, there remained some information which, if released, seemed unlikely to harm the quality of future advice, since the material was over six years old and therefore very likely to have reduced in sensitivity with the passage of time.

Case No. A.13/05 Refusal to provide a copy of a report into allegations about the General Osteopathic Council

The requester sought access to information in a report dealing with the results of an investigation carried out by the Department of Health into the General Osteopathic Council (GOC). There were two categories of information which the Department sought to exempt under exemption 2 (internal discussion), being:

- comments on the registration system for osteopaths approaching retirement; and
- advice on steps that could be taken to avoid difficulties with the appointment of future Council Chairmen

The Ombudsman agreed that exemption 2 applied, *prima facie*, to both categories of information.

With respect to the comments on the registration system, she believed that there was considerable public interest in the registration system, particularly in the profession (that was why the investigation had been held), and that this public interest outweighed what she considered would be only very limited harm to the tendering of future advice. She recommended that this information be released.

With respect to the second category, the discussion as to future appointments, the information included reference to arrangements with other government departments and discussed various issues of policy, including the feasibility of amending legislation. She accepted that disclosure could hamper similar exercises in future, since those involved might not comment freely if they knew their views could be made widely available. This potential harm outweighed the public interest in disclosure for this category of information.

Case No. A.34/05 Refusal to provide information about a business breakfast meeting hosted by the Prime Minister

The requester sought information both from the Department of Trade and Industry (DTI) and the Cabinet Office relating to a decision to invite a representative of Powderject Pharmaceuticals to a business breakfast meeting hosted by the Prime Minister. He also sought information concerning any contribution or issues raised by that representative at the meeting, together with records of any discussion after the meeting relating to that representative and of any action taken as a result of

representations by that individual. The departments declined to provide the information sought, applying exemptions as follows.

The Cabinet Office applied exemption 2 (internal discussion) to information concerning the contribution made by that representative, as recorded in a note of the meeting.

Having read that minute, the Ombudsman considered that although there was a public interest in those present at such a meeting being able to speak frankly, in this case there would be very little harm caused to the public interest by release of the comments attributed to the representative of Powderject Pharmaceuticals, and that any potential harm was outweighed by the public interest in making that information available, being an interest in the openness and transparency of the lobbying process and in disclosing information about the relationship between the government and the company concerned. The Ombudsman expressed disappointment that the Cabinet Office did not accept this recommendation.

The Department of Trade and Industry also applied:

- exemption 2 to certain information concerning briefings for the meeting, and
- exemption 7 (harm to departmental competitive position) and exemption 12 (personal privacy) to protect the identity of the individuals referred to in the document,

while disclosing the information to the requester.

The Ombudsman considered that disclosure of the withheld information contained in the briefing note could hamper the future provision of candid advice by officials to Ministers and while recognising that there was a valid public interest in knowing how representatives of companies came to be invited to meetings, she was of the view that the public interest was best served by non-disclosure.

She also considered that exemption 12 applied to the identity of the attendees at the meeting and did not need to go on to consider exemption 7.

Public interest in disclosure outweighed potential harm

- Public interest in knowing how legal aid money spent
- Public interest in up to date cost estimates on spending of public funds on a proposed wetland habitat
- Public interest in knowing about the authentication of electronically filed documents at the Companies House
- Issue of significant public interest because considered by Select Committee and Parliament
- Public interest in impact of Ilisu Dam on human rights
- Information would assist public understanding of an issue subject to national debate
- Old documents containing information already in the public domain
- Where information relates to events in the past and previous disclosure of similar information had not caused harm
- Non-sensitive information already in the public domain
- Prices paid by agencies to service providers where no real commercial prejudice is demonstrated
- Information concerning the evolution of legislation and the issues raised during its enactment

Public interest in disclosure did not outweigh harm caused by release

- Protecting names of third parties (not officials) where information on the substance of the issue had already been released
- Sensitive issues discussed internally still on the agenda and which may still arise in future
- Premature release of commercial information could prejudice the sale of public assets
- Information is commercially sensitive and offers no more insight than the information already available on the issue
- Information relates to investigations carried out in a very rancorous manner
- Northern Ireland Prison service security at risk if information released
- Information relates to nuclear capability and security
- Government policy is still evolving on an issue
- Information relates to the identification and prevention of fraud
- Interference with a complaints system
- Interference with workings of a revenue agency
- Sensitive matter involving international relations
- Prejudice to anti-terrorist security measures
- Harm to third party private company
- Interference with negotiations of agency

Decisions of the UK Information Tribunal

As at the time of writing, there have been no decisions of the Information Tribunal considering the question of public interest under the FOI Act.

Decisions of the UK Information Commissioner

Decisions where the public interest in disclosure outweighed the harm likely to arise from disclosure⁵⁸

Case Ref: FS50073296 Refusal to provide hygiene inspection report⁵⁹

The requester sought access to the last inspection report of the Heronston Hotel conducted by Bridgend County Borough Council. The Council refused the request, relying on section 31(1)(g) (prejudice to the exercise of an authority's functions).

The Council argued that disclosure would prejudice its system of informal inspections under which advice and assistance was given to businesses. Businesses would not co-operate in open discussions with Council and the Council would need to undertake formal inspections. This, it was argued, would prejudice the purpose in section 31(2)(c) of ascertaining whether circumstances existed or might arise which would justify "regulatory action in pursuance of any enactment".

The Commissioner found that Council had not established the likelihood of any prejudice to the exercise of its functions. While disclosure might have a detrimental effect on the relationship between Council and some businesses, others would react positively to disclosure, which would bring greater clarity to and reinforce public confidence in the inspection system. Moreover, any prejudice would only apply to the informal system established by Council and would be very unlikely to prejudice the purpose described in section 31(2)(c) since Council would still have a duty to conduct formal inspections and to take regulatory action if warranted.

Accordingly, the Commissioner did not have to go to the next stage and consider the public interest. He did note, however, that in his view, there was an overwhelming public interest in disclosure of this category of information. It had been disclosed by other authorities and even published proactively on some Council web sites.

Case Ref: FS50074589 Refusal to provide minutes relating to the setting of school budgets⁶⁰

The requester sought all minutes of senior management meetings at the Department of Education and Skills in the period June 2002 to June 2003 relating to the setting of school budgets in England.

The department exempted most information from disclosure under section 35 (1)(a) (formulation and development of policy) and one minute under section 35(1)(b) (information relating to Ministerial communications), applying the public interest test in each case.

The Commissioner found that section 35(1)(a) applied to most of the material and that section 35(1)(b) applied to the single minute (it revealed one policy option which had been taken to a Cabinet Committee). However he took a different view of where the balance of the public interest lay in the case of the bulk of the documents. The Commissioner accepted that there was a public interest, in appropriate situations, of allowing policy development to take place away from public scrutiny, but this was not an absolute, just as the exemption was not an absolute one. In this case, release of the information would show how the department was responding properly to serious

⁵⁸ Decision notices can be accessed from pages beginning at <http://www.ico.gov.uk/eventual.aspx?id=8617>; summaries are sorted by month of decision

⁵⁹ **FS50073296**, 09/12/05, Public Authority: Bridgend County Borough Council, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_73296.pdf

⁶⁰ **FS50074589**, 04/01/06, Public Authority: Department for Education and Skills, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_75489.pdf (number of PDF is different from case reference number)

funding issues and would not have a detrimental effect on the frankness and candour of future debates, whether within the department or across the whole civil service, as the department had submitted.

In the view of the Commissioner, release of the information would not set a precedent. Information relating to the formulation of policy would be protected when it was sufficiently in the public interest that this be done. The fact that the department had published information explaining the policy did not support exemption. The information sought was relevant to the public interest in considering the processes and argument relating to the formulation and adoption of the policy. The Commissioner also noted that the strength of the public interest in non-disclosure had in this case diminished with the passage of time.

The Commissioner also rejected arguments that the public interest in accurate record keeping would be damaged by disclosure and that impartial civil servants might have their position compromised and the quality of their advice affected if their names were to be disclosed. He did not consider these results likely and took the view that these were management issues.

In all the circumstances of this case, the Commissioner found that the public interest in transparency and understanding decisions prevailed over the interests asserted by the department.

For the same reasons, the single minute was not exempt in the public interest. The Commissioner did not consider that release of the minute would undermine collective Cabinet responsibility. He considered that the public could distinguish between collective responsibility for policies adopted and the fact of disagreement at earlier stages of the deliberative process. The public appreciated that Cabinet might consider a range of policy options.

Case Ref: FS50068235 Refusal to provide information about the reasons for investigating a company⁶¹

The requester sought the reasons for a decision by the Department of Trade and Industry to investigate a company, Atlantic Property Limited, under the companies legislation.

The Commissioner accepted that the request was for information within the scope of section 30 (investigations by an authority). The information arose in an investigation which could lead to a prosecution and related to a confidential source of information. The Commissioner went on to consider where the balance of the public interest lay.

The Commissioner referred to the public interest in authorities being open, transparent and accountable. He stressed the public interest in a company knowing why it was being investigated, even in outline terms, which was all that the requester sought. He also highlighted the public interest in authorities being able to demonstrate that they are following good administrative practices.

He dealt with a number of public interest arguments against disclosure advanced by the department, as follows:

(a) He did not accept that release of the information would delay or significantly affect the investigation. While the company might debate and resist requests for information and seek to tailor answers that it gave, the department had already experienced difficulties in collecting information, and these would not be exacerbated. In addition, the department still retained its statutory powers to compel production of information.

⁶¹ **FS50068235**, 05/01/06, Public Authority: Department of Trade and Industry
http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_68235.pdf

(b) He accepted that there was a public interest in informants reporting matters to the authorities without fear of identification, but was not convinced in this case that providing the outline sought would identify the informant.

In summary, there was no overwhelming evidence to substantiate the department's concerns. The public interest in release outweighed that supporting non-disclosure.

Case Ref: FS50080353 Refusal to provide documents concerning the maintenance of standards in a university pharmacy course⁶²

The requester sought access to all documents relating to investigations held in the previous year concerning standards of the pharmacy courses at De Montfort University. Certain documents were released in full or in redacted form, but the university withheld certain other documents on the basis of sections 36 (effective conduct of public affairs), 40 (personal information) and 43 (prejudice to commercial interests).

The Information Commissioner said in respect of the section 40 exemption, that information could be released in suitably redacted form which would not identify students, lecturers and examiners, other than, in this case, senior staff, whose names were to be disclosed as having acted in an official capacity.

The Commissioner considered the public interest arguments under each of sections 36 and 43. The university argued that there would be a detrimental effect on internal debate which would lead to a weakening of the university and to the maintenance of standards and that there could be harm to professional reputation of persons and hence those persons' commercial interests for the purpose of section 43.

The Commissioner set out a number of public interest arguments both in favour of disclosure and non-disclosure. On balance, he considered that the public interest in disclosing the information outweighed the public interest in withholding it. Factors which apparently influenced the Commissioner were that allegations of improper conduct against publicly funded organizations should be investigated properly and that there should be proper accountability to the public in respect of both process and outcomes. In addition, the fact that the matter had already been widely reported in the national press weakened arguments against disclosure based on a detrimental effect upon the university. There were also public interests in maintaining the standards of professional training of pharmacologists and in permitting public debate on how standards for passing examinations were set.

Case Ref: FS50095304 Refusal to provide police investigation materials⁶³

The requester applied to Suffolk Constabulary for copies of a report of an interview between a senior officer and a constable, and a notebook entry by that same constable. The notebook entry included mention of an incident between the requester and the constable which had led to the requester being charged with a motoring offence, of which he was acquitted. The interview report related to a complaint made by the requester against the constable, which was investigated by the senior officer. The request was refused, the agency relying on section 30 (prejudice to investigations), section 31 (prejudice to authority functions), and section 40 (personal information).

The Commissioner found that section 30 was engaged with respect to the notebook entry, but given that the prosecution had concluded and there was no material which could prejudice any future

⁶² **FS50080353**, 07/03/06, Public Authority: De Montfort University, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50080353.pdf

⁶³ **FS50095304**, 06/04/06, Public Authority: The Chief Officer of Suffolk Constabulary, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50095304.pdf

investigation, there was no case for exemption in the public interest. The public interest in scrutiny of the agency's conduct prevailed. The same provision was not engaged with respect to the report since there was no allegation of any criminal misconduct by the officer.

Section 31 was engaged with respect to the report since there was an inquiry into alleged improper conduct by the constable: section 31(2)(b). However, the Commissioner did not accept that any harm would flow to any of the individuals involved (the complainant, the constable, or the investigating officers). The complaint and the results of the investigation (no action was to be taken) were known to all concerned. Nor would there be detriment to the community by way of persons fearing that incidents could not be reported in confidence, because although there was a public interest in the confidentiality of witness statements, here the only witness was the complainant and disclosure could be explained and justified on this basis. Since the relevant "harm" did not arise, there was no need to consider the public interest test applicable to this exemption. However, there was one paragraph, an *aide-memoire* of the investigating officer, which did satisfy the harm test and which it was not in the public interest to disclose.

Case Ref: FS50073980 Refusal to provide a copy of the Defence Export Services Organisation Directory⁶⁴

The requester sought access to the March 2004 edition of the DESO Directory. The Ministry of Defence supplied only a redacted copy, showing the structure of the organisation and post titles, but deleting names of staff, contact details, and locations of staff based in Saudi Arabia. The Ministry relied for exemption on section 21 (information accessible by other means), section 36(2)(c) (prejudice to conduct of public affairs), section 38 (health and safety), and section 40 (personal data).

The section 40 argument, while not abandoned, was not substantiated by the Ministry. The Commissioner considered the section 38 arguments very carefully, particularly the claims that discussing the names of staff could lead to danger for such staff from anti-arms activists and that disclosing even the general locations of staff in Saudi Arabia (who were already provided with security) would endanger them. The Commissioner stated that evidence of significant risk of endangerment would be necessary, and that the Ministry evidence was neither sufficient nor sufficiently persuasive to permit him to find that releasing names, contact details, and general locations of staff would endanger them. This was so even though the Commissioner had taken into account reports indicating that more violent action was being adopted by anti-arms protestors. Some information contained in the Directory was already in the public domain and had not led to staff being endangered. Therefore, section 38 was not engaged, and the public interest was not considered in relation to this exemption.

The Ministry stated that section 36 was at the heart of its case. The Commissioner accepted that the Under Secretary of State was the "qualified person" and that the opinion not to release was a reasonable one for the purposes of section 36(2)(c). There was a risk that disclosure could cause some disruption to DESO staff by the tying up of numbers and e-mail addresses and diverting staff from their work to deal with such problems.

The following public interest arguments were cited in favour of disclosure:

- there should be as much transparency as possible between defence companies and the Ministry, and disclosure of the Directory would guard against inappropriate closeness between such companies and Ministry staff, as well as making more visible movement between such companies and the Ministry;

⁶⁴ **FS50073980**, 19/04/06, Public Authority: Ministry of Defence, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50073980.pdf

- it would allow a better understanding of the Ministry, its involvement in overseas projects, and its relationship with the arms industry;
- it would further the accountability and transparency of public officials by allowing the public to understand their professional responsibilities;
- public confidence in the integrity of DESO officials could be improved;
- staff would be made more accessible to the public.

The Ministry put the following public interest factors against disclosure:

- the public interest in transparency and openness was sufficiently served by release of a redacted copy of the Directory;
- the web site gave a central point of contact as well;
- stringent rules already existed concerning the conduct and behaviour of staff;
- it was in the public interest for the work of DESO to be conducted effectively and without unwarranted disruption or delay;
- further publication would not conduce any more to the public interest than the arrangements already in place.

The Commissioner regarded the arguments in favour of disclosure as more compelling. He also noted that the Directory, which was widely distributed within the arms industry, was not protectively marked (e.g. as classified). He also considered that public authority employees should have the expectation that they will be publicly accountable and be identified in relation to their official duties, depending on their seniority and the nature of their role.

The Act's presumption in favour of disclosure was not displaced by a stronger public interest in maintaining the exemption and disclosure was appropriate.

The Commissioner accepted that at least some of the information was accessible to the public by other means (e.g. the Civil Service Yearbook). Since section 21 was an absolute exemption, the Ministry could continue to rely on this provision, but in light of the fact that disclosure of the balance of the information had been directed, the Commissioner could see no reason why the Ministry should continue to rely on this exemption. It was preferable to allow public access to a complete copy of the Directory.

Decisions where the public interest in disclosure did not outweigh the harm caused by disclosure

Case Ref: FS50063478 Refusal to provide information to a third party on payments made to an artist⁶⁵

The complainant requested documents and correspondence relating to any payments made to an artist for an exhibition staged at Queen's House at the National Maritime Museum (NMM). The Commissioner noted that NMM was involved in active negotiations with another artist for a project of a similar nature at the time the FOI request was made. He therefore decided that the premature disclosure of financial information about the project in question would prejudice NMM's

⁶⁵ **FS50063478**, 20/6/05, Public Authority: National Maritime Museum, <http://www.ico.gov.uk/documentUploads/63478%20DN.pdf>

bargaining position relating to its negotiation for that subsequent project. The public interest in maintaining exemption under section 43(2) therefore outweighed the public interest in disclosing the information for the time being. It was noted that while the potential prejudice to the artist's commercial interest would also be avoided as a result of the Commissioner's ruling, the artist's commercial interest was not, in itself, sufficient reason to maintain the exemption. The Commissioner highlighted that potential prejudice would diminish with time, in particular after NMM had completed the negotiations for the subsequent project and thus the risk of prejudice would at such a time no longer outweigh the public interest in releasing the information requested by the complainant.

This decision was appealed to the Information Tribunal which found that no commercial prejudice to NMM sufficient for the purposes of section 43(2) existed. In those circumstances, the Tribunal did not regard it as necessary or appropriate to consider the public interest argument.

Case Ref: FS50064699 Refusal to release personal information relating to an investigation⁶⁶

The complainant requested the Standards Board for England to provide all correspondence and other materials relating to a complaint against him. The Commissioner agreed with the Standards Board's refusal of this request based on the following grounds:

(a) Firstly, some of the requested information consisted of personal data of which the applicant was the data subject, and was therefore subject to the absolute exemption in section 40(1) of the FOI Act.

(b) To the extent some of the information was personal data of a third party, the Commissioner decided that it was absolutely exempt under section 40(2) of the FOI Act since disclosure would breach one of the data protection principles (as stated in section 40(3)). This was the principle in section 31 of the **Data Protection Act** to the effect that personal data of a third party will be exempt where the data was processed for the purposes of an agency's regulatory functions and disclosure would prejudice those purposes. In this case the relevant purpose was the protection of the public from dishonest or unlawful conduct by and the incompetence or unfitness of professional persons or of those carrying on another activity.

(c) The Commissioner applied a public interest test only under section 42 (legal professional privilege / confidentiality of communications). Certain of the requested information comprised legal advice obtained by the Standards Board in considering the allegations made against the complainant. While there was some public interest in disclosure, the Commissioner was of the view that there was always a strong public interest in maintaining this exemption. The Commissioner pointed out that the complainant disputed the allegations against him. In those circumstances, and given that the complainant would have recourse to the processes of the law if the Board upheld the allegations made against him, the public interest in the Board keeping the advice to itself outweighed any interest in disclosure.

(d) In addition, some of the information used in the investigation was absolutely exempt under section 44 of the FOI Act, since its disclosure was prohibited by another enactment, namely section 63 of the **Local Government Act 2000**.

⁶⁶ **FS50064699**, 01/08/05, Public Authority: The Standards Board for England, <http://www.ico.gov.uk/documentUploads/64699%20DN.pdf>

Case Ref: FS50067279 Refusal to release enforcement statistics of and revenue raised by fixed speed cameras⁶⁷

The complainant asked the Hampshire Constabulary to provide information about the number of offences detected at, and the revenue generated by, two fixed speed cameras on Mountbatten Way in Southampton. The Commissioner agreed with the Hampshire Constabulary that exemptions in accordance with section 31 (prejudice to law enforcement) and section 38 (likely to endanger health and safety of any individual) under the FOI Act should apply. Although the Commissioner recognised that the release of the requested information would enhance debate about the purpose and efficacy of speed cameras, he considered that there were stronger public interests in withholding the information as provided under the said exemptions, taking into account the likelihood that disclosure would prejudice law enforcement, increase risk to health and safety of an individual as well as lead to greater non-compliance with road traffic laws. The reasons given by the Commissioner were, in substance, those given in the Essex Constabulary decision (above), except that the Commissioner did not refer to potential vandalism of cameras. The Commissioner also noted that other Constabularies had in the recent past released site-specific information (though now reversing this policy), but pointed out that these examples were not precedents binding on other Constabularies choosing to exempt such information under the FOI Act.

Case Ref: FS50068017 Refusal to release enforcement information of and revenue raised by fixed speed cameras⁶⁸

The complainant asked the Hampshire Constabulary to provide him with information about the number of speeding tickets issued and monetary revenue raised by each camera site across Portsmouth, Gosport, Havant and Fareham in 2004/05. The Commissioner agreed that exemptions in accordance with section 31 (prejudice to law enforcement) and section 38 (likely to endanger health and safety of any individual) under the FOI Act should apply. The Commissioner was satisfied that the release of site specific information might prejudice law enforcement and endanger the safety of individuals and hence the public interest in maintaining the exemptions outweighed that in disclosing the information requested. The reasons given by the Commissioner were, in substance, those given in the previous Hampshire Constabulary decision (above), and in addition, the Commissioner in this case referred to a report by the Transport Research Laboratory which identified speeding as the biggest single contributor to road casualties and a study by University College London, which showed that the presence of speed cameras significantly reduced road injuries and deaths.

Case Ref: FS50068601 Refusal to release information on the location of fixed speed cameras, their enforcement statistics as well as revenue raised by each of these cameras⁶⁹

The complainant asked Essex Police to provide him with information as to the location of the 20 fixed cameras in Essex that caught the most drivers speeding, the number of drivers caught and the revenue raised from each location of these cameras. The Commissioner accepted that the exemptions contained in section 31 (law enforcement) and in section 38 (likely to endanger the health and safety of any individual) under the FOI Act should apply. These were both subject to a public interest test. The Commissioner recognised that there was a public interest in disclosing the information so as to improve public awareness and accountability of public authorities, and to enhance debate concerning the effectiveness and purpose of speed cameras. However, he was convinced that there was a stronger public interest in withholding the information requested,

⁶⁷ **FS50067279**, 02/08/05, Public Authority: The Chief Officer of Police of Hampshire Constabulary, <http://www.ico.gov.uk/documentUploads/67279%20DN.pdf>

⁶⁸ **FS50068017**, 02/08/05, Public Authority: Chief Officer of Police of Hampshire Constabulary, <http://www.ico.gov.uk/documentUploads/68017%20DN.pdf>

⁶⁹ **FS50068601**, 03/08/05, Public Authority: The Chief Officer of Police of Essex Constabulary, <http://www.ico.gov.uk/documentUploads/68601%20DN.pdf>

accepting that disclosure would prejudice law enforcement, increase risk to public safety and health and encourage greater non-compliance with traffic laws. This could arise as a result of disclosure of where the “active” cameras were sited, which would encourage speeding at “safer” locations, with potential risks to road safety and public health if more accidents were to result. The Commissioner also took into account that if the information were released, consideration might need to be given by the Police to installation of additional “active” cameras, resulting in further expenditure of public funds. In addition, the Commissioner accepted the argument of the police that disclosure could prejudice law enforcement in another way, namely that “active” cameras might be targeted by vandals for damage.

Case Ref: FS50068767 Refusal to release document containing legal advice⁷⁰

The complainant requested copies of several documents from the University of Cambridge. The university provided most documents but withheld one document which contained advice from the university’s Legal Adviser. After examining the document, the Commissioner found that the document did constitute legal advice provided to the university. The evidence also established that the Legal Adviser held qualifications entitling him to practise as a solicitor, so the necessary professional relationship existed. In addition, the Commissioner was satisfied that the university has not waived legal professional privilege by publicly disclosing the information. In balancing the respective public interests:

(a) The Commissioner referred to the general public interest in accountability of organisations to ensure that they were acting properly, to disclosure leading to better public debate and to disclosure leading to improved decision-making, as factors weighing in favour of disclosure.

(b) Against those factors he considered that there were strong public interests in maintaining what he termed the “established principle” of confidentiality of communication between lawyers and their clients so as to preserve the frankness and integrity of the advice given. He regarded this as itself a compelling factor against disclosure. In addition, the Commissioner considered that the rule should be able to operate with reasonable certainty in advance. The threat of disclosure could lead to advice being given which was not frank and balanced or to cases where the authority might not seek advice at all with respect to its exercise of its powers. This could lead to authorities being less able to comply with their obligations.

On balance, the Commissioner regarded the grounds against disclosure as stronger and upheld the university’s decision to exempt the document.

Case Ref: FS50066313 Refusal to provide details of legal advice on a complaint made against a franchise company⁷¹

The complainant requested details of the legal advice (including the briefs, details of all meetings, telephone calls, emails and letters) sought by the Department of Trade and Industry's (DTI) legal department from Treasury Counsel in relation to the complaints made about a franchise carpet cleaning company.

The DTI refused to disclose the information requested citing the exemptions provided by section 21 (information reasonably accessible by other means) and 42(1) (legal professional privilege) of the FOI Act. The DTI also refused to confirm or deny whether it held information about an investigation into the company's activities on the basis of FOI Act section 43(2) and (3) exemption

⁷⁰ **FS50068767**, 23/09/05, Public Authority: University of Cambridge, <http://www.ico.gov.uk/documentUploads/68767%20DN.pdf>

⁷¹ **FS50066313**, 24/10/05, Public Authority: Department of Trade and Industry, http://www.ico.gov.uk/documentUploads/New_Decision_Notice_66313.pdf

(no duty to confirm or deny if to do so would, or would be likely to, prejudice the commercial interests of any person).

In the view of the Commissioner, the submission and further material provided to Counsel as well as Counsel's advice were covered by legal professional privilege and that there was a public interest in permitting advice to be received on what remained a sensitive issue in confidence without the fear of disclosure affecting the frank and disinterested nature of that advice.

In addition, the Commissioner was convinced that exemption under section 43(2) and (3) was justified since:

(a) confirming that an investigation had taken place would affect adversely the business reputation of the franchisor and franchisees;

(b) denying the investigation would affect adversely other companies which had been investigated and in respect of which the DTI had neither confirmed nor denied that an investigation had taken place.

In the case of both of these exemption provisions, the Commissioner considered that the public interest in withholding the information would outweigh any public interest in the transparency of the processes of the DTI.

Case Ref: FS50072311 Refusal to provide information on the location of street storage boxes which were broken into⁷²

The complainant requested the number and locations of street storage boxes, used for the delivery of mail, that were broken into in Glasgow in the previous year. Royal Mail disclosed the number, but declined to identify the locations. Royal Mail cited the section 30 exemption (investigations and proceedings conducted by public authorities). It argued that in view of the widespread and increasing number of attacks on a particular type of street storage boxes, the release of the requested information would facilitate further attack on these boxes. This would in turn raise public anxiety about the security of their mails.

The Commissioner accepted that there was a public interest in the public having the requested information in order to be able to assess the risks of the postal system and to lodge compensation claims where mail had been affected. On the other hand, the Commissioner recognised Royal Mail's concern and identified the relevant public interests in exempting the information:

(a) the importance of Royal Mail being able to prevent and identify criminal activity and to prosecute offenders effectively;

(b) disclosure would seriously hamper these efforts and lead to increased risk of break ins;

(c) given such increased risk, the benefits of disclosure would be at the expense of the longer term strategy to eradicate these effects;

(d) disclosure would require Royal Mail to incur additional expenditure in upgrading the security of boxes being targeted.

For these reasons, the Information Commissioner considered that the public interest in withholding the information outweighed that in releasing it and thus the exemption should apply.

⁷² **FS50072311**, 24/11/05, Public Authority: Royal Mail Plc, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_72331.pdf (number of PDF is different from case reference number)

Case Ref: FS50066050 Refusal to provide enforcement data on speeding⁷³

The complainant requested from Northants Police information relating to the speeding offences recorded by the speed camera at Kelmash. He was refused, based on section 31 (prejudice to law enforcement) and section 38 (health and safety of an individual) exemptions.

The Commissioner agreed with the Police that each of the exemptions was *prima facie* satisfied, given the risks to law enforcement and, indirectly, to health and safety. He went on to consider the public interests involved.

He accepted that there was a public interest in the public debate concerning the adequacy of signage for speed cameras, but that disclosure in this case would not inform the debate and that the public interest in maintaining the exemptions outweighed that in disclosing the requested information.

The Commissioner considered that there were stronger public interests in favour of non-disclosure. First, that would prevent drivers from exploiting the information in order to speed when they might otherwise not have done so. There would also be damage to the Police policy of intermittent activation of cameras and an increase in fines and administrative costs if more cameras had to be activated on a continuing basis. There was also a risk of increase in road accidents, since speed was a not insignificant factor in causing such accidents.

In the result, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Case Ref: FS50068973 Refusal to provide information on the recruitment of social workers in Australia and New Zealand⁷⁴

The complainant sought information identifying the Council officers who went abroad to seek to recruit social workers and the legal advice given to Calderdale Council in respect of the recruitment process.

The advice was subject to section 42 of the FOI Act (legal professional privilege).

The Commissioner accepted that there was a clear public interest in the public knowing that proper legal advice has been sought, obtained and acted upon. Further, there was a strong public interest in the public being aware of how decisions are made and whether all matters have been addressed in the course of the decision-making process.

However, the Commissioner considered that the public interests in maintaining the confidentiality of legal advice were stronger and that the information was properly exempted. He accepted that disclosure could make it more difficult for Council to receive external legal advice in future and Council officers could be more reluctant to seek such advice, and these results would affect adversely the quality of decision-making. The Commissioner also took into account the existence of Council's Monitoring Officer, whose role in ensuring the fairness and lawfulness of decision-making should help assure the public that the proper processes had been followed.

⁷³ **FS50066050**, 24/11/05, Public Authority: Chief Officer of Northamptonshire Police, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_66050.pdf

⁷⁴ **FS50068973**, 24/11/05, Public Authority: Calderdale Council, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50068973.pdf

Case Ref: FS50067004 Refusal to provide information concerning Council vehicles⁷⁵

The complainant sought various details, including Vehicle Identification Numbers (VINs), of Oxford City Council vehicles registered with the Driver and Licensing Authority. The Council exempted all the information from disclosure under section 31(1)(a) (prejudice to prevention and detection of crime).

The Commissioner accepted that disclosure of the VINs could produce the necessary prejudice, because it could lead to vehicle cloning, but did not accept that disclosure of the other requested information could have any such effect. He considered as to the VINs that there was a strong public interest in maintaining the exemption, and could find no obvious public interest at all in disclosure, with the result that these details only were properly exempt.

Case Ref: FS50066308 Refusal to provide registration marks and Vehicle Identification Numbers of Council Vehicles⁷⁶

The complainant sought various details of vehicles registered to Carmarthenshire County Council. The Council provided all information other than registration marks and VINs, relying on section 31(1)(a) to exempt these details.

In conformity with the previous decision, the Commissioner regarded the VINs as exempt in the public interest, but did not regard disclosure of the registration marks as being likely to have the necessary prejudicial effect.

Case Ref: FS50066054 Refusal to provide information on customer service at a Post Office⁷⁷

The complainant requested details of service standards, waiting times and persons who gave up waiting at a specified post office at Clapham. The Post Office Limited held only information concerning service standards and exempted that information under section 43(2) (prejudice to commercial interests).

The information held was in the form of a number of “mystery shopper surveys” collected over the whole postal network, in which a post office employee, acting as a customer, collected information concerning service at the branches surveyed. That information gave a snapshot of standards at a given time and was necessarily transient in nature.

The Commissioner accepted the submission that this information engaged the commercial interests of the Post Office, which was increasingly losing its monopoly in many respects and was competing with other service providers in a consumer market, and that section 43(2) applied. He then considered the various public interests involved.

He accepted that there was a significant public interest in the openness and accountability of the Post Office in the use of public funds. In this case the benefit was lessened since the information was not robust or meaningful in assisting public understanding.

On the other hand, there were a number of elements of the public interest tending against disclosure, including:

⁷⁵ **FS50067004**, 29/11/05, Public Authority: Oxford City Council,
http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_67004.pdf

⁷⁶ **FS50066308**, 29/11/05, Public Authority: Cyngor Sir Gâr (Carmarthenshire County Council),
http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_66308.pdf

⁷⁷ **FS50066054**, 30/11/05, Public Authority: The Post Office Limited,
http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_66054.pdf

- (a) the information would disclose marketing strategies used at post office service counters;
- (b) the information was potentially misleading and could be used in such a way by competitors;
- (c) the information could be used detrimentally to the Post Office's interests in negotiations with potential franchisees of a local post office (this was not a strong factor, given the limited value of the information);
- (d) disclosure could prejudice the marketing strategies of post offices in selling a range of private sector goods and services.

These factors all pointed to real prejudice and would detrimentally affect the ability of the Post Office to compete on a level playing field. Reduction of branch services or even closure of the branch could result. They outweighed the public interest in disclosure and the information was held to be exempt.

Case Refs: FS50067984, FS50069727, and FS50080366 Refusal to provide legal advice⁷⁸

These were three requests for access to legal advice received by Thanet District Council which related to the permission for night flights at Kent International Airport. The advice was subject to legal professional privilege under section 42, and the Commissioner was required to apply the public interest test.

He referred to the public interest in the transparency and accountability of the decision-making process as a factor in favour of disclosure and noted that disclosure of the reasons for decision could lead to better decisions in the future. There was also a public interest in the furthering and participation in public debate.

Against these factors, the Commissioner regarded the established public interest in the maintenance of confidentiality in communications between lawyer and client as a compelling one. It promoted respect for the law, encouraged clients to apply for legal advice and allowed full and frank exchanges. Routine disclosure of legal advice might result in such advice not being as full and frank as it ought to be. It was in the public interest and vital for agencies to be encouraged to seek legal advice as to their legal obligations and in the conduct of their businesses. The disclosure of advice could discourage agencies from doing so for fear of disclosure of adverse material arising in the course of communications and could hamper the ability of agencies to carry out their functions and comply with legal obligations. There should be reasonable certainty relating to confidentiality and the disclosure of legal advice.

In this case the Council had sought advice for a specific purpose relating to performance of its legal obligations. The public interest factors against disclosure outweighed those in favour and the advice was withheld from the requester in each case.

Case Ref: FS50070183 Refusal to provide legal opinion on noise control⁷⁹

The requester asked for the legal opinion on which Richmondshire District Council based its noise control policy for the Croft motor racing circuit and related correspondence between the authority and Counsel. The Council applied section 42 (legal professional privilege) in refusing the request.

⁷⁸ **FS50067984, FS50069727, FS50080366**, 30/11/05, Public Authority: Thanet District Council, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_67984.pdf, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_69727.pdf, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_80366.pdf

⁷⁹ **FS50070183**, 15/12/05, Public Authority: Richmondshire District Council, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_70183.pdf

The Information Commissioner accepted that the operations of the circuit had been a matter of local contention for some years, particularly for those living close to the track. Disclosure would assist local residents in understanding the approach taken by Council in not prosecuting the owners of the circuit for possible breach of an agreement made with Council in 1998. It would also assist local people who were in the process of bringing their own action against the owners.

The Commissioner was of the view that the material sought was clearly subject to the exemption. He noted that Council had been receiving legal advice on possible breach of the 1998 agreement for some years and would continue to do so. It was in the public interest to receive such advice rather than possibly expending public funds on an unsuccessful prosecution. Disclosure could prejudice the ability of Council to receive appropriate advice in future which was clear and frank. This need outweighed the public interest in disclosure and the material was properly exempt.

The Commissioner did not regard it as in the public interest to release any of the earlier advices since the matter was an evolving one and the earlier advice remained relevant to the present position.

He also noted the applicability of the public interest exception in clause 12(5)(b) of **Environmental Information Regulations** 2004 (adverse effect on the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature). He considered that there would be such an adverse effect under that regulation and that the public interest test would operate in the same manner as under the FOI Act.

Case Ref: FAC0069504 Refusal to provide information about serious offences committed by diplomats⁸⁰

The requester sought information from the Foreign and Commonwealth Office about countries whose diplomatic staff in London had allegedly committed serious offences. The Office relied on section 27(1) (prejudice to international relations) in refusing to provide the information. The requester had originally requested names of the diplomatic staff involved, but withdrew that request.

The Commissioner was satisfied that release of the information would prejudice relations between the UK and the countries involved and went on to consider the question of the public interest.

The Commissioner thought that there was a considerable public interest in the public having information about criminal acts committed by persons who have diplomatic immunity and that publishing details of the countries involved could act as a deterrent against future offences being committed.

On the other hand, disclosure could lead to an adverse effect on relations with the countries involved, with the risk that they would not co-operate with authorities in the future, for instance, concerning waiver of diplomatic immunity and the withdrawal of diplomats accused of serious offences. This risk of prejudice was considered by the Commissioner to outweigh the public interest in disclosure.

The Commissioner noted the policy of the Office and the expectations of foreign missions that such information would not be disclosed. While he took these factors into account in the present decision, he suggested that the Office might wish to review its policy and communicate with foreign missions concerning the changes brought about by the FOI Act.

⁸⁰ **FAC0069504**, 05/01/06, Public Authority: Foreign & Commonwealth Office, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50069504.pdf (number of PDF is different from case reference number)

Case Refs: FS50066295, FS50070769 and FS50073129 Refusal to provide minutes of meetings of Board of Governors⁸¹

The requester sought access to minutes of meetings of the Board of Governors of the BBC which had been held to consider their response to the Hutton report. The request was refused, exemption being based on section 36(2)(b)(ii) (inhibition of free and frank exchange of views for the purposes of deliberation).

The Commissioner found, first, that the view of the BBC (which he regarded, in the form of the Chairman or any member of the Board, as the “qualified person” for the purposes of the exemption) was a reasonable one in finding that the information ought not be released; that is, it was within a range of acceptable responses and was not outrageous or absurd.

He recognised a clear public interest in the response by the BBC to the report by Lord Hutton into the circumstances surrounding the death of Dr David Kelly.

Against that, the Commissioner noted that the relevant minutes were headed “confidential”. There was no doubt that Board members regarded the meeting as being held in confidence, concerning as it did one of the major events in the history of the BBC and dealing with matters of the utmost sensitivity. Having reviewed the minutes, the Commissioner was of the view that had the participants thought their views concerning prominent figures in public life carrying out tasks of considerable public importance might be published they would not have said what they did or might have spoken in a more guarded manner. The public interest would not have been best served had the participants not thought they could speak freely.

In what the Commissioner regarded as an unusual case he considered that the public interest in applying the exemption outweighed the public interest in disclosure. Release would inhibit frank discussion in similarly significant circumstances in the future and the decision not to release was confirmed, while the Commissioner noted that some information about the BBC response (effectively the outcome of the meeting) was already in the public domain.

Case Ref: FS50078588 Refusal to provide a police report in an old investigation⁸²

The requester sought access from Avon and Somerset Constabulary to the Senior Investigating Officer’s Report to the Chief Constable concerning the alleged conspiracy to murder Norman Scott, allegedly involving a former prominent politician, Mr Jeremy Thorpe. The request was refused, the Constabulary relying upon sections 30 (information held for purposes of an investigation), 38 (endanger physical or mental health or safety) and 40 (personal data).

As to section 38, the Commissioner could find no basis for this exemption. He was not prepared to act on mere speculation. As to section 40, he found that disclosure would be unfair to individuals and that it would contravene the first data protection principle.

For the purposes of section 30, the Commissioner identified public interest factors for and against disclosure, as follows:

For Disclosure

⁸¹ **FS50066295, FS50070769, FS50073129**, 15/02/06, Public Authority: British Broadcasting Corporation, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50066295.pdf, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50070769.pdf, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50073129.pdf

⁸² **FS50078588**, 22/02/06, Public Authority: Avon & Somerset Constabulary, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50078588.pdf

(a) Release would or might demonstrate the vigilance and transparency of the police investigation. The Commissioner did not regard this as a strong factor, given that there had been a trial some years before and the investigation had already been exposed to public scrutiny.

(b) Mr Thorpe had occupied a prominent position at the time he was accused of a serious offence. However, given that he was acquitted, that much information had already entered the public domain and Mr Thorpe had not been in public life for some time, this argument carried no weight at all. This was not an instance of information being of possible relevance to the ability or propriety of a public figure to carry out their official duties.

(c) There may be an interest in prior release since the 30 year period under section 63(1) would expire in 2008 and the section 30 exemption would cease to apply.

Against Disclosure

(d) Possible media attention could result in a retrial by media in a case where there had been an investigation, a trial and an acquittal, with no suggestion of any miscarriage of justice. This would be wholly undesirable and not in the public interest.

(e) There was a public interest in avoiding distress to those who had been tried, and possibly to their families and friends, particularly since no useful purpose would be served by release.

(f) Information had been provided in confidence to the Constabulary and there was concern that people would be dissuaded from coming forward if the information were to be released. This was to be accorded some weight in a high profile case, although it would not apply always.

(g) The Commissioner entirely rejected as without foundation in the Act a policy of the Association of Chief Police Officers that information relating to an investigation would be released where it was relevant to a police "core purpose", but would rarely be disclosed under the Act.

(h) The existence of the "30 year rule" in section 63(1) of the Act indicated that there was a public interest in maintaining the exemption for that period unless there were strong public interest factors in favour of disclosure.

The Commissioner found that the public interest factors in favour of maintaining the exemption were stronger than those in favour of disclosure.

Case Ref: FS50065663 Refusal to provide documents concerning the proposed relocation of a medical practice⁸³

The requester sought documents and information regarding any proposed relocation of Farndon Green Medical Centre or to any proposed expansion on the Centre's present site. The Centre provided some documents; some minutes requested did not exist; other materials, particularly the Heads of Terms between the Centre and a private developer, were withheld under section 43(2) (prejudice to commercial interests).

The Commissioner noted that the withheld information remained sensitive, inasmuch as there was still the legal possibility that the Centre could withdraw from the proposed arrangement and enter into negotiations with competing firms in respect of the development. Disclosure could therefore advantage those rival firms and operate to the commercial prejudice of the developer which had signed the Heads, because those firms would obtain information concerning rent, rent reviews, repair obligations, and other relevant terms of lease. The section 43(2) exemption was therefore engaged.

⁸³ **FS50065663**, 03/04/06, Public Authority: Farndon Green Medical Centre, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50065663_V2.pdf

The Commissioner considered that there was a very strong public interest in disclosing how public funds were being used, what the funds were buying, and whether public authorities were obtaining value for money. There was also a public interest in disclosing information that demonstrated the diligence and integrity with which the procurement process had been managed.

However, these factors only related to information about the current state of the project. There was significant potential for circumstances to change and for new negotiations to commence. Disclosure would work against the public interest because it could hinder the successful outcome of such negotiations. At the current time, therefore, the factors supporting non-disclosure outweighed those in favour of disclosure, though this could well change once negotiations had been concluded.

Case Ref: FS50086598 Refusal to provide information relating to an informant⁸⁴

The requester sought access from Staffordshire Constabulary to documents concerning a person he alleged to be a malicious informant.

The Commissioner upheld the exemption based on section 30(2)(b) (confidential source of information). There was a clear public interest in establishing and maintaining the correct conditions under which members of the public feel able to come forward and provide evidence to the police. Though each case should be looked at on its merits, here disclosure would be likely to have a significant deterrent effect on other potential witnesses and therefore hamper the ability of the police to detect and prevent crime. These factors outweighed the public interest factors in favour of disclosure identified by the requester, including:

- assisting persons to understand action taken by a public authority;
- enabling an injustice to be righted;
- assisting the public understanding of the way in which public money is spent.

Case Ref: FS50064581 Refusal to provide a report on management of a sports arena⁸⁵

The requester sought access from Boston Borough Council to a report provided to the Council by a charitable company, relating to the company's management of a sports arena. The Council provided the requester with a redacted version of the report, relying on section 43 (commercial information) and section 41 (actionable breach of confidence) to exempt certain parts of the report from disclosure.

The Commissioner did not consider section 43, finding that section 41 applied so as to permit the deletions made to the report, because:

- there was a mutual understanding of confidence between the supplier of the report and the Council;
- the information had the necessary quality of confidence in that it was sensitive commercial, legal and financial information;
- the information had been supplied on the basis that it would not pass beyond the immediate recipients nor be used for purposes other than those for which the report was supplied;

⁸⁴ **FS50086598**, 06/04/06, Public Authority: The Chief Officer of Staffordshire Police, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50086598.pdf

⁸⁵ **FS50064581**, 06/04/06, Public Authority: Boston Borough Council, http://www.ico.gov.uk/cms/DocumentUploads/Decision_Notice_FS50064581.pdf

- disclosure would undermine and damage the commercial interests of the company, particularly with respect to reclaiming costs of construction, forecasted returns, third party funding, and ongoing pre-contractual negotiations and discussions.

The Commissioner then considered whether the public interest nevertheless overrode confidentiality for the purposes of section 41.⁸⁶ There was a public interest in accountability and transparency of the authority, including as to the application of public moneys. There was also a public interest in informing issues of public debate, particularly since there was considerable local interest in the construction and management of the project. Costs incurred by Council on the project would deplete Council reserves and might have a detrimental effect on the local community as a whole.

On the other hand, disclosure would reveal private information of bodies which were not public authorities. It could also affect the viability of the arena, potentially depriving the community of a valuable resource. As well, planned reclamation of some of the public funds already expended on the project could be prevented. Disclosure could also prejudice potential legal action and the development of future arrangements for the arena, affect the ability of the arena to gain further funding, dissuade further use of the arena by the community, and lead to financial difficulties for the managers. This might lead to a need for further assistance from the Council by way of financial guarantee, which would burden the Council and the local community. The Commissioner also noted that it was essential for Council to be able to receive commercial information of this kind on a confidential basis in order to be able to assess the level of risk involved in its ongoing relationship with the management company. In all of these circumstances the Commissioner found the public interest reasons for maintaining the exemption outweighed those in favour of overriding the duty of confidence.⁸⁷

⁸⁶ For a consideration of the principles involved in this context where section 41 contains no express public interest test but one is required at general law, see paragraphs 3.34 – 3.45

⁸⁷ The Commissioner could have added that on the case law at general law, there is a public interest in the very maintenance of confidentiality itself.

Public interest in disclosure outweighed potential harm

- Information relating to the system of hygiene inspections carried out by Council
- Information showing that a department is responding properly to serious funding issues
- Public interest in transparency and understanding decisions where detrimental effects not demonstrated
- Public interest in a company knowing why it was being investigated in circumstances where identity of the informant would not be disclosed
- The proper investigation of complaints in relation to the setting of standards for pharmacology students at a publicly funded university

Public interest in disclosure did not outweigh harm caused by release

- Prejudice to the negotiating position of an agency
- Potential vandalism of speed cameras, prejudice to road safety, and increased non-compliance with traffic laws
- Very strong interest in upholding legal professional privilege to ensure agencies seek and receive full and frank advice to assist the lawful performance of their functions
- Prejudice to the safety of the Royal Mail
- Disclosure of Vehicle Identification Numbers could lead to vehicle cloning
- Prejudice to the position of the Post Office in an increasingly competitive environment by disclosure of marketing strategies
- Prejudice to international relations concerning alleged offences by diplomats
- Inhibition of discussion in a matter of the utmost sensitivity to the BBC
- Where old matters which had already been litigated would be re-litigated for no useful purpose and with prejudice to individuals
- Protection of continuing availability of information from police informants

4 Scotland

Legislative Framework

- 4.1 The **Freedom of Information (Scotland) Act 2002** (Scottish Act or Act) was enacted on 28 May 2002. The right of access given to applicants under section 1 of the Act came into force on 1 January 2005.
- 4.2 The Act permits applications to be made for information held by a Scottish public authority. The definition of a “Scottish public authority” appears in section 3 of the Act and extends to the wide range of bodies and persons set out in Schedule 1 to the Act, including the Scottish Parliament, Scottish Ministers, local government agencies, numerous Scottish boards and agencies and health and educational institutions, and any person designated by the Scottish Ministers as a Scottish public authority as per section 5(1) of the Act.

Administration of the FOI Act

- 4.3 The Scottish Act is administered by the Freedom of Information Unit within the Scottish Executive Government.

Enforcement of the FOI Act

- 4.4 The Act is enforced and promoted by the Scottish Information Commissioner. If an applicant is dissatisfied with the response to a request, the applicant may seek a statutory internal review (section 20), following which the applicant has a right to apply to the Information Commissioner (section 47), who has the power to overturn the decision of a public authority and order disclosure.
- 4.5 A further appeal lies, on a point of law only, to the Court of Session from a decision of the Information Commissioner.
- 4.6 Complaints concerning the conduct of a review by the Information Commissioner may be made to the Scottish Public Services Ombudsman. However, the Ombudsman will only consider a matter if it has been fully investigated by the public authority concerned and will take no action in respect of a decision which has been made properly or when an appeal is available to the court.

Official Guidance

- 4.7 The web site of the Scottish Information Commissioner⁸⁸ contains decisions and a list of cases under current investigation by the Commissioner.
- 4.8 The Information Commissioner has published a series of Briefings which provide an overview of the view which the Commissioner takes of the exemption provisions in the Act (sections 25 to 41) and certain key

⁸⁸ <http://www.itspublicknowledge.info/index.htm>

concepts.⁸⁹ There is a specific Briefing dealing with the public interest test. These briefings are to be developed and amended over time as the Commissioner determines applications under the Act and the courts make decisions.

- 4.9 The Commissioner has published various booklets for the benefit of the public, one of which contains sample letters which members of the public might adopt in writing to authorities. This booklet is entitled “How to Make the Freedom of Information Act Work for You”.⁹⁰

Public Interest Provisions

- 4.10 The Scottish FOI Act applies a standard public interest balancing test to the majority of the exemption provisions. The language of the test is that information will be disclosed if, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by the public interest in maintaining the exemption: section 2(1)(b) of the Act.
- 4.11 The public interest provision is to the same effect as section 2(2)(b) of the UK FOI Act, although the language is slightly different. Both provisions require the public interest in maintaining the exemption to outweigh the public interest in disclosure, with the result that where the competing public interests are evenly balanced or where there is doubt about where the public interest lies, the information requested must be disclosed.⁹¹
- 4.12 **The exemption provisions of the Scottish FOI Act which are subject to the public interest balancing test are:**

⁸⁹ <http://www.itspublicknowledge.info/legislation/briefings/briefings.htm>

⁹⁰ http://www.itspublicknowledge.info/Documents/How_to_make_the_FOI_Act_work_for_you.pdf

⁹¹ See the Briefing by the Scottish Information Commissioner, “The Public Interest Test”, citing the speech in Parliament of the Scottish Justice Minister upon introduction of the FOI Bill.

Section 27	information intended for future publication;
Section 28	relations within the United Kingdom;
Section 29	formulation of policy by the Scottish Administration;
Section 30	prejudice to conventions of collective Cabinet responsibility, to the free and frank provision of advice or exchange of views, and the effective conduct of public affairs;
Section 31(1) and 31(4)	national defence and security and the armed forces;
Section 32	international relations and interests of the United Kingdom
Section 33(1)	trade secrets and commercial secrets of a person (including a Scottish public authority)
Section 33(2)	economic interests of whole or part of the United Kingdom and financial interests of an administration in the United Kingdom;
Section 34	investigations by Scottish public authorities, and proceedings arising out of such investigations
Section 35	law enforcement;
Section 36(1)	confidentiality of communications (legal professional privilege);
Section 38	in the case of personal data, where the first condition in section 38(1)(b) is satisfied by subsection 38(2)(a)(ii), or where the second condition mentioned in section 38(1)(b) is satisfied as described in section 38(3); see below for details;
Section 39	health, safety, and the environment;
Section 40	audit and efficiency examination functions of Scottish public authorities;
Section 41	communications with Her Majesty and exercise of Her prerogative of Honours.

More detail is provided below, but as an overview, section 38 requires that personal data be subject to a public interest balancing test:

- Where the information is personal data and the first condition in section 38(1)(b) is satisfied by subsection 38(2)(a)(ii) (the right under the **Data Protection Act 1998** to prevent processing likely to cause damage or distress (see sections 38(1)(b) and (2)). In other words, where an individual has the right to notify a data controller under section 10 of the **Data Protection Act 1998** to cease or not to begin processing, or processing for a specified purpose, or in a specified manner, any personal data in respect of which the individual is the data subject, on the grounds that (for reasons specified) such processing is causing or likely to cause substantial damage or substantial distress to him or another which would be unwarranted and disclosure would contravene the objection by the individual, THEN, if those circumstances apply, the Act requires the public interest balancing test to be applied to the exemption in section 38(1)(b), read together with section 38(2)(a)(ii) of the latter Act; more detail is provided below;
- Where the information is personal data and the second condition mentioned in section 38(1)(b) is satisfied. The second condition is that mentioned in section 38(3): where information is exempt from section 7(1)(c) of the **Data Protection Act 1998** (which gives the data subject a right of access to personal data) by virtue of any provision of Part IV of that Act (which sets out the exemption provisions of that Act). In other words, where the data subject would not have a right to access to

personal data under the **Data Protection Act 1998**, then the Act requires the public interest balancing test to be applied before providing access under the latter Act (sections 38(1)(b) and (3)).

- 4.13 The following provisions of the Act are **“absolute” exemptions under which the public interest need not be considered** and exemption is made out if the requirements of the section are satisfied (these exemptions are listed in section 2(2) of the Act):

Section 25	information reasonably accessible by other means;
Section 26	information the disclosure of which: <ul style="list-style-type: none"> • is prohibited by or under an enactment; • is incompatible with a Community obligation; • would amount to a contempt of court;
Section 36(2)	where disclosure would amount to an actionable breach of confidence
Section 37	court or arbitration records;
Section 38	information which constitutes: <ul style="list-style-type: none"> • personal data of which the applicant is the data subject (38(1)(a)); • personal census information (38(1)(c)); or • a deceased person’s health record (38(1)(d));
(and also)	information which constitutes personal data, and either: <ul style="list-style-type: none"> • disclosure contravenes any of the data protection principles where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998; or • in any other case, disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

- 4.14 Where a Scottish public authority claims that any information is exempt on the basis of an exemption subject to the public interest test, the notice of refusal must state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information: section 16(2) of the Act. This provision is virtually identical to section 17(3)(b) of the UK FOI Act.

- 4.15 The application of section 38(1)(b) is complex; see the section that follows.

Discussion of Section 38(1) and 38(2)(a)(ii)

- 4.16 In regard to the absolute exemption, section 38(1)(a):

There will be absolute exemption where the information is personal data and disclosure would contravene any of the data protection principles in the Data Protection Act 1998.

Exemption in the Public Interest

- 4.17 The exemption constituted by section 38(1)(b) and section 38(2)(a)(ii) when read together is not absolute and the public interest test will need to be applied where the information is personal data and disclosure would

“contravene” the right of an individual to prevent processing of personal data likely to cause damage or distress.

- 4.18 Section 38(2)(a)(ii) is curiously drafted, since it refers to disclosure contravening section 10 of the **Data Protection Act** 1998. Section 10 gives an individual a right to object to certain processing, but under section 10(3) the data controller may either comply or disregard the objection notice. An application may be made to the court under section 10(4) if an individual wishes to contest a decision to disregard the notice.
- 4.19 In that context, it is a misuse of language to speak of “contravening” section 10. One normally speaks of contravening a rule of law, a statutory provision or a prescribed norm of conduct. One does not speak of “contravening” a provision which gives a right to an individual to object and to another the power to disregard the objection.
- 4.20 The Briefing on section 38 by the Information Commissioner suggests that section 38(2)(a)(ii) will apply if the data subject has exercised the right to object under section 10.
- 4.21 It should also be noted that the UK Awareness Guidance No. 1 expressly states in respect of the equivalent in the UK Act to section 38(2)(a)(ii), that where an authority has previously accepted an objection notice as valid, it must reconsider that acceptance where an FOI request is received for the same information.
- 4.22 Neither the Briefing nor the UK Awareness Guidance deals with the situation where the notice has been regarded by the data controller or the court as not justified. If that has occurred at the time of an FOI request, does it follow that section 38(2)(a)(ii) can no longer apply since, at least to some extent, there will have been a prior determination against the individual in respect of the objection notice lodged and the individual would, to that extent, have lost the right to prevent processing? That is a difficult question which will require a clear decision of the Information Commissioner or probably the Court of Session to determine finally.
- 4.23 The difficulty is acute since section 38(1)(b) requires as a condition of exemption, that the information is personal data and that the first condition is “satisfied”. Part of the first condition is that the data falls within the definition of “data” in section 1(1) of the **Data Protection Act** 1998 and the second part is that the condition to be satisfied is that disclosure would contravene section 10 of that Act (see section 38(2)). The better view, it is submitted, is likely to be that disclosure will be held to “contravene” section 10 only in circumstances where the right to prevent processing continues, not where it has been lost by the decision of a court which will be binding upon a public authority. Section 10, it is submitted, will not be “contravened” where the data subject has a right to lodge an objection notice, but has not done so.
- 4.24 However, perhaps curiously, if the data controller has previously decided to disregard the objection notice, there would in principle be nothing to prevent the data controller from reaching a different conclusion at a different time where the matter had not proceeded to a determination by the court. This would simply occur in a reconsideration by the public authority and while a

decision to disregard the notice of objection will not itself lightly be overruled by the same authority, it is conceivable that this could occur from time to time.

The Harm Test: “Prejudice Substantially”

- 4.25 It is significant that in those exemption provisions of the Scottish FOI Act which contain a “harm” test, the requirement is satisfied if disclosure would or would be likely to “prejudice substantially” the particular function of government involved. The provisions are:

Section 27(2)(b)	
Section 28(1)	
Section 30	which refers also to “inhibiting substantially” the free and frank provision of advice and exchange of views
Section 31(4)	
Section 32(1)(a)	
Section 33(1)(b)	
Section 33(2)	
Section 35	
Section 40	

- 4.26 In this context, the term “substantial” is very likely to mean “weighty” or “significant” rather than the possible alternative meaning of “having substance” or “not immaterial”.

- 4.27 By way of contrast, the exemption provisions in the UK **Freedom of Information Act** 2000 contain a lesser requirement of “prejudice” only. Reference may be made to the following provisions of the UK Act:

Section 26(1)	
Section 27(1)	
Section 28(1)	
Section 29(1)	
Section 31(1)	
Section 33(2)	
Section 36(2)	which refers to the inhibiting only of views and advice rather than “inhibit substantially”
Section 43(2)	

- 4.28 This will have the effect, in practice, of making the exemption provisions in the Scottish FOI Act more difficult to satisfy, with a likely result that more information will be released under the Scottish legislation than will be the case under the UK legislation.

- 4.29 It should be noted that where a harm test appears in an exemption provision of the Irish **Freedom of Information Act** 1997, the requirement is normally that of “prejudice” (or equivalent term), rather than “substantial prejudice”. However, certain provisions of that Act refer to a more strict test, for example:

- Section 30(1)(a) (“serious disadvantage” to research);
- Section 31(1)(a) (“serious adverse effects” on financial interests or economy);
- Section 31(1)(b) (“undue disturbance” of ordinary course of business).

Case Law under the FOI (Scotland) Act 2002

4.30 As at the time of writing, there have been no decisions by the Court of Session pursuant to the right of appeal from decisions of the Scottish Information Commissioner under section 56 of the Scottish FOI Act. However, appeals in cases raising public interest issues were pending in decisions 018/2005, 057/2005, and 060/2005, which are summarised in the following section.

Decisions of the Scottish Information Commissioner

4.31 Key decisions of the Scottish Information Commissioner dealing with public interest questions are summarised in this section, though not all decisions dealing with personal information have been summarised.⁹²

Decisions where the public interest in disclosure outweighed the harm likely to arise from disclosure

Decision 015/2005: Failure to provide certain correspondence relating to the Edinbane Wind Farm proposal⁹³

The applicant sought access to a number of documents relating to the Edinbane Wind Farm proposal, being certain internal correspondences between officials offering opinions on what should be included in the final form of the proposal. Exemption was based upon section 30(b)(i) and (ii), the substantial inhibition of the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

The Information Commissioner pointed out that the standard to be met in applying these tests was high. The word “inhibit” suggested a suppressive effect, so that communication would be less likely, or would be more reticent or less inclusive. Some of the information was purely factual, and release would not have this effect. Even with respect to those items of correspondence which proffered opinions on whether particular information should be included in the final draft, the Commissioner did not regard disclosure of that information as having the necessary substantial inhibiting effect. Nor did he accept that certain of the information cast doubt on official policy and would have the necessary effect for that reason.

The Commissioner also mentioned that he would also have regarded this particular information as strongly in the public interest to be disclosed. He stated that decision-makers should be prepared to justify the basis on which planning decisions are based and to be accountable for the reliability of

⁹² Decision notices can be accessed from pages beginning at <http://www.itspubliknowledge.info/appealsdecisions/decisions/index.php>

⁹³ **Decision 015/2005, Mr John Hodgson, Chairman of the Skye Windfarm Action Group Ltd and the Scottish Executive,** <http://www.itspubliknowledge.info/appealsdecisions/decisions/Documents/decision015.htm>

any research upon which they depend. Such openness could only improve accountability and therefore increase public confidence in the decision-making process.

The information was therefore ordered to be released, with certain deletions for privacy reasons under the Act.

Decision 057/2005: Refusal to provide information relating to the commencement of sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990⁹⁴

The applicant requested from the Scottish Executive various categories of information relating to the commencement of sections 25 to 29 of the **Law Reform (Miscellaneous Provisions) (Scotland) Act 1990**. After the initial decision and internal review, much of the information was withheld from the applicant with the Executive citing a total of 11 exemptions, including section 28(1), section 29(1), section 30(a), (b) and (c) and section 38, being the exemptions subject to the public interest test.

The Information Commissioner considered that there were public interests involved in the general debate around the issue of competition in the legal services market and in the reasons for the postponement of the commencement of these provisions which were passed by Parliament some 15 years before. It was reasonable for citizens to question why legislation has still not been commenced after 15 years and citizens were entitled to know those reasons unless there was a greater public interest in keeping them secret. Particularly was this so when equivalent legislation came into force in England and Wales in 1990 and that in those jurisdictions there were still further plans being considered for increasing competition in the legal services market.

Having regard to those matters, he found that a substantial quantity of the information should be released in the public interest even where the exemption provision *prima facie* applied. In some cases where the information was less relevant to these public interest issues, the Commissioner upheld the decision of the Executive to withhold the information. In certain cases where the information related to the active and ongoing development of policy, the Commissioner accepted that the public interest lay in upholding the exemption under section 29(1)(a). In the case of certain information, the Commissioner upheld the exemption based on confidentiality of communications under section 36(1), although even here he found that certain other information was disclosable even though it did constitute confidential communications of the relevant kind.

Decision 060/2005: Refusal to provide information concerning a decision taken by Scottish Ministers not to “call in” a planning application⁹⁵

Two applicants made virtually identical requests seeking access to paperwork surrounding the decision taken by Scottish Ministers not to “call in” the planning application for a waste disposal and ecological conservation area at Trearne Quarry, Gateside, North Ayrshire. The Executive refused to supply the information on the basis that it was exempt under sections 30(a), (b) and (c).

With respect to the information withheld under section 30(a), the Commissioner found that the information did not fall within that exemption provision in any event. The document in question did not record the views or opinions of the Minister but was simply a record of advice sought and provided in relation to the Quarry by the Minister acting in his capacity as a member of the Scottish Parliament. There was therefore no information in that document which could undermine the convention of the collective responsibility of Scottish Ministers by revealing the Minister’s position on the issue.

⁹⁴ **Decision 057/2005, Mr William Alexander and the Scottish Executive**, <http://www.itpublicknowledge.info/appealsdecisions/decisions/Documents/decision057.htm>

⁹⁵ **Decision 060/2005, Mr David Elstone / Mr Martin Williams of the Sunday Herald and the Scottish Executive**, <http://www.itpublicknowledge.info/appealsdecisions/decisions/Documents/decision060.htm>

With respect to section 30(c), the Commissioner did not find that release of the information would or would be likely to prejudice substantially the effective conduct of public affairs in circumstances where planning permission for the development at the Quarry had been granted and there could be no prejudice to any decision of Council about the planning application by release of the information. The Commissioner pointed out that it was very rare for Scottish Ministers to become involved in the planning application procedure at such a late stage. Accordingly, the exemption provision was not activated.

The Commissioner did find that the exemption in section 30(b) was activated with respect to certain of the information. However, he repeated his views (set out in Decision 041/2005 – see above), that it was not a question of the routine release of internal communications but that, rather, the individual circumstances of each case must be taken into consideration and the public interest assessed on its own merits in each instance. The Commissioner found that in most cases the advice and expressions of opinion in the documents withheld under this exemption were of a factual nature; that is, documents summarising the proposal for Ministers, considering the implications of planning policies or legislation and making a recommendation for Ministers' consideration. The Commissioner did not accept that the release of such straightforward, factual advice would substantially inhibit officials from participating in such correspondence in future. The Commissioner pointed to the clear public interest arguments in enhancing public understanding of decision-making procedures and in decision-makers being prepared to justify the basis on which planning decisions are based and to be accountable for the reliability of any research upon which they depend.

However, with respect to certain information, the Commissioner found that it did contain exchanges which, if released, would be likely to inhibit the exchange of similar advice in future. Such information was *prima facie* exempt, and in two instances, the public interest in withholding the information outweighed the public interest in disclosure. However, even with respect to these additional documents, there was one in respect of which the Commissioner found that the public interest lay in disclosing the information. This was a document which summarised the planning department's conclusion on whether the proposed development at the Quarry constituted a significant departure from the structure plan. Given that there had been a departure, and given that the planning application received objections from more than 900 individuals, the Commissioner found there was a strong public interest in disclosing the reasons of the Executive as contained in the document.

Decision 065/2005: Refusal to provide information on the mortality rates of surgeons⁹⁶

The applicant journalist asked the Common Services Agency for the Scottish Health Service to provide him with information on the mortality rates of all surgeons since 2000, including the name of each surgeon, his/her specialty, the hospital in which he/she was based, the number of patients the surgeon had operated on, and the mortality rates by year. The CSA refused to release the information, relying on the personal information exemption in section 38 and certain provisions of section 30 (effective conduct of public affairs).

In a detailed consideration, the Information Commissioner found:

1. The information in question did constitute "personal data" within the meaning of section 1(1) of the **Data Protection Act 1998**, since it identified specific individuals, that is, the surgeons involved, their specialty, the hospital in which they operated and the mortality rates. For the purposes of section 38(1)(b), he then considered whether there was a breach of the first of the data protection principles, which was the one relied upon by the CSA. The Commissioner did not regard the data as sensitive personal data and therefore there was no requirement that one of the conditions

⁹⁶ **Decision 065/2005, Mr Camillo Fracassini and the Common Services Agency for the Scottish Health Service**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision065.htm>

in Schedule 3 of that Act was required to be met. For the purposes of the first data protection principle, there were two elements:

- personal data must be processed fairly and lawfully;
- it must not be processed unless at least one of the conditions for processing in Schedule 2 of the Data Protection Act is satisfied.

The Commissioner had to consider whether processing of the data would be fair, and in this regard, he referred to his own guidance on the topic where he had stated that it was likely to be helpful to ask whether the information related to the private or public lives of the surgeons. According to the guidance, information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information relating to an official work capacity should normally be provided unless there is some risk to the individual concerned. In this case, the personal data related to the professional lives of the surgeons. He took a similar approach to the argument that release of the mortality rates would be potentially misleading and distressing to the surgeons and could damage their reputation, standing or professional practice. Once again, the Commissioner considered that a much stronger case for exemption arose if there was damage or distress to an individual in a personal or private capacity. The Commissioner pointed out that the exemption should not be used, for instance, so as to spare officials embarrassment over poor administrative decisions, or in this case, potential embarrassment over mortality rates. The Commissioner regarded this decision as consistent with an FOI case in New York and one decided by the Queensland Information Commissioner.⁹⁷

In those circumstances, although the information was personal data, the Commissioner found that disclosure would not be unfair or unlawful within the first data protection principle and therefore the information was not exempt under section 38(1)(b).

2. The Commissioner considered the argument of the CSA that disclosure would lead to a situation where clinicians would be unwilling to be frank in reporting errors and being critical of their own and their colleagues' performance if they felt there was a possibility of disclosure. However, the Commissioner pointed out that the request did not encompass any comment, opinion, reason or conclusion regarding the performance of surgeons in respect of mortality rates and that disclosure would not include any frank advice or exchange of views. There was, in the present case, simply no input by surgeons by way of frankness in the reporting of errors or in supplying their views on the performance of others; this was not a case of clinical audit which would require such co-operation, but simply one of data collection. The Commissioner, accordingly, found that no case was made out for exemption under section 30(b)(i) or (ii).

3. The Commissioner rejected the argument of the CSA that release of the information would impact adversely upon the collection of data on clinical performance and would undermine the willingness of clinicians to take part in clinical audit to the extent of substantial prejudice to such activities. Again, the Commissioner distinguished between data collection and the process of clinical audit; it was only the latter which required co-operation and was a voluntary system involving individual performance appraisal by self-reporting and peer review as well as other relevant matters. The Commissioner expressed a preliminary view that if it was clinical audit information which was being sought, then it was highly unlikely that such information would be released. In this case, the Commissioner having regard to other material which had been previously published, said that the conclusion was not warranted that improper interpretation or publication of the results might occur in the media. It was not likely that all media outlets would be unaware of or would ignore relevant contextual information which would have a bearing on the mortality rates. As well, the Commissioner could not find instances of non-co-operation and negative impact on

⁹⁷ See **Coulthart and Princess Alexandra Hospital and Health Service District** (2001) 6 QAR 94, <http://www.austlii.edu.au/au/cases/qld/QICmr/2001/6.html>, discussed in chapter 8

information gathering processes following earlier publications in March 2005 which included non-risk adjusted data for individually named surgeons. The true position was that mortality data was routinely captured by health organizations and would not be adversely affected by disclosure. The Commissioner therefore took the view that release of the information would not or would not be likely to prejudice substantially the process of collection of surgical mortality data, nor could he conclude that participation in the separate process of surgical audit would be substantially prejudiced.

Accordingly, he found that the exemption in section 30(c) did not apply.

4. It was therefore not necessary for the Commissioner to consider the public interest test, but he went on to make certain further observations nevertheless. The Commissioner pointed to the Scottish Ministers' Code of Practice under section 60 of the FOI Act which had the following features concerning the public interest:

- In deciding whether a disclosure is in the public interest, authorities should not take into account the risk of misinterpretation of the information;
- Nor should the authority take into account possible embarrassment to government or other public authority officials.

5. Moreover, the Information Commissioner pointed out that where it was within the capacity of the public authority to ensure that accurate information is gathered or is checked for accuracy, then it cannot be proper to maintain that it is not in the public interest to provide information because of inaccuracies; such an approach would lead to the unusual result of assisting public authorities who had not checked data or who had not set up systems to ensure that the data submitted was accurate, whereas, by contrast, those authorities who had ensured accuracy would be required to release information.

Further, it was in the public interest to draw attention to the fact that inaccurate figures were being gathered in a particular context. He pointed out that at this stage, risk-adjusted data could be produced and it was therefore a question of whether any data at all would be given out; it was not a choice between unadjusted data or risk-adjusted data but between unadjusted data or no data at all. Even with unadjusted data, there was some benefit to individual patients being able to consider the mortality rate of particular surgeons to be directly informed about matters such as contributory risk factors which might be relevant to their particular circumstances.

In the circumstances, if the Commissioner had been required to consider public interest, he would have taken the view that the public interest lay in release, having regard to the decisions in other jurisdictions and also the Ministerial guidance on the interpretation of the public interest test. However, if in any case, harm extended beyond such matters to the compromise of patient health, then he would in such a case be likely to come to a contrary view.

Decision 034/2006 Refusal to provide information concerning costs of roofing works⁹⁸

The applicant sought certain information from Dundee City Council concerning the re-roofing of a house at an address in Dundee. Apart from providing the list of tender applicants, the Council refused to provide the balance of the information, stating that some of the information could not be found in written form and relying on the exemptions in section 33(1)(a) (trade secrets), section 36(2) (actionable breach of confidence) and section 33(1)(b) (substantial prejudice to commercial interests).

⁹⁸ **Decision 034/2006, Mr David Smith of Pentland Homeowners Association and Dundee City Council**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6034.htm>

The information relating to the successful tender bid had been exempted as a trade secret. The Commissioner considered, for the purposes of this exemption, the decision of the Irish Information Commissioner in **Henry Ford**⁹⁹ which he pointed out considered the case law on trade secrets and confidentiality from a number of jurisdictions. The Commissioner took the view that any trade secret element in the tender materials would relate to the way in which the prices for each component were calculated, rather than the actual prices themselves. The method of calculating the prices could not be worked out from the information available in the document which had been exempted and in circumstances where the contract had been agreed in 2000, there was nothing in the document of use or value to the tendering company's competitors. The information withheld was not a trade secret and the Commissioner did not have to consider the public interest in relation to that question.

With respect to the confidentiality exemption, the Commissioner repeated his view that it was the method of calculation of the prices which might have some element of confidentiality. This method of calculation could not be established from the information in the documents withheld and there was therefore not a strong argument that the information in question had the necessary quality of confidence, particularly since six years had passed. The passage of time also meant that the prices quoted would not any longer be a guide to any submission for a similar tender in future and for that reason, the Commissioner took the view that a court would be unlikely to uphold an obligation of confidentiality for information which was now only of historical interest. In addition, there was no real basis for a conclusion that disclosure of that information would cause harm to the contractor. Accordingly, the exemption in section 36(2) was not engaged.

In respect of section 33(1)(b), the Commissioner referred to his briefing to the effect that the effect of disclosure should be to cause real, actual and significant harm which would have to occur in the near future not in some distant time. Again, the passage of time had reduced the potential value of the information to any competitors for future tenders as prices would undoubtedly have changed. The Commissioner did not accept that disclosure of the information concerning the successful tenderer would cause substantial prejudice to that tenderer. He reached the same conclusion with respect to the information concerning the unsuccessful tenderers.

While the Council did not specifically raise an argument of prejudice to its own interests, the Commissioner did consider the arguments in relation to the exemption in section 30(c) of the Act (substantial prejudice to the effective conduct of public affairs). The Commissioner regarded as unrealistic an argument of Council that Council might be required to withdraw from a contract on the grounds that a member of the public had sought out a cheaper contractor who might provide better value to the Council, after consideration of the contractor's experience, financial standing and other relevant matters. Nor did the Commissioner accept that disclosure of the information at this time (as distinct from six years earlier) would damage business confidence. There was a responsibility on Council to work with suppliers and take into account the new information culture introduced by the Act so that existing contractors would be aware of the extent to which information could be protected on the grounds of confidentiality now and in the future. Accordingly the Commissioner rejected the argument that release of the information at this time would damage business confidence to such an extent that it would seriously prejudice the Council's ability to attract sufficient tenderers to secure best value. The Commissioner did not accept the likelihood of potential suppliers being deterred on these grounds.

⁹⁹ See the discussion of this decision in Chapter 5

Decisions where the public interest in disclosure did not outweigh the harm caused by disclosure

Decision 007/2005 Refusal to provide information relating to fit person assessments¹⁰⁰

The applicant sought a list of questions and answers used by the Scottish Commission for the Regulation of Care (the Commission) when conducting a fit person assessment in respect of carers of children. The initial decision and the internal review of the Commission was to refuse the request on the basis that disclosure would prejudice substantially the exercise by the Commission of its regulatory functions. The Commission relied on sections 35(1)(g) and 35(2)(a) to (c) to exempt the information.

On appeal to the Information Commissioner, the decision of the Commission was upheld. The Information Commissioner agreed that releasing into the public domain the questions and answers would significantly reduce the benefit of a fit person interview, since a person being interviewed as to their fitness to register a care service would be able to study the questions and answers in advance. This would result in the process not fulfilling its basic function of testing a service provider's knowledge and ability to answer questions.

The Information Commissioner said that in order for a public authority to succeed on this exemption ground it would have to show that release of information would prejudice substantially the interest in question: it must be able to show that the damage caused by disclosure would be real or very likely (not hypothetical) and that the harm caused must be significant (not marginal) and would have to occur in the near future (not in some distant time). The Commissioner regarded this aspect of the section satisfied and went on to consider the public interest test.

It was argued on behalf of the applicant that questions and answers should be provided in order to allow an applicant for registration of a child care service to prepare properly for interviews. However, while acknowledging that if the interview was only for the purposes of demonstrating knowledge, there might be a stronger argument for disclosing past questions and answers, if (as was the case) the questions were intended to assess a person's character and integrity, physical and mental fitness, qualifications, skills and experience, the Commissioner considered that it was difficult to see how the questions and answers could be disclosed without substantially affecting the Commission's ability to assess the suitability of relevant applicants. The result would be to impede seriously the Commission's ability to regulate care services and such an outcome could not be judged to be in the public interest; if it led to inexperienced or even inappropriate people being regarded as fit for the role of care provider, then this could put people using care services at significant risk.

In the circumstances, the Commissioner regarded the public interest in maintaining the exemption and therefore withholding the information as overriding and outweighing any public interest in disclosure.

Decision 014/2005 Refusal to provide access to certain property services files¹⁰¹

The applicant sought access to certain property services files held by Perth & Kinross Council. The Council provided access to much of the material sought, but exempted 11 items of correspondence. In its letter, the Council referred to various sections of the FOI Act but did not specify which subsections or paragraphs of each section applied, nor did it give reasons as to why each exemption applied to each document withheld. Moreover, the Council did not set out its analysis of the public

¹⁰⁰ **Decision 007/2005, Mrs S and the Scottish Commission for the Regulation of Care (Care Commission)**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision007.htm>

¹⁰¹ **Decision 014/2005, Mr Steven Jarvis and Perth & Kinross Council**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision014.htm>

interest. In the internal review, the Council gave somewhat more detail as to the precise grounds relied upon under the relevant sections, but still did not provide a detailed analysis of the exemptions applied.

The information in question related to two competing applications for planning consent for supermarkets in Crieff. The Council had an interest in the land affected by both proposals.

In its submissions to the Information Commissioner, the Council argued that to disclose details of unconcluded property transactions could prejudice the commercial interests of third parties with whom the Council transacted and was liable to prejudice seriously the Council's own interests as a corporate body required to operate in the commercial property sector. If there were to be disclosure, it was argued that there was a genuine risk that persons and entities would be reluctant to enter into negotiations with Council. The Council also pointed to correspondence with a third party as to several of the documents withheld in which that third party argued that its correspondence should be treated as confidential and that disclosure prior to the conclusion of negotiations would be prejudicial to its interests. Ultimately, the Council relied on:

- Substantial prejudice to its own commercial interests under section 33(1)(b);
- Substantial prejudice to the effective conduct of its affairs under section 30(c).

Council accepted that there was a public interest in the disclosure of information in connection with its property transactions, that the public had a right to know about the Council's use of money and the management of its property resources and that the Council be open and accountable in respect of its decision-making processes. However, the Council also argued that the current transactions were incomplete and that premature disclosure of information would put at risk the appropriate conclusion of the transactions. It argued that the public interest would be better served in the present case by allowing the process to run its due course. The Council further argued that there was a public interest in ensuring that potential transactions were considered fairly and equitably and in a professional manner and in ensuring that this was done without inappropriate public pressure at times such as this. It did not consider that all Council business should be conducted in full view of the public at all times.

The Information Commissioner accepted that the Council had "commercial interests" within the meaning of section 33(1)(b). He also accepted that the commercial interests of an authority (or a third party) could be harmed in the course of ongoing negotiations if information about a party's negotiating position and/or proposal were released into the public domain. Commercial interests could be substantially prejudiced and the bargaining position of the authority could be weakened by disclosure. However, the Commissioner stated that authorities would have to argue any exemption in relation to specific information and that, accordingly, an authority wishing to rely on section 33(1)(b) would need to show that disclosure would:

- reveal specific information relating to the authority's commercial interests; for example, the authority's bargaining position, the value of a commercial interest and that disclosure would substantially prejudice commercial interests; and/or
- reveal specific information relating to a third party's commercial interests; for example, the third party's pricing system or bargaining position, and that disclosure of this information would substantially prejudice its commercial interests.

While Council argued that its general commercial interests would be harmed, it had not demonstrated what substantial prejudice would occur to its commercial interests in this instance, if the information were to be disclosed, and, on that basis, the Commissioner held that the Council had not justified use of the exemption under section 33(1)(b).

The Commissioner accepted that certain information would substantially prejudice the ability of the Council to obtain best value in the proposed transaction and that disclosure of information

revealing negotiating positions and/or proposals of the parties to the correspondence would, or would be likely to, substantially prejudice the effective conduct of public affairs. However, this did not apply to all the information.

In looking to the public interest, the Commissioner considered that there could be strong public interest grounds in the public having access to the information relating to the applications in order to contribute to the debate, given that there was significant public interest in the planning applications for the two supermarkets. There was also a public interest, in the view of the Commissioner, in the public being aware that discussion was taking place concerning the Council's own interests. This fact was in the public domain as was the identity of the parties discussing the matter with Council. In those circumstances, the Commissioner held that the public interest would not be served by disclosure of the exact proposals under discussion. He considered that harm caused to the effective conduct of public affairs if this information were to be disclosed was not outweighed by the public interest in disclosing the information at this time. As a result, the specific information regarded by the Commissioner as falling within section 30(c) was exempt but, the Commissioner noted, it would lose its sensitivity once negotiations had concluded, and a further request under the FOI Act at such a time would require a reconsideration of the public interest.

Decision 018/2005: Refusal to provide certain information in relation to a police investigation¹⁰²

The applicant sought access to a number of documents relating to a police investigation. Nine documents were withheld by Grampian Police, including witness statements, police internal reports, and related letters. Grampian Police relied on section 35(1)(g) (substantial prejudice to law enforcement) and section 39(1) (health and safety).

The Commissioner did not accept an argument by Grampian Police that effectively all police reports and statements should be withheld under section 35(1)(g). He regarded this as a "class" claim and said that he would consider the public interest in releasing police reports on a case by case basis. He did go on to say, however, that arguments based on the public interest in disclosure would have to be specific and strongly persuasive to permit him to conclude that particular police reports should be released.

The Commissioner accepted that there was generally a strong public interest in enabling police officers to make comprehensive and unreserved statements to assist with the processes of law and order and that if such reports were routinely disclosed, this would have the effect of inhibiting the officers' and witnesses' comments and, as a result, would substantially prejudice the ability of the police to exercise their function of investigating (as in this case) whether a police officer was responsible for improper conduct. In the circumstances of the current case, he regarded disclosure would have the relevant prejudicial effect and would be against the public interest.

He also found the health and safety exemption made out with respect to certain other information, finding no public interest at all in release. He also made the general point that where a public authority relied on a number of exemption provisions for the same item of information, the authority would have to provide a separate, detailed argument justifying the use of each exemption in relation to the information withheld.

¹⁰² **Decision 018/2005, Mr Robert Bennett and the Chief Constable of Grampian Police,** <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision018.htm>

Decision 023/2005: Refusal to provide legal advice¹⁰³

The applicant sought access to certain information including legal advice passing between Communities Scotland and its legal advisers. The information was exempted by Communities Scotland under section 36(1) (confidentiality of communications).

The Information Commissioner was satisfied that the communications in question were between a client and a legal adviser. The confidentiality extended to an in-house solicitor and the adviser was acting in a professional capacity. Accordingly, two of the records were exempt, being the request for legal advice from Communities Scotland to its solicitors, the Office of the Solicitors of the Scottish Executive, and the legal advice in response to this request.

With respect to the public interest test, the Commissioner said that there would always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, he was likely only to order the release of such communications in highly compelling cases. He referred to the strong arguments in favour of maintaining confidentiality of communications in the House of Lords decision in **Three Rivers District Council v Governor and Company of the Bank of England** (2004) UKHL 48. In this case, the Commissioner could find no compelling reasons for the legal advice to be released to the applicant.

Decision 041/2005: Refusal to provide report serving as a basis for a decision not to consent to a company purchasing Drumrunie Forest Estate¹⁰⁴

The applicant sought access to the full report in respect of this transaction which was used as the basis for the decision by the Scottish Ministers not to consent to the Coigeach Community Company Limited purchasing Drumrunie Forest Estate. The Executive sought to exempt the report under sections 30(b)(i) and (ii) (free and frank advice and opinion).

The Information Commissioner regarded the argument of the Executive as being, in effect, a “class” claim. The Executive sought to argue that disclosure of the particular submission would by its very nature, substantially inhibit the provision of advice or exchange of views in the future, as the candour with which officials present advice or opinion would be diminished if they perceived that such information could be routinely disclosed. The Commissioner said that the matter should be approached on a case by case basis. Release of internal communications in one case should not be taken to imply that such communications would be “routinely” released in future. Each set of individual circumstances would be required to be taken into consideration and the public interest assessed in each case on its own merits.

In the circumstances, the Commissioner regarded the report as containing substantially straightforward, factual advice. He did not accept that disclosure would substantially inhibit officials from participating in this type of correspondence in future. However, there was one paragraph in an annexure which was a frank expression of opinion of the type which the Commissioner said could be substantially inhibited in future. In considering the public interest with respect to this information, the Commissioner pointed out that the Executive acknowledged that there are often clear public interest arguments for disclosure where this would enhance public understanding of decision-making procedures. However, in this particular case, the Commissioner regarded the information in the annexure as satisfying the statutory test of substantial inhibition and as not being in the public interest to release.

¹⁰³ **Decision 023/2005, Mr David Emslie and Communities Scotland,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision023.htm>

¹⁰⁴ **Decision 041/2005, Mr Reiner Luyken and The Scottish Executive,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision041.htm>

Decision 045/2005: Refusal to provide legal advice¹⁰⁵

The applicant sought access to certain information relating to an objection by the Clyde Heritage Trust to a bridge over the River Clyde. The respondent Glasgow City Council provided some information but refused to provide a copy of a legal advice received from a Queens Counsel.

There was no doubt that the legal opinion fell within the category of material protectable by the principles applicable to confidentiality of communications. In going on to consider the public interest, the Information Commissioner reiterated his view that he was likely only to order the release of such communications in highly compelling cases. He did not find any compelling reasons to provide the legal opinion in this case. He rejected arguments that there was a compelling public interest in understanding which legislation and authority controls development of bridges over the River Clyde and a further compelling public interest in proposals to alter the navigation of the river and its potential to flood with possible loss of life and damage.

Decision 048/2005: Refusal to provide geographical numbers corresponding to telephone numbers¹⁰⁶

The applicant applied to NHS 24 asking a number of questions about NHS 24's use of 0845 numbers, including what the equivalent geographical number of the 0845 number was. The authority released most of the information but only partially released the geographic numbers in that it released only the area codes rather than the full numbers. Reliance was placed on section 39(1) of the Scottish FOI Act, that disclosure would, or would be likely to, endanger the physical or mental safety of individuals.

Upon application to the Information Commissioner, the Commissioner pointed out that the effect of providing the telephone numbers would be to give a direct line into NHS 24 call centres, which would have the result that members of the public would not need to go through the national number to contact NHS 24 and would therefore circumvent the exchange and call routing facility that was in place at each NHS 24 call centre. This might in turn lead to congestion of the telephone lines and might mean that individuals calling on the 0845 number would not have their call routed properly.

Having considered the potential effect on clinical risk of individuals, the Commissioner was satisfied that the section 39(1) exemption was activated. In applying the public interest test, the Commissioner found that the interest in public safety was paramount in the circumstances and that this interest would be better served by the information not being released.

Decision 055/2005: Refusal to provide general arrangement plans for a ferry in service¹⁰⁷

The applicant applied to Caledonian MacBrayne Limited, a company owned by Scottish Ministers, for a copy of the general arrangement plans for a new ferry, MV Bute. The request for the plan was refused on the basis that to make available publicly the general arrangement plans for sensitive areas and decks of the ferry could risk the security of the vessel. Section 39(1) of the FOI Act was relied upon by the authority.

The Commissioner said that for the purposes of that exemption, it was not required that any threat to the health or safety of an individual should be imminent or of a particular magnitude; there was required, however, to be some reasonable apprehension of danger. The plan sought contained

¹⁰⁵ **Decision 045/2005, Mr Geoffrey Jarvis, The Clyde Heritage Trust and Glasgow City Council**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision045.htm>

¹⁰⁶ **Decision 048/2005, Mr Keith Bell and NHS 24**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision048.htm>

¹⁰⁷ **Decision 055/2005, Russ McLean, Chief Executive of Argyll Group plc, and Caledonian MacBrayne Limited**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision055.htm>

detailed information about the physical arrangement of the ferry including the location of key machinery and control points, ventilation, fuel storage and the layout of crew accommodation. Details of a number of the restricted areas were also shown.

The Information Commissioner considered that release of the information while the vessel was in service could undermine the authority's responsibility to monitor and control all of these areas, and thereby to ensure the safety and security of the vessel, passengers and crew. He accepted the argument that release of the plans would increase the vulnerability of the ferry, its passengers and crew to terrorist or similar acts. He therefore held that the exemption had been correctly applied and went on to consider the question of the public interest.

The Commissioner identified factors in favour of release as the openness and transparency of public authorities in carrying out their functions and the consideration that providing information about the layout of the ferry could enhance the safety of its passengers by allowing them to be aware of how to escape from the vessel in an emergency. However, some information about layout of the public decks had already been provided in a schematic and less detailed form on the authority's web site and on board the vessel itself. In those circumstances, the Commissioner concluded that the public interest in ensuring the health and safety of the vessel and passengers outweighed the public interest in releasing the plans.

Decision 076/2005: Refusal to provide witness statements¹⁰⁸

The applicant applied to the Chief Constable of Fife Constabulary for information in relation to a road accident in which an individual, the client of the solicitor applicant, had been involved. Fife Constabulary relied upon various provisions of the FOI Act to exempt the information from disclosure, including in the case of certain witness statements, section 34(1)(a) (information relevant to investigations).

The Information Commissioner accepted that the exemption provision in section 34(1)(a) applied and went on to consider the public interest test. This was a case, he pointed out, where the Constabulary had confirmed that there was no prospect of any party being prosecuted. However, the exemption applied in perpetuity to information falling under its scope, and the Commissioner held that there were strong reasons to uphold the exemption even where the information is no longer part of an ongoing investigation. This was so because there was a significant public interest in maintaining the willingness of the public to co-operate with the criminal justice system through providing witness statements, and such willingness might well be compromised if witness statements were released regularly under the FOI Act.

In the circumstances, having examined the witness statements, the Commissioner decided that there was insufficient general public interest in the details of the statements to outweigh the public interest in maintaining the exemption and accordingly, the statements were properly exempted.

Decision 078/2005: Refusal to provide information concerning the applicant¹⁰⁹

The applicant sought certain information in his name held by NHS Borders relating to certain medical matters which involved him. Certain information was provided by NHS Borders while other information was either not held or was withheld on the basis that it was the applicant's own personal data and was exempt under section 38(1)(a). A large quantity of the documentation constituted communications between NHS Borders and its lawyers concerning pending litigation. In respect of those documents, the Information Commissioner considered that section 36(1)

¹⁰⁸ **Decision 076/2005, Mr David Laing and the Chief Constable of Fife Council,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision076.htm>

¹⁰⁹ **Decision 078/2005, Mr W and NHS Borders,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision078.htm>

(confidentiality of communications) applied and repeated his comments that there would have to be highly compelling reasons for disclosure of such information. In this case, although the applicant said he wished to have access to the information so that he could raise it with the Scottish Parliament, the routine nature of the information and the strong public interest in maintaining confidentiality prevailed. The Commissioner found that there were no highly compelling reasons why the information should be released in this case.

Decision 089/2005: Refusal to provide information relating the use of powers under sections 4 and 5 of the Freedom of Information (Scotland) Act 2002¹¹⁰

The applicant made eleven separate requests for communications relating to the use of powers under sections 4 and 5 of the **Freedom of Information (Scotland) Act 2002** (which relate to the amendment of the public authorities covered by the Act). The Executive, upon internal review, advised the applicant that information it held fell under the scope of only two of his eleven requests and that it had decided that each document was exempt from release as follows:

- All six documents were exempt under section 29(1)(a) (formulation or development of government policy);
- One of the documents was exempt under section 29(1)(b) (Ministerial communications);
- Two of the documents were exempt under section 30(a) (prejudice to collective responsibility of Scottish Ministers);
- All six documents were exempt under section 30(b)(ii) (free and frank exchange of views for the purpose of deliberation).

The Information Commissioner agreed that section 29(1)(a) did apply to all of the six documents under consideration. The documents related directly to the development of the policy on the use of the powers under section 5 of the Act, including submissions to Ministers, the presentation of options and the cases for and against different approaches being taken.

The Commissioner also agreed that section 29(1)(b) had been correctly applied to the one document which was a Ministerial communication (and further emails relating to it).

The two documents to which section 30(a) had been applied contained statements of the views of individual Ministers on how to move forward in determining the Executive's policy on the use of powers under section 5. Given that the policy formulation process was ongoing, these were not necessarily reflective of the final position. In those circumstances, the Commissioner accepted that release of the information setting out these views would have the potential to undermine or to substantially prejudice the convention of collective responsibility in relation to this policy area. However, the Commissioner found that this exemption applied only two parts of each of the two documents and not to the whole of the two documents.

The Commissioner did not uphold the exemption under section 30(b)(ii). The Executive did not demonstrate by reference to any specific content of the advice and views exchanged in the documents, why disclosure would lead to substantial inhibition of the free and frank exchange of views for the purposes of deliberation. Once again, the Commissioner eschewed an approach on a class basis such that release of certain types of information would be said to have an inhibitive effect on all such exchanges in the future. He repeated that release in one case should not be taken to imply that such communications would be "routinely" released in future.

¹¹⁰ **Decision 089/2005, Mr David Hutchison and the Scottish Executive,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision089.htm>

Having made these findings, the Commissioner went on to consider the public interest. The applicant argued that the failure of the government to consult over a period of three years indicated that there were no proper reasons for the government not to have exercised its powers under sections 4 and 5. He also pointed to the need for individuals or organisations considering tendering for public sector contracts to have some certainty as to whether they would have responsibilities under the Act. He was also concerned to argue that it was in the public interest for the public to know the division of responsibilities between the Ministers and the Scottish Prison Service in relation to freedom of information and whether there would be a level playing field between the public and private sectors in this respect (the applicant was particularly concerned with the question of whether contractors to the Service would be brought under the FOI Act). However, the Commissioner gave greater weight to the arguments of the Executive. The Executive argued that the policy options needed to be considered in a “free space” and that disclosure would be premature and would endanger the provision and quality of dialogue taking place between Ministers and officials. There could be a damaging effect on the quality of government if the Ministers were not to be able to make decisions based on strong advice and to be able to discuss options in a secure environment. In relation to collective responsibility, this principle required that Ministers were able to argue freely in private while maintaining a united front once a decision was reached. In these circumstances, the Commissioner did not find that the public interest in releasing the information outweighed the harm of so doing.

Decision 090/2005: Refusal to provide papers and background documentation relating to a grievance appeal¹¹¹

The applicant sought access to all documentation and background papers relating to the decision made by the Policy & Resources (Personnel Appeals) Sub-Committee of North Lanarkshire Council relating to the Department of Planning & Environmental Grievance Appeal, as well as other correspondences, notes and memoranda between the Department and Personnel Services in relation to that appeal. In respect of the documentation and background papers, all of the information provided was redacted to exclude anything which might constitute personal data, while with respect to the second category, the Council relied on section 30 of the FOI Act to withhold the information requested.

The Commissioner noted in his decision that the subject matter of the request related to an application by a member of staff of the Council for a regrading of a post and a subsequent grievance appeal. The member of staff was not the applicant for the information under the FOI Act.

The Commissioner accepted that information relating to an individual’s grievance appeal did constitute that individual’s personal data particularly where the focus of the appeal was the individual’s work and performance. He also accepted that the nature of the information was such that the person would not expect the information to be disclosed to third parties or to enter the public domain. For these reasons, he found that where the information was the individual’s personal data, that disclosure would be unfair and in breach of the first data protection principle. In substance therefore, the information was exempt under section 38(1)(b).

In respect of the second category of information, the Commissioner considered each of the documents in turn. He also regarded a number of them as raising exemption issues under section 38(1)(b) and that certain of the information was exempt on this ground.

With respect to the information stated by Council to be exempt by virtue of section 30(b) (free and frank exchange of views and free and frank provision of advice), the Commissioner found by and large that the Council had not demonstrated why the specific documents were sensitive or why disclosure would cause real harm in each case. A good period of time had elapsed since the

¹¹¹ **Decision 090/2005, Ms Isobel Marshall and North Lanarkshire Council**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision090.htm>

relevant discussions took place, the issues under discussion were no longer current and for the most part, the content of the discussions was not particularly remarkable.

In respect of the first category of documents, the Commissioner also considered that where the information was the personal data of a named individual, there would have to be compelling public interest arguments to override the exemption under section 30(b). There were no such considerations in this case and therefore the first category of information which was exempt under section 38(1)(b) was also exempt by virtue of section 30(b)(i) and (ii).

Decision 017/2006: Refusal to provide details of the basis upon which a pupil was excluded from a school¹¹²

The applicant sought information from Angus Council as to the details of how the members of the Appeal Hearing Committee had reached the decision in relation to the exclusion of a pupil from a school under the Council's Management Plan. The Council refused to provide any information, relying on the exemptions in section 38(1)(b) (personal data) and section 30(1)(b) (inhibition of the free and frank provision of advice or the free and frank exchange of views) and (c) (substantial prejudice to the effective conduct of public affairs).

The Commissioner found that all of the four documents exempted were properly exempted under the personal information exemption in section 38(1)(b). The Commissioner stated that section 38(1)(b) is an absolute exemption and that the exemption in section 38(1)(b) is an absolute exemption where the conditions in section 38(2) or (3) are met. **[These statements are, strictly, incorrect, since the exemption in section 38(1)(b) is only absolute when section 38(1)(b) is read together with subsections 38(2)(a)(i) or 2(b), but not when read together with subsection 38(2)(a)(ii), in which case the public interest test applies (see paragraphs 4.20 to 4.27 above), but they did not affect the outcome (authors' note).]** Since the Commissioner found that disclosure would contravene the first and second data protection principles, he applied the exemption constituted by section 38(1)(b) read together with section 38(2)(a)(i), which does constitute an absolute exemption. However, as stated, when section 38(2)(a)(ii) is applied, the exemption is subject to the public interest test.

The Commissioner did not find that the information fell within section 30(b)(i) or (ii) because the documents did not contain "advice" but evidence or information provided for the purposes of the hearing (in the case of the exemption in (i)) and that the opinions set out in the documents were not capable of being attributed to particular individuals and therefore disclosure could not reasonably be expected to have the inhibiting effect required under (ii). In these two cases therefore, the Commissioner did not have to consider the public interest.

However, the Commissioner did find a potential prejudice to the effective conduct of public affairs under section 30(c). In the Commissioner's view, the system of Appeal Committee Hearings would be substantially prejudiced if disclosure of these materials was made, as this would be likely to affect the willingness of parties and witnesses involved in future hearings to be as open as they would be if the hearing was in private. As a result, there would be substantial prejudice to the ability of the Appeal Committee to secure the relevant information. In going on to consider the public interest test, the Commissioner accepted that there was a public interest in enhancing the scrutiny of the decision-making process and improving accountability. He also considered the submission from the applicant that the information should be released due to the public concern about poor discipline in schools. The Commissioner however pointed out that disclosure in this case would only provide information as to the decision in the particular instance and not the views of authorities or Appeal Committees on matters of school discipline generally. Therefore, whatever public interest there was in disclosure was, in the Commissioner's view, outweighed by the public

¹¹² **Decision 017/2006, Mrs X and Angus Council,**

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6017.htm>

interest in ensuring that the Appeal Committee was able to go about its work and secure relevant information from parties and witnesses to permit it to arrive at a well-informed decision.

Decision 019/2006: Refusal to provide information relating to the operations of a ferry company¹¹³

The applicant made several requests for information from Caledonian MacBrayne Limited concerning various aspects of the ferry service and fleet operated by that company. As pointed out in an earlier decision, that company was wholly owned by the Scottish Ministers. The company declined to provide the information requested, citing section 33(1)(b) (prejudice to commercial interests) and section 30(c) (prejudice to the effective conduct of public affairs).

The Commissioner found, relevantly in respect of the requests, as follows:

1. One request was for details of any discount given to the company on the published rate for harbour dues by Argyll & Bute Council. The Commissioner accepted that release of this information would have a detrimental impact upon the company's competitive position in an upcoming tendering process for the route between Gourock and Dunoon. One of the matters referred to in the invitation to tender draft was that the tenderers would be required to establish detailed arrangements for the operation of any particular vessel at the harbours involved. In those circumstances, any discount that a company could negotiate for the use of Dunoon Pier would be of significance in preparing a bid to operate the service and therefore disclosure would have a detrimental effect upon the company.

In terms of the public interest, while there was a public interest in transparency in the use of public funds, which the company was a significant recipient of, there was a greater public interest in not undermining the fair operation of the tendering process and the process by which bidders would each negotiate with the Council for the use of Dunoon Harbour. Upon this request, therefore, the public interest in withholding the information outweighed that in release.

2. In request No. 3, the applicant sought information concerning the value, funding provided and sums expended on all vessels, as well as repairs and maintenance costs over the last five years. In respect of this information, the Commissioner found that there was no available basis for exemption under section 33(1)(b). He stated that the fact that certain of the information might be incorrect or misleading was not itself a reason for withholding the information. The Commissioner could not find any basis upon which release of information about expenditure on the fleet, though relevant to the tendering process, could affect the chances of the company bidding successfully or could result in risk to its commercial activities more generally. Accordingly, there was no need to go on and consider the question of the public interest in respect of this particular request.

Decision 027/2006: Refusal to provide copies of vessel log sheets for the Gourock to Dunoon route¹¹⁴

The applicant sought copies of Caledonian MacBrayne's vessel log sheets for the Gourock to Dunoon route over a twelve month period, and subsequently made twelve separate requests, each for a copy of the log sheets covering a period of one month (on the basis that the initial request was stated by the company to exceed the relevant prescribed cost of responding of £600). Apart from this ground, the company also relied on section 33(1)(b) (prejudice to its commercial interests).

¹¹³ **Decision 019/2006, Mr Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited,**

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6019.htm>

¹¹⁴ **Decision 027/2006, Mr Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited,**

<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6027.htm>

The company argued that release of the passenger numbers contained in the log sheets would substantially prejudice its commercial interests by providing competitors with information that would enable them to “cherry pick” the most attractive periods to operate a service and, second, by reducing the company’s ability to tender successfully for the continued operation of the service between Gourock and Dunoon.

First, it should be noted that the Commissioner rejected a submission from the applicant that because the company did not make a profit on the route, it did not have “commercial interests” that could be harmed by release of the information. The Commissioner reiterated his earlier views in another case that the term “commercial” did not correlate to “profit making”. The term had a wider meaning in the context of section 33 of the Act, referring to a person’s ability to participate successfully in a commercial activity. There was no requirement that these activities be profit making for the exemption to be engaged.

The Commissioner accepted that release of the information could allow a competitor to “cherry pick” by modelling their own timetable so as to offer services during busy periods and to avoid services where passenger numbers were lowest. This could lead to increased losses for the company, particularly in the short term where its obligations to provide a specified level of service would prevent a swift response to the changed environment. The Commissioner however did not find that release of the information would prejudice the competitive position of the company in the tendering process.

In considering the public interest, the Commissioner took the view that as a publicly-owned company providing lifeline ferry services to some of Scotland’s remotest communities, the company held a secure and privileged position as a result of receiving public funds. There was, therefore, a public interest in transparency going beyond that applicable to private sector companies. However, the Commissioner considered that the operation of the company in a competitive environment made it contrary to the public interest to require such a level of disclosure which would be likely to substantially prejudice its own interests (and ultimately the interests of the public that owns it) while going significantly beyond the level of disclosure required of private sector counterparts. The result could be a need for additional subsidy but if increasing costs of providing lifeline services led to a reduction in service levels, this could have adverse consequences for the communities served. While the Commissioner could not rule out the suggestion from the applicant that the company might well have been over-subsidised, the public interest was greater in non-disclosure of the information. An additional reason was the upcoming tendering process which was to take place in the near future and there was a public interest that this process proceed in a manner which was fair to all parties. Release of the passenger numbers at the level of detail contained in the log sheets would affect the fairness of that process.

Accordingly, the information was properly exempted in the public interest under section 33(1)(b).

Decision 033/2006: Refusal to provide Counsel’s opinion on the legality of a proposed sale of a school site¹¹⁵

The applicant sought a copy of Senior Counsel’s opinion on a proposed sale of a school site by East Dunbartonshire Council. The Council refused the request on the basis of section 36(1) of the FOI Act (confidentiality of communications in legal proceedings).

There was no doubt in the view of the Commissioner that Senior Counsel’s opinion fell within section 36(1) and the real question was where the public interest lay. The Commissioner repeated his views that there would always be a strong public interest in maintaining the right to

¹¹⁵ **Decision 033/2006, Mrs Eileen O'Donnell on behalf of the Bearsden Action Group and East Dunbartonshire Council,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6033.htm>

confidentiality of communications between legal adviser and client. In the present case, there was a public interest in favour of releasing the information so as to enhance scrutiny of the legality of the actions of a public body and, further, in the effective oversight of expenditure of public funds in obtaining value for money. It was also possible that disclosure would make a significant contribution to debate on a matter of public interest.

The Commissioner made the point that the requirement that disclosure be in the public interest did not mean that it needed to be in the national interest as a whole. Rather, it could be in the interests of the public to establish whether certain standards were being upheld or maintained by an authority, even though the circumstances of a particular case only exercised the concern of a section of the population. In this case, the Commissioner accepted that there were reasons which might justify disclosure of the opinion, but did not regard those reasons as so highly compelling as to outweigh the public interest in confidentiality of the communication. In particular, he was not convinced that sufficient arguments had been advanced as to why the interests of the affected community required disclosure.

Decision 038/2006 Refusal to provide copies of information concerning a refusal of an application for extension of an officer's police service¹¹⁶

The applicant sought access to all documents and information produced and used by the Chief Constable Grampian Police after the decision to refuse his request for extension of service had been made by the police. The police relied on a range of grounds in refusing access to the information sought including section 36 (confidentiality), section 38 (personal information), section 30(b) and (c) (effective conduct of public affairs), section 34 (investigations by public authorities) and section 35(1)(g) (law enforcement).

The Commissioner found it necessary to consider only the exemptions in sections 35(1)(g) and 38(1) in reaching his decision.

A number of statements and reports had been withheld from the applicant on the basis that they involved investigations into alleged improper conduct (an allegation made by the applicant against certain named officers who, he said, had unfairly refused his request for extension for a further five years). The Commissioner pointed out that police officers should be able to make comprehensive and unreserved statements to assist with the processes of law and order and if reports were routinely disclosed, this would have an inhibiting effect on comments and, as a result, would substantially prejudice the ability of the police to exercise their investigative functions in this regard. It followed that the harm test in section 35(1)(g) was made out.

In considering the public interest, the Commissioner was of the view that there was a general public interest in releasing information that might lead to an increase in accountability and scrutiny of the actions of public officials. However, in this case, no wrongdoing was found on the part of the officers against whom the allegations had been made or on the part of the police generally. No recommendation was made for consideration of criminal actions. The Commissioner was satisfied that the police had demonstrated to the public that correct procedure for investigating complaints was followed in this case. He did not consider that disclosure of the documents in question would add anything to the public debate or increase the accountability of the police in carrying out its internal investigation. The Commissioner concluded that the public interest in releasing the documents did not override the general public interest in withholding information relating to the reports.

Certain of the information was exempt as the personal information of the applicant under section 38(1)(a) of the Act and certain other information was exempt under section 38(1)(b) as relating to a

¹¹⁶ **Decision 038/2006, Mr T and the Chief Constable of Grampian Police,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6038.htm>

third party. The witnesses in question did not consent to release of the information and had provided the information with the expectation that it would be kept secret. Release of their witness statements would be unfair and would breach the first data protection principle. In addition, redaction to protect the identities of those who had given statements would be impossible in this case.

Decision 039/2006 Refusal to provide a report concerning the future of a Neighbourhood Complaints Unit¹¹⁷

The applicant sought from Aberdeen City Council a copy of a report written by a third party company which contained proposals for the future of the Council's Neighbourhood Complaints Unit. The request was refused with Council citing section 38(1)(b) (personal data) and section 36(2) (actionable breach of confidence).

The Commissioner considered the circumstances of the report carefully and concluded that neither of these two exemptions applied on their face. In the case of section 36(2), there was therefore no need to consider the public interest question.

However, the Commissioner noted that he had power to refer to an exemption that had not been relied upon by a public authority and although generally he stated that he would only consider the application of those exemptions on which a public authority had sought to rely, he departed from that practice in the particular circumstances of this case.

The report was commissioned by the Council following a serious internal dispute between employees of the Council. There was a real concern that if the report was to be released, Scottish public authorities would not be able to rely on the assumption that such reports are private to them and they might well not produce such information in the future. This would be likely to prejudice substantially the conduct of public affairs as it was imperative that authorities should be able to conduct full investigations into internal disputes in order to resolve matters and prevent the recurrence of such disputes. Accordingly, the report was within the terms of section 30(c).

The Commissioner went on to consider the public interest. The applicant argued that the matter had not been handled as well as it could have been and that disclosure would lead to greater transparency in the manner in which Council had conducted itself. However, the Commissioner found that there was a difference between accusations of wilful misconduct and a dispute as to whether the authority correctly accepted or rejected recommendations. While there was a public interest in transparency, which was increased where there were allegations of misconduct, the Commissioner did not consider that disclosure in this case would serve to highlight incidences of misconduct. There was therefore not a specific public interest in disclosure and on balance, the public interest was better served by the information being withheld.

Decision 048/2006 Refusal to provide financial information relating to the Gourock to Dunoon Ferry Service¹¹⁸

This was another case where the applicant made several requests for financial information relating to the operation of the Gourock to Dunoon Ferry Service by the company Caledonian MacBrayne. The requests were refused with the company applying section 33(1)(b) (prejudice to its commercial interests).

¹¹⁷ **Decision 039/2006, Mr Cooper and Aberdeen City Council,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6039.htm>

¹¹⁸ **Decision 048/2006, Mr Gordon Ross, Managing Director of Western Ferries (Clyde) Limited and Caledonian MacBrayne Limited,**
<http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6048.htm>

The specific information sought was:

- breakdown of operational costs on the route;
- breakdown of revenue by passenger, car, freight and coach;
- revenue of agent sales by type in Dunoon;
- accounting procedure and allocation percentage of revenue to the Dunoon route from various forms of tickets;
- copies of all freight invoices on the route.

In each case, the information was sought for the previous five financial years.

The company reasoned in refusing the requests that release of the information would prejudice its commercial interests and its ability to tender successfully for the Gourock to Dunoon route.

The Commissioner agreed that release of the information would be likely to substantially prejudice Caledonian MacBrayne's commercial interests in relation to the forthcoming tender. The information would provide valuable insights into the likely content of that company's tender and could assist a competitor in formulating its own tender in a way that was more likely to succeed. The Commissioner rejected a further argument that disclosure would be likely to prejudice substantially the company's commercial interests by increasing the likelihood of the introduction or enhancement of competition on the service. The Commissioner pointed out that there was already competition on the service by an established competitor (Western Ferries). There was no likelihood therefore of "cherry picking".

In considering the public interest, the Commissioner agreed that there was a significant public interest in allowing effective scrutiny and oversight of the use of public funds and Caledonian MacBrayne was a recipient of considerable public subsidy. On the other hand, circumstances could exist that would be contrary to the public interest to require the company to provide a level of disclosure which would go significantly beyond the level required of its private sector counterparts. The Commissioner agreed with the applicant that the requested information could (in conjunction with other information) be used to either allay or confirm concerns regarding over-subsidisation of the route. However, the Commissioner found that the requirements of fairness in the tendering process overrode the public interest in disclosing the information and it was, accordingly, held to be exempt.

Decision 051/2006 Refusal to provide information detailing the attitude of the Royal Family and the Royal Household to the Holyrood Project¹¹⁹

The applicant requested information from the Scottish Executive detailing the attitude of the Royal Family and the Royal Household to the Holyrood Project. The request was refused on the basis of section 41(a) (information relating to communications with the Royal Family or Royal Household) and section 30(b)(i) and (ii) (effective conduct of public affairs).

The Commissioner upheld the decision of the Scottish Executive under both exemptions. Both exemptions were engaged in the circumstances. The information was either actual communications with a member of the Royal Family or Royal Household or related directly and specifically to those communications. In considering the public interest, the Commissioner did not accept that disclosure would prejudice the political neutrality of members of the monarchy, because the communications were private and personal communications which, for other reasons, might be

¹¹⁹ **Decision 051/2006, Mr Peter MacMahon, The Scotsman newspaper, and the Scottish Executive,** <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6051.htm>

thought to have an expectation of protection from general disclosure on privacy grounds. The Commissioner drew a distinction between information in which the public was interested and information in the public interest. This was a case of the information being in the former category and in the view of the Commissioner, fell significantly short of the standard required to ensure that disclosure would be in the public interest.

The Commissioner also considered that six documents fell within the terms of section 30(b)(i) and (ii) of the Act. Disclosure of those documents would inhibit substantially both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. Once again, there was a public interest in ensuring the Executive was open and accountable in the carrying out of its functions. However, this was required to be balanced against the public interest in ensuring that the Executive could undertake discussions and deliberations on sensitive issues (such as this one) as freely and frankly as possible, without fear that the exploration of potential solutions would be subdued or inhibited. The Commissioner concluded that the public interest in non-disclosure was not outweighed by that in disclosure. This was so largely for the reasons already given with respect to the section 41 exemption. The communications fell well short of being in the public interest to be disclosed.

Decision 056/2006 Refusal to provide lists of properties in respect of which the City of Edinburgh Council collected waste water and household water charges on behalf of Scottish Water¹²⁰

The applicant firm of solicitors submitted a number of requests to local authorities in Scotland, primarily concerned with copies of the lists of the properties which each authority used to collect household and waste water charges on behalf of Scottish Water. The Council refused to provide the information, citing the exemptions in section 33(1)(b) (substantial prejudice to commercial interests), section 25 (information reasonably available by other means) and section 36(2) (actionable breach of confidence).

The Commissioner considered the detailed agreement in place between Scottish Water and the Council entered into in 2004. The agreement contained an express confidentiality clause which extended to the information sought. The Council was restricted to using the information for the purpose of collection of charges and the information was stated in the agreement to be confidential. The existence of the contract meant that the Council received the information in circumstances imposing an obligation of confidentiality. The information had the necessary quality of confidence in that it was not general or public knowledge and had been derived wholly from information held by Scottish Water. In addition, the third element of potential detriment to Scottish Water was made out in that disclosure of the information would or be likely to prejudice substantially its commercial interests.¹²¹ The Commissioner went on to consider the public interest for the purposes of section 36(2). He stated that while the exemption was not subject to the public interest test in section 2(1), the law of confidence recognised that there was a strong public interest in ensuring that people respect confidences and that the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in some cases this public interest in maintaining confidences might be outweighed by the public interest in disclosure of information. In this situation, however, there was no presumption in favour of disclosure.

In the case, the Commissioner considered whether disclosure would enhance the scrutiny of decision-making processes and thereby improve accountability and public participation, whether

¹²⁰ **Decision 056/2006, MacRoberts and the City of Edinburgh Council**, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6056.htm>

¹²¹ There is a real issue as to whether, where a contractual term of confidence exists, it is necessary to establish the elements of an actionable breach of confidence in equity. The better view may be that where the contract applies it is unnecessary to consider the elements of the equitable action: see the discussion in paragraphs 3.34 to 3.47 and, in particular, paragraphs 3.42 to 3.44.

disclosure would contribute to ensuring that public bodies were adequately discharging their functions and whether it would contribute to the effective oversight of the expenditure of public funds and the public obtaining value for money. Other defences to actions for breach of confidence would be a claim that wrongdoing was involved, or where the public would be misled or unjustifiably inhibited in public scrutiny of matters of genuine concern. Having considered all of these factors, the Commissioner could not find any reasonable basis to conclude that the Council would have a defence to an action for breach of confidence on any of these public interest grounds in the event that they released the information. This was also true of several other defences to an action for breach of confidence, namely, that the information was already known to the recipient before given in confidence, that the information was useless or trivial or that the information in question has subsequently become public knowledge. None of these considerations applied in the present case.

The Commissioner did not regard the information as constituting a trade secret under section 33(1)(a). The Commissioner noted that the information could be reproduced by compiling it (although at considerable cost) from Council tax registers. The information could therefore not be said to be unique, was reproducible by a competitor and did not amount to a trade secret.

However, the Commissioner considered that Scottish Water had commercial interests in relation to deriving a considerable income from providing information regarding water and sewerage connections. Scottish Water argued that it was funded by its customers and the income derived from providing this information to solicitors, search companies and the public. Disclosure of the information in those circumstances would, or would be likely to, result in a significant loss of income for Scottish Water and would, or would be likely to, prejudice substantially its commercial interests.

The Commissioner accepted that there was a public interest in increasing competition in the relatively narrow area of the supply of the information of the kind identified. Scottish Water had effectively been given by law a statutory monopoly in respect of water and water information and the Commissioner had to accept the law as it stood. Its scheme of charges was approved by the Water Industry Commission for Scotland. Release of the information would, or would be likely to, significantly harm the finances of Scottish Water in relation to the property search services and this loss of income could have the unintended consequence of increasing water and sewerage prices to the detriment of the public. The only obvious advantage would appear to be to commercial companies to harvest such data for their own commercial benefit.

In the circumstances, the Commissioner found that the public interest in increasing competition was not sufficient to outweigh the public interest in avoiding the likely increase in charges to the public.

Public interest factors favouring disclosure of information

- Accountability and transparency in relation to the decision-making process generally
- Accountability and transparency in the use of public funds
- Where matters had been discussed some time ago and the contents of the documents sought were unremarkable
- Accountability of public authorities in relation to planning decisions and in the reliability of their research
- Accountability of a planning authority after the planning decision has been made and no prejudice could result
- The need for officials to justify the basis upon which planning decisions are based, especially where there has been a significant departure from the original structure plan
- Interest in the public having information as to why legislation had not been proclaimed to commence for a period of 15 years
- Where data on the mortality rate of surgeons gathered by an authority may be unadjusted or inaccurate, nevertheless a benefit to patients may result from release

Public interest factors supporting withholding of information

- Public interest in police preparing comprehensive and unreserved statements in the course of law enforcement and investigation
- Witness statements, if disclosed, could prejudice the willingness of the public to co-operate with the criminal justice system (even in a case where no prosecution was proposed)
- Compelling public interest in confidentiality of communications (legal professional privilege)
- Prejudice to the fair operation of an upcoming tendering process
- Information would reveal proposals and negotiating positions and hinder a public authority in obtaining best value for money
- Ensuring a level playing field between public and private businesses
- The need, in certain cases, for Ministers to be able to debate proposals in a “free space” and without individual views being subject to disclosure at a premature time
- Safety of individuals at risk if direct telephone numbers of NHS provided
- Need for a public authority to keep to itself questions asked of potential applicants for child care assessments
- Harm to individuals in providing detailed plans of the design of a ferry
- Disclosure would adversely affect the system of Appeal Committee hearings in the school system, because it would affect the willingness of parties and witnesses to be open
- Likelihood of increased charges by a public utility
- Prejudice to decision-making process involving sensitive communications with the Royal Family

5 Ireland

Legislative Framework

- 5.1 The Irish **Freedom of Information Act** 1997 (the Irish FOI Act or Act) came into force on 21 April 1998 for most government bodies and on 21 October 1998 for local authorities and health boards. Since that time, additional public bodies have been prescribed under Regulations to be covered by the Act. The purpose of the Act is to give members of the public a right of access to official information to the greatest extent possible consistent with the public interest and right to privacy. The Act also gives rights to members of the public to seek amendment to records relating to personal information.
- 5.2 The Irish FOI Act was subject to substantial amendment in 2003 which related to fees, deliberations of public bodies, security, defence, and international relations, amongst other topics.

Administration of the Irish FOI Act

- 5.3 The Central Policy Unit of the Irish Department of Finance administers the Irish FOI Act.
- 5.4 The Unit maintains a web site¹²² which contains a great deal of useful material, including a Manual for FOI Decision Makers, a list of public bodies covered by the Irish Act, short guides to the 1997 and 2003 legislation, and Central Policy Unit notices dealing with a range of FOI issues arising under the Act.

The Public Interest Test

- 5.5 There are 12 sections in the Irish FOI Act which contain exemptions to release, and a total of 26 separate exemption provisions contained within those 12 sections. The public interest test applies to the eight exemptions set out below and requires a decision-maker to release information:

...where in the opinion of the head of the public body concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request.

¹²² <http://www.foi.gov.ie/foi.nsf/HomePage>

Section 20	deliberative processes of public bodies;
Section 21	functions and negotiations of public bodies;
Section 23	law enforcement and public safety;
Section 26(1)(a)	information given in confidence where disclosure would prejudice future supply;
Section 27	commercially sensitive information;
Section 28	personal information;
Section 30	research and natural resources;
Section 31	financial and economic interests of the State and public bodies.

5.6 Certain sections of the Irish Act contain “class” based exemptions. These are contained in sections 19, 22, 24, 26(1)(b), and 32, and are satisfied if the record in question meets the description set out in the exemption, including in some of these provisions (but not all) a “harm” test, but with no application of a public interest test.

Official Guidance

5.7 The FOI Central Policy Unit of the Irish Department of Finance publishes a *Manual for FOI Decision Makers* on its web site.¹²³ The FOI CPU Notices are contained in Part C of the manual, and the Notices that deal with exemption provisions include specific discussions of the type of public interest factors which may apply in each case.

5.8 The manual identifies a number of general public interest factors, as follows:

- The public interest is not necessarily the same as that in which the public is interested.
- Usually the public interest pertains to a fairly large group of people, but there is nothing to stop it applying to a single individual.
- Factors which operate against disclosure include potential damage to community interests, and the need to avoid serious damage to the proper working of government at the highest level.
- Factors which operate for disclosure include the need for transparency and accountability of public bodies, and for individuals to know the reasons for decisions made which concern them.
- There is a public interest in the rights of individuals to have access to records.
- There is a public interest in members of the community being provided with ways to ensure the accuracy of personal information held by government.

¹²³ <http://www.foi.gov.ie/foi.nsf/DecisionGuide2004?OpenFrameSet>

- There is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government.

Decisions of the Supreme Court of Ireland

Sheedy v Information Commissioner¹²⁴

- 5.9 In this case, the Supreme Court held that the decision of the High Court below and that of the Information Commissioner were correct on a consideration of the “harm” test under section 21. The Court (Kearns J., with whom Denham J. concurred) went on to state that the weighing up of the various public interests by the Commissioner was a task “uniquely within his remit”. Once there was some evidence before the Commissioner as to the circumstances in which the relevant records had been compiled, the general principles applicable to review of decision-makers for error of law meant that his decision in such a case was not to be interfered with. (However, the Supreme Court overturned the decision of the High Court and the Information Commissioner, not on an FOI basis, but on the basis that section 53 of the **Education Act** 1998 applied to exempt the material.)

Decisions of the High Court of Ireland

Mr. Barney Sheedy v The Information Commissioner¹²⁵

- 5.10 This was the decision by Gilligan J. before the case went on appeal to the Supreme Court of Ireland. The Court pointed to the detailed consideration of the public interest question which the Commissioner had carried out, and could find no legal error in his approach to the subject.

Decisions of the Information Commissioner

- 5.11 The Information Commissioner publishes the full text of decisions on the web site.¹²⁶ The decisions are searchable on case name, decision number, date, and section of the Irish FOI Act.
- 5.12 Summaries of significant decisions in which the Irish Information Commissioner discussed the public interest follow (with the exception of certain cases dealing primarily with personal information).

¹²⁴ **Barney Sheedy v Information Commissioner** [2005] IESC 35, <http://www.oic.gov.ie/en/CourtJudgments/SupremeCourtJudgments/Name,3979,en.htm>

¹²⁵ **Mr. Barney Sheedy v The Information Commissioner and the Minister for Education and Science and the Irish Times Limited (First and Second Notice Parties)** [2003] No. 20 M.C.A., <http://www.oic.gov.ie/en/CourtJudgments/HighCourtJudgments/HighCourtJudgmentsSortedbyYear/Name,1525,en.htm>

¹²⁶ <http://www.oic.gov.ie/>

Decisions where the Commissioner held that the public interest was better served by granting the request

Case 98040: Records dealing with Ministerial trips¹²⁷

The requester sought access to a variety of emails received or sent by the Taoiseach and two other specified individuals on certain dates. The Department of the Taoiseach relied on section 20(1)(a) (deliberative processes) to exempt the records from disclosure.

The Information Commissioner found that the decision of the Department should be varied and access was provided to the following documents:

- Three dealing with visits abroad by the Taoiseach
- One dealing with a proposed visit to Ireland by the President of the European Commission.

The Information Commissioner took the view that the record concerning the proposed visit by the President of the European Commission did not contain any matter relating to deliberative processes within section 20(1)(a). The record contained no opinion, advice or recommendation concerning the proposed visit or proposed itinerary but was concerned solely with the making of administrative arrangements in relation to the visit.

Even if the record had contained matters relating to deliberative processes, no material had been advanced that suggested that release would be contrary to the public interest. The Information Commissioner pointed out that in some cases such as when disclosure might endanger the security of the person concerned or where a foreign government would find disclosure objectionable, there might be a public interest in not releasing the matter. In addition, in some cases courtesy alone might require simultaneous announcements in Ireland and abroad. Such a consideration might permit deferral of access but this argument was not relied upon by the public body in this case and might well not have been appropriate.

In respect of a record regarding the Taoiseach's proposed visit to China, the matter might have related to deliberative processes in as much as it contained a discussion of the relative merits of using the Government jet or using commercial transport. However, no specific public interest arguments had been adduced by the Department and the Information Commissioner found that it would not be contrary to the public interest to release this record.

With respect to the email concerning the Taoiseach's programme of foreign engagements for 1998, the Information Commissioner found that this section 20(1) exemption did not apply where:

- the visits/meetings have taken place
- future visits/meetings listed in a programme have not yet taken place but have been confirmed;
- visits/meetings which were due to take place did not occur.

In these cases, the deliberations have ended and the decision has been made.

In any event, the Information Commissioner held that he was not satisfied that this record contained matter relating to the deliberative processes of the Department.

¹²⁷ **Mr. Mark Henry and the Department of the Taoiseach**, case 98040, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1446,en.htm>

In respect of the personal visit of the Taoiseach, the Information Commissioner did not find that this was “personal information” within the meaning of the Act, in that it was not information of a kind which would normally be known only to the Taoiseach or members of his family or friends. The Information Commissioner also found that this record did not fall within section 20.

Case 98020: Notes of an Interview Board¹²⁸

The applicant sought access to all personal information held about him. The agency declined the request, relying on section 21(1)(b) (adverse effect on management functions) to do so.

The Information Commissioner annulled the decision of the agency and, with minor exceptions, the applicant was provided with access to the records requested. The Information Commissioner dealt with a number of arguments raised by the agency in support of the exemption under section 21(1)(b).

The Department argued that disclosure of the matter could lead to more challenges to the recruitment process, resulting in a diversion of resources from the recruitment process and adversely affect the ability of the agency to manage the process. In addition, it would be difficult to find persons willing to serve on interview boards. The Information Commissioner took the view that while it was possible that some prospective interviewers would be deterred, no evidence was offered to indicate that this could be expected to happen to such a degree as to have a significant adverse effect on the ability of the agency to find suitable interviewers. Particularly was this so in a case of an interview for a position such as a clerical assistant (as was the case here) where it was reasonable to assume that the pool of prospective interviewers was fairly wide. In respect of future challenges, the Information Commissioner was not convinced that either the likelihood or the scale of such challenges in the present case was such as to significantly affect the ability of the agency to recruit effectively.

The Information Commissioner expressed the opinion that to affirm the decision of the agency in this case he would need to have been satisfied that release could reasonably be expected to have a significant adverse effect on the performance of at least one of the agency’s functions relating to management. The onus of course rested on the public body to show to the satisfaction of the Information Commissioner that the decision to refuse access was justified: section 34(12) of the Act applied.

Although not strictly necessary to be considered, the Information Commissioner did deal with the public interest question under section 21(2). First, the Information Commissioner rejected an argument that records created at interview were the personal records of the interviewers. He was of the opinion that persons who served on interview boards did so either as agents of the agency in question or in the performance of their functions and the records created could not be considered to contain personal information about the board member but rather, personal information about the person being interviewed. In relation to further arguments about the “integrity and viability” or “confidentiality” of the decision-making process and the “broader Civil Service recruitment and selection interests”, these arguments were not developed in any detail and the public interest in non-disclosure had not been demonstrated. If information of the kind sought was already available to the applicant in synopsis form (as the agency had stated), then it was difficult to see, and the agency had not demonstrated, how release of the records upon which the synopsis was based would be detrimental to the public interest.

¹²⁸ **Mr. AAF and the Office of the Civil Service and Local Appointments Commissioners**, case 98020, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1361,en.htm>

Cases 98049, 98056, and 98057: Information about successful tenders¹²⁹

The requester sought access to all of the documentation relating to a tender for army vehicles. The Office of Public Works decided to release details of the successful tenderer's name, the tender price, and the number and type of vehicle involved. Three of the four successful tenderers sought review by the Commissioner of this decision, relying on section 26(1)(a) (information provided in confidence) and section 27(1) (commercially sensitive information).

The Information Commissioner handed down a lengthy and seminal judgment in the context of the Irish FOI Act. The Commissioner's findings are summarised, by section, in the following paragraphs.

According to the Commissioner, four elements are required before **section 26(1)(a)** can apply:

- the information was given in confidence;
- the information was given on the understanding that it would be treated by the agency as confidential;
- disclosure of the information would be likely to prejudice the giving to the agency of further similar information from the same person or other persons in the future; and
- that it is of importance to the agency that such further similar information should continue to be given.

Here, each tenderer originally disclosed the tender price in confidence, so the first element was made out.

There was an understanding that the price would be treated as confidential until the end of the tender process. While the tenderers might have assumed, based on past experience, that the price information would be kept confidential even after the end of the tender process, such an assumption or understanding on the part of the provider of the information was not sufficient. The second element requires a mutual understanding of confidence, and this was not met.

The principles in the decision of the Queensland Information Commissioner in **Re B v Brisbane North Regional Health Authority** (Decision No. 94001) were relevant to the third requirement:

- where a person was under an obligation to continue to supply confidential information to government or where there was a statutory power to compel disclosure of information or where a person was required to disclose information in order to obtain a benefit from government or avoid a disadvantage, then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information;
- the test was not considered by reference to whether the particular confider whose confidential information was being considered for disclosure could reasonably be expected to refuse to supply such information in the future but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.

In considering governmental practices in Queensland, Western Australia, and Canada, it appears that a tender system involving price disclosure has been found practicable in those jurisdictions and in the circumstances the Information Commissioner did not accept that it was likely that a similar

¹²⁹ **Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office for Public Works**, cases 98049, 98056, 98057, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1450,en.htm>

system in Ireland would result in commercial enterprises refusing to tender. Accordingly, the third element was not made out.

According to the Commissioner, for **section 26(1)(b)** to apply it is necessary to show that disclosure would constitute a breach of a duty of confidence provided for by a provision of:

- an agreement; or
- an enactment; or
- otherwise by law.

The expression “otherwise by law” comprehends the duty of confidence known in equity. The elements of a breach of an equitable duty of confidence were set out in **Coco v A.N. Clark (Engineers) Limited**¹³⁰, which has been accepted in Ireland. Those three elements are:

- the information itself must have the necessary quality of confidence about it;
- the information must have been imparted in circumstances imposing an obligation of confidence;
- there must be an unauthorised use of that information to the detriment of the party communicating it.

There is an overlap between the first two requirements of section 26(1)(a) and the first two elements of the test in the case of the equitable duty of confidence.

No principle or authority supported the proposition that price information was in all cases inherently confidential, but in a case such as the present, the price information was not known at the outset and therefore did not have the necessary quality of confidence.

There was no evidence of circumstances giving rise to an obligation of confidence and no inference could be drawn from the relationship of vendor and purchaser that pricing information would be kept confidential; indeed, in such a relationship there is no general expectation that a purchaser will keep secret the price paid for goods or services.

As to the third requirement, a release of information under the Act could not amount to “unauthorised use” of the information. [Note: The authors consider that **this statement of the Commissioner should not be applied in other cases**. If release under FOI could not amount to an unauthorised use of information, no record could be exempt under section 26(1)(b).] Accordingly, section 26(1)(b) did not apply.

In regard to **section 27(1)(a)**, the Commissioner noted that the factors identified by Gowans J. in **Ansell Rubber Co Pty Limited v Allied Rubber Industries Pty Limited**¹³¹, a Victorian decision, were a useful guide to the meaning of the term “trade secret”. Those factors are:

- the extent to which the information is known outside a business;
- the extent to which it is known by employees and others involved in the business;
- the extent of measures taken by the proprietor to guard the secrecy of the information;
- the value of the information to the proprietor and to his contemporaries;

¹³⁰ **Coco v A.N. Clark (Engineers) Limited** [1969] RPC 41

¹³¹ **Ansell Rubber Co Pty Limited v Allied Rubber Industries Pty Limited** [1967] VR 37

- the amount of effort or money expended by the proprietor in developing the information; and
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

The information must be information used in the trade or business and the owner must limit dissemination of the information or at least not encourage or permit widespread publication. Historical pricing information was not information in respect of which it could be said that it was presently being used in the trade or business. Historical pricing information would not normally have a substantial value to tenderers when tenderers came to quote or tender for future work, given that a competitor could not readily predict the behaviour of competitors on future occasions in a competitive market setting. In these circumstances, the pricing information could not be considered a trade secret after the end of the tender process.

In regard to **section 27(1)(b)**, the Commissioner considered that while the information was certainly “financial or commercial” information, the following points were relevant:

- once again, knowledge by future tenderers of historical prices did not automatically provide any advantage, given the inability to predict the behaviour of competitors;
- it was unlikely that disclosure of such prices would drive tenderers from the market, but even if it did, loss of business would result from that decision rather than from release of the information;
- given that the price in this case was a special or unique price, there seemed to be little scope for the argument that the disclosure of the information could affect other business; there was no evidence or possible inference available that any business relationship with other customers would be disrupted.

However, the test that disclosure “could prejudice the competitive position” of the parties concerned was met in this case, given that this was a lesser standard than “might reasonably be expected to”, inasmuch as what could occur is that other customers who might be paying a different price from that quoted in the tender might well be concerned enough to take their custom elsewhere.

In regard to **section 27(1)(c)**, the Commissioner held that in these circumstances negotiations with other customers could be prejudiced if knowledge of the tender price became known inasmuch as it would provide a lever to the other party in the negotiations and lead to the objector being able to command only a lower price.

Although sections 27(1)(b) and 27(1)(c) applied, the documents would not be exempt if by applying section 27(3), the public interest would, on balance, be better served by granting than by refusing access. It was so held in this case for the reasons that the significant public interests in ensuring openness in relation to the use of public funds and the public interest in requesters availing themselves of rights under the Act outweighed the possible prejudices to the objectors with respect to their competitive position and the conduct or outcome of the negotiations with other customers. These latter considerations were not such as to be given significant weight in this case since the information was historic, it related to a single transaction, and by itself, the price disclosed nothing about the policy adopted by tenderers or how they arrived at the quoted prices. Moreover, no evidence was provided that these harms would in fact occur although the Information Commissioner accepted that they could occur; however a mere possibility of such occurrence must necessarily carry a great deal less weight than a prejudice which was likely to occur. Similarly, the suggestion that the tender process itself would be affected by reason of persons not tendering in future was, although a possibility, not of particularly significant weight and it was unlikely that release of the pricing information would have these effects.

Case 98058: Information about the legislative process¹³²

The requester asked the Department of Justice for papers relating to the drafting of the Solicitors Amendment Bill 1998. The records at issue consisted of correspondence between the Department and the Law Society, records created by the Office of the Attorney General, a memorandum to the Government and earlier drafts, the Government decision about the Bill and copies of two published articles.

In relation to the information for which the Department could legitimately claim an exemption under section 26(1)(a) for information given in confidence, the Commissioner considered that on balance the information should be released in the public interest under section 26(3). He expressed the clear view that “it is in the public interest that views and representations which influence the legislative process should be open to public scrutiny” and noted:

Before the enactment of the Freedom of Information Act, significant weight might not have been attached to this aspect of the public interest. Indeed, it might have been assumed generally that the public interest was better served by conducting deliberations which preceded legislation on a confidential basis. However, the very enactment of the Freedom of Information Act suggests that significant weight should be attached to the public interest in an open and transparent process of government.

With respect to one letter exempted under section 20(1)(a) (deliberative processes), the Department had failed to discharge its burden under section 34(12)(b) of showing that the exemption decision was justified.

Cases 98114, 98132, 98164, and 98183: Invoices paid by government departments to telecommunications companies¹³³

The requester sought access to copies of all invoices paid to 18 telecommunication companies by three agencies. Various parts of section 27(1)(b) and 27(1)(c) were argued. The decision of the Department of Finance to release the records was affirmed, while the decisions of the other two public bodies to grant access to summary information were annulled. In the latter two cases, access was granted subject to certain deletions of names, telephone numbers and account numbers to avoid potential breaches of security systems of the bodies concerned. In the decision, the Information Commissioner set out the following principles:

- For the purposes of the exemption in section 27(1)(b), the expression “could reasonably be expected” is a more generous expression than the word “would”. The section would apply even where the relevant harm is not certain to materialise but might do so.
- However, in this case the resultant harm from release was not a harm that could reasonably be expected; however, it was found that the information contained in the invoices if disclosed, could “prejudice” (in the sense of injure or potentially injure) the competitive advantage held by Eircom in dealing with public bodies.
- It was sufficient for section 27(1)(c) to apply if the release could prejudice the outcome of negotiations for the provision of services to the public bodies concerned; it was held that the

¹³² **Mr. Phelim McAleer of the Sunday Times and the Department of Justice, Equality and Law Reform**, case 98058,

<http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1452.en.htm>

¹³³ **Eircom PLC and the Department of Agriculture and Food; Mr. Mark Henry and the Department of Agriculture and Food; Eircom PLC and the Department of Finance; Eircom PLC and the Office of the Revenue Commissioners**, cases 98114, 98132, 98164, and 98183,

<http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1472.en.htm>

better informed competitors are, the more likely they are to succeed at the expense of the objector, in this case Eircom.

- For the purposes of the public interest test in section 27(3), relevant public interests include the interests in ensuring the maximum openness in relation to the use of public funds and the public interest in requesters availing themselves of rights under the Act.
- However, the public interest in public bodies obtaining value for money and in openness about expenditure of public funds is not absolute and cases could be envisaged where the effect of disclosure would be to totally undermine the business of the company, though this was not such a case.
- A general proposition that disclosure would result in unfairness with respect to future competition for the provision of services was not accepted; rather, the Information Commissioner held that such disadvantage as Eircom might suffer was an inevitable consequence of the regulatory regime which required it to publish its prices and/or required Eircom to ensure that its charges in at least some areas were cost-oriented and transparent; these were matters themselves which furthered the public interest and therefore on balance, the public interest was better served by release of the records in this case.

Case 98078: Records relating to the expenditure of health boards and voluntary hospitals¹³⁴

The requester sought access from the Department of Health and Children to reports concerning expenditure trends and outcomes of health boards and hospital services and certain correspondence from the Department to health boards and voluntary hospitals. The Department based its exemption decision on section 20 (deliberative processes) and section 21 (prejudice to management functions).

In regard to **section 20**, the Information Commissioner found the decision of the Department should be varied, and that non-factual information submitted by hospitals and health boards to the Department was exempt under section 20(1), but that matter would not be exempt to the extent that it had already been released through the health boards. The Commissioner expounded the following principles:

- The Information Commissioner observed that the general approach of the Department was to seek an exemption in relation to all of its correspondence with the health boards and the voluntary hospitals, regardless of content and the Department failed to accept that at least some of the material must have lost its sensitivity since the request was made. The Information Commissioner considered this to be an extreme position and apparently amounting to an assertion that the Department must be allowed to administer the Health Service with whatever degree of secrecy it sees fit. Such a proposition was not sustainable under the terms of the Act.
- The Information Commissioner pointed out that the bulk of the records in the case contained factual information and analyses within the meaning of section 20(2)(b) and therefore could not be exempted under section 20. Examples of such material included reports of actual expenditure, amount of budget variance, steps taken to keep within budget, changes which have occurred to cause the increased expenditure, and other similar information. The Information Commissioner took the view that the only parts of the records which were not factual information were those parts which reflected proposed courses of action being considered by agencies or the Department.
- Correspondence from the Department warning agencies to keep within budget were not, in the view of the Information Commissioner, related to the deliberative process, but rather to the

¹³⁴ **Mr. Martin Wall, The Sunday Tribune newspaper and the Department of Health and Children**, case 98078, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1457.en.htm>

administrative or regulatory role of the Department in overseeing expenditure. Section 20(2)(d) was relevant to this category of matter.

- In examining the general reports received each month (the IMRs), the Information Commissioner held that the Department was not engaged in a deliberative process but was acting in a monitoring or supervisory role to ensure that agencies were operating and delivering services within budget. There was no evidence in the records of any weighing up or evaluation of competing options by the Department.¹³⁵
- While the records reflected certain deliberative processes being considered by the hospitals or health boards for bringing budgets back into line, these were proposals that did not relate to the deliberative processes “of the public body concerned”, which is a requirement of section 20(1). However, the Information Commissioner considered that proposals of this kind submitted to the Department could themselves be considered by the Department for the purposes of deciding what further allocations to make or action to take and to that extent such information could be said to relate to the deliberative process of the Department.
- The Department sought to argue that the public interest in maintaining effective and efficient delivery of health services outweighed the public interest in disclosure. The Information Commissioner pointed out that this was a mistaken approach because section 20 requires the public body to show that release **would be contrary to the public interest** (authors’ emphasis). This was at the time a stronger public interest test than the test in other sections of the Act (but was amended in 2003 to impose the same public interest test as the other exemption provisions which are not absolute exemptions) which require that on balance the public interest would be better served by granting than by refusing the release. In the present case, the Department had not shown that release would be against the public interest.
- The Information Commissioner pointed out that the Department had taken a narrow view of public interest and that the public interest was not limited to matters of cost efficiency alone. He identified a public interest in the community knowing about possible cutbacks to health services and about the community knowing as much about how the services are being administered as is consistent with the provision of an efficient and effective service. While the public did not have a right to know every proposal that was made and in many cases there was a strong argument in favour of protecting proposals from release at an early stage in order to allow the public body properly to consider the matter, once a decision on a course of action was taken, the need to withhold information was weaker. In addition, the Information Commissioner pointed out that another argument of the Department that the information once released will be used or abused in some particular way or misinterpreted was an attitude which prevailed in an era dominated by the Official Secrets Act rather than one governed by the FOI Act.
- In respect of factual information, even though the Information Commissioner strictly did not have to consider the question, he stated that he did not accept the Department’s argument that release was not in the public interest. While release of factual information in the records would give an insight into specific problems facing health boards and hospitals and might prompt questions as to how these problems are being dealt with and although one could sympathise with managers seeking to do their job without external distractions, the policy under the Act was a policy of greater openness which carried with it the burden of dealing with the increased scrutiny that openness might invite. The possibility of such a burden arising therefore was not a factor which might suggest that the public interest was not served by release of the material.

¹³⁵ In the view of the authors, the significant distinction between monitoring or supervising on the one hand and weighing up or evaluating on the other, is one which must be carefully considered in decision-making and one which may easily be overlooked.

- The Information Commissioner pointed out that enquiries by his office had indicated that much of the information in the IMRs was already in the public domain without having had the negative consequences on deliberative process and on delivery of health services which the Department had claimed.
- Certain proposal material furnished to the Department which the Department might have been considering with a view to further action was identified by the Commissioner and exempted. Other records however where action had been taken or which referred to past practices, problems and events, was, with the passage of time, no longer exempt pursuant to section 20.

In regard to **section 21**, the Information Commissioner found the decision of the Department should be varied, and that certain information disclosing negotiating positions or plans of the health boards and which had not been previously released by them was exempt under section 21(1)(c). In respect of that exemption, the Commissioner expressed the following views:

- The Department had not shown any adverse effect on the performance of its own functions relating to management for the purposes of section 21(1)(b); rather, if anything, it had suggested possible difficulties for individual health agencies. While such difficulties might in turn make the Department's job more difficult, the Information Commissioner did not accept that this alone was sufficient to support the exemption in section 21(1)(b).
- In any event, enquiries indicated that a great deal of this information was already in the public domain having been released by the health boards and significant adverse affects predicted had not occurred by reason of such disclosure.
- The Information Commissioner made the point that as a matter of weight, he could not be satisfied by a general prediction without any supporting evidence; such a prediction was not sufficient to satisfy the requirement that disclosure could reasonably be expected to have a significant adverse effect on the performance by the Department of any of its functions relating to management.
- Certain other records relating to failure by a particular health board to spend all of its allocation were generally available to persons attending meetings of the board, including journalists, and in some cases were published by the board in any event. Such records could not be exempt under section 21(1)(b).
- The Department had mistakenly applied the exemption in section 21(1)(c); for example, it sought to argue that the disclosure of the existence of unfunded positions could cause industrial relations problems and public confusion. The Information Commissioner pointed out that such a disclosure would not be a disclosure of a position taken or a plan, procedure or other matter within section 21(1)(c).
- The Information Commissioner expressed the view that the only information contained in the records that would be exempt under section 21(1)(c) would be information relating to the negotiation positions or plans of the Department and the health boards (which were all public bodies), but not that of the voluntary hospitals. Exemption could be claimed for such records to the extent that they had not already entered the public domain.
- While it was not necessary to consider the issue with respect to factual information, the Information Commissioner nevertheless expressed the view that he was not satisfied that negative outcomes suggested by the Department from release of records could reasonably be expected to occur. The claims of the Department in this regard were undermined, he thought, by the Department maintaining claims that release of information already in the public domain would have such adverse effects. The Information Commissioner pointed out that there was a public interest in the community knowing how health spending decisions (or decisions not to spend) are made and a public interest in seeing how official management and decision-making

is conducted. Public scrutiny would be greatly reduced if the only disclosure occurred in the publication of annual reports well after the end of the relevant period. On balance, if he was required to decide it, the Information Commissioner would have found that the public interest would be better served by release of the information than by withholding it.

- The position was different with respect to information concerning proposals. The Information Commissioner considered that there was a great likelihood of negative consequences argued for by the Department where there was release of information at a time when options or various measures were still being considered. Given that management of the health services was a complex task requiring constant monitoring and consideration of various courses of action, it would interfere to such an extent with the process of management to have ongoing disclosure to the world of such proposals, that it would not be in the public interest to do so. While there was public interest in members of the public exercising their rights under the Act and in being informed as to how the health services were being managed, there was a greater public interest in managers in the health service being allowed the opportunity to formulate plans without undue interference as well as the public interest in avoiding the disclosure of negotiation plans and positions. Accordingly, disclosure of proposal information in this case would not be in the public interest under section 21(2).

Case 98127: Records relating to employment policy¹³⁶

The requester sought access to minutes and a policy paper prepared for the Interdepartmental Strategy Group on Employment and Unemployment. The Department of the Taoiseach exempted the material under section 20 (deliberative processes). The Information Commissioner made the following findings:

- decision of the Department annulled;
- access in full granted to the background paper and to the minutes of 3 meetings;
- partial access granted to the minutes of a fourth meeting.

The Commissioner stated the following principles.

As to the background paper, the Information Commissioner found that the bulk of it was factual, but identified some specific parts of the paper which contained comment, interpretation and suggestions as to future actions. The Commissioner rejected the submission of the Department that the interpretation of the term “public body” should be read as wider than the Department itself. He did however accept that the background paper did contain matter relating to the Department’s deliberative processes inasmuch as the Department considered the paper for the purpose of deciding on its input into policy and strategy in relation to unemployment.

Deliberative processes involve the consideration of various matters with a view to making a decision on a particular matter.

There were two requirements for the exemption in section 20(1) to apply:

- the record must contain matter relating to the deliberative process; and
- disclosure must be contrary to the public interest.

These two were independent requirements and the fact that the first one may be met carries no presumption that the second is also met.

¹³⁶ **Ms. Eithne Fitzgerald and the Department of the Taoiseach**, case 98127, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1475.en.htm>

As to the public interest, this was an issue to be considered having regard to the contents of the record or records at issue in each particular case and the Information Commissioner cited Australian case law in support of that proposition. In other words, the Information Commissioner pointed out section 20 was not a “class” exemption designed to protect all records relating to a deliberative process regardless of their contents.

The Information Commissioner rejected a submission from the Department that as a matter of principle the deliberative process should be given “full protection” until completed and that this was the purpose of section 20. The Information Commissioner stated that he could find no such principle within section 20 and had that been the intention of the legislature, then it would have been a simple matter to have enacted a specific provision along those lines.

The Department raised three specific arguments as to why granting of the request would be contrary to the public interest:

(1) Disclosure of the material would inhibit the development of a co-ordinated position on these matters across Government Departments and agencies. In support of this argument the Department argued that the frankness and candour of participants would be prejudiced by premature disclosure of the deliberations and this would in turn inhibit the development of a co-ordinated position. The Information Commissioner, having regard to the contents of the paper, rejected this argument. He also pointed out that the Act has introduced a new regime in respect of records held by public bodies and, while accepting that open and frank discussion is often required in order to evaluate and assess policy options, he did not accept as a general proposition that disclosure under the Act would have the effect of preventing public servants from properly carrying out their functions.

In some exceptional cases, an argument regarding frankness and candour might be sustainable in the context of the public interest test. The Information Commissioner cited two examples from the **Eccleston** case in Queensland as follows:

- the furnishing of a report on the suitability of an officer for appointment to a position;
- a need to preserve the confidentiality of an official’s views where that official may be responsible for advising the Minister but whose views may need to be kept confidential as the only means of ensuring that the official is acceptable to a number of parties who have competing interests.

(2) The Department sought to argue that disclosure of the material could prejudice the Government’s position concerning discussions and negotiations with the social partners and release of the papers would put into the public domain information on strategies which the Government might adopt. While the Information Commissioner accepted in a general sense that in certain circumstances disclosure of future Government strategies might not be in the public interest, no evidence and no detailed arguments were put in this case as to why disclosure of future strategy would be against the public interest. The argument was accordingly rejected.

(3) The Department also argued that the paper contained proposals for strategies and policies which had not yet been agreed and that premature release of such information would be contrary to the public interest. This was an argument virtually identical with the submission that matter should not be released until the deliberative process has been completed. The Information Commissioner was not willing to accept the concept of “premature” release for the purposes of section 20, but in any event the Department did not provide any explanation of how such release could be against the public interest. The Information Commissioner pointed out that release prior to the conclusion of a deliberative process might be inconvenient to public bodies and that such disclosure might spark further public debate, challenges to the views or facts contained in the material or criticisms of the public body or its officials. The Information Commissioner pointed out that such consequences might also arise if the material is released after the deliberations have been completed and mentioned in passing that such a delay might well work in the interests of the public body in the

sense that matters will have moved on and the public will concern itself more with the decision which has emerged and less, if at all, with the detail of the process which resulted in the decision. The Information Commissioner said that as with the frankness and candour argument, specific facts in relation to the case must be presented and a specific harm to the public interest flowing from release must be identified. This had not been done in the case and the arguments were rejected.

With regard to minutes of meetings, the Information Commissioner made the point that minutes are a brief summary of proceedings at meetings and, by their very nature, were bound to contain some factual information. He discussed but rejected the proposition that minutes might be regarded as entirely factual because they record matters or events which occurred at a meeting, including advice, opinions and recommendations. The Information Commissioner took the view that this was not the proper way of approaching the term “factual information”, and that the proper way of considering that issue was to look beyond the fact that the contribution was made and examine the content of each contribution. Approaching the matter in this way, and having examined the minutes, the Information Commissioner decided that they consisted almost entirely of non-factual information other than attendance lists. Those lists were factual information and section 20(1) could not be relied upon to refuse access to those lists.

The Department raised the same three general arguments with respect to the minutes as it did with the background paper. The Information Commissioner considered each of these arguments in relation to each of the sets of minutes and rejected them for the same reasons as he rejected the claims for exemption in relation to the background paper. Essentially, where the Information Commissioner found there was non-factual information within the minutes, he decided that release would not be contrary to the public interest for the reasons he outlined in relation to the background paper.

Case 98198: Records relating to companies involved in poultry processing¹³⁷

The requester sought access to certain records relating to two companies involved in poultry processing. The Department of Agriculture and Food refused access on the basis of section 26(1) (confidentiality) and section 27(1) (commercial information).

The Information Commissioner found that section 26(1) did not apply to any of the records. He accepted that the records did contain information which could damage the reputation and commercial interests of the companies.

However, the Commissioner found that there was a significant public interest in the public knowing that the Department carried out its regulatory functions in the areas of health, food safety, and the control of disease. These interests of the public, as ultimate consumers of food products, outweighed any public interest in protecting the commercial interest of the companies.

Case 99168: Details of members' expenses¹³⁸

The requester sought access to the total expenses paid to each member of the Houses of the Oireachtas in relation to travel expenses, telephone and postage expenses, secretarial and office administration expenses and all other expenses paid since April 1998. Release of information on an anonymous basis was made, but the Office argued that the identities of the members and how much each received was personal information which should be withheld under section 28.

¹³⁷ **ABC Ltd and DEF Ltd and the Department of Agriculture and Food**, case 98198, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LetterDecisions/Name,1486,en.htm>

¹³⁸ **Mr. Richard Oakley, The Sunday Tribune newspaper and the Office of the Houses of the Oireachtas**, case 99168, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1629,en.htm>

The Commissioner held that that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the members might enjoy in relation to details of their expenses claims. A failure to disclose the information requested had the potential to damage public confidence in the integrity of members.

Case 99309: Report relating to a charitable organisation¹³⁹

The requester sought access to a report commissioned by the Department of Foreign Affairs into the charitable organisation GOAL. The Department refused access, relying on sections 26 and 27.

The Information Commissioner found that none of the provisions of section 26 or 27 applied. Having regard to its accountability to Dáil Eireann any understanding of confidentiality was inappropriate. Nor could the Commissioner see how disclosure of the report could result in a material financial loss to GOAL.

Therefore the Commissioner strictly did not have to consider the public interest. Nevertheless he observed that while there was a public interest in the efforts of charitable organisations not being disrupted, the public interests in disclosure outweighed that interest. These were the interests in ensuring that the objectives in respect of which public funds are allocated were met, and the interest in accountability as to how such funds were applied.

Case 000274: Recommendation of Refugee Appeal Authority¹⁴⁰

The requester sought access to the recommendation of the Refugee Appeal Authority on his application for refugee status. The Department refused access under section 21(1)(a) (prejudice to investigations) on the basis that release of such detail could help other asylum seekers to build up false cases in their applications.

The Commissioner found that there was no real prospect of prejudice under section 21(1)(a). In his experience, refugees already swapped information about their experiences verbally. Moreover, the part of the record explaining why the application of Mr. X was allowed was at such a level of generality that it would be of very little use to any applicant seeking to fabricate a case.

Strictly, therefore, the Commissioner did not have to consider the public interest. Nevertheless, he observed that while there was a public interest in having an effective appeals system in refugee cases, the public interest in transparency and accountability of the appeals body was great enough to outweigh the countervailing interest. The Commissioner said:

Sometimes a public body will have to accept the risk of some reduction in the effectiveness of its procedures in the interests of transparency and accountability.

In the opinion of the authors this is a perspective that should always be borne in mind in an FOI context.

Case 98166: Records relating to the future funding of FAI International Consulting¹⁴¹

The requester sought access to records relating to the future funding of FAI International Consulting and certain other information on that body held in the Office of the Tanaiste. The

¹³⁹ **The Sunday Times and the Department of Foreign Affairs**, case 99309, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1700,en.htm>

¹⁴⁰ **Mr. X and the Department of Justice, Equality and Law Reform**, case 000274, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1027,en.htm>

¹⁴¹ **Mr. X and the Department of Enterprise, Trade and Employment**, case 98166, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1477,en.htm>

Department of Enterprise, Trade and Employment held the records exempt under section 21(1)(c) (disclosure of positions for negotiations) and section 27(1)(b) (material financial loss). Section 20 (deliberative processes) was also applied.

The Information Commissioner could find no public interest in refusing to disclose earlier projections even at a time when the final projections had been prepared. He did not accept that the potential of information to mislead the public was a factor against disclosure, a point made by him also in other decisions. This underestimated the ability of the public to understand information properly, and in any event, there was nothing in the FOI Act to exempt information which was factually inaccurate.

In respect of the matter relating to negotiations, those negotiations had concluded. While section 21(1)(c) made no distinction between concluded and ongoing negotiations, the Commissioner was of the view that where the negotiations were at an end, the public interest in openness and accountability would tend to release of section 21 records. But where disclosure of past negotiations could reasonably be expected to prejudice current or future negotiations or cause some other harm, then this would weigh heavily in the balance in applying the public interest test.

While the exemption in section 21(1)(c) had at first been applied properly by the Department, the changed circumstances meant that it was no longer appropriate to do so. In the result, almost all of the records were to be released.

Case 000041: Letters of objection relating to a work permit application¹⁴²

The requester sought access to three letters written by representatives of a rival sporting organisation objecting to a work permit application that had been filed on behalf of the requester. The agency refused access on the basis of the confidentiality exemption in section 26(1)(a).

The Information Commissioner annulled the decision of the agency and made a new decision granting access to the three letters.

The Commissioner stated the following principles:

The case reiterates the four elements required in order for section 26(1)(a) to apply, namely:

- that the information was given in confidence;
- that the information was given on the understanding that it would be treated as confidential;
- that the disclosure of the information would be likely to prejudice the giving to the body of further similar information from the same person or other persons in the future; and
- that it is of importance to the body that such further similar information should continue to be given to the body.

The purpose of section 26(1)(a) is to protect the flow of information which relates to the exercise by the body of its statutory powers and functions; in the case of a Department of State, this purpose extends to the Minister's statutory powers and functions.

However, the collection of extraneous information (perhaps based on a lack of knowledge on the part of the person providing the information as to what is relevant) was not an inevitable consequence of seeking relevant information. It followed that it could not be regarded as being of importance to the Department to continue to receive extraneous information in the future.

¹⁴² **Mr. Daniel Reed and the Department of Enterprise, Trade and Employment**, case 000041, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1013.en.htm>

An assurance of confidentiality given by a public body is not conclusive when considering the question of release of information under the Act, as the terms of section 26 make clear.

There was a public interest in the Department receiving relevant information about a particular industry or beneficiary of a work permit application and a further public interest recognised by section 26 itself in the proper preservation of confidences.

However, in this case there was a strong public interest in promoting openness and transparency in the decision-making process and in ensuring fair treatment of applicants for work permit applications and for their prospective employees. Where action is taken prejudicial to a person's interest based upon adverse comments provided by a third party, then procedural fairness would ordinarily require that the person be informed of the substance of those adverse comments and be given an opportunity to respond to them; in this regard, the Information Commissioner followed the approach of the Queensland Information Commissioner in **Coventry and Cairns City Council** (1996) 3 QAR 191.

While recognising the significant public interest in the proper preservation of confidences, such an interest could not be promoted at the expense of fair procedures, and on balance the public interest was better served by granting rather than refusing access to all but the last paragraph of one of the letters.

A case where the adverse comments were taken into account (such as the present one) is to be distinguished from a case where the allegations do not lead to the action being taken or put another way, if the action is not taken on foot of the allegations: see the Information Commissioner's decision in **Mr. AAY and the Department of Social, Community and Family Affairs**.

Case 99035: Records of communications between Shannon Development and Esat Telecom¹⁴³

The requester applied to the Department of Enterprise, Trade & Employment for access to records relating to communications between Shannon Development and Esat Telecom. The Department refused access under sections 26 (confidentiality) and 27 (commercial interests).

The Commissioner decided that section 26(1)(a) did not apply and nor did section 27(1)(b) or (c). The Commissioner did not consider that disclosure of the records would undermine the negotiating position and competitiveness of Esat Telecom in the circumstances. Information would be of little or no relevance once the final outcome of negotiations was known. Moreover, the subject matter of the negotiations was relevant to other telecommunications providers who would have access to the information in the proper course.

Although it was not strictly necessary for the Commissioner to do so, he went on to make certain comments concerning the public interest. He expressed the view that while there was a legitimate public interest in persons being able to conduct commercial transactions with public bodies without fear of adverse commercial consequences, there was also a significant public interest in the actions and business of public bodies being open to scrutiny. The Commissioner stated, significantly, that this latter public interest was of greater significance where the business being conducted involves transactions which may confer a benefit on a particular party (Esat Telecom) to the detriment or exclusion of others (the alternative telecommunications providers). On this basis, the Commissioner would have found, had it been necessary, that the public interest would be better served by granting the request than refusing to do so.

¹⁴³ **Mr. X and the Department of Enterprise, Trade and Employment**, case 99035, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LetterDecisions/Name,1561,en.htm>

Case 000365: Letter of complaint concerning work atmosphere in a school¹⁴⁴

The requesters sought access to a letter written by a number of teachers under the **Safety, Health and Welfare at Work Act 1989** regarding working conditions at their school in the west of Ireland. The Department of Education and Science refused access by reference to, among other provisions, section 26(1)(a) and section 23(1)(b) (both confidentiality provisions).

The Information Commissioner annulled the decision of the Department and held that the letter be released to one of the requesters, the Principal of the school, subject to deletion of the names and signatures of the signatories to the letter. However, the letter was withheld from the other requesters.

The Commissioner stated the following principles concerning **section 26(1)(a)**:

The elements of section 26(1)(a) were made out; in particular the fact that the signatories did not seek any action to be taken on the letter, but that the complaint be recorded, meant that they expected confidentiality to be maintained.

The relevant public interests in this case included requesters exercising their rights under the Act, an interest in enabling people, against whom allegations have been made, to be aware of those allegations and to be in a position to refute them, and a public interest in discouraging the making of false or malicious allegations.

Public interests on the other side included an interest in safeguarding the right of staff members to report problems identified in the workplace under the relevant legislation and the public interest in defending the right to privacy of persons who reveal personal information to their employer regarding the effects that their work conditions are having on them.

In this case, no prejudice could flow to the reporting systems under the relevant legislation due to the fact that in the absence of the names and signatures, no persons could be identified as being responsible for making the complaints; therefore, the provision of information of this kind in the future would not be prejudiced.

However, release of the contents of the letters (without the names and signatures) might allow the Principal, should this become necessary in the future, to refute the allegations made about the running of the school and accordingly the public interest was better served by release of the contents of the letter to the Principal.

However, the remaining requesters (being teachers at the school who had not signed the letter) would not be likely to suffer in the future as a result of the Department holding this letter in that no specific allegations were contained against any of the requesters and no action was sought or had been taken to date on the basis of the letter.

Case 98188: Balance of records with respect to the tender for army vehicles¹⁴⁵

This request followed up the release of the order forms in **Henry Ford** and sought the remainder of the records relating to the tender competition for army vehicles. The Office of Public Works refused the request, citing the exemptions in section 26 (confidentiality) and section 27 (commercial information).

¹⁴⁴ **Ms. ACH and Others and the Department of Education and Science**, case 000365, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1030,en.htm>

¹⁴⁵ **Mr. Mark Henry and the Office of Public Works**, case 98188, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1481,en.htm>

The Information Commissioner varied the decision of the agency so as to require disclosure of some records while maintaining the exemption of others. The Commissioner set out a long exposition of the relevant principles, as follows.

In regard to **section 26**:

The principles concerning sections 26(1)(a) and 26(1)(b) set out in **Henry Ford** were reiterated here. In addition, reference was made to European Union directives which provide for the disclosure of certain materials in the case of tender or contract awards while maintaining confidentiality of other materials. Reference was also made to guidelines published by the Office of Public Works which stress confidentiality, although such confidentiality cannot be absolute having regard to the directives and the enactment of the FOI Act.

The Information Commissioner emphasised that each record relating to a tender competition must be examined on its own merits; even a cover letter (while normally innocuous) might in some cases reveal strategic information about the company's approach to tendering or as in the Canadian decision **Ontario Hydro** (Ontario Information and Privacy Commissioner Order P-367), represent a "how-to" manual for the design and implementation of a contract.

In regard to **section 27**:

The case reiterates the elements of a trade secret as set out in **Henry Ford**. As a matter of clarity, the Information Commissioner added that, as a general proposition, documents revealing detailed information about a company's current pricing strategy or otherwise unavailable product information might be exempted under section 27(1)(a) even following the conclusion of the tender.

In some cases (usually exceptional ones) a simple statement of a tender price might be used to derive damaging information about a company's pricing strategy, as occurred in at least one major United States decision. However, any suggestion of such effects would have to be exactly spelt out by the person objecting to disclosure of the price.

In applying these principles concerning sections 26 and 27, the Information Commissioner reached the following conclusions:

- Information relating to the identities of unsuccessful tenderers or components in respect of which the tender was rejected, remained commercially sensitive and/or confidential and not to be disclosed under the Act. There was no public interest in these details because they referred to prices which had not been accepted and no public funds had been paid out to these persons.
- Product or specification information was held not to be exempt under sections 26 or 27, in the absence of extraordinary circumstances. Information of this kind was not only to be released in the public interest in disclosing the products upon which public money has been spent, but also on the basis that such product information could readily be obtained from a dealer in or a purchaser of vehicles of this kind.
- A cover letter is often in the nature of a self-serving marketing pitch, and was in this case. There was no confidential or commercially sensitive information in the letter.
- The disclosure of pricing information of successful tenderers itself was not exempt. This was not a case where such unit pricing information might disclose tenderers' margins, costs or approach to tendering, as occurred in **Maddock, Lonie and Chisholm** [1995] WAICmr 15 in Western Australia.
- The prices tendered by unsuccessful tenderers and details of unpurchased optional extras offered by one of the successful tenderers were commercially sensitive for the purposes of sections 27(1)(b) and (c).

- Product information of unsuccessful tenderers was also commercially sensitive on the same bases.
- Disclosure of pricing or product information of a successful tenderer is counter-balanced by the benefits of being awarded the contract, but this is not true with respect to an unsuccessful tenderer. This would mean that a tender system which would add further to the costs of an unsuccessful tenderer by disclosing commercially sensitive information regardless of success would be likely to deter at least some companies from tendering for particular contracts.
- However, there was no basis shown upon which it could be said that disclosing the names of the unsuccessful tenderers disassociated from their prices would be likely to have a deterrent effect on future tenders or could cause detriment to a company.
- The requirement of “detriment” (required under the third **Coco** test for the purposes of section 26(1)(b)) is not difficult to achieve and in this respect the Information Commissioner referred to statements by the Queensland Information Commissioner in the case of **Re B** (1994) 1 QAR 279 which referred to not only detriment in a pecuniary sense but also detriments including embarrassment, a loss of privacy or fear, and indirect detriment, for example, injury to some relation or friend.
- The test of the requisite prejudice for the purposes of sections 26 and 27 required at least the possibility of some tangible detriment or harm; the test was not whether the harm is certain to materialise but whether it might do so.
- As a general rule where the confidential commercially sensitive information of a tenderer does not involve the expenditure of public money, the public interest lies in protecting that information from disclosure. As was said in **Raytheon** No 89-2841, 1989 US Dist. LEXIS 18281 (D.D.C. Dec 22, 1989), there is very slight public interest in such information because it reveals little about the operations or expenditures of governments and policy considerations of this kind therefore did not apply.
- In the Queensland case **Dalrymple** (1998) 4 QAR 474, even disclosure of unit rates of a successful tenderer was held not to be in the public interest because the total price tendered was the key determinant in the evaluation of the tenders and there was no sufficient public interest to outweigh the potential harm of disclosure to the successful tenderer.

The Information Commissioner offered a helpful general summary of his views to date regarding records relating to a tender competition. In his view, the following principles are relevant:

- Public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.
- Tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances would historic prices remain trade secrets. However, documents which would reveal detailed information about a company’s current pricing strategy or about otherwise unavailable product information could fall within the exemption in section 27(1)(a) even after the conclusion of a tender competition.
- Tender prices generally qualify as commercially sensitive information for the purposes of section 27(1)(b) and (c) of the Act. Depending on the circumstances, product information can also be considered commercially sensitive under section 27(1)(b).
- When a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied, and the public interest also favours the release of such information but exceptions may arise.

- Other successful tender information which is commercially sensitive or detailed explanations as to how the tenderer proposed to meet the requirements of a public body may remain confidential. The public interest would not normally require disclosure of these matters unless it were necessary to explain the nature of the goods or services purchased by the public body.
- Unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract and the public interest lies in protecting that information from disclosure.
- The Information Commissioner stressed that no tender-related records are released or exempted as a class; each record must be examined on its own merits in light of the relevant circumstances.

Case 99454: Report concerning the remuneration of Chief Executives in Commercial State Organisations¹⁴⁶

The requester sought access to a report prepared by external management consultants concerning the evaluation and market pricing of Chief Executive positions in Commercial State Organisations. The request was subsequently limited to the findings and recommendations contained in the report. The Department sought to exempt this information under section 21(1)(b) (detrimental effect on the functions of the Department in the pay determination process), section 21(1)(c) (disclosure of negotiating position of departments) and section 27(1)(b) (adverse effect on the commercial interests of the consultants).

The Information Commissioner did not accept that there would be a significant adverse effect on the function of the Department in respect of its management. The Commissioner pointed out that information concerning salary levels of senior public servants was commonly published in annual reports and in other publications. Even if some chief executives would be dissatisfied with their relative position, the Department was now in a much better position to justify differences in pay structures by reference to the evaluation provided by an expert group.

The Commissioner did not accept that section 21(1)(c) applied either since, effectively, the negotiating position of the Departments concerned was already known, including the parameters set by the external consultants' report in respect of any particular job and the fact that any improvement on a salary range would have to be justified by reference to new factors or considerations.

Strictly speaking, the Commissioner therefore did not have to consider the public interest. However, he did make some relevant comments. He considered that there was a significant public interest in the public having access to the findings of a report on the basis of the public interest in openness and accountability in the use of public funds. The Commissioner could not accept that the Department relied on the report of an external body not accountable to the public and then sought to withhold the report of that body from the public under the FOI Act. There was also an interest in the Chief Executives having some assurance that their salaries were being set in a fair way by reference to the importance of the jobs which they held. If the report was not adequately robust to withstand public scrutiny, then the Commissioner could not see how protecting the report from such scrutiny could serve the public interest.

With respect to section 27(1), the Commissioner did not find that the findings and recommendations were commercially sensitive and in any event, would have found that they should be released in the public interest for the reasons he set out with respect to section 21(1).

¹⁴⁶ **The Sunday Tribune and the Department of Finance**, case 99454, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1744,en.htm>

Case 030182: Successful tender submission relating to the float of Telecom Eireann¹⁴⁷

The requester sought access to the successful tender submissions for the contract to act as the global co-ordinators and financial advisers to the Minister for Public Enterprise and Minister for Finance in relation to the initial public offering of shares in Telecom Eireann. The decision of the Department was to decline the request on the basis of sections 26 (confidentiality) and 27 (1)(b) (prejudice to commercial information).

For reasons of confidentiality under section 43(3), the Commissioner did not publish a full decision in this matter. However, she found that all of the information requested should be released to satisfy the strong public interest in openness and accountability in relation to the float of Telecom Eireann.

The decision, as reported, notes that this was a departure from previous decisions, such as the decision in **Mr. Mark Henry and the Office of Public Works** (case 98188, described above). She distinguished the present case because the information in the case was five years old and more historic than the previous cases considered and, secondly, on the basis that the circumstances of the float had a significant impact on the public as well as the public purse having to meet substantial fees to the advisers. Indeed, the Commissioner did not find section 26 satisfied in the circumstances, although section 27 *prima facie* applied. However, the strong public interest in disclosure prevailed in this case.

Case 020533: Records relating to investigation into a private nursing home¹⁴⁸

The requester sought access to records relating to all communications and findings by the South Eastern Health Board in relation to reports of incidents alleged to have occurred in a nursing home in which the requester's late mother had been resident. After failing to make a decision at first instance and upon internal review, the Board subsequently wrote to the requester saying that while access was provided to certain documents, substantial quantities of other documents were exempted under sections 26 (confidentiality) and 27 (commercial information) as well as section 28 (personal information).

The Commissioner found that section 26 did not apply to most of the documentation exempted by the Board. Some were excluded by section 26(2) as having been prepared within the authority. In addition, the four requirements identified in earlier cases of section 26(1)(a) were not satisfied. In addition, since one of those requirements was that the information have the "necessary quality of confidence", and this was also a requirement of section 26(1)(b), that latter exemption also did not apply.

While the Commissioner was constrained under section 43 as to what she could say about the contents of the records in respect of which section 27 exemption had been claimed, the argument was that commercial interests of the Home in question could be prejudiced. The Commissioner accepted that paragraphs (b) and (c) of section 27(1) did apply to the records in question. However, in considering the question of the public interest, the Commissioner identified significant public interests in information about private nursing homes being available to the public. Those interests were:

- The payment of substantial sums out of the public purse and the need to ensure accountability in respect of this funding.

¹⁴⁷ **Company X and the Department of Communications, Marine and Natural Resources**, case 030182, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LetterDecisions/Name,1292,en.htm>

¹⁴⁸ **Mr. X and the South Eastern Health Board**, case 020533, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LetterDecisions/Name,1270,en.htm>

- The interest of the public in knowing that such homes operate within the standards prescribed by law.

The Commissioner considered there was a significant public interest in the public knowing how health boards carried out nursing home inspections in individual cases and that the regulatory functions assigned to the boards achieved the purpose of the relevant legislation. She went so far as to state that in the normal course, reports of health board inspections of private nursing homes should be available as a matter of routine, subject only to the deletion of personal information and, occasionally, the protection of confidentiality in relation to third parties. There was an overriding public interest, in her opinion, in ensuring that the health, security and welfare of elderly and vulnerable members of society is seen to be protected by appropriate health board action.

These public interest factors clearly outweighed a public interest in non-disclosure, being the support of an environment conducive to the conduct of business, including the operation of private nursing homes. Accordingly, the records at issue were required to be released subject to the deletion of some references which constituted personal information. In deleting the information, the Commissioner considered that there were stronger public interests in protecting privacy, and these interests were:

- The public interest in protecting the general right to privacy of members of the public.
- The public interest in members of the public and the business community being able to communicate in confidence with public bodies without fear of disclosure in relation to sensitive matters.
- The public interest in ensuring the flow of information to public bodies and
- The public interest in public bodies being able to perform their functions effectively and efficiently, particularly in relation to issues relating to the investigation of alleged breaches of the law.

For these reasons, identifying information was required to be deleted from the records the Commissioner found should be released.

Case 031109: Records relating to a decision to close a College of Education¹⁴⁹

The requester sought access to records relating to a decision to close St. Catherine's College of Education for Home Economics. The Department of Education & Science refused access on the grounds that the records were exempt under sections 21(1)(b) and (c) (functions relating to management and disclosure of plans or positions).

The Commissioner pointed to serious deficiencies in the decision of the Department. There were no public interest considerations discussed in the decision and no particular reasons given for the invocation of the exemptions. The Commissioner considered that there were no past, present or possible future negotiations involved for the purposes of section 21(1)(c). In addition, apart from assertion, the Department had not explained how management functions would be adversely affected for the purposes of section 21(1)(b). In those circumstances, the Department had not satisfied its onus under section 34(12)(b) of showing that the exemption decision was justified.

Accordingly, the Commissioner was not required to consider the public interest. However, she made a number of comments in that regard. She stated that she would have found that in the circumstances the public interest would be better served by releasing the records. They concerned a decision to close a third level college which had very significant implications for existing staff and

¹⁴⁹ **Ms. Madeleine Mulrennan and the Department of Education and Science**, case 031109, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LetterDecisions/Name,1340,en.htm>

for potential future students as well as having significant financial implications. In those circumstances, the public interest arguments in favour of openness and accountability were particularly strong and overcame public interests in the efficiency of public bodies.

Case 030759: Information about the identity of a requester under the FOI Act¹⁵⁰

The requester sought access from the Midland Health Board to full information about the identity and details of a requester who had previously made a request under the Act in relation to the prescription of the drug class “Statins” by general practitioners in a particular region. Information already disclosed indicated that the first requester was a pharmaceutical company. The request for the identity and details of that previous requester was refused by the Board relying on section 27(1)(b) (commercial interests).

The Commissioner pointed to a public interest in the public having as much information as possible about the public health service and about how the various interests within the service interacted. She was of the view that it was in the public interest that information was freely available regarding the contacts between medical practitioners and pharmaceutical companies and whether, and if so how, such contacts influenced prescribing patterns. This was part of the very strong public interest in ensuring the greatest level of transparency possible in regard to the operation of the health service.

The Commissioner pointed out that not to identify the first requester meant that one or other pharmaceutical company would be wrongly associated with that FOI request and might suffer some damage on that account, a result which would not be in the public interest. On the other hand, by releasing the information, transparency would make it less likely that anything improper would occur (although she did not impute any bad motives to the first requester). The Commissioner also recognised that there were public interests in the first requester not suffering any prejudice in the view of doctors (because it might be suggested that the request was an invasive investigation into the doctors’ prescribing practices). There was also a public interest argued by the first requester in it being able to pursue initiatives to improve economic efficiency.

Notwithstanding these public interest arguments, the Commissioner found that the balance of the public interest favoured release of the identity of the first requester. The Commissioner found it difficult to envisage that a commercial entity would expect to have a right of access under FOI to detailed information regarding prescribing patterns of named medical practitioners while also holding the view that the practitioners concerned, or the public generally, would be precluded from knowing the identity of the requester. Part of the information held by public bodies was details of use of the FOI Act and such details were potentially releasable under the Act unless they were protected by a specific exemption such as section 28 or section 27. In this case, however, the public interest test applicable to section 27 required disclosure.

Case 000528: Details of an out of court settlement¹⁵¹

The requester sought records relating to an out of court settlement of an employment dispute involving the North Eastern Health Board and a senior hospital consultant. The Board exempted the records under various provisions, including section 21(1)(b) (adverse effect on management functions) and section 26 (confidentiality).

The Commissioner annulled the decision and required the records to be provided. She rejected an argument that disclosure would make it impossible for the Board to enter into similar settlements in

¹⁵⁰ **Dr. X and the Midland Health Board**, case 030759, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1333,en.htm>

¹⁵¹ **Mr. John Burns and the North Eastern Health Board**, case 000528, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1039,en.htm>

the future, since a confidentiality clause in the settlement agreement would thereby be negated and this would have a significant adverse effect for the purposes of section 21(1)(b). While the existence of the confidentiality clause in the agreement was of importance, it did not follow that release in this case would mean that records relating to future settlements would also have to be released. The finding of the Commissioner in this case depended on specific facts which she went on to set out in her decision. She rejected arguments that the Board would be put at risk of substantially higher claims in the future if settlement negotiations were made impossible.

The Commissioner was surprised that the Board had expressed the view that the settlement could not be explained adequately and she went on to state that much of the background to the dispute was already in the public domain including details set out in a High Court judgment. The Board would be in a position, or be capable of, presenting information in a manner which would allow any objective observer to draw accurate and balanced conclusions. The Commissioner did not accept that the size of any settlement would impact upon the conduct of other settlement negotiations since it was reasonable to expect that future claims would depend on the facts and on terms that might reasonably be expected to be achieved based on those facts. In addition, the records at issue related to matters which occurred about four years in the past, they related to a very specific dispute and much information was already in the public domain. While accepting that release would have certain consequences, the Commissioner was not satisfied that it would have a significant adverse effect on management functions.

In respect of section 21(1)(c), the Commissioner pointed out that the Board was seeking to exempt information in relation to the outcome of negotiations and not positions taken for the purpose of negotiations. The section was intended to protect undisclosed strategies, positions or alternatives not the results of a settlement. Accordingly, she found that section 21(1)(c) also did not apply.

While not having to do so strictly, the Commissioner went on to consider the public interest under section 21(2). The Commissioner pointed to the fact that in correspondence with the doctor in question, he had shown no interest at all in expressing a view as to whether release of the records would be to his detriment. Accordingly, the argument put by the Board that release would affect the reputation of the doctor was not one acceptable to the Commissioner in the circumstances. In addition, the fact that the circumstances in the present case were unique and the settlement was over four years old, minimised any potential harm to current or future proceedings if the records were to be released. Public interest required the Board to act fairly and to be subject to public scrutiny. There was a public interest in the openness and transparency in the expenditure of public money which favoured release in the case. The fact that the Financial Statements of the Board were audited by government authorities and had been published did not lead to a conclusion that the additional further safeguard of public disclosure under the FOI Act should be put to one side. While there was no grounds for thinking that there had been any abuse of position, if the details of the settlement were to remain secret, the scope for abuse would remain as a possibility in the public mind. This was an additional reason why public scrutiny was desirable. There was also a strong public interest in disclosing how public bodies carried out their functions in cases such as this including functions in relation to management and employment of staff and the resolution of disputes with staff. Overall, this was a matter of real public concern and the public interests referred to by the Commissioner favoured disclosure had she found that the section 21(1) exemptions applied.

In considering the breach of confidence exemption, the Commissioner recognised that there was a contractual obligation expressly set out providing for confidentiality. Disclosure would break one of the terms of the agreement between the Board and the doctor and would therefore amount to a breach of a contractual duty of confidence. However, where a contractual right to confidentiality had been waived, this would not be the case. The Commissioner pointed to a number of communications between her Office and the doctor and his solicitors in the course of the review. There had been no substantive response at all made to the Office and no response in particular as to whether the doctor would regard release by the Board as detrimental to his own interests. In the absence of any reply whatsoever, the Commissioner was entitled to take the view, and did so, that

the doctor had no objection to disclosure and did not insist upon confidentiality. Since he did not do so, he would not have a cause of action for breach of confidence under section 26(1)(b) and that exemption did not apply. The exemption under section 26(1)(a) did not apply by reason of section 26(2); if any duty of confidence was owed, it was owed by the Board to a member of staff of a public body.

In the circumstances, the public interest was better served by granting the request.

In the course of the decision, the Commissioner also made the finding that section 26(1)(b) was not intended to protect solely the interests of a government authority; rather, it was intended to protect persons and entities dealing with government authorities. It was possible in some cases that the public authority would also be protected where its interests coincided with the third party to whom the duty of confidence under section 26(1)(b) was owed.

Case 030847: Records of correspondence between a hospital and the Post Mortem Inquiry¹⁵²

The requester sought access to records of correspondence between Our Lady's Hospital for Sick Children and the Post Mortem (Dunne) Inquiry and between the Hospital and others relating to the Inquiry. The Hospital exempted a large number of records on the basis of various exemptions, including section 26(1) (confidentiality) and section 21(1)(a) (prejudice to investigations).

The Commissioner did not regard the exemption provisions of section 26(1) as applicable. Nor did she regard section 20(1) as applicable. Nevertheless, she went on to make certain comments concerning the public interest. The Commissioner stated that there was a very strong public interest in ensuring the maximum transparency possible in regard to the manner in which public bodies conducted their business on behalf of the public. This was certainly true in the sensitive area of the post mortem practices of hospitals. On the other hand, there was a public interest in enabling the Hospital to conduct its business effectively and allowing it a space to think out its response to the Inquiry. However, once a decision had been made to proceed with a response by the Hospital to the Inquiry's requests, the need to withhold information weakened considerably. In addition, the argument raised by the Hospital that the ultimate public interest was in the success of the Inquiry had lost its force since the Government announced the conclusion of the Inquiry. The Commissioner was required to make her decision upon the facts as applying at the time of that decision, including the fact that at that time (though not earlier) the Inquiry had concluded.

The Commissioner found that having regard to the content of the records (many of which were administrative), the passage of time since their creation, the fact that the Inquiry had concluded, and a very substantial public interest served by transparency in relation to all of the issues arising, she was of the view that were it necessary to apply the public interest test under section 20(3) she would have found that the public interest would be better served by granting than by refusing the request.

¹⁵² **Parents for Justice and Our Lady's Hospital for Sick Children**, case 030847, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LetterDecisions/Name,1335,en.htm>

Decisions where on balance the public interest was better served by withholding the information

Case 98032: Allegations made by an informant¹⁵³

The requester sought access to “my file and any other information you may have on me”. The Department of Agriculture and Food exempted certain records under section 26(1)(a) (information given in confidence).

The Information Commissioner varied the decision of the Department, permitting disclosure of certain records referring to allegations made against the requester.

The Commissioner reiterated the four elements required for section 26(1)(a) to apply.

Where information comes from an anonymous source, it is reasonable to assume that information given about the informant and which might identify him is given in confidence and on the basis that it will be kept confidential; this situation differs little from that of an allegation from a named informant who explicitly requests confidentiality.

The Information Commissioner accepted that it was important to the Department to know the identity of informants or (as in this case) to have some details about them as distinct from the details of their allegations. Information from identifiable sources was more useful than entirely anonymous information, because it was usually easier to determine the quality and accuracy of the information if the source is known.

For the purposes of section 26(3) there is a significant public interest in the Department being able to effectively detect and eliminate offences of the kind which were the subject of the allegations against the requester; on the other hand there can be a public interest in an individual against whom allegations are made knowing about these allegations and being given an opportunity to refute them. However, in this case there was no public interest in the requester being given information to identify the parties who made allegations about him, given that following the allegations, an investigation was carried out, a prosecution commenced and the requester pleaded guilty to one of the alleged offences. Since the matter had concluded, there was no public interest in the requester knowing the identity of the informants.

In some cases, disclosure of the full details of an allegation would be likely to reveal the identity of an informant, and in such a case, there could be an implicit understanding that those details would be kept confidential. There was no such general understanding in this case concerning the contents of the allegations. Records containing the contents of the allegations therefore could be disclosed, with however any matter which might identify the source having first been deleted.

The Information Commissioner also applied section 46(1)(f) to exclude from release matter which could disclose the identity of the source of the information.

Case 98099: Departmental draft reports into a schools pilot project¹⁵⁴

The requester sought access to a number of Whole School Evaluation (“WSE”) reports created during a pilot project. The Department of Education and Science relied on sections 20 and 21 in refusing access.

¹⁵³ **Mr. AAK and the Department of Agriculture and Food**, case 98032, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1443.en.htm>

¹⁵⁴ **Mr. John Burns and the Department of Education and Science**, case 98099, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1465.en.htm>

The Information Commissioner affirmed the decision of the Department in refusing access under **section 20**. He stated the following:

- The reports were part of the pilot project which had the purpose (in part) of refining the process of evaluation of schools and that the records clearly contained matter relating to the deliberative process.
- The argument that release of the records could derail the pilot project was no longer relevant since the pilot project had been completed.

The Information Commissioner accepted the Department's evidence and argument that schools had participated voluntarily in the project and had not expected the reports to be published and that it was critical to the Department to be able to secure co-operation in relation to future pilot projects. The Information Commissioner considered the arguments of the applicant that there was a public interest in the public having access to the reports and being in a position to engage in constructive debate concerning their contents. However, the Information Commissioner found that in the circumstances of this case the public interest in disclosure was insufficient to outweigh the public interest in ensuring the Department continued to receive co-operation in future. An important factor was the fact that the final report of the project, which contained an analysis and critique of the individual reports, provided a solid basis for an informed public debate, although the Information Commissioner did not seek to suggest that the public's rights under the Act to obtain information about a pilot project could always be satisfied by the publication of a final report.

The fact that the pilot project was testing a new and controversial concept was also one that the Information Commissioner took into account in considering the public interest in the Department being in a position to ensure future co-operation in respect of projects of this kind.

The Information Commissioner considered and rejected an argument that the inspectors who wrote the reports were scientific or technical experts within the meaning of section 20(2)(e) of the Act. In so doing, the Information Commissioner followed the approach of the Federal Court of Australia in **Harris v The Australian Broadcasting Corporation**¹⁵⁵. In that case, Beaumont J. held that the reference in section 36(6)(a) of the Commonwealth of Australia legislation to "technical experts" was intended to describe experts in the mechanical arts and applied sciences generally; such a meaning was suggested by the mention of scientific experts in the same connection. The Information Commissioner considered that such an interpretation was appropriate to the Irish Act.

Subject to the Department not being entitled to rely upon section 20 to refuse access to the factual elements of the reports, the Information Commissioner found that the Department was entitled to refuse access to the reports under section 20.

As a matter of general guidance the Information Commissioner stressed that his decision in this case was based upon the very specific facts of the pilot project. He pointed out that given the significant public interest in educational matters and particularly the vast expenditure of public funds on the education system, it could not be argued that what goes on in a school is always the business only of the Board of Management, teachers, parents or pupils. While individual privacy rights should be protected in providing access to records, the Information Commissioner considered that in other cases records of this kind might not fall to be withheld from the public. There was a strong public interest in making reports of this kind available so that the Department's role in the provision of resources could be open to public scrutiny.

The Department made a submission that a policy of publication of reports based upon negotiation and agreement with partners would be more acceptable to those partners than a policy imposed by

¹⁵⁵ **Harris v The Australian Broadcasting Corporation** (1983) 78 FLR 236, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1104.html

the requirements of the Act. While agreeing that it was desirable that agreement should be reached in respect of publication prior to such publication occurring, the Information Commissioner nonetheless stressed that the Department and other groups such as teachers or school management could not negotiate away rights conferred by the Act or impose vetoes designed to prevent the public exercising those rights.

The Information Commissioner affirmed the decision of the Department in refusing access according to **section 21(1)(a)**. He stated the following principles:

Section 21(1)(a) envisages two potential types of “prejudice”:

- Prejudice to the “effectiveness” of the tests and other subjects referred to;
- Prejudice to the “procedures or methods employed for the conduct thereof”.

The Information Commissioner considered that the term “effectiveness” referred to the ability of the test, examination or audit to produce or lead to a result of some kind, or the ability of the procedures or methods employed to achieve their purpose.

The Information Commissioner accepted that the section could apply to similar exercises to be conducted in the future. However, it was not clear to him how release of the reports in this case or of similar future evaluations could prejudice the effectiveness of future tests, audits etc. If the Department was seeking to argue that release might result in reduced co-operation from some of the other parties involved in the WSE process, then the Information Commissioner considered that this confused the question of the effectiveness of the evaluations and the methods used to conduct them with the ability of the Department to reach an agreement concerning the model of WSE which would be introduced. The effect of release on reaching such a consensus was not a matter which could be taken into account for the purposes of section 21(1)(a). In the result, the exemption in section 21(1)(a) was not made out.

In considering section 21(1)(b), the Information Commissioner pointed out that the standard of “significant, adverse effect” required stronger evidence of damage than the “prejudice” standard of section 21(1)(a); that is, that the harm would be of a more significant nature than that required under the earlier subsection.

For the same reasons as those he set out in respect of the part of his decision dealing with section 20, the Information Commissioner upheld the exemption under section 21(1)(b) finding that release in this case could reasonably be expected to have a significant adverse effect on the performance of the Department’s functions of pilot testing new initiatives in the education system.

In respect of a possible argument by the Department concerning potential industrial relations difficulties, the Information Commissioner followed the approach he had outlined in **Sunday Times** (Case No. 98104) where he had made the point that the fact that disclosure might upset some party involved in the industrial relations process was not sufficient to allow the exemption in section 21(1)(b) to operate, because to do so would mean that the requester’s right to seek information could depend solely on the goodwill of another party, allowing third parties to operate an effective veto on what a public body might release under the Act.

On the public interest question, the Information Commissioner did not accept that the public interest would, on balance, be better served by granting than by refusing to grant the request and therefore held that section 21(2) did not apply to defeat the exemption in section 21(1)(b).

Case 98100: Commercially sensitive information regarding staff redundancies¹⁵⁶

A journalist asked the Department of Enterprise, Trade and Employment for records listing high-risk companies or companies which might be forced to make staff redundant. She subsequently amended her request and sought access only to lists prepared by Forbairt, IDA and Shannon Development detailing "companies in which jobs are at risk." The Department refused access to these records on the basis that they contained commercially sensitive information (section 27) and information given in confidence (section 26(1)(a)).

The Commissioner accepted that release would disclose a wide variety of commercially sensitive information (including details of losses, financing arrangements, and future plans), which could prejudice the companies' competitive position.

The Commissioner agreed that the balance of the public interest did not favour disclosure. He analysed the public interest for the purpose of both exemptions in the following terms:

The premature release of this information could significantly damage the operation of the early warning system and limit the opportunities available to the State to take action and prevent job losses. I also consider that the harm that could result to vulnerable companies by the premature release of commercially sensitive information of this kind is a significant factor to be taken into account in considering the balance of the public interest.

On the other hand, I consider that there is a strong public interest in the public being aware of how public bodies are carrying out their functions, particularly in circumstances that could involve the expenditure of public monies. There is also a public interest in requesters exercising their rights of access under the Freedom of Information Act. Important though these latter two factors are, they do not, in my opinion, tilt the balance of the public interest in favour of disclosure.

Case 98103: Letter from anonymous informant¹⁵⁷

The requester sought access to an anonymous letter sent to the Department of Social, Community and Family Affairs which stated that the requester had been working while claiming benefit. The Department exempted the record under section 26(1)(a).

In upholding the decision of the Department, the Information Commissioner applied the principles concerning anonymous informants which he had set out in **Mr. AAK**.

The following public interest factors were in favour of release:

- the interests of the requester as an individual exercising rights under the Act.
- the need to ensure proper and fair treatment of social welfare claimants against whom allegations of fraudulent claims are made.
- the public interest in discouraging the making of allegations which are false, malicious and designed only to cause distress to the party involved without providing any assistance to the public body. It may be that section 26 could not apply to such allegations at all in that it would not be of importance to the body that further similar information should continue to be provided.

¹⁵⁶ **Ms. Fiona McHugh, the Sunday Times newspaper and the Department of Enterprise, Trade and Employment**, case 98100,

<http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1466,en.htm>

¹⁵⁷ **Mr. AAY and the Department of Social, Community and Family Affairs**, case 98103,

<http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1469,en.htm>

Here, the investigation had cleared the requester and the public interest in proper and fair treatment was therefore lessened; the Information Commissioner made the point that the position would be different if the Department had withdrawn the requester's allowance on the basis of the allegations, and in such event he would have examined much more closely whether refusal of access to the record would have militated against the requester's ability to refute the allegation.

Also in this case, there was not sufficient evidence to find the informant knew that the allegations were false and therefore the public interest factor in discouraging false allegations did not exist.

In this case, the handwriting and contents of the letter would have been likely to reveal the identity of the author and therefore the Information Commissioner also found that the exemption in section 23(1)(b) applied.

Case 99273: Access to confidential advice given by health professionals¹⁵⁸

The requester sought access to a report prepared by an independent third party for the CEO of the Health Board dealing with complaints made by the applicant about a number of health professionals. The Information Commissioner affirmed the decision of the agency in refusing access to accounts of interviews with the doctor and pharmacist under sections 21(1)(a) and 21(1)(b). The exemption in section 26(1)(a) did not apply, by reason of section 26(2). The Information Commissioner set out the applicable principles in respect of each exemption provision as follows.

In regard to **section 26(1)(a)**:

Although finding that the information in the interviews was provided and accepted in confidence for the purposes of section 26(1), the Information Commissioner further found that:

- for the purposes of section 26(2), the record was prepared by a person providing a service to the public body under a contract for services, that person being the investigator;
- the obligation of confidence was owed to the doctor and pharmacist concerned, and those persons were, it was found, under contract for service to the Board; it followed therefore that the earlier part of section 26(2) applied and the records of the interviews were not exempt under section 26(1).

In regard to **section 21(1)(a)**:

In considering whether a result "could reasonably be expected" to occur, the section is not concerned with probabilities or possibilities; it is concerned with whether or not the decision-maker's expectation is reasonable.

In arriving at the decision, the decision-maker must identify the potential harm that might arise from disclosure and having identified that harm, consider the reasonableness of any expectation that the harm will occur.

The term "effectiveness" is to be interpreted as the ability of a test, examination or audit to produce or lead to a result of some kind.

As to the effect on "procedures or methods", the Information Commissioner was satisfied that the procedures involved in this investigation, which relied on assurances of confidentiality, could reasonably be expected to be prejudicially affected by release of the records sought because it

¹⁵⁸ **Mr. ABL and the North Western Health Board**, case 99273, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1690,en.htm>

would involve a breach of confidentiality and lead to a disinclination on the part of persons to cooperate in the future or lead them to be less frank in their comments.

In regard to **section 21(1)(b)**:

The test of “significant, adverse effect” in this section requires stronger evidence of damage than the “prejudice” standard of section 21(1)(a); in other words, the harm must reasonably be expected to be of a more significant nature than that required under the earlier section.

The investigation of complaints against a health board, members of its staff and parties under contract to it represents a function “relating to management” within the section.

If the procedure in this case were not available to the Board, then it might have to resort to more formal procedures which would be slower and more costly; such an outcome could reasonably be expected to have a significant effect on the performance of the Board’s function of carrying out these investigations.

In the present circumstances, where an investigation had been carried out and certain conclusions favourable to the requester had been made, the public interest was not on balance better served by permitting the requester to re-open the inquiry by challenging the versions of events given by the doctor and pharmacist; in the circumstances, the public interest in upholding the qualified assurances of confidentiality in investigations of this kind outweighed the public interest contended for by the requester, and the records were held to be exempt.

Case 98169: Access to records about a teacher’s disciplinary action¹⁵⁹

The requester applied for access to the Department of Education and Science's file concerning a complaint she had made about a national school teacher. The Department applied section 21(1)(b) (adverse effect on management functions) and section 26(1) (confidentiality), and refused access to certain records given to it by the Board of Management of the school concerned, including the teacher's response to the complaint. It argued that release of the response would have an adverse impact on the receipt of similar information from teachers and boards of management in similar cases in the future.

The Information Commissioner accepted that there was a public interest in preserving confidences. There was also a public interest in complaints against teachers being properly investigated, with outcomes which were both fair and impartial, but in this case, he could not see how release of the response would further this interest. Release was no substitute for the proper discharge of their functions by the Department and the Board of Management.

Even though there were public interests in persons exercising their rights of access under the FOI Act, in the accountability of officials, and in scrutiny of the decision-making process, the balance in this case weighed against disclosure.

This decision is also significant because in considering section 26(1)(b) of the Act (disclosure would found an action for breach of confidence), the Information Commissioner applied the public interest test, even though that subsection is not expressly subject to such a test under the Act. He did so on the basis that the action for breach of confidence at general law itself imposes a public interest test; see paragraphs 3.34 to 3.37 above.

¹⁵⁹ **Mrs. ABY and the Department of Education and Science**, case 98169, <http://www.oic.gov.ie/en/DecisionsOfTheCommissioner/LongFormDecisions/Name,1478.en.htm>

Cases 99347 and 99357: Information about negotiations between a nursing home and third parties¹⁶⁰

A patient died in a private nursing home in November 1998. His brother sought access to records held by the North Eastern Health Board relating to his late brother and records relating to the nursing home. The public interest was at issue in relation to one document which contained information about negotiations between the nursing home and third parties.

The Information Commissioner accepted that section 27(1)(c) applied to this document. He went on to find that the public interest would not, on balance, be better served by the release of this information because it related purely to the financial business of the nursing home and had no bearing on its regulation by the health board. He noted that section 27(1)(b) or (c) (the commercially sensitive exemption) could apply to some other records although no such argument had been made to him. If the argument had been made, he would have considered the significant public interest in the public knowing how public bodies carry out inspections and in knowing that the regulatory functions assigned to them achieve the purpose of the relevant regulations. He found that references to third parties in one of the records related to personal information about those parties and should not be disclosed.

Case 99097: Letters alleging child sexual abuse¹⁶¹

The requester sought access to two letters that referred to the requester in relation to an inquiry into matters relating to child sexual abuse in swimming. The Department of Tourism, Sport and Recreation refused the request on the basis of section 26(1)(a) (information given in confidence).

The Information Commissioner upheld the decision of the Department and stated the following principles:

The first two requirements of section 26(1)(a) are to be interpreted in light of a definition of the term “confidence” based on a definition in textual authority as follows:

A confidence is formed whenever one party (“the confider”) imparts to another (“the confidant”) private or secret matters on the express or implied understanding that the communication is for a restricted purpose.

The information must therefore be concerned with private or secret matters and cannot be information which is trite or already in the public domain.

There was no express assurance of confidentiality in this case and therefore all the circumstances needed to be examined to determine whether there was an implied understanding of confidentiality.

It appeared clear that the authors of the letters expected confidentiality in the context of an inquiry that had only recently been concluded, which inquiry had treated not only the complaints of the victims as confidential, but also the evidence of all other parties who had provided information to the inquiry. Similarly, the Department understood and accepted the desire and need of the authors for confidential treatment of the letters. It was also clear that persons providing information on such a basis who did not stand to benefit in any tangible manner would be deterred from making similar submissions in the future.

¹⁶⁰ **Ms. ABT, Mr. ABU and the North Eastern Health Board**, cases 99347 and 99357, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1725.en.htm>

¹⁶¹ **Mrs. ACE and the Department of Tourism, Sport and Recreation**, case 99097, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1577.en.htm>

The purpose of section 26(1)(a) is to protect the flow of information which relates to the exercise by a public body of its statutory powers and functions and in the case of a Department this extends to the Minister's statutory powers and functions, including those arising as a member of government. In this case, given the responsibility of the Minister for sport and his role in relation to funding, it was necessary that the Minister should be as fully informed as possible about matters that are relevant to the safety and well-being of those involved in sport, especially children. It was of importance to the Department that information of this type be continued to be supplied.

Factors weighing against disclosure were:

- the public interest in the proper preservation of confidences; and
- the public interest in protecting the right to privacy of third parties (a particularly strong one where, as here, the record concerns a victim of child sexual abuse and her family).

This case was similar to **Mr. AAY**. Here, the requester was already aware of the substance of the allegations and the Minister had no authority to take any action against the requester even if he so desired. The Minister's role in relation to funding could not be influenced by the letters, which had been overtaken by events in this regard. It followed that public interest in disclosure on the basis of procedural fairness did not carry substantial weight.

As in **Mr. AAY**, there was no public interest in discouraging false allegations here because it did not appear that the authors had knowingly made any false allegations.

Also in favour of release was the public interest in an open and transparent process of government. However, in this case the influence of the private individuals on the Minister's decision-making process was minimal compared, for example, to the influence of a statutory body such as the Law Society in a case such as **Mr. Phelim McAleer**.

On balance therefore, the public interest in release was outweighed by the public interest in the proper preservation of confidences and the protection of the right to privacy of the individuals concerned.

Case 000180: Report on the audit of working practices within a Council¹⁶²

The requester sought a copy of a report on the audit carried out by an external consultant of the working practices in one area within Dun Laoghaire-Rathdown County Council. The Council refused the request primarily on the ground that release would have a significant adverse effect on the performance by Council of its staff management functions, the exemption in section 21(1)(b).

In upholding the decision to exempt the report, the Information Commissioner said that the staff who attended for interview by the external consultant did so on the understanding that their statements would be treated as confidential. Many of the employees would have great difficulty in discussing their employment in an open manner had they not been assured of such confidentiality. Accordingly, the Commissioner accepted that release could be seen by staff as a breach of trust and that this could hamper future investigations. In the result, this could reasonably be expected to have a significant adverse effect on the performance of the Council's function of dealing with complaints relating to staff, and therefore section 21(1)(b) applied.

The Commissioner thought that there was a clear public interest in a public body being able to carry out investigations into complaints and examine work practices of staff in an effective manner. The Commissioner pointed out that in such a process, assurances of confidentiality to staff would not be warranted in every case, although they did appear to him to have been necessary in this case.

¹⁶² **Mr. X and Dun Laoghaire-Rathdown County Council**, case 000180, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1023,en.htm>

There was also a strong public interest in promoting an individual's right of access to records under the FOI Act. There was also a public interest in employees being in a position to establish that their legitimate grievances were properly investigated and considered by their employer. However, in this case, the audit was undertaken in consultation with the relevant trade unions and release of the report was not necessary to ensure that the complaints had been properly investigated.

However, there was a strong public interest in the Council honouring the guarantees of confidentiality given to the staff and preserving a relationship of trust between management and staff, and for that reason, the Commissioner found that the public interest was best served by withholding the audit report.

Case 99373: Records relating to an investigation at the request of US Customs¹⁶³

The requester sought access to four records relating to an investigation carried out by the Revenue Commissioners at the request of US Customs. The Revenue refused access under the confidentiality provisions of section 26(1)(a) and (b) of the Act.

The Commissioner found that the exemption provisions applied inasmuch as there was a Mutual Assistance Agreement which provided for mutual assistance in matters of this kind. The US Customs had provided information pursuant to that Agreement for the specific purpose of having the Revenue visit the office of the requester company and carry out an investigation. That investigation related to suspected fraud by a company other than the requester. Concern had been expressed both by the Revenue and US Customs that disclosure would have an adverse effect on an ongoing investigation. In those circumstances, having regard to the importance of the exchange of information and assistance under the Agreement, the Commissioner found that the relevant materials had been provided in confidence by US Customs (although not all information which might be provided would necessarily be of a confidential character).

In considering the public interest, the Commissioner rejected an argument from the requester that there was a public interest in it being accorded natural justice. The Commissioner pointed out that no public accusations had been made against the requester company and there was a separate company under investigation. There were no proposals for action to be taken against the requester since the visit and therefore the alleged public interest did not arise. Accordingly, the public interest in maintaining the confidence in the Mutual Assistance Agreement prevailed and with one minor exception, the records were held exempt in the public interest.

Case 99146: Records concerning a father and child¹⁶⁴

The requester sought access to all records held in relation to him and his child, for whom he had been assessed an unsuitable custodian. The Southern Health Board exempted a substantial quantity of records, relying on, among other provisions, section 21(1)(a) (prejudice to investigations).

The Information Commissioner annulled the decision of the Board and access was provided to certain specified records, with access to the balance of the records being refused. The Commissioner set out the following principles.

He referred to the statutory duty of health boards to promote the welfare of children and their functions including the co-ordination of information relating to children. Here, the board was directed by the District Court to undertake an investigation of the child's circumstances. The

¹⁶³ **Y Ltd and the Office of the Revenue Commissioners**, case 99373, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1728,en.htm>

¹⁶⁴ **Mr. X and the Southern Health Board**, case 99146, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1623,en.htm>

Commissioner held that this was an inquiry or investigation within the meaning of section 21(1)(a) of the Act.

While the Commissioner did not accept that all information furnished to health boards is always given on a confidential basis, he was satisfied that in certain circumstances release of information received by health boards in the course of inquiries or investigations could reasonably be expected to inhibit the co-operation which health boards receive in such matters and could reasonably be expected to prejudice the effectiveness of the boards' inquiries or investigations.

Certain public interest factors favouring release of the records were:

- public interest in members of the public knowing how a public body performs its functions;
- the public interest in members of the public knowing that information held by public bodies about them is accurate;
- the public interest in individuals against whom allegations are made being made aware of those allegations and being given an opportunity to refute them;
- the public interest in parents being able to exercise guardianship rights in relation to their children.

Public interest factors favouring refusal of the request were:

- the public interest in protecting the right to privacy;
- the public interest in members of the public being able to communicate in confidence with public bodies, and without fear of disclosure, in relation to personal or sensitive matters;
- the public interest in safeguarding the flow of information to public bodies;
- the public interest in public bodies being able to perform their functions effectively, particularly in relation to issues involving the welfare of children;
- in this context, the public interest in the public body adopting fair procedures in the conduct of an investigation or inquiry where the outcome might affect the interests of an individual.

It was a question of weighing up the public interest considerations in favour of disclosure against those favouring non-disclosure. As part of this process, an attempt must also be made to measure the actual benefit to the requester which would result from release of the records, and as part of that process, the Information Commissioner considered the extent to which records had already been released to the requester and whether release of further records would add significantly to his understanding of the Board's acts or decisions.

In this case, the social work report produced by the Board and presented in Court had already been provided to the requester, and it was this report that appeared to be the basis upon which the Court had acted in deciding that the requester should not have custody of his child.

In the result, the Information Commissioner considered that release of the records would not add significantly to the requester's understanding of the issues in his case and on balance the public interest was not better served by granting than by refusing to grant access to those records.

Case 020425: Request for a reference¹⁶⁵

The requester, Dr. X, sought access to a reference provided by a previous employer which had been given to the Civil Service & Local Appointments Commissioners. The Commissioners refused the request on the basis of section 26 (confidentiality). The Information Commissioner considered that certain parts of the reference were merely factual and neither section 26(1)(a) nor (b) could apply to those factual elements. At issue therefore was a set of handwritten responses by the previous employer of Dr. X. The Commissioner found that in all the circumstances there was an obligation of confidence imposed upon the recipient of the reference due to contents of certain correspondence which specifically referred to an understanding of confidentiality.

In considering the public interest, the Commissioner observed that the argument in respect of natural justice was much less strong for Dr. X because Dr. X had been successful in the competition to obtain the position of surgeon and comments made by her previous employer did not adversely affect the assessment made of her. For those reasons, he did not consider any public interest in procedural fairness could outweigh the public interest in preserving the duty of confidence owed by the Commissioners to her previous employers. The Commissioner also did not give great weight to an argument that the reference would remain on Dr. X's file, as he considered that her performance in her new position would be much more influential in her future prospects than any previous reference given.

Cases 030361 and 030699: Records relating to a review of Building Societies legislation¹⁶⁶

The requester sought access to records relating to the Review Committee on Building Societies legislation. The Department of Environment, Heritage & Local Government refused access to a substantial number of records relying, amongst other provisions, on section 20(1) (deliberative processes). These records concerned consultations between the Department and other members of the Review Group to make recommendations as to whether or not legislative change was warranted to the legislation governing the building societies. The Commissioner found that although the Review Group had delivered its report to the Government, the deliberative processes relating to legislation were ongoing. She therefore accepted that in those circumstances the public interest would be better served by refusing access under section 20(1) to the records, apart from records which were merely factual or of an innocuous nature.

¹⁶⁵ **Dr. X and Office of the Civil Service and Local Appointments Commissioners**, case 020425, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1179,en.htm>

¹⁶⁶ **Mr. X and the Department of Environment, Heritage and Local Government**, cases 030361 and 030699, <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1293,en.htm>

The following public interest factors favour disclosure:

- accountability of the public body in a wide variety of respects, including policy, management, and financial
- knowing reasons for decisions
- views and representations which influence the legislative process
- ensuring public bodies obtain value for money
- individuals receiving fair treatment according to law
- individuals ensuring that information held about them is accurate
- interests of the public in having access under the FOI Act
- ensuring that investigations and inquiries are carried out properly

The following public interest factors favour exemption:

- It is necessary to avoid serious damage to the proper working of government at the highest level
- A final report on the relevant issue is imminent
- Premature release of sensitive information would damage commercial interests
- Regulatory function of the agency is at issue and the information relates to its financial business rather than regulatory functions
- Significant impact on service delivery by government
- Significant impact on ongoing investigations (but no general concept of “premature” release exists)
- Discouraging the making of false and malicious allegations

6 Australia Commonwealth

Legislative Framework

- 6.1 The Australian Commonwealth **Freedom of Information Act** 1982 (the Commonwealth Act or the Act) gives a right of access to personal information and official information. The Act was assented to on 9 March 1982, commenced on 1 December 1982, and applies to Commonwealth government departments and prescribed authorities. Prescribed authorities include bodies established for public purposes under laws of the Commonwealth.
- 6.2 The FOI Acts of all of the Australian states and territories are modelled on the Commonwealth legislation, though there are differences. For present purposes, it should be noted that there are some differences in the application of the public interest test within the exemptions.

Administration of the Freedom of Information Act 1982

- 6.3 Policy in respect of the Commonwealth Act is administered by the Attorney-General's Department in Canberra.

Enforcement of the Act

- 6.4 The Commonwealth Act provides for two avenues of enforcement. Requesters have a right of appeal, under section 55, directly to the Administrative Appeals Tribunal (AAT) which has the power to order disclosure. Alternatively, they can complain to the Commonwealth Ombudsman, under section 57, who has the power to recommend disclosure, and to investigate complaints about delays or excessive fees.
- 6.5 Applicants can appeal against a decision of the AAT on a point of law to the Federal Court of Australia. On a significant point of law applicants could seek special leave to appeal to the High Court of Australia.

Public Interest Provision

- 6.6 The Commonwealth Act requires a decision-maker to consider public interest factors for and against disclosure. The test operates in three different ways.
- 6.7 The first is the "classic" public interest test which requires the decision-maker **to weigh** factors for and against disclosure and decide where **the balance** lies. This formulation of the test applies to exemptions covering relations between Commonwealth and states (section 33A), financial/property interests of the Commonwealth (section 39), and operational functions of agencies (section 40).
- 6.8 Each of these sections contains a "harm" test and it therefore follows that the harm suffered will itself be a public interest in favour of withholding information.

- 6.9 The second formulation of the test relates to deliberative internal working documents. Section 36 provides that documents can only be withheld which meet the description in section 36 of internal working documents and, in addition, where disclosure would be contrary to the public interest. Since the requirement is to demonstrate that disclosure is contrary to the public interest, this gives a slight tilt in favour of disclosure.
- 6.10 The third is effectively a deeming provision that it would be contrary to the public interest to release information that would have a substantial adverse effect on the management of the economy or undue disturbance on the ordinary course of business. Section 44 requires a decision-maker to consider whether a substantial adverse effect exists. If it does, then the provision states that it would be contrary to the public interest to release the information.¹⁶⁷
- 6.11 There is provision in section 36(3) for a Minister to issue a certificate to the effect that disclosure of any document which meets the statutory description of an internal working document would be contrary to the public interest. The issue of such a certificate may be reviewed by the AAT (and subsequently, by the Federal Courts), but under section 58(5) of the Act, the AAT (and the Courts) may only decide whether or not there exist reasonable grounds for the **claim** that disclosure would be contrary to the public interest, and in that type of review, the AAT (and the Courts) do not carry out the exercise of balancing the public interests involved.¹⁶⁸
- 6.12 The following sections confer absolute exemption:

Section 33	national security, defence and international relations;
Section 34	Cabinet documents;
Section 35	Executive Council documents;
Section 37	law enforcement and administration;
Section 38	secrecy enactments;
Section 41	unreasonable disclosure of personal information, though the term “unreasonable” permits a consideration of public interest factors;
Section 42	legal professional privilege;
Section 43	commercial affairs, though again the “harm” tests will permit consideration of the public interest;
Section 43A	unreasonable disclosure of research;
Section 45	action for breach of confidence;
Section 46	contempt of a Court or Parliament;
Section 47	certain companies documents;
Section 47A	the electoral roll.

¹⁶⁷ **Re Arnold Mann and the Australian Taxation Office** (1985) 7 ALD 648 at 710, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1998.html>. This decision has been criticised by at least one commentator, who takes the view that section 44 does not operate as a deeming provision, but requires both that the documents meet the description and that the public interest test be applied: Christopher Enright, *Federal Administrative Law* (2001) at page 178. However, the AAT has repeated this view: see **Re Edelsten and the Australian Federal Police** (1985) 4 AAR 220, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2080.html>, and the cases there referred to.

¹⁶⁸ **McKinnon v Secretary, Department of Treasury** [2005] FCAFC 142 (2 August 2005), <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/142.html>

- 6.13 There is an onus under the Act for an agency to establish that its decision was justified or that a decision adverse to the applicant should be made: see section 61.

Official Guidance

- 6.14 The Attorney-General's Department published in December 2004 a detailed and useful memorandum on the exemption sections of the Commonwealth Act. This includes a lengthy discussion of the public interest test.¹⁶⁹ The Attorney General's Department web site also hosts a number of other memoranda and FOI research papers.

General Observations of Australian Courts Concerning Public Interest in an FOI Context¹⁷⁰

- 6.15 The Australian courts recognise that the availability of information relevant to the performance of government is essential to the effective maintenance of the democratic system and that the FOI Act is a necessary supplement to the operation of responsible government.¹⁷¹
- 6.16 Because FOI legislation has been in place in Australia since 1982, there is a well-developed body of law in which a variety of elements of the public interest have been identified in an FOI context. These elements pertain to the interest of the public as a community and more specific elements of the public interest which are recognised as rights held by individuals.
- 6.17 A list of a number of those elements, drawn from the decided cases, is set out below:
- the public interest in maintaining effective decision-making processes in government;
 - the relationship between the federal government and state governments in a federal system and amongst the state governments;
 - the effectiveness of internal procedures of agencies and the deliberations of officials;
 - the need to protect the internal procedures of police forces and law enforcement agencies;

¹⁶⁹ *Memorandum No 98 Exemption Sections in the FOI Act*, available in the Memorandums section of the Attorney General's web site: <http://www.ag.gov.au/agd/WWW/agdHome.nsf/D2801B61EABE80A2CA256809001328BA/E2F1B66EC83C5834CA25709A0012EF32>, or go to <http://www.ag.gov.au/> and search for "FOI Memo 98".

¹⁷⁰ See also the discussion "The Concept of 'Public Interest' at General Law" beginning at paragraph 2.6

¹⁷¹ **Australian Capital Television Pty Limited and Others and The State of New South Wales v The Commonwealth and Another** (1992) 177 CLR 106 at 231 (McHugh J.), <http://www.austlii.edu.au/au/cases/cth/HCA/1992/45.html>; **Egan v Willis** [1998] 195 CLR 424 at para [42] (Gaudron, Gummow & Hayne JJ.), <http://www.austlii.edu.au/au/cases/cth/HCA/1998/71.html>; **McKinnon v Secretary, Department of Treasury** [2005] FCAFC 142 at para [244]; <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/142.html>

- the need to protect the public from unsafe consumer products, drugs, or prohibited substances;
- the public interest in the detection of crime;
- the public interest in the detection of regulatory offences, such as breaches of taxation legislation, trade practices legislation and other similar regulatory laws;
- the public interest in maintaining an open and democratic system of government;
- the public interest in protecting national security and defence arrangements from unlawful or unwarranted attack;
- the public interest in protecting important social institutions such as the judiciary, family and so forth;
- the public interest in having information concerning all arms of government, including information concerning public wrongdoing or criminal conduct;
- the need to protect key interests such as those of consumers or the environment.

6.18

There are further aspects of the “public interest” which might be thought to deal more specifically with the rights and privileges of individuals and corporations, such as:

- the rights of persons to freedom of speech and freedom of movement;
- the rights of persons to be protected from unlawful acts or harassment;
- the rights of persons to carry on legitimate business activities, subject to all proper regulation;
- the rights of persons to choose their own employment and not to be forced into employment;
- the right of persons to keep certain matters confidential and to use such confidential material in their private lives or business affairs;
- the rights of persons to be protected from arbitrary arrest, incarceration or detention;
- the right of free association with other persons and groups;
- the right of individuals and organisations to report on news and current affairs;
- the rights of persons and organisations to comment upon government and governmental activities and to be provided with necessary information concerning such activities.

6.19 It must be borne in mind that, as it is recognised in Australia, the concept of “public interest” embodies also public concern for the rights of an individual.¹⁷² It has also been said that the public interest is not synonymous with the interest of the government.¹⁷³

6.20 The Australian courts have recognised the process under which a decision-maker must weigh (amongst other elements of the public interest):

*...the public interest in citizens being informed of the processes of government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other.*¹⁷⁴

Administrative Appeals Tribunal Case Law

6.21 The Administrative Appeals Tribunal has considered the application of the public interest test in a number of cases (excluding cases which involved a request for personal information.) A summary of relevant principles from key decisions follows later in this section.

6.22 It is established as a matter of law in Australia that where there are ambiguities in the interpretation of the Commonwealth Act, including exemption provisions, it is proper to give them a construction that would further, rather than hinder, free access to information. The onus is on the agency to make out a case for exempting a document based on a construction of the exemptions, which presumes disclosure. The Australian Attorney-General’s guidance states that this approach may have important consequences for the application of the public interest test.

6.23 In one decision, the AAT identified a number of matters relevant to a consideration of where the public interest lies when considering a request for internal working documents. The AAT said:

*Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be ‘misunderstood or misapplied by an ill-informed public’; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned.*¹⁷⁵

¹⁷² **Re Burns and Australian National University** [1984] 6 ALD 193, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1419.html>; **Re James and Australian National University** [1984] 6 ALD 687 at 701, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1889.html>

¹⁷³ **Re Bartlett and the Department of Prime Minister and Cabinet** (1987) 7 AAR 355

¹⁷⁴ **Harris v Australian Broadcasting Corporation** (1983) 78 FLR 236 (Federal Court of Australia, Beaumont J.), http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1104.html

¹⁷⁵ **Re Lianos and Secretary to the Department of Social Security No. N83/893 Freedom of Information**, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1922.html>

6.24 The AAT has consistently rejected, as a ground of exemption, the claimed public interest in officers within agencies supplying information and advice with frankness and candour and the associated argument that such public interest weighs significantly against release of information. As early as 1984, the AAT said:

It was submitted, though not strongly, that candour and frankness in making recommendations and in writing opinions with respect to assessments, objections and requests for reference would be affected if disclosure to the public or to the particular taxpayer of such recommendations and opinions took place.

6.25 The candour and frankness argument is not new. It achieved pre-eminence at one time but has now been largely limited to high level decision-making and to policy-making. See **Conway v Rimmer & Anor**, cited below, **Burmah Oil v Governor and Company of the Bank of England** (1980) AC 1090, 1132-1133, per Lord Keith; **Campbell v Tameside Metropolitan Borough Council** (1982) 1 QB 1065, 1077, per Ackner LJ., 1079, per O'Connor LJ.; **Science Research Council v Nasse** (1980) AC 1028, 1070 per Lord Salmon, 1081 per Lord Fraser; **Sankey v Whitlam**, cited below, 38 per Gibbs ACJ, 62-63 per Stephen J., 97 per Mason J; cp **Burmah Oil v Governor and Company of the Bank of England**, cited above, 1112 per Lord Wilberforce, 1145 per Lord Scarman.

6.26 In an early AAT decision under the Commonwealth Act, a Full Panel of the Tribunal presided over by the President expressed great scepticism concerning the candour and frankness argument in the following terms:

It was submitted that, if officers of the Department of Taxation knew of the possibility that their written comments would be disclosed to the particular taxpayer, they would be more reluctant to commit their views to paper. Mr Tomkins gave evidence that officers of the Department were actively encouraged to put their personal beliefs in no uncertain terms. Often, Mr Tomkins said, they would "argue strongly" in favour of taxpayers. It was suggested that such a process might be hampered if an officer knew that at some later point in time in the appeal stage he or she would have to argue in favour of the Commissioner and contrary to the officer's earlier observations. It was suggested that this would put the officer in an untenable position.

We cannot accept this view. It is one of the duties of an officer of the Department to argue in favour of proper recovery of taxation. It is also a duty to weigh up arguments in favour of and against the taxpayer. The fact that an officer may express views which favour a taxpayer cannot be held against him or her in any way. The expression of such views cannot be used against him or her at the review stage. If officers are made aware of this fact then they should not temper the nature of their comments nor be reluctant to commit them to paper.

No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the FOI Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative

law, of which the FOI Act 1982 forms a part, has led to an improvement in primary decision-making.¹⁷⁶

6.27 The AAT has recognised that in some cases it may well be necessary to give a special protection to communications between Ministers, between servants of the Crown and Ministers, and even very high level communications within the public service.¹⁷⁷

6.28 However, even with respect to such Ministerial and high level communications, the “frankness and candour” argument has been rejected in Australia, including in the AAT. In **Re Waterford and Treasurer of the Commonwealth of Australia**, the AAT referred to and adopted the reasoning of the Australian and English courts, as follows:

*29. I do not accept the respondent’s argument on this point. The document has been prepared by highly skilled and senior members of the Treasury. Indeed, it is the advanced nature of the document and the fact that it assumes considerable expertise in economic analysis which provides part of the justification for its non-publication to the general public. I find it difficult to believe that these persons would shrink from the preparation of such a document if they knew that it was to be published. Mr Evans’ evidence revealed that ... It is hard then to see why these departmental officers would be inhibited in expressing their views to other persons, the vast majority of whom could be considered far less knowledgeable in the area than those to whom it has already been revealed. In this regard I respectfully adopt the statements of Mason J in **Sankey v Whitlam** (1978) 142 CLR 1 at 97:*

*“The possibility that premature disclosure will result in want of candour in cabinet discussions or in advice given by public servants is so slight that it may be ignored, despite the evidence to the contrary which was apparently given and accepted in **Attorney-General v Jonathan Cape Ltd** (1976) QB 752. I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.”*

*And Upjohn LJ in **Conway v Rimmer** (1968) AC 910 at 994:*

“I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duties on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day.”¹⁷⁸

6.29 While there is a presumption in favour of disclosure in the legislation, application of the public interest test has led (as one might expect) to a range of decisions, both in favour of, or against, disclosure.

¹⁷⁶ **Re Robyn Frances Murtagh and Commissioner of Taxation** [1984] 6 ALD 112, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1536.html>

¹⁷⁷ **Re Murtagh** (*op. cit.*), a case in which internal records relating to the assessment of a taxpayer were ordered to be released

¹⁷⁸ **Re Waterford and Treasurer of the Commonwealth of Australia** AAT (16 May 1985), <http://www.austlii.edu.au/au/cases/cth/aat/unrep1994.html>

- 6.30 One important question in the decisions, both at Commonwealth and State level in Australia, has been whether a document should be exempted in the public interest because disclosure would lead to confusion of the public, for example, because the document merely discusses possible policy options and/or on the ground that the contents or options discussed were not ultimately adopted in the decision-making process.
- 6.31 It is fair to say that earlier decisions of the Commonwealth AAT did place great weight on the “confusion” argument and upheld exemptions on this ground, but that later decisions have moved away from application of this principle as the FOI jurisdiction has become more developed. Examples of decided cases are summarised in the sections which follow dealing with the Commonwealth, Queensland, and New South Wales jurisdictions.

Decisions where the balance lay in favour of disclosure

Documents relating to housing policy¹⁷⁹

A journalist sought access to certain documents relating to certain government housing policies in the Australian Capital Territory and reasons for transfer of the Head of Department. The AAT held that the public interest under s.36(1)(b) favoured release of the documents. Details given included:

1. The documents would not produce confusion in the public mind. Although in one case, public concern and speculation as to the subject matter of one document could have arisen, the AAT said that disclosure would add to public knowledge already derived from other documents which had been released.
2. Release would not inhibit frankness and candour, even in the case where one document was a communication from a senior public servant to the Minister.
3. Nor would release misrepresent the reasons for a decision made by the Departmental Secretary.
4. In one case, a document recording handwritten notes of the Minister was released, since conclusions which might be drawn from the notes could already be drawn from documents previously released.

Production of documents to the AAT¹⁸⁰

In this decision, the AAT was required to decide whether, on the evidence presented, there existed reasonable grounds for the claim that certain documents were exempt in the public interest. If the AAT was not so satisfied, it could, under the FOI Act, require the documents to be produced to it.

Broadly, the documents held by Treasury related to a proposal by one company to take over several other companies and indicated why the proposal was rejected by the authorities.

Various public interest arguments were put by the respondent and considered by the Tribunal:

1. That documents passing at a very high level between a statutory authority reporting directly to the Treasury are exempt. The Tribunal read this principle (from **Re Howard**) as being empiric; that

¹⁷⁹ **Re Graham Downie and Department of Territories No. A 85/3 Freedom of Information** [1985], <http://www.austlii.edu.au/au/cases/cth/aat/unrep2079.html>

¹⁸⁰ **Re Lordsvale Finance Limited (No. 2) and Department of Treasury No. A84/181 Freedom of Information** [1986] AAT No. 2540, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2292.html>

is, it needed to be demonstrated with respect to the particular document that the public interest would be adversely affected.

2. That there was a public interest in protecting information supplied voluntarily and confidentially by commercial organisations. The Tribunal pointed out that disclosure of a confidential document was not contrary to the public interest solely because its disclosure would constitute a breach of confidence¹⁸¹ (**authors' note: though the public interest in preserving confidences is normally a strong one**).

3. Disclosure would prejudice the flow of information between agencies. While the Tribunal accepted that such a factor would be relevant, it had to be demonstrated with respect to the specific documents in question (which had not been produced).

4. There was a “frankness and candour” argument also. The Tribunal pointed out that it had repeatedly demonstrated its unwillingness to entertain this claim unless evidence in support could be adduced. The Tribunal pointed out that even if what was committed to paper by public servants were to reduce, this would not necessarily show a detrimental effect on government administration; it might reflect greater care in what was being written and this would be in the public interest. The Tribunal therefore ordered that the documents be produced to it so that the case could continue.

Certain Human Resources Plans¹⁸²

A union official sought access to certain plans of the employer Commission for the deployment of technician personnel in districts within New South Wales.

The AAT rejected the “frankness and candour” argument. It also rejected the argument that disclosure would inject confusion and unnecessary debate into consultations between the Commission and the union. Disclosure would facilitate the process of consultation in this case, just as a similar purpose was served, the Tribunal pointed out, by disclosure of departmental documents to the taxpayer in **Re Murtagh**.

Internal Taxation Working Documents¹⁸³

The applicant taxpayer sought access to certain internal working documents of the Australian Taxation Office which would disclose:

1. Whether an amended assessment issued by the Office was based on fraud or evasion or both;
2. The basis upon which the applicant was being proceeded against after expiry of the normal six year limitation period.

The AAT applied the reasoning in **Re Murtagh**. It held that disclosure would not prejudice the case of the taxation authorities upon any case upon the assessment. Further, there was nothing secret about the law, and the applicant was entitled to know (and there was a public interest in his knowing) the legal bases of the action being taken by the authorities.

¹⁸¹ see **Re Graham Downie and Department of Territories No. A85/3 Freedom of Information** [1985], <http://www.austlii.edu.au/au/cases/cth/aat/unrep2079.html>

¹⁸² **Re Ian McCarthy and Australian Telecommunications Commission No. V86/535 AAT No. 3573 Freedom of Information** [1987] AAT No. 3573, <http://www.austlii.edu.au/au/cases/cth/aat/unrep3024.html>

¹⁸³ **Re Barry Saunders and Commissioner of Taxation** [1988] AAT No. 4508, <http://www.austlii.edu.au/au/cases/cth/aat/unrep3454.html>

Non-sensitive documents of an investigation¹⁸⁴

The applicant had made certain complaints, concerning companies with which he had been associated, to the corporate regulatory authorities, and subsequently sought access to certain documents relevant to his complaints.

The Tribunal rejected a “frankness and candour” argument. It went on to hold that the documents in question were not sensitive and that it was in the public interest to disclose the making of representations by a Minister of Parliament (as the documents did), as well as the careful way in which those representations were examined by the authorities and a reply to them prepared for recommendation to the relevant Minister. In particular, it was in the public interest to disclose that after a suggestion had been made about purported inaction on the part of public servants, an investigation led to information which rebutted that suggestion.

Information on economic forecasts¹⁸⁵

An applicant requested information from the Department of the Treasury on economic forecasts. The Tribunal held the documents were deliberative process documents under section 36 of the Act, and *prima facie* excluded. The Tribunal rejected the Department’s claim that disclosure would inhibit the provision of frank, unqualified written advice. There was no evidence to suggest that candour and frankness of future advice would suffer as a result of the disclosure. Nor was there evidence to suggest that the economic information to be disclosed would put certain investors at an unfair advantage.

Notes of a promotion appeals inquiry¹⁸⁶

The applicant sought access to notes of an inquiry which reviewed the decision to promote another officer to the position for which the applicant had also applied.

The Tribunal accepted that there was a public interest in the individual right of the applicant to seek to ensure the fair and proper operation of the promotion and review system.

The AAT thought that the “frankness and candour argument” was weak and observed that “the trend of the cases is in favour of giving weight to the objects of the FOI Act over submissions arguing a lack of candour would result if disclosure were ordered.”

The argument that confusion would arise was rejected, since the applicant had seen the final report and the notes could not have that effect. Similarly rejected was the argument that the integrity of the process would be compromised; even if the notes showed that the decision-maker had changed his mind as he prepared the report, that would not amount to such a compromise in some undefined manner.

Release of Reasons for Decision¹⁸⁷

The applicant company sought access to certain documents relating to an assistance payments scheme for manufacturers of recycled paper administered by the Treasury. The issue was whether

¹⁸⁴ **Re John Russo and Australian Securities Commission** [1992] 28 ALD 354, <http://www.austlii.edu.au/au/cases/cth/aat/unrep4734.html>

¹⁸⁵ **Re Paul Gerard Cleary and Department of the Treasury** (1993) 18 AAR 83 (1993) 31 ALD 214, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5100.html>

¹⁸⁶ **Re Anthony John Wallace and Merit Protection and Review Agency** [1995] AAT No. 10288, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5844.html>

¹⁸⁷ **Cosco Holdings Pty. Ltd and Department of Treasury** [1998] AATA 124, <http://www.austlii.edu.au/au/cases/cth/aat/1998/124.html>

release of five documents which could damage Commonwealth-State relations (section 33A) was or was not, on balance, in the public interest.

The Tribunal stressed the public interest in a person gaining access to the reasons for a decision that affects him or her and so to the findings of fact upon which that decision is based. The Tribunal also regarded the public's "right to know" under the FOI Act and the interest in ensuring that information gathered by government is accurate, relevant and soundly based, as public interests of "grave import". These factors overwhelmed any other public interests involved.

The AAT also rejected an argument that release of the information would diminish the frankness and candour of officers required to report on aspects of administration of the scheme.

Narrowing of the exemption on Public Interest Grounds¹⁸⁸

In one decision, the AAT specifically stated that the concepts of public interest (which would justify exemption) have been narrowed in recent years.

The Tribunal referred to the so-called "**Howard** factors"¹⁸⁹ and said these (following) were no longer accepted without question:

1. The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed.
2. Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest.
3. Disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest.
4. Disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest.
5. Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

The AAT pointed out that Davies J. in **Re Howard** had gone on to state that time and experience would impinge on consideration of the public interest for FOI purposes. The Tribunal considered that Davies J. envisaged a flexible approach, not a fixed or immutable one.

Possible Misconduct in Statutory Office¹⁹⁰

The applicant sought access to a range of documents relating to investigations into certain alleged financial misconduct of some regional Aboriginal councillors of the Aboriginal and Torres Strait Islander Commission.

In respect of a consultant's report which considered certain questions, the AAT found that disclosure was not contrary to the public interest because:

¹⁸⁸ **Re Mijares and Minister for Immigration and Multicultural Affairs** [2000] AATA 214, <http://www.austlii.edu.au/au/cases/cth/aat/2000/214.html>

¹⁸⁹ From **Re Howard and Treasurer of the Commonwealth No. A.84/154 Freedom of Information** (1985) 3 AAR 169 at 178, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1940.html>

¹⁹⁰ **Smith and Aboriginal & Torres Strait Islander Commission** [2000] AATA 512, <http://www.austlii.edu.au/au/cases/cth/aat/2000/512.html>

1. There had been serious allegations against statutory office holders and there was a strong public interest in ensuring that public moneys were expended impartially and for the purposes for which they were allocated.
2. Sufficient time (four years) had passed since the report was delivered during which ATSIC could have made its decision without the intrusion of public debate.
3. There was a strong public interest in knowing the identities of those whom the consultants considered had been in breach.
4. If the request had come soon after delivery of the report then there might have been a strong argument that disclosure would create misleading impressions, encourage ill informed speculation, and lead to unnecessary debate.
5. The understanding which elected office holders have of their responsibilities, both legal and ethical, was also a matter of public interest.
6. There was a public interest in the proper and appropriate consideration of complaints about the manner in which the holders of elected offices carry out their duties and their fitness for office.
7. Where public funds were used to acquire assets, there was a public interest in knowing whether those assets are maintained and, should they be disposed of, that this occurs at an appropriate value.

The AAT made the important point that simply because debate and speculation might follow from disclosure, it would not necessarily be the case that disclosure itself would create misleading impressions, speculation and debate. This might or might not occur, depending on context; for example if there were simply no other information released. The Tribunal pointed to the absence of any evidence as to the other information that might be available.

A similar point (and analysis) has been made in decisions of the Queensland Information Commissioner¹⁹¹ (dealt with in the next chapters).

Community consultation document¹⁹²

The applicant sought access to a consultant's report which had investigated community views on the existing tax system and proposals to simplify that system.

The AAT weighed up competing aspects of the public interest. In that process, the following were very important considerations:

- the document was not prepared by the Australian Taxation office and did not reflect its input;
- rather, it dealt with a sample survey of public opinion, including public reaction to proposals for change;
- there would be enhancement of public debate by disclosure;
- there would be no adverse effect on the deliberative processes of government from disclosure.

¹⁹¹ The Queensland Information Commissioner has expressed a sceptical view when dealing with claims that disclosure of information would confuse or mislead the public, pointing out that this claim might be discounted when it was in the power of the agency to release other clarifying information: **Re Coulthart and Princess Alexandra Hospital** (2001) 6 QAR 94 at 119-120, <http://www.austlii.edu.au/au/cases/qld/QICmr/2001/6.html>

¹⁹² **McKinnon and Commissioner of Taxation** [2001] AATA 871, <http://www.austlii.edu.au/au/cases/cth/aat/2001/871.html>

The Tribunal held that the report was “a document of overwhelming public interest” and decided that it should be released.

Submissions to Remuneration Tribunal¹⁹³

The applicant journalist sought access to a submission made to the Commonwealth Remuneration Tribunal on behalf of judges of the Federal Court of Australia. The request was made before the Remuneration Tribunal had concluded its review of judicial and related offices and released its findings.

The AAT considered at some length the concept of the public interest. It pointed out that in an earlier time, that which was in the public interest meant:

*...not that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.*¹⁹⁴

The Tribunal pointed out however, that in the modern age, the public interest has not been defined in terms of rights or liabilities. It pointed to the observations of Lord Simon of Glaisdale:

*The public interest in freedom of discussion (of which freedom of the press is one aspect) stems from the requirements that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.*¹⁹⁵

The AAT pointed out that in the context of the courts, it has been said that:

*...one feature and one facet of the public interest is that justice should always be done and should be seen to be done.*¹⁹⁶

In an FOI context the Tribunal referred to the well-known remarks of Beaumont J. in **Harris v Australian Broadcasting Corporation**:

*In evaluating where the public interest ultimately lies in the present case, it is necessary to weigh the public interest in citizens being informed of the processes of their government and its agencies on the one hand against the public interest in the proper workings of government and its agencies on the other.*¹⁹⁷

The AAT pointed out that, as stated in a number of cases,¹⁹⁸ the FOI applicant’s “right to know” was itself a relevant public interest.

In this case, the AAT had to weigh up the public interest in the public’s being informed of the processes of the Remuneration Tribunal against the public interest in the Tribunal being able to carry out its functions properly and effectively.

¹⁹³ **Robinson and Department of Employment and Workplace Relations** [2002] AATA 715, <http://www.austlii.edu.au/au/cases/cth/aat/2002/715.html>

¹⁹⁴ **R v Inhabitants of Bedfordshire** [1855] 4 EL & BL 535 at 542, 119 ER 196 at 195, per Lord Campbell CJ.

¹⁹⁵ **Attorney-General v Times Newspapers** [1974] AC 273 at 320

¹⁹⁶ **Ellis v Home Office** [1953] 2 QB 135 at 147

¹⁹⁷ **Harris v Australian Broadcasting Corporation** [1983] 5 ALD 545 at 554, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1104.html

¹⁹⁸ See **Re Kamminga and Australian National University** (1992) 26 ALD 585, and other cases referred to therein, <http://www.austlii.edu.au/au/cases/cth/aat/unrep4577.html>

The AAT did not find, on the evidence, that disclosure would:

- Inhibit frankness and candour in the future on the part of those making submissions to the Tribunal.
- Lead to public confusion or the public being misled. The AAT made the important point that submissions, disagreement and debate did not, of themselves, mean that there was likely to be public confusion.
- Hinder the Tribunal to any significant degree in carrying out its functions in a timely, efficient way at reasonable cost to the community. The AAT said that it was difficult to see why release of a written submission would have this effect when release of transcripts of submissions in proceedings before the Australian Industrial Relations Commission (a body with more extensive wage determining powers) did not hamper that Commission.

The AAT pointed to the strong public interest in the public being properly informed so that the Remuneration Tribunal could receive informed public comment prior to making its determination.

In the result, the AAT found that the Department had not established that release of the submission would be contrary to the public interest.

Decisions where the balance lay against disclosure

Investigative documents regarding a share acquisition hearing¹⁹⁹

The applicants sought access to investigative documents prepared by the National Companies and Securities Commission, relating to a hearing into a share acquisition.

One of the grounds for refusal was that the information requested consisted of internal working documents (section 36), and therefore disclosure would not be in the public interest, since it would inhibit frank discussions between officials.

The Tribunal agreed that the functions of the Commission were an essential public interest, and so withholding disclosure of the documents was in this instance necessary for the protection of that public interest.

Withholding access to state's negotiating strategy²⁰⁰

The Public Service Board and a Union were in an ongoing dispute over wages. The Union sought access to background correspondence.

The Board refused, citing two exemptions. First that the documents were internal working documents and second that disclosure would have a substantial adverse effect on national industrial relations.

On appeal, the Tribunal held that the public interest in non-disclosure outweighed the public interest in disclosure. The PSB was entitled to maintain a confidential negotiating strategy.

¹⁹⁹ **Re News Corporation Ltd, Mirror Newspapers Ltd, Nationwide News Pty Ltd and Control Investments Pty Ltd and National Companies and Securities Commission No. N83/543, Freedom of Information** [1984] 8 ACLR 316, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1850.html>

²⁰⁰ **Re Desmond Heaney and Public Service Board, No. A83/105 Freedom of Information** [1984], <http://www.austlii.edu.au/au/cases/cth/aat/unrep1406.html>

Documents dealing with school performance²⁰¹

The applicant sought access to a range of documents dealing with performance of students in government and non-government schools. One document was a computer tape containing raw data on student performance from selected students attending schools in the Australian Capital Territory.

The Tribunal accepted that there was a public interest in a debate concerning educational standards. However, on the evidence presented, the material on the tape was statistically unreliable and, in the opinion of the Tribunal, it was purely speculative to suggest that such data would make any useful contribution to the public debate. Indeed, the Tribunal thought that the data could lead not only to statistically unreliable conclusions, but to ones which were potentially mischievous.

Against such a dubious possibility of benefit, was set the real potential damage to Commonwealth-State relations, since confidentiality had been promised to State schools and fundamental to the arrangement was that the data was not to be used to make comparisons between educational systems. Accordingly, reasonable grounds existed for the claim that disclosure would not be in the public interest.

Certain other documents were ordered to be released where to do so would not breach the confidentiality arrangements between the Commonwealth and States.

Documents (minute) to a Minister²⁰²

A newspaper editor sought access to a Treasury minute to the Treasurer (including an attachment) which dealt with forward estimates for budget receipts.

Once again, the Minister issued a certificate and the AAT was restricted to a consideration of whether the claim that disclosure was not in the public interest was reasonable.

The AAT held that it was, relying on the facts that the document was out of date, highly speculative (while giving the appearance of being authoritative), and likely to be different if being prepared as at the date of the AAT's decision. Further, the document differed in certain respects from published government documents and had been prepared for a small circle of experts. In the circumstances, the AAT was of the view that significant public confusion would result from disclosure and held that there were reasonable grounds for the claim to withhold.

Documents relating to export approval²⁰³

The applicant, a Swiss-owned joint venturer in an Australian mining project, sought access to certain documents relating to the internal processes engaged in by the Minister in deciding whether or not to grant export approvals.

The AAT pointed out that the Minister had adopted a process of negotiations with the applicant as part of the process of reaching a decision. Moreover, such decisions were politically sensitive decisions and required not only the interests of the applicant and its co-venturer to be taken into

²⁰¹ **Re Warwick Bracken and Minister for State for Education and Youth Affairs No. A84/25 Freedom of Information** [1984], <http://www.austlii.edu.au/au/cases/cth/aat/unrep1684.html>

²⁰² **Re Waterford and Treasurer of the Commonwealth of Australia No. A84/40 Freedom of Information** [1985], <http://www.austlii.edu.au/au/cases/cth/aat/unrep1994.html>

²⁰³ **Re Swiss Aluminium Ltd and Department of Trade of the Commonwealth of Australia and Victoria Aluminium Company Inc., Aluminum Company of America Inc., ALCOA of Australia Limited and Comalco Limited No. N85/102 Freedom of Information** [1985] 9 ALD 243, AAT No. 2487, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2260.html>

account, but also the public interest as a whole, which included obtaining a proper price for Australian goods and the interests of persons who depended on the project for their livelihood.

In those circumstances the AAT held that disclosure of the documents would prejudice the process because it would reveal the strengths and weaknesses of the Minister's position to the applicant, another participant in the process.

International Communications²⁰⁴

The applicant sought access to parts of a letter written by the Attorney-General of the United States to the Attorney-General of Australia.

The AAT held that the letter was obviously a communication at the highest level and confidentiality was assumed in the giving and receipt of it as an inter-governmental understanding (though this did not amount to an express or implied obligation of confidentiality). The letter dealt with sensitive anti-trust issues and there was no expectation that it would be made public. This high level understanding of confidentiality was itself a public interest factor against disclosure.

In addition, the government of the United States opposed disclosure. No particular public interest factor in favour of disclosure was identified in the case.

The Tribunal therefore held that there were reasonable grounds for the claim that disclosure would be contrary to the public interest, a certificate to that effect having been issued by the Australian Attorney-General.

Documents relating to retirement from a position²⁰⁵

The applicant sought access to documents relating to matters concerning his retirement from the university. Public interest arguments were directed to tapes of a University Council meeting and what was termed a "strictly confidential" report from a review committee to the Vice-Chancellor. Since a Ministerial certificate had been issued, the question for the Tribunal was whether reasonable grounds existed for the claim that disclosure would be contrary to the public interest.

The Tribunal considered that there was a public interest in an individual having access to documents where the individual's interests were or might be affected by the documents and their disclosure or non-disclosure to him. In a case where the individual's private "need to know" was large, the public interest in his being permitted to know would be commensurately enlarged, conversely where his interest was slight.

However, the Tribunal thought that there was a greater public interest in a University Council being able to conduct its proceedings in private, likening such a Council to a Cabinet rather than an administrative setting. Accordingly, there were reasonable grounds for the Minister's claim of exemption.

The report was dealt with by the Tribunal under another section of the Act and the public interest question not considered in any detail. The AAT did say, however, that given that the report contained "a statement of a fundamental character about the applicant", it would have required a great deal of public interest in the good government of universities to have outweighed the public interest in the rights of the applicant as an individual.

²⁰⁴ **Re Laurence William Maher and Attorney-General's Department No. V84/291A Freedom of Information** [1985] 7 ALD 731 <http://www.austlii.edu.au/au/cases/cth/aat/unrep1942.html>

²⁰⁵ **Re Arthur Lee Burns and Australian National University No. A83/113 Freedom of Information** [1985], <http://www.austlii.edu.au/au/cases/cth/aat/unrep918.html>

Documents dealing with leaks²⁰⁶

The documents involved in this request from a journalist related to proposals for action to be taken to deal with the problem of leaks from the Prime Minister's Department. The Tribunal (Morling J.) held that there were reasonable grounds for the certificate that disclosure would be contrary to the public interest, finding that confidentiality ought be preserved for recommendations dealing with such a sensitive matter and disclosure would inhibit the making of recommendations.

Another document suggested advice as to how the Prime Minister might choose to reply to Parliamentary questions, also with respect to leaks. The Tribunal found that it was "very much in the public interest that Ministers should be able to receive advice in confidence from their senior advisers" as to how to answer in Parliament questions on sensitive matters.

Information regarding Government control of public hospital services²⁰⁷

An applicant sought access to documents relating to a dispute about Government control of public hospital services and the doctors' remuneration and conditions of service.

Disclosure was refused under section 33A (damage to Commonwealth/State relations), section 34 (documents disclosing Cabinet deliberations), and section 36 (internal working documents).

The Tribunal upheld the section 33A claim, on the basis that there were sufficient indications that the correspondence between the New South Wales and Commonwealth governments were intended to be confidential. The correspondence was high-level and discussed problems of strategy and methods of dealing with the doctors' dispute.

The Tribunal also upheld the section 36 claim, on the basis that there was an ongoing disagreement about the hospital system and medical funding. Although the public might have some idea about the strategies developed by the Government, this was not justification to disclose the precise details. It could adversely affect public opinion if there was disclosure of proposals which were considered and not implemented.

It found that there was a public interest in medical and health matters. But it did not find that this justified disclosing confidential communications between the Commonwealth and NSW governments.

Position paper on a defence procurement²⁰⁸

A journalist sought access to a Position Paper of the Royal Australian Air Force on selection of a basic trainer aircraft which had been submitted to a committee required to make that selection.

The AAT considered that disclosure of this single document could lead to public confusion in as much as the Position Paper was only one ingredient in the debate, and disclosure could have distorted the validity of the decision that was made. In addition, disclosure of the document could have been unfair to the decision-maker because it did not fairly set out the reasons for the decision, and could thus prejudice the integrity of the decision-making process.

²⁰⁶ **Re Brian Toohey and the Department of the Prime Minister and Cabinet No. N128 of 1984 Freedom of Information** [1985] AAT No. 2497, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2268.html>

²⁰⁷ **Re Hyland and Department of Health No. N86/110 Freedom of Information D152 (7/8/86)** AAT No. 2984, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2656.html>

²⁰⁸ **Re Alan Sunderland and the Department of Defence No. V86/260 Freedom of Information** [1986] AAT No. 2890, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2528.html>

Policy documents dealing with politically motivated violence²⁰⁹

The applicant sought access to all documents and records related to him. Given his conviction in respect of certain politically motivated violent acts, the request extended to documents dealing with policy options available to government for dealing with such acts.

The AAT found that there was a very considerable public interest in ensuring that government is not inhibited in its responses to any groups suspected of embarking upon a violent course of action. Such groups sought to achieve, by violent confrontation with authority, as much political advantage as possible, and responses of government needed to be most carefully considered. Disclosure would inhibit the capacity of government to deal effectively with such activities if documents analysing policy options of general application in the context of a particular perceived threat were accessible to the general public and thus to any minority group that might be prepared to contemplate such action.

That element of public interest alone far outweighed any countervailing public interest in disclosure.

In a similar vein, documents disclosing measures to ensure the safety of the Prime Minister on an overseas visit in the recent past were exempt in the public interest as disclosure could hardly fail to reduce the efficacy of similar measures in the future.

It should be noted that the prejudice to the effectiveness of law enforcement procedures exemption was also applied in this case.

Documents relating to Questions in Parliament and to the making of FOI decisions²¹⁰

The applicant sought access to two categories of documents:

1. Documents relating to a Parliamentary question concerning himself.
2. Internal documents relating to the processing by the Department of the Prime Minister and Cabinet of a previous FOI request made by him.

In respect of the first category, the AAT considered that there was a strong public interest in preserving confidentiality of advice given to the Minister as to how the Parliamentary question should be answered. In taking this view, the AAT agreed with the comments of Morling J. (sitting as the former Document Review Tribunal) to the effect:

It is obvious that the confidential relationships between Ministers and their official advisers must be preserved. When Ministers are asked questions in Parliament they must be able to seek advice on a confidential basis before answering those questions. They are entitled to receive draft answers which, upon reflection, they may wish to discard.²¹¹

As to the second set of documents, the Tribunal accepted that there was a public interest in showing how agencies respond to FOI requests and to external reviews of their decisions upon requests. However, given that there would often be conflicting views within an agency and that the decision to be made would be refined as a result of internal deliberations and given that external

²⁰⁹ **Re Timothy Edward Anderson and Department of Special Minister of State (No. 2) No. N83/817 Freedom of Information** [1986] AAT No. 2016, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2393.html>

²¹⁰ **Re F. E. Peters and Public Service Board and Department of Prime Minister and Cabinet (No. 4) No. A83/53 & A83/77 Freedom of Information** [1986] AAT No. 2751, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2420.html>

²¹¹ Quoted in the Tribunal's judgment at para [20] from the decision of Morling J. in **Re Peters (No 2)** 1983 5 ALN N306

review existed which could test the original decision, it would be contrary to the public interest to expose the internal deliberations of agencies in this process to public scrutiny. This would particularly be the case where the agency's decision was upheld on review.

A certificate having been issued, the finding of the Tribunal was that reasonable grounds existed for both exemptions claimed under s.36(1)(b).

Documents useful in litigation²¹²

The applicant sought access to certain documents prepared by or on behalf of the Aboriginal Development Commission. The issue of public interest concerned certain documents expressing opinions, legal advice or deliberations on tactics with regard to existing or anticipated legal action between the applicant and the Commission.

The Tribunal pointed out that although there was a public interest in the applicant having access to documents which related to his personal interests and affairs, the requested documents had not been generated in a relatively neutral context. Rather, they had been brought into existence because of litigation between the parties. The Tribunal held that it would be against the public interest to disclose these documents, because the functions of the agency and its statutory duty (in which the service of the Legal Branch of the agency formed an essential part) would be severely hampered in conducting the litigation if the strategies which it employed prior to taking of a decision were to be disclosed to the applicant, its adversary in the litigation.

Access to documents relating to a draft bill²¹³

The applicant sought access to documents relating to a draft Bill on reorganising the administration of Aboriginal affairs.

The Minister and Department argued that five documents were internal working documents. It was held that an internal briefing note was exempt under section 36, and that disclosure would breach the need for confidentiality in such communications and would mislead the public.

Documents relating to high level appointments²¹⁴

Access to documents in two main categories was sought by the applicant, a politician:

1. Documents disclosing the names of possible or prospective appointees to the Constitutional Reform Commission or its Advisory Committees.
2. Documents relating to the formulation of Cabinet submissions and draft submissions (but not the submissions themselves).

The Tribunal considered that there were public interests in ensuring the efficacy and integrity of the processes of selection for appointment to positions of importance in the community and in constitutional reform itself. However, the Tribunal held that in this case, these interests were outweighed by the potentially damaging effects upon the capacity of government to make appointments to important public positions. To disclose the names of those considered but not appointed would be likely to provoke "mischievous speculation" as to the reasons for non-

²¹² **Re Ralkon Agricultural Company Pty. Ltd and Aboriginal Development Commission No. S85/92 Freedom of Information** [1986] AAT No. 2720, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2475.html>

²¹³ **Re P Reith MP and the Minister for Aboriginal Affairs and the Department for Aboriginal Affairs No. A88/7 Freedom of Information D227 (21/12/88)** AAT No. 4212, <http://www.austlii.edu.au/au/cases/cth/aat/unrep3328.html>

²¹⁴ **Re Peter Reith and Attorney-General's Department No. A86/30 Freedom of Information** [1986] AAT No. 3125, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2668.html>

appointment, with potentially damaging or at least embarrassing effects upon the reputations of those concerned.

With respect to the second category, the AAT held that these documents (minutes, draft minutes and correspondence) played an integral part in formulation of the submissions that went to Cabinet and were inextricably interwoven with those submissions. Accordingly, disclosure would effectively undermine the principle of Cabinet secrecy and on this significant public interest ground, these documents were exempt.

Documents regarding uranium stockpiles²¹⁵

An opposition MP sought access to Department of Finance documents about proposed sale of uranium stockpiles.

The Department refused. It argued that releasing the documents would have a substantial adverse effect on financial or property interests of the Commonwealth because the uranium market was volatile and information about its sale would impact on the price obtained at market.

The Tribunal considered the public interest for and against disclosure and held the public interest in this case was in the stability of the market price for uranium.

Documents regarding advice concerning foreign shareholders²¹⁶

An MP asked the Department of the Treasury for advice by the Foreign Investment Review Board on foreign investment thresholds.

The department refused and claimed the advice was exempt under section 36(1) (deliberative process documents). The Minister issued a certificate stating that it was in the public interest to withhold. The Tribunal then had only to consider whether he had reasonable grounds for his belief. It held that he did and that there was a public interest in maintaining Cabinet confidences.

Information concerning requirements imposed upon a mining company²¹⁷

The Environment Centre of the Northern Territory sought access to a range of documents. One which was withheld from access was a facsimile passing between the Department of Prime Minister and Cabinet and the Department of the Treasury and the Commonwealth Environment Protection Agency. The document dealt with concerns raised by the mining company, MIM, about the environmental statement process undertaken in respect of a proposed mine in the Northern Territory.

The AAT found that the document expressed the views of one particular author and did not reflect the regulatory requirements that were subsequently imposed on MIM. Having regard to the facts that the communication was one between high level officers and that the course actually adopted was different from those contemplated in the document, the AAT found that disclosure under the Act would lead to confusion, and upheld the decision to exempt the document from access.

²¹⁵ **Re David Miles Connolly v Department of Finance No. A94/50 Freedom of Information D337** (28/6/94) AAT No. 9571, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5436.html>

²¹⁶ **Re Ken Aldred and Department of the Treasury No. A94/121 Freedom Of Information D344** (25/10/94) AAT No. 9796, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5602.html>

²¹⁷ **Re The Environment Centre NT Inc and Department of the Environment, Sport and Territories No. D93/27 Freedom Of Information** [1994] AAT No. 9781, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5607.html>

The Tribunal considered the public interest test in relation to damage to Commonwealth/State relations with respect to other documents and held that the public interest in disclosure was outweighed by the damage which disclosure would cause to relations between the Commonwealth and the Northern Territory.

Letter relating to a decision to protect Aboriginal sites²¹⁸

The applicants sought access to a letter sent by the relevant Minister to the Prime Minister which concerned a proposed declaration to be made protecting certain Aboriginal sites from potential adverse effects of the proposed construction of a bridge at Hindmarsh Island in South Australia.

The decision is important in that it indicated a move away from the earlier approach of the Tribunal, which had tended to regard high level communications which might cause confusion to the public as being exempt from release.

The tribunal referred to the joint report of the Australian Law Reform Commission, Report No. 77, and the Administrative Review Council, Report No. 40 (1995), *Open Government: a review of the federal Freedom of Information Act 1982*²¹⁹.

In that report, those two important advisory bodies identified factors of relevance and irrelevance to the question of public interest.²²⁰ Factors of relevance were:

- the general public interest in government information being accessible;
- whether the document would disclose the reasons for a decision;
- whether disclosure would contribute to debate on a matter of public interest;
- whether disclosure would enhance scrutiny of government decision-making processes and thereby improve accountability and participation.

Stated as “possibly not being relevant”:

- the seniority of the person who is involved in preparing the document or who is the subject of the document;
- that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information;
- that disclosure would cause a loss of confidence in the government;
- that disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

The AAT rejected the view that the following factors (of themselves) could lead to exemption:

- the fact that this was consultation at the highest level of government, between Minister and Prime Minister;

²¹⁸ **Thomas Lincoln Chapman and Wendy Jennifer Chapman v Minister for Aboriginal and Torres Strait Islander Affairs No. S95/220 Freedom of Information** [1996] 23 AAR 142. AAT No. 10551A, <http://www.austlii.edu.au/au/cases/cth/aat/unrep6244.html>

²¹⁹ ALRC 77, <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html>; ARC 40, http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Freedom_of_Information_Research_Aids_FOI_Research_Papers_Open_government:_a_review_of_the_Federal_Freedom_of_Information_Act_1982

²²⁰ See paragraph 8.14 of the ALRC form of the report

- the fact that the document was similar to a Cabinet consultation, the Minister having consulted the Prime Minister rather than Cabinet itself.

The AAT took the view that factors of this kind had to be considered in context, in light of the exact nature of the decision-making process which was involved. Here, there was a strong public interest in the Minister being able to consult prior to reaching a final decision which would be open to scrutiny. In addition, it was important that the declaration, when made, would be subject to scrutiny by both Houses of Parliament and by the Federal Court of Australia. In those specific circumstances, exemption in the public interest was made out.

However, the fact that the matter remained controversial was not a public interest factor against disclosure. The Tribunal cited the well-known comments of Mason J. in **Commonwealth of Australia v John Fairfax and Sons Ltd.**²²¹:

...it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

This is an important statement of the law in Australia concerning public interest and is generally referred to and applied when questions arise concerning information which is that of the government or where it is only government which might be embarrassed by disclosure of such information.

Complaints about a civil servant²²²

The applicant had previously complained about the conduct of an officer of the Australian Taxation Office, which was investigated by the Ombudsman. Subsequently, the applicant sought access to certain letters and a draft report prepared during the course of the Ombudsman's investigation.

The AAT was of the view that the documents, all of which stated tentative or preliminary conclusions (including, in particular, the draft report), were exempt in the public interest under s.36(1)(b) of the FOI Act. The final report had not been prepared and before this could be done, submissions were awaited from the officer who was the subject of the complaint.

In respect of the draft report, the Tribunal applied the decision of the Federal Court in an earlier case²²³. In that decision, Sheppard J. said:

*And, depending on their submissions, will depend the form of [the Ombudsman's] final report. It follows that if, as the applicant would have it, the draft report is disclosed, the problems mentioned by Beaumont J [in Harris] are likely to arise. It may well be that criticism the Ombudsman has made will not be maintained or will be changed. If that were to occur it may be unfair to the Department or to the persons [criticised in the draft report] that his tentative criticisms be disclosed. On balance it would be contrary to the proper working of government for there to have been published an earlier report in which criticism, no longer maintained, was included.*²²⁴

²²¹ **Commonwealth of Australia v John Fairfax and Sons Ltd** [1980] 147 CLR 39 at 51; <http://www.austlii.edu.au/au/cases/cth/HCA/1980/44.html>

²²² **Re Brown and Commonwealth Ombudsman** [1999] AATA 559, <http://www.austlii.edu.au/au/cases/cth/aat/1999/559.html>

²²³ **Re Kavvadias and Commonwealth Ombudsman No. G393 of 1983 Freedom of Information** (1984) 2 FCR 64, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1553.html

²²⁴ **Kavvadias** at pp. 79-80, cited at **Brown**, para [27]

Documents concerning sites for nuclear reactors²²⁵

The applicant Council sought access to documents concerning possible alternative sites for a nuclear reactor which was located within its boundaries.

In its decision, the Tribunal reiterated a number of public interest principles:

1. A matter which is of interest to the public does not equate to a matter of public interest.²²⁶
2. The relevant interest is the interest of the public as distinct from the interest of an individual or small group of individuals.²²⁷
3. But the interest of a significant section of the public is a public interest.²²⁸
4. There is a public interest in the rights of an individual.²²⁹

The Tribunal also said that the “clear trend and preponderance of modern thought is away from those **Howard** principles which act as a shield against disclosure based upon the status and supposed discomfiture of public servants.”²³⁰

On the facts, some documents were exempt in the public interest because their disclosure could have led to public confusion and unnecessary and ill-informed debate or because their disclosure would breach the confidentiality applying to deliberations and processes of Cabinet (even though they were not themselves Cabinet documents). Other documents where these effects were not proved were ordered to be released.

Report Prepared by a Third Party²³¹

The applicant had made certain grievances against two fellow members of the Royal Australian Navy. She met with a Queen’s Counsel who subsequently prepared a report for the RAN. Subsequently, the applicant sought access to those parts of the report which related to her.

The Tribunal found that the applicant was involved in a process of alternative dispute resolution which the Queen’s Counsel was facilitating. The Tribunal considered that there was a significant public interest in parties being able to resolve difference by a process of alternative dispute resolution and in the confidentiality attaching to such process. Accordingly, the Tribunal was of the view that disclosure would inhibit the type of effective communication that was necessary to alternative dispute resolution and future disputants might be reluctant to engage in that process if information arising out of that process were to be disclosed. In addition, in the present case, disclosure might lead to a reopening of the dispute.

The Tribunal pointed out that a different result might arise in a different factual context where there might be a stronger public interest in disclosure than was apparent in this case.

²²⁵ **Re Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration** [2001] AATA 718, <http://www.austlii.edu.au/au/cases/cth/aat/2001/718.html>

²²⁶ Citing **Re Eccleston** (1993) 1 QAR 60 at 79; see chapter 7

²²⁷ **Sinclair v Mining Warden at Maryborough** (1975) 132 CLR 473 at 480, <http://www.austlii.edu.au/au/cases/cth/HCA/1975/17.html>

²²⁸ Sinclair’s case at 480

²²⁹ **Re James** [1984] 6 ALD 687 at 701

²³⁰ Para [38] of the decision

²³¹ **Re SRGGG and Department of Defence** [2001] AATA 1029, <http://www.austlii.edu.au/au/cases/cth/aat/2001/1029.html>

Document identifying blind spots²³²

The applicant, a member of a firm of solicitors, sought access to an internal memorandum of the Australian Taxation Office which identified the applicant's firm as a potential high risk to the revenue due to participation in certain tax planning arrangements.

The Tribunal refused a request for access to those parts of the memorandum which referred to shortcomings in the systems of the Commissioner of Taxation which could be used by an unscrupulous taxpayer to defraud the revenue. The Tribunal said that in this case, it was contrary to the public interest to identify the Commissioner's "blind spots".

This case may be contrasted with the earlier AAT decision in **Re Murtagh**. In that case, the information disclosed was useful to taxpayers in seeking to comply lawfully with the requirements of the Australian Taxation Office and it was in the public interest that such requirements be disclosed so as to facilitate the operation of the tax system.

Information concerning a proposed bypass road²³³

An individual sought access to documents relating to and connected with proposed routes for a proposed bypass road off the Hume Freeway which would bypass the regional city of Albury-Wodonga.

In respect of some of the documents, the AAT considered that integrity of the decision-making process led to exemption in the public interest under s.36 of the Act, given that the documents were sensitive.

In respect of one document, the AAT ruled against exemption on the ground that it was in the public interest the document be disclosed so as to indicate to the public the reasons why one bypass route was chosen rather than another. The public interest was particularly strong in this case since the ultimate decision replaced a previous decision (which was only three years old) which recommended a different route.

Documents assessing casualties in war²³⁴

A journalist sought access to documents assessing possible Australian casualties in the operation known by the US military as "Operation Iraqi Freedom".

The AAT found that there were public interests in:

1. The Australian public knowing why their country has engaged in a war and is presently engaged in war-like activities.
2. The entitlement of the Australian public to assess the decision made on their behalf.
3. The public knowing the extent of risks that may be faced by service personnel; that is, in knowing how many of those personnel are estimated to become casualties.
4. Service personnel not being exposed to any greater danger than that which they already face.

²³² **Re Hart and Deputy Commissioner of Taxation** [2002] AATA 1190, <http://www.austlii.edu.au/au/cases/cth/aat/2002/1190.html>

²³³ **Re Terrill and the Department of Transport and Regional Services** [2003] AATA 52, <http://www.austlii.edu.au/au/cases/cth/aat/2003/52.html>

²³⁴ **Re Dunn and Department of Defence** [2004] AATA 1040, <http://www.austlii.edu.au/au/cases/cth/aat/2004/1040.html>

Against this, the Tribunal considered that to release more than one set of draft estimated casualty figures was not in the public interest as it would lead to public confusion and generate unnecessary public debate. In all the circumstances, the Tribunal held that the public interest in releasing draft figures was outweighed by the likelihood of confusion, particular where the final estimate of casualty figures was available and would be released.

Summary of Factors For And Against Release

6.32 The following factors for and against the public interest can be drawn from the case law. Some are from federal decisions and others from state decisions. It is not an exhaustive list of all public interest considerations. In particular, further public interest factors appear in the section below dealing with decisions of the Queensland Information Commissioner.

Public interest has outweighed the exemption in situations where there was a public interest in:

- Full information to assist in defence in criminal cases (especially involving the death penalty);
- curing distortion of facts caused by earlier disclosure;
- official accountability to the public;
- promotion of public participation in the processes of government;
- making a valuable contribution to public debate on an issue;
- the proper administration of justice and in the availability of evidence (**Sankey v Whitlam** (1978) 142 CLR 1 at 49);
- environmental, and health and safety concerns;
- examining the effectiveness of controls and safeguards in relation to health and quality controls or safeguards against water pollution (Senate Committee Report 1979);
- ensuring that government decisions that affect the quality of life of citizens are soundly based and that due consideration is given to environmental factors in the decision making process. (Environmental Defender's Office and Ministry for Planning WA 1/11/99 D)351999);
- the scrutiny of and accountability of officials;
- informing the public as to internal procedures of the taxation authorities used in raising an assessment (**Re Murtagh**);
- public accountability as to the terms of grants/financial assistance provided from public funds (**Re Seeney and Department of State Development** [2004] QI Cmr 4 (29 June 2004);
- the public having reasons for a change of a government decision from one made only a few years earlier (**Terrill and the Department of Transport and Regional Services**);
- the public having more information concerning certain policy matters and reasons for transfer of an administrator (**Re Graham Downie**);
- facilitating a process of consultation between a government employer and a trade union (**Re Ian McCarthy and Australian Telecommunications Commission**);
- the public being informed as to the processes of a Remuneration Tribunal in determining the salaries of senior judicial officers (**Robinson and Department of Employment and Workplace Relations**);
- the public having access to a survey of its own opinions concerning the taxation system and proposed changes to the system, where the document did not reflect government views nor have government input and where there would be no adverse effect on deliberative processes (**McKinnon and Commissioner of Taxation**);
- the reasons for and the basis of a decision being disclosed to the party affected (**Cosco Holdings Pty. Ltd. and Department of Treasury**);
- an unsuccessful applicant for a position having access to notes of an inquiry reviewing the selection process (**Anthony John Wallace v Merit Protection Review Agency**);
- an individual applicant knowing the legal basis upon which he was being proceeded against by the taxation authorities (**Re Barry Saunders and Commissioner of Taxation**);
- disclosure of documents which indicated that, following complaint, and representations by a Member of Parliament, a thorough investigation by the regulatory authorities had taken place concerning a matter which was not intrinsically particularly sensitive (**Re John Russo and Australian Securities Commission**).

The public interest did not outweigh the exemptions in situations where:

- There was a likelihood of damage to security or international relations of the Commonwealth (**Re Throssell and Department of Foreign Affairs** (1987) 4 ALD 296);
- The release of documents would impair the integrity and viability of the decision making process to a significant or substantial degree (**Re Murtagh and Commissioner of Taxation** (1983) 6 ALD 112 at 121);
- Disclosure would undermine stability of the market; (**Re David Miles Connolly and Dept. Finance**);
- Disclosure would undermine a confidential negotiating strategy of the Minister (**Re Swiss Aluminium and Department of Trade** (1985) 9 ALD 243);
- Disclosure would impact on international relations;
- There is a need to preserve public agency resources; therefore it may be contrary to the public interest to release information which could lead to great expense, unless this were outweighed by competing public interests;
- There is a need for effectiveness of ministerial and official deliberations;
- It may impair the ability of an agency to obtain the information in future;
- International governmental co-operation may be discouraged;
- Consultation between Ministers was involved before the making of a decision which would come under scrutiny directly by both Houses of Parliament and federal Courts (**Re Chapman**);
- Release would disclose international communications between governments at the highest level which proceeded on an understanding of confidentiality and where no specific public interest in disclosure could be identified (**Re Laurence William Maher and Attorney-General's Department**);
- Persons needed to be able to participate in a process of confidential alternative dispute resolution without running a risk of subsequent disclosure of information and a possible reopening of the dispute (**SRGGG and Department of Defence**);
- Disclosure would permit unscrupulous taxpayers to learn about how a particular shortcoming in the systems of the revenue authorities might lead to fraud (**Hart and Deputy Commissioner of Taxation**);
- Disclosure would reveal details of investigations into possible wrongdoing of officials holding elected statutory offices (**Smith and Aboriginal & Torres Strait Islander Commission**);
- Disclosure of a draft report would not be in the public interest in circumstances where the subject of the report had not had an opportunity to comment on the draft; in that event there would be significant interferences with the working of government (**Kavvadias and Commonwealth Ombudsman, Brown and Commonwealth Ombudsman**);
- A very strong public interest was involved in documents which canvassed policy options for dealing with politically motivated violence and procedures for ensuring the safety of political leaders (**Re Timothy Edward Anderson and Department of Special Minister of State (No. 2)**);
- The documents sought concerned: (a) confidential advice to a Minister concerning answers to a Parliamentary question, and (b) the internal deliberations of an agency concerning a previous decision made on an FOI request (**Re F. E. Peters (No. 4)**);
- Not releasing draft estimates of casualty figures likely to arise in military operations where the final estimate was available and it would (in the public interest) be released (**Dunn and Department of Defence**);
- A strong public interest existed in the good governance of the universities and in the confidentiality of University Council deliberations (**Re Burns and Australian National University**);
- Disclosure would reveal to the applicant (the adversary in litigation) the strategies of the respondent leading to the making of certain decisions concerning the litigation (**Re Ralkon Agricultural Company Pty. Ltd and Aboriginal Development Commission**);
- The documents would disclose matter that was inextricably interwoven with submissions that went to Cabinet and the names of those who had missed out on appointment to certain high level appointments made by government (**Re Peter Reith and Attorney-General's Department**);
- The result of disclosure would be to breach the confidentiality of Cabinet processes (even though the documents were not Cabinet documents) or where confusion and unnecessary and ill-informed debate would arise (**Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration**);
- Statistical information, if released, would be entirely unreliable and where release would be contrary to understandings between the Commonwealth and States as to the manner in which the information could be used (**Re Warwick Bracken and Minister of State for Education and Youth Affairs**).

7 Eccleston: A Key Public Interest Case

Introduction

- 7.1 An important decision involving the public interest is **Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs**.²³⁵ This decision of the Queensland Information Commissioner has been described as “a comprehensive examination of the meaning of ‘public interest’ in relation to internal working documents.”²³⁶
- 7.2 The analysis of the public interest in **Eccleston** has been approved, followed, or applied in or by:
- The New South Wales Court of Appeal²³⁷
 - Commonwealth Administrative Appeals Tribunal²³⁸
 - The NSW Administrative Decisions Tribunal²³⁹

²³⁵ **Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs** (1993) 1 QAR 60, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html>. AustLII web references are given for consistency, but this and other decisions of the Queensland Information Commissioner are also available at the Commissioner’s web site, as listed at <http://www.infocomm.qld.gov.au/?p=26>. The Queensland copies of the cases are carefully formatted and available in both HTML and PDF versions. For example, as of date of publication, **Eccleston** in HTML format is at <http://www.infocomm.qld.gov.au/indexed/decisions/html/93002.htm>.

²³⁶ **Simpson v Director-General, Department of Education & Training** (NSW Administrative Decisions Tribunal) [2000] NSWADT 134, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/134.html>

²³⁷ **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales** [2006] NSWCA 84 (24 April 2006), <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/84.html>

²³⁸ In a number of cases, including **Chapman v Minister for Aboriginal and Torres Strait Islander Affairs No. S95/220 Freedom of Information** [1996] 23 AAR 142. AAT No. 10551A, <http://www.austlii.edu.au/au/cases/cth/aat/unrep6244.html>;
Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration [2001] AATA 718, <http://www.austlii.edu.au/au/cases/cth/aat/2001/718.html>;
Dunn and Department of Defence [2004] AATA 1040, <http://www.austlii.edu.au/au/cases/cth/aat/2004/1040.html>;
Purcell and Veteran’s Review Board [2002] AATA 163, <http://www.austlii.edu.au/au/cases/cth/aat/2002/1163.html>;
Toomer and Department of Agriculture, Fisheries & Forestry and Ors [2003] AATA 1301, <http://www.austlii.edu.au/au/cases/cth/aat/2003/1301.html>;
Martin Saxon v Australian Maritime Safety Authority No. A94/167 Freedom Of Information [1995] AAT No. 10235, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5795.html>;
Wallace and Director of Public Prosecutions [2003] AATA 119, <http://www.austlii.edu.au/au/cases/cth/aat/2003/119.html>;
Terrill and the Department of Transport and Regional Services [2003] AATA 52, <http://www.austlii.edu.au/au/cases/cth/aat/2003/52.html>;
Mijares and Minister for Immigration and Multicultural Affairs [2000] AATA 214, <http://www.austlii.edu.au/au/cases/cth/aat/2000/214.html>

²³⁹ **Simpson**, *op. cit.*

National Parks Association of New South Wales Inc. v Department of Lands & Anor [2005] NSW ADT 134, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/124.html>;
Allen & Anor v Rural Fire Service [2005] NSW ADT 222, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/222.html>;
Waite v General Manager, Hornsby Shire Council [2004] NSW ADT 93, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/93.html>;

- The Western Australian Information Commissioner²⁴⁰
- The Irish Information Commissioner²⁴¹

7.3 **Eccleston** is most important for its discussion of the concepts and principles relevant to the question of “public interest” and should be considered by reference to the principles discussed in the decision. Because of its subsequent application in multiple jurisdictions, it is discussed here at length, ahead of the general Queensland chapter.²⁴²

7.4 The actual finding of the Information Commissioner was that the respondent Department had failed to satisfy him that disclosure of the deliberative processes matter contained in seven documents would be contrary to the public interest.²⁴³ The seven documents in issue related to assessment or advice of the consequences for the Queensland Government of the then recent decision of the High Court in **Mabo**²⁴⁴, which is the leading Australian decision on Indigenous Australians’ land rights.

7.5 Section 81 of the Queensland Act meant that the onus to prove that the Department’s decision to exempt the matter was justified, was on the Department, and, as section 41 requires, the Department had to establish that disclosure would be contrary to the public interest.²⁴⁵

The Concept of the Public Interest

7.6 The Information Commissioner referred to judicial recognition of the principle that government exists for the benefit of the community it serves.

Martin v Commissioner of Police, NSW Police [2005] NSW ADT 23,
<http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/23.html>;

Law Society of New South Wales v General Manager, WorkCover Authority of NSW (No. 2) [2005] NSW ADT AP 33, (a decision of a Panel of the Tribunal presided over by the President),
<http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>;

Gales Holdings Pty. Limited v Tweed Shire Council [2005] NSW ADT 168,
<http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/168.html>;

Cianfrano v Director-General, New South Wales Treasury [2005] NSW ADT 7,
<http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/7.html>

²⁴⁰ **Veale and Town of Bassendean** [1994] WAICmr 4,
<http://www.austlii.edu.au/au/cases/wa/WAICmr/1994/4.html>;

Re Jeanes and Kalgoorlie Regional Hospital, [1995] WAICmr 3,
<http://www.austlii.edu.au/au/cases/wa/WAICmr/1995/3.html>

Ravlich and State Supply Commission [1999] WAICmr 37,
<http://www.austlii.edu.au/au/cases/wa/WAICmr/1999/37.html>

Australian Medical Association Limited and Health Department of Western Australia [1999] WAICmr 7, <http://www.austlii.edu.au/au/cases/wa/WAICmr/1994/4.html>

²⁴¹ **Ms. Eithne Fitzgerald and the Department of the Taoiseach**, case 98127,
<http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1475,en.htm>

²⁴² The authors wish to acknowledge and thank Greg Sorensen, formerly Deputy Information Commissioner (Queensland), the author of the decision in **Eccleston** and numerous other decisions discussed in chapter 8.

²⁴³ See paragraph [185] of the decision

²⁴⁴ **Mabo and Others v Queensland (No. 2)** (1992) 175 CLR 1,
http://www.austlii.edu.au/au/cases/cth/high_ct/175clr1.html

²⁴⁵ See paragraph 8.10

In **Attorney-General (UK) v Heinemann Publishers Pty. Limited** (the Spycatcher case), McHugh JA said:²⁴⁶

But governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.

7.7 The Information Commissioner referred to the 1991 report²⁴⁷ by Professor Paul Finn²⁴⁸ and quoted from it:

The manner in which government manages – and is lawfully allowed to manage – information in its hands has a marked bearing both on the quality of the citizen-State relationship and on the vitality of the democracy in which it governs. In the 200 years of our legal and governmental history, the latitude given to government in this has been variable. To the extent that it is possible to make broad generalisations and disregarding the very early colonial period, one can discern three overlapping phases in our law’s governing of information management generally and of official secrecy in particular. Each, as will be seen, reflects rather different assumptions about the nature and proper working of our constitutional system. Each, for a period, has been the predominant influence in our law ... While the impact of these phases has been variable in our nine governmental systems, and while the pace of legal development in them is by no means uniform, the following discussion will proceed on a broad national basis, emphasising the change in constitutional and democratic principles which are embodied in our law, and particularly in the emerging law of the last decade.

*Assigning labels to the three phases, the **first** can be described as one of “**public interest paternalism**” ... While using the “public interest” to set the legal limits to the protection of official information, deference to the Crown and its advisers left it very much to the Crown to determine both what constituted the public interest and what and when official information should be made publicly available. The **second** phase, and much the most influential in Australia, has been that of “**governmental authoritarianism**” ... In it neither official secrecy nor the public availability of information was made to depend upon the “public interest”. It allowed government to elevate its interests over all others; to regulate at its discretion the public dissemination of information; and, formally at least, to coerce subservience from its officials through stringent official secrecy regimes. The **third** and much the most recent phase, can be designated the **liberal-democratic** one. Its manifestations are various: in **Freedom of Information** and in **Privacy** legislation; in the common law’s “public interest” test for protecting governmental information; and in the now less deferential attitude taken to government in privilege cases. While accepting that official secrecy has a proper and necessary province, the guiding ideas here are that: ‘the interests of government ... do not exhaust the public interest’ (**Glasgow Corporation v Central Land Board** [1956] S.C. (HL) 1 at 18-19, endorsed by Stephen J in **Sankey v Whitlam** (1978) 142 CLR 1 at 59); that the public*

²⁴⁶ **Attorney-General (UK) v Heinemann Publishers Pty. Limited** (1987) 10 NSWLR 86 at 191, quoted at paragraph [36] of the decision

²⁴⁷ Finn, P. 1991, *Official Information (Integrity in Government Project: Interim Report 1)*, Canberra

²⁴⁸ Subsequently a judge of the Federal Court of Australia; see paragraph [35] of the decision

availability of information is an important value to be promoted in a democratic society especially where this enables 'the public to discuss, review and criticize government action' (Commonwealth of Australia v John Fairfax and Sons Limited (1981) 55 ALJR 45 at 49, (1980) 32 ALR 485 at 493 per Mason J) (the democratic theme); and that persons and bodies who supply confidential information to government about their own affairs have a legitimate interest in having the integrity and confidentiality of that information respected (the liberal theme).

For the most part contemporary Australian law is in a period of transition from the second to the third of these phases. The power of government to act in the manner of its own choosing in the management of official information is being subordinated progressively to wider considerations of public interest. This trend in this particular sphere is not an isolated one. It reflects a wider and more general commitment to liberal-democratic ideals now evident in Australian public law generally.

- 7.8 The Information Commissioner quoted from the important judgment of Mason J. in **Commonwealth of Australia v John Fairfax & Sons Limited and Ors**,²⁴⁹ concerning the manner in which claims for confidentiality by government must be assessed and what detriment government must show in order to establish such a claim.

"The question then, when the executive Government seeks the protection given by Equity, is: What detriment does it need to show?"

The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the Government, but it is to say that when Equity protects Government information it will look at the matter through different spectacles.

It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize Government action.

Accordingly, the Court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

The Court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, as long as it does not prejudice the community in other respects.

²⁴⁹ **Commonwealth of Australia v John Fairfax & Sons Limited and Ors** (1980) 147 CLR 39, <http://www.austlii.edu.au/au/cases/cth/HCA/1980/44.html>; see paragraph [43] of the decision

Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.

*Support for this approach can be found in **Attorney-General v Jonathan Cape Ltd** [1976] QB 752, where the Court refused to grant an injunction to restrain publication of the diaries of Richard Crossman. Widgery LCJ said (at pp. 770-771):*

'The Attorney-general must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.'"

7.9 The Information Commissioner pointed to the comments of Mason J, and regarded it as implicit in those comments that embarrassment to the government or exposing the government to criticism will not be a ground for refusing disclosure of information, just as it would not be in a case of government impropriety.²⁵⁰

7.10 The Information Commissioner took the view that since the **John Fairfax** case dealt directly with public interest considerations bearing on the publication of government information, the principles enunciated by Mason J. were particularly apposite to the FOI context.²⁵¹

7.11 The Information Commissioner pointed out that the concept of "public interest" is not one defined in statutes (including FOI legislation) and that it is really a legal term of art.²⁵² He also quoted the well-known passage from **Director of Public Prosecutions v Smith**.²⁵³ Having done so, he made the observation (referred to in a number of subsequent cases), that:

*a matter which is of interest to the public does not necessarily equate to a matter of public interest.*²⁵⁴

Public Interest and the Rights of the Individual

7.12 The decision in **Eccleston** accepts the principle that while in general terms, a matter of public interest must be a matter that concerns the interests of the

²⁵⁰ See paragraph [46] of the decision

²⁵¹ At paragraph [44] of the decision

²⁵² At paragraph [45] of the decision

²⁵³ Set out at paragraph 2.11

²⁵⁴ At paragraph [50] of the decision

community generally, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community.²⁵⁵ The Information Commissioner cited in this regard the statement by Mason CJ. in the High Court that “the public interest necessarily comprehends an element of justice to the individual.”²⁵⁶

- 7.13 Similarly, another public interest consideration regarded as worthy of protection, depending on the circumstances of any particular case, is the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests.²⁵⁷

Public Interest in Accountability of Government and Public Participation in Government

- 7.14 The Information Commissioner regarded the FOI Act as intended to:

(a) enable interested members of the public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process; and

*(b) enable interested members of the public to discover what the government proposes to do, and obtain relevant information which will assist the more effective exercise of the democratic right of any citizen to seek to participate in and influence the decision-making or policy forming processes of government.*²⁵⁸

- 7.15 He pointed to the intentions of the Queensland government in passing the FOI Act by quoting from the second reading speech of the Queensland Attorney-General when introducing the FOI Bill:

*“Freedom of information legislation throughout Australia enshrines and protects three basic principles of a free and democratic government, namely, openness, accountability and responsibility ... [after repeating the terms of s.5(1) of the FOI Act] ... The Bill enables people to have access to documents used by decision-makers and will, in practical terms, produce a higher level of accountability and provide a greater opportunity for the public to participate in policy making and government itself.”*²⁵⁹

- 7.16 Moreover, the Explanatory Notes to the Bill said in respect of clause 5 of the Bill (now section 4 of the Act):

“The clause states two basic reasons for the enactment of FOI legislation. First, the public interest is served by public participation in, and the

²⁵⁵ At paragraph [55] of the decision

²⁵⁶ **Attorney-General (NSW) v Quin** (1990) 170 CLR 1, <http://www.austlii.edu.au/au/cases/cth/HCA/1990/21.html>, at paragraph [25] of Mason CJ’s judgment.

²⁵⁷ **Eccleston**, paragraph [55]

²⁵⁸ At paragraph [58] of the decision

²⁵⁹ At paragraph [66] of the decision

accountability of, government. Second, the public interest is served by enabling persons to have access to documents held by government which contain information which relates to their personal affairs. The clause acknowledges that the public interest is also served by the non-disclosure of certain information, where disclosure would harm the essential public interests or the private or business affairs of members of the community."²⁶⁰

7.17

The Information Commissioner also referred to the democratic underpinnings of the public interest in having access to information when he quoted from an article by an English legal academic, as follows:

"The reason for desiring public political institutions to be organised democratically is that democracy allows individuals a say in the terms and conditions on which social rules which bind them are developed. Intrinsically undemocratic social organisations may make the trains run on time but are bad because, regardless of the benefits which they produce, they deny the autonomy of individual citizens by denying them a voice in the determination of policies, rules and procedures. ...

... there are (higher order) democratic rights. These should be respected and protected by a system which claims to be democratic; failure in this will represent a lapse from the democratic ideal. ...

These higher order rights secure each citizen's access to the machinery of political decision-making. ... This provides a reason for individuals to subject some of their interests and freedom of choice to the public political process for some purposes. If it is ever rational for citizens to accept that their rights and obligations will be fixed by social institutions, it will be so only if the institutions operate under rules which guarantee to all citizens an equal right to influence decisions about the form and behaviour of those institutions. ... Some rights, at least are necessary to democratic institutions.

*For instance, it would be undemocratic to deny the vote to blacks, Jews or women because that would contravene the principle of political equality. On the other hand, it would not be illegitimate to fix a minimum voting age, so long as it is reasonably related to the age at which people are regarded as capable of discharging civic responsibilities and applies to all groups in a non-discriminatory way. These limitations on the majority's power to disenfranchise a minority are not limitations on democracy. They are an essential part of democracy. The same applies to a wide range of rights, which take up a special status as higher order democratic rights which need special protection under a democratic constitution. These include freedom of speech and association, **the right to receive information which is relevant to public political decisions which one is entitled to make or influence**, and perhaps the right to be provided with forums for speech and association." (my emphasis)²⁶¹*

²⁶⁰ At paragraph [67] of the decision

²⁶¹ Feldman, D. 1990, 'Democracy, the Rule of Law and Judicial Review', *Federal Law Review* 1 at pages 2-4, quoted at paragraph [68] of the decision

7.18 The Information Commissioner was mindful that the policy of the FOI Act (reflected in subsections 5(2) and (3) as enacted, now in subsections 4(3) and (4)):

*...is intended to strike a balance between competing interests in secrecy and openness for the sake of preventing prejudicial effects to essential public interests, or to the private or business affairs of members of the community, in respect of whom information is collected and held by government.*²⁶²

7.19 Nevertheless, he pointed out that:

*The public participation rationale for freedom of information legislation is inherently democratic in that it affords a systemic check and balance to any tendency of the small elite group which ultimately manages and controls the processes of high level government policy formulation and decision-making, to seek participation and input only from selected individuals or groups, who can thereby be accorded a privileged position of influence in government processes.*²⁶³

7.20 The ability of citizens to scrutinise the activities of government and to empower them as electors in a democratic society was addressed, the Information Commissioner pointed out, in a High court decision in which McHugh J. said:

*"If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation. ... Only by the spread of information, opinions and arguments can electors make an effective and responsible choice in determining whether or not they should vote for a particular candidate or the party which that person represents. Few voters have the time or the capacity to make their own examination of the raw material concerning the business of government, the policies of candidates or the issues in elections even if they have access to that material. As Lord Simon of Glaisdale pointed out in **Attorney-General v Times Newspapers** [1974] AC 273 at 315:*

'People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has

²⁶² At paragraph [40] of the decision

²⁶³ At paragraph [59] of the decision

to be conducted vicariously, the public press being a principal instrument.’”²⁶⁴

7.21

In the same High Court decision, Mason CJ. described the process of public participation in government and the accountability of government in the following terms:

“The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. ... The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.

Freedom of Communication as an Indispensable Element in Representative Government

*Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. **Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.** By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of this freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.” (my emphasis)²⁶⁵*

7.22

This passage gave implicit support, in the view of the Information Commissioner, for the principle that citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation. The importance of FOI legislation is that it provides the means for citizens to have access to the

²⁶⁴ **Australian Capital Television Pty. Limited and Others and The State of New South Wales v The Commonwealth and Another (No. 2)** (1992) 177 CLR 106 at 231, <http://www.austlii.edu.au/au/cases/cth/HCA/1992/45.html>, quoted at paragraph [61] of the decision

²⁶⁵ **Australian Capital Television**, *op. cit.*, quoted at paragraph [70] of the decision

knowledge and information that will assist a more meaningful and effective exercise of that right.²⁶⁶

Balancing of Public Interests

7.23 The Information Commissioner drew attention to the exemption provisions where a public interest balancing test was required to be applied. He was mindful that

...where apparently legitimate interests conflict, as will frequently arise when competing interests of individuals, of government in the conduct of its affairs, and of the public generally (or a substantial segment thereof) are sought to be protected or furthered in disputes over access to information, it is the balance of public interest which determines the particular interest(s) which it will be appropriate to protect, and whether by openness or secrecy. It is inherent in the process of balancing competing interests that one or more interests, whether public, individual or government interests, will in fact suffer some prejudice, but that that prejudice will be justified in the overall public interest.²⁶⁷

7.24 The Information Commissioner went on to describe the manner in which (as a general principle) the balance in the public interest is properly arrived at:

The appropriate balance in the public interest will be struck according to the relative weight of the competing interests at play in any particular set of circumstances. Sometimes the public interest in accountability and public participation will outweigh the public interest in the effective and efficient use of limited government resources to obtain the government's desired outcomes. A certain amount of inefficiency in getting things done should be a burden that democratic governments are prepared to accept as the price of honouring the higher values of the democratic process.²⁶⁸

7.25 Observations in a report of a Senate Committee on the draft Commonwealth Bill were, in the view of the Commissioner, also appropriate to the Queensland Act:

In our view then, 'public interest' is a phrase that does not need to be, indeed could not usefully, be defined - a task that many submissions asked us to undertake. Yet it is a useful concept because it provides a balancing test, by which any number of relevant interests may be weighed one against another. ... the relevant public interest factors may vary from case to case - or in the oft-quoted dictum of Lord Hailsham of Marylebone "The categories of public interest are not closed". It is essential therefore that wherever the phrase is used the Bill should provide scope for adequate argument as to what result the public interest may require. This scope will only exist if the Tribunal is empowered to adjudicate on the question. "Public interest" is not a balancing test that is customarily applied by administrators. It is a test that must be weighed by an adjudicator who has no interest in the outcome

²⁶⁶ See paragraph [71] of the decision

²⁶⁷ At paragraph [41] of the decision

²⁶⁸ At paragraph [74] of the decision

*of the proceeding and who is skilled by professional experience in weighing factors one against another. ... in many of the submissions ... [o]bjection was made not so much to a public interest ground but to the interpretation and application of it by administrators alone.*²⁶⁹

- 7.26 In approaching the task, FOI decision-makers are required, in the view of the Commissioner, to give full weight to the important principles of public interest in weighing up the appropriate balance:

*Unless the exemption provisions, and s.41 in particular, are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged.*²⁷⁰

The Information Commissioner's Analysis of the Howard Principles

- 7.27 The Information Commissioner gave a detailed exposition and analysis of the principles identified by the Commonwealth AAT in the early decision in **Re Howard and Treasurer of the Commonwealth of Australia**.²⁷¹

- 7.28 The Information Commissioner pointed out that when **Re Howard** was decided, the Commonwealth AAT had only been hearing FOI cases for two years. He said quite specifically:

*The Tribunal, however, made what I consider, with the benefit of hindsight, to have been an ill-advised attempt to formulate a list of five general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest. For reasons explained below, I consider some of those five principles (hereinafter referred to as the five Howard criteria) are incorrect and should not be followed in Queensland, while the others all require significant cautionary qualifications.*²⁷²

- 7.29 Before going on to consider the five **Howard** factors, the Commissioner stated that he regarded as too vague and amorphous to amount to a legitimate public interest, the concept of protecting the integrity and viability of the decision-making process, which had been enunciated in **Re Howard** and prior to that in **Re Murtagh**.²⁷³ In criticising this concept, the Commissioner followed the comments in another Commonwealth AAT

²⁶⁹ Report of Senate Committee on Constitutional and Legal Affairs (1979), quoted at paragraph [48] of the decision

²⁷⁰ At paragraph [75] of the decision

²⁷¹ **Re Howard and Treasurer of the Commonwealth of Australia No. A.84/154 Freedom of Information** (1985) 3 AAR 169, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1940.html>; see the discussion of **Mijares and Minister for Immigration & Multicultural Affairs** (in chapter 6) where the Howard factors are set out in the section "Decisions where the balance lay in favour of disclosure"

²⁷² At paragraph [101] of the decision

²⁷³ **Re Robyn Frances Murtagh and Commissioner of Taxation No. V.83/236 Freedom of Information** [1984] 6 ALD 112, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1536.html>

case, **Re Dillon and the Department of the Treasury**.²⁷⁴ In **Dillon**, Deputy President Todd said:

The first public interest ground offered [by the respondent] was that there was a public interest in "protecting the viability of the decision-making process". Without more, this is too vague and amorphous a concept to be considered a legitimate public interest. It is, moreover, a tag which an agency could easily attach to any document which is sought not to be disclosed and which, if accepted, would greatly reduce the review function of the Tribunal in this jurisdiction.

7.30 The Information Commissioner set out the five **Howard** criteria in his decision:

From such authorities and from decisions of Tribunals ... it is possible to postulate that in each case the whole of the circumstances must be examined including any public benefit perceived in the disclosure of the documents sought but that:

(a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;

(b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

(c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(d) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;

(e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

*The FOI Act has been in operation since 1 December 1982 ... the Tribunal has not yet received evidence that disclosure under the FOI Act has in fact led to a diminishment in appropriate candour and frankness between officers. As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. Weight must be given to the object of the FOI Act.*²⁷⁵

7.31 The Commissioner pointed out that the opening words of the passage from **Re Howard** emphasised the need for the whole of the circumstances to be considered and the closing words suggested that the five criteria were not set

²⁷⁴ **Re Dillon and the Department of the Treasury (No. 2) No. D84/16 Freedom of Information** (1986) 4 AAR 320 at 330, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2318.html>, quoted in paragraph [104] of the decision

²⁷⁵ Quoted at paragraph [105] of the decision

in concrete but were indicators which might need to be revised in the light of greater experience in the FOI Act and with the concept of the public interest, but that in practice these qualifications to the five criteria were rarely acknowledged.²⁷⁶

7.32

The Commissioner then proceeded to analyse in great detail why the formulation of the five **Howard** criteria was ill-advised in part of the decision which merits being set out in full:²⁷⁷

107 I consider that the formulation of the five Howard criteria was ill-advised for a number of reasons. First, it placed an unwarranted emphasis on factors justifying non-disclosure, and provided an easy checklist of factors that could be called in aid to justify non-disclosure. No similar set of criteria specifying considerations which favoured disclosure was enunciated.

108 Second, the terms in which the criteria were framed, using words like "tends not to be", "is likely to be", "may be unfair to", "may prejudice", and referring only to general and mostly intangible kinds of harm (e.g. prejudice to the "integrity of the decision-making process"), has given government agencies the impression that it is sufficient to point in a general and speculative way to largely intangible kinds of harm to the public interest, instead of requiring them to state with precision the kinds of tangible harm to effective government decision-making processes (or other aspects of the public interest) that can be expected to flow from disclosure.

109 Third, in respect of at least the first two of the criteria, aspects of the class claim (against which the Tribunal specifically warned in the passage from Murtagh quoted earlier in the Howard decision itself) were permitted to re-enter by the specification of categories of documents disclosure of which tends not to be in the public interest (high-level documents, policy documents) without any qualifying reference to the overriding need to consider whether disclosure of the actual contents of such documents would be injurious to the public interest.

*110 Fourth, the Tribunal seems to have drawn on principles from United States case law interpreting the fifth exemption, (b)(5), of the US FOI Act (see especially at p.633 of the case report) which are not necessarily appropriate to the materially different wording and structure of s.36 of the Commonwealth FOI Act (a fact which was recognised by Beaumont J in **Harris v ABC** (1983) 50 ALR 551 at p.563, and by a Full Court of the Federal Court of Australia in **Harris v ABC** (1984) 1 FCR 150 at p.154). Exemption 5 in the US FOI Act excludes from the obligation of disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency". The US legislature was prepared to express its exemption in terms which incorporated by reference the US law with respect to a government agency's privilege from production in legal proceedings (which would roughly equate to the English and Australian law of Crown privilege/public interest immunity plus legal professional privilege) and thereby accepted the*

²⁷⁶ At paragraph [106] of the decision

²⁷⁷ At paragraphs [107] –[119] of the decision

limitations inherent in that law, with its very narrow focus on public interest considerations favouring disclosure - see paragraph 116 below. The Commonwealth Parliament, on the other hand, and all State legislatures that have followed it, chose to adopt a quite different statutory formula which left wide open the range of competing interests that might bear on the question of whether disclosure of particular deliberative process documents would on balance be contrary to the public interest. There is no requirement to import notions from the law of discovery in legal proceedings into the interpretation of s.36 of the Commonwealth FOI Act or s.41 of the FOI Act, and attempts to do so should be tempered by an appreciation of the quite different objects that the law is seeking to achieve in these two different contexts.

111 Fifth, the Tribunal has drawn on some principles expressed in the leading English and Australian authorities on Crown privilege/public interest immunity and sought to apply them in a manner that is quite inappropriate, having regard to the materially different context and objects of freedom of information legislation. Take for instance the passage from the judgment of Lord Reid in *Conway v Rimmer* which was quoted in Howard's case shortly before the formulation of the five criteria, and seems to have influenced the formulation of at least the second and fourth of those criteria. That passage from Lord Reid's judgment is in the following terms (at p.952):

"I do not doubt that there are certain classes of documents which ought not be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments, including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further, it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition, but there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan's case* [1942] AC 624 at 642, whether the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service'." (my emphasis)

112 The sentences which I have underlined express principles which I consider to be particularly inappropriate for transposition into the context of freedom of information legislation. It is doubtful that Lord Reid's remarks about disclosure creating or fanning ill-informed or captious public or political criticism have ever been accepted by the High Court as reflecting an appropriate justification for Crown privilege/public interest immunity in

Australian law. In *Sankey v Whitlam*, Gibbs ACJ after quoting those remarks of Lord Reid, said (at p.40):

"Of course, the object of the protection is to ensure the proper working of government and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based."

113 *Mason J* after referring to the same passage said (at p.97):

"I also agree with his Lordship that the efficiency of government would be seriously compromised if Cabinet decisions and papers were disclosed whilst they or the topics to which they relate are still current or controversial. But I base this view, not so much on the probability of ill-formed criticism with its inconvenient consequences, as upon the inherent difficulty of decision-making if the decision-making processes of Cabinet and the materials on which they are based are at risk of premature publication."

114 In addition, Lord Reid's comments appear to be contrary to the principles enunciated by *Mason J* in ***Commonwealth of Australia v John Fairfax and Sons***, as set out in paragraph 43 above, and inconsistent with *Mason CJ's* comments in the ***Australian Capital Television Pty Ltd v Commonwealth*** (No. 2) as set out in paragraph 70 above (though legal questions of a different kind were under consideration in those cases).

115 It is important to remember that both *Conway v Rimmer* and *Sankey v Whitlam* were decided in an era when the prevailing law was that, apart from the curial processes of discovery, interrogatories and subpoena, the Executive government could not be compelled to disclose any information which it possessed. The authority of the courts was limited to compelling disclosure of government-held information for the purpose of its use as relevant evidence in court proceedings, and the courts were generally conscious that they were exercising an exceptional power. (Those two cases were in fact among the first in their respective jurisdictions to mark the end of a longstanding trend of judicial deference to the judgment of the Executive government as to whether the public interest would be injured by disclosure in court proceedings of government-held information.)

116 It is particularly important to bear in mind that in the Crown privilege/public interest immunity cases, there is only one facet of the public interest for which disclosure of government information is being sought, and it is generally the only public interest consideration favouring disclosure which is placed on the scales in the weighing process which occurs in these cases, namely, the public interest in the due administration of justice by the courts, in that litigants should be entitled to have their disputes resolved by the courts in the light of all relevant and admissible evidence which bears on the dispute. Occasionally other public interest considerations favouring disclosure have been recognised in these cases, but generally only as factors which neutralise a claim of harm to the public interest through disclosure, which is advanced by the government party. The only purpose for which disclosure is being contemplated is for use in court proceedings. Public interest considerations relating to open and accountable government are not directly relevant in that context, and this is especially so of the cases decided against a background where the prevailing law accepted that

Executive governments otherwise possessed a largely unfettered discretion as to the release or withholding of information.

117 Freedom of information legislation, however, has turned on its head the natural order that had prevailed for centuries with respect to the disclosure of government-held information. It has done so in the pursuit of objects of the kind discussed in paragraphs 58 to 75 above. Among its avowed objects are to facilitate informed scrutiny and indeed criticism of the performance of Government. The comments of Lord Reid underlined in the passage above (and indeed several other facets of the public interest recognised in some of the Crown privilege cases as weighing against disclosure of government information) must be recognised as the product of a different legal order, and as being inimical to the attainment of the avowed objects of freedom of information legislation.

118 Decisions in the Crown privilege/public interest immunity cases can provide guidance as to aspects of the public interest which have been acknowledged by the courts to exist, and as to how the process of identifying and balancing competing public interests is to be approached. But in my opinion, the leading authorities on Crown privilege/public interest immunity must be used with a keen awareness of the factors which I have referred to above, which may make some statements of principle incompatible with, and unsuitable for application within, the very different legal framework of freedom of information legislation.

119 The five Howard criteria have been subjected to telling criticism by Deputy Presidential members of the Commonwealth AAT in subsequent cases (some of which are referred to below), by academic critics (see for example S. Zifcak, "Freedom of Information: Torchlight but not Searchlight", Canberra Bulletin of Public Administration No. 66, October 1991, 162 at p.165; P. Bayne, "Freedom of Information : Democracy and the protection of the processes and decisions of government", (1988) 62 ALJ 538) and in the EARC Report on Freedom of Information at paragraph 7.121-7.127 inclusive. The five Howard criteria have also, however, been uncritically embraced and applied by some members of the Commonwealth AAT and some members of the Victorian AAT (doubtless influenced to some extent by the stature of the presiding member of the Tribunal), and probably also by a host of FOI decision-makers eager to embrace a simple set of criteria set out in such general and easily manipulable terms, all of which are directed toward affording support for a finding that disclosure of documents would be contrary to the public interest.

7.33 He then went on to consider each of the five **Howard** criteria in turn:

1. The documents involved high level communications

7.34 In respect of this principle, the Commissioner²⁷⁸ endorsed the approach taken by Deputy President Todd in two Commonwealth AAT cases.²⁷⁹ These cases held that simply because documents consisted of high level communications, it did not follow that disclosure was contrary to the public

²⁷⁸ At paragraphs [120] – [122] of the decision

²⁷⁹ **Re Dillon** (*op. cit.*); **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589

interest. If high level communications had certain characteristics which made disclosure contrary to the public interest, then it is those characteristics which are relevant and not the fact that the communications are high level.²⁸⁰

2. Disclosure of policy documents tends not to be in the public interest

7.35 The Information Commissioner²⁸¹ regarded this criterion as “plainly wrong” and not supported by authority. Indeed, he regarded it as quite contrary to the Act itself and said:

*To uphold the second Howard criterion in the very broad terms in which it is stated would defeat one of the main purposes of the FOI Act which is to allow citizens access to documents that will permit informed participation in the development of government policy proposals which are of concern to them.*²⁸²

3. Inhibition of frankness and candour

7.36 The Commissioner pointed out that this principle has been viewed by the Commonwealth AAT with a healthy degree of scepticism.²⁸³ The Commissioner also referred to observations of the High Court in a non-FOI context expressing similar scepticism. He also went on to cite the comments of Lord Upjohn in **Conway v Rimmer**:²⁸⁴

*“... I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worst fear might be libel and there he has the defence of qualified privilege like everyone else in every walk of professional, industrial and commercial life who everyday has to express views on topics indistinguishable in substance from those of the servants of the Crown.”*²⁸⁵

7.37 The Commissioner also cited the views of Mason J. in **Sankey v Whitlam** (the leading Australian authority on public interest immunity):

*“... The possibility that premature disclosure will result in want of candour in Cabinet discussions or in advice given by public servants is so slight that it may be ignored, despite the evidence to the contrary which was apparently given and accepted in **Attorney-General v Jonathan Cape***

²⁸⁰ **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589 at p.604, quoted at paragraph [121] of the decision. It is worth noting the terms of the uncommon provision in section 27(4)(a) of the Tasmanian **Freedom of Information Act** 1991 which states that disclosure of information is not contrary to the public interest merely because of the seniority of the person who created, annotated, or considered the information.

²⁸¹ At paragraphs [122] – [123] of the decision

²⁸² At paragraph [123] of the decision

²⁸³ At paragraph [124] of the decision

²⁸⁴ **Conway v Rimmer** [1968] AC 901

²⁸⁵ **Conway v Rimmer** [1968] AC 901 at 994, quoted in paragraph [126] of the decision

Limited [1976] QB 752. I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient."²⁸⁶

7.38 The Commissioner was of the view that the approach which should prevail in Queensland on the third **Howard** criterion was that taken by Deputy President Todd in **Re Fewster and Department of Prime Minister and Cabinet (No.2)**,²⁸⁷ which is that a “frankness and candour” argument:

*“should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.”*²⁸⁸

7.39 He based this holding on the approach of Deputy President Todd in **Re Fewster (No.2)**²⁸⁹ where the Deputy President said:

*“With respect, proof of the ‘indicators’ set out by the Tribunal in para (c) of the passage quoted has been, in the light of subsequent consideration in other cases, culminating in the first Fewster case, so elusive as to attract consistent scepticism on the part of the Tribunal. When married to the principle that, in the absence of an ability to secure exemption under a particular class (such as Cabinet documents), it is the information in the particular document that counts, it is in my view really time that agencies stopped repeating the “candour and frankness” claim under s.36 unless a very particular factual basis is laid for the making of the claim.”*²⁹⁰

7.40 The Information Commissioner also cited the comments of Deputy President Hall in another Commonwealth AAT decision:

“(37) I agree with Mr Bayne that, as expressed in the s.36 certificate, and as supported by Mr McInnes’ affidavit evidence, the grounds relied upon were thinly-veiled ‘class’ claims. Although couched in terms that purported to relate to the individual documents, the substance of the ground in each case (as Mr McInnes’ affidavit evidence made clear) was that to release the particular document (or part of document) would ‘increase the expectation that such documents would be released in the future’ and would thus prejudice either the necessary ‘confidentiality’ that must exist in high level communications between Ministers or the necessary ‘candour and frankness’ with which advice to Ministers must be expressed. In other words, so the argument ran, the need to ensure confidentiality and candour and frankness in future ‘similar’ documents is of such overriding importance in the public interest, that the present documents should not be disclosed. Such an argument, if accepted by the Tribunal, would lead inevitably to the conclusion that all deliberative process documents of the kind in question are exempt from disclosure under the Act. To disclose one such document would be likely to destroy the climate of confidentiality and

²⁸⁶ **Sankey v Whitlam** (1978) 142 CLR 1 at 97, http://www.austlii.edu.au/au/cases/cth/high_ct/142clr1.html

²⁸⁷ **Re Fewster and Department of Prime Minister and Cabinet (No.2)** (1987) 13 ALD 139

²⁸⁸ At paragraph [132] of the decision

²⁸⁹ **Re Fewster** (*op. cit.*)

²⁹⁰ *Ibid.* at 141, quoted at paragraph [129] of the decision

candour and frankness which is essential to communication between and with Ministers.

(38) In my view, a proposition in those broad terms cannot be sustained for the purposes of s.36(1)(b) of the FOI Act. ... no justification is to be found within the language of s.36 of the Act for a 'class' claim of exemption. As framed, grounds 1 and 2 would be satisfied on proof that the communications in question were 'confidential' communications between Ministers (ground 2, in my view, being no more than a particular application of ground 1). Ground 3 would be satisfied on proof that the minute contained 'candid and frank' advice from a senior public servant to the Prime Minister. In my view, more than that is required for the purposes of s.36(1)(b).

*(39) Where parliament has deemed it necessary to give paramountcy to the undoubted public interest in confidentiality and candour and frankness by protecting a class of documents containing high level communication from disclosure under the Act, it has done so by express proscription. Thus, by force of s.34(1)(a) of the Act, a document is an exempt document if it is a document that has been submitted to Cabinet for its consideration, being a document that was brought into existence for that purpose. Similar provision has been made with respect to Executive Council documents: see s.35(1)(a). The document is exempt upon proof of the facts which bring it within the prescribed class, regardless of the actual contents or subject matter: see **Re Anderson and Department of Special Minister of State (No. 2)** (1986) 4 AAR 414 at 441-2; 11 ALN N239; cf **Re Lianos and Secretary, Department of Social Security** (1985) 7 ALD 475 at 493. Parliament has not gone on to provide, as it might well have done, had it been so minded, that documents containing confidential communications between Ministers or between senior public servants and Ministers are also exempt, as a class, from disclosure under the Act. Rather, the question whether such communications should be exempt has been left to be determined having regard to the contents of each document, in the light of the public interest test posed by s.36(1)(b): see **Lianos** at 494-5. The need to ensure candour and frankness in the expression of advice etc and to maintain confidentiality, where appropriate, are left, in my view, as facets of the public interest to be weighed and evaluated in each case with other competing considerations. They are relevant but not determinative considerations: see **Re Brennan and Law Society of Australian Capital Territory (No. 2)** (1985) 8 ALD 10 at 21; cf **Re Lianos** at 496.”²⁹¹*

7.41 The Information Commissioner stated that in the absence of clear, specific and credible evidence, he would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse by threat of disclosure under FOI legislation.²⁹²

²⁹¹ **Re Fewster and Department of Prime Minister and Cabinet (No.1) Nos. A86/8 and A86/23 Freedom of Information** (1986) 11 ALN N 266 at N270-1, AAT No. 3131, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2716.html>

²⁹² At paragraph [133] of the decision

4. Disclosure producing confusion and unnecessary debate

7.42 The Information Commissioner pointed out that this criterion does not refer to injury to government processes at all, but simply asserts a judgment that disclosure will lead to confusion and unnecessary public debate.²⁹³ He regarded this approach as inconsistent with the remarks of the High Court in **Australian Capital Television** concerning the indispensability of freedom of communication in relation to public affairs and political discussion in a representative democracy.²⁹⁴

7.43 The Information Commissioner regarded the fourth Howard criterion as based on rather elitist and paternalistic assumptions and considered that it was better left to the judgment of individuals and the public generally as to whether information is too confusing to be of benefit or whether debate is necessary. The Commissioner also pointed to the criticism of this principle in the 1987 Senate report previously referred to, where the Committee reported in the following terms:

*“11.11 In **Re Howard**, the documents concerned possible taxation options. With respect to the particular guideline, the Tribunal said: 'disclosure of the documents could lead to confusion and debate about taxation proposals which were not in fact adopted by the Government'. The implication is that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. Debate after the event on an option that was not adopted is presumably 'unnecessary debate'.*

11.12 The Committee regard the Australian community as more sophisticated and robust than the guideline assumes. The Committee acknowledges that documents relating to policy proposals considered but not adopted can be used to attempt to confuse and mislead the public. But the Committee considers that such attempts, if made, will be exposed. The process of doing so will lead to a better public understanding of the policy formation process.

11.13 Consistent with its attitude to the basis on which deletions should be able to be made, the Committee records its conclusion that possible confusion and unnecessary debate not be factors to be considered in calculating where the public interest lies.”²⁹⁵

5. Disclosure of documents which do not fairly disclose the reasons for a decision may be unfair to a decision-maker and prejudice the integrity of the decision-making process

7.44 Reference has already been made²⁹⁶ to the Information Commissioner’s criticism of the concept of the “integrity of the decision-making process”.

²⁹³ At paragraph [136] of the decision

²⁹⁴ See paragraphs 7.20 to 7.22

²⁹⁵ Quoted at paragraph [137] of the decision

²⁹⁶ See paragraph 7.29

7.45 Otherwise the Commissioner said that this criterion could be justified in some circumstances; for example where a draft report had been prepared and a person criticised in the draft had not yet had a chance to comment. In those circumstances, it would be contrary to the public interest to release the draft at that time.²⁹⁷

7.46 The Commissioner went on to endorse the approach of Deputy President Todd in the Commonwealth AAT who had held that just because a policy document does not reflect subsequent policy does not mean it would not be disclosed; if that were the applicable principle then no interim policy document would ever be released because some person might assume it represented current government thinking. Deputy President Todd said:

*"I agree with Mr Bayne that a distinction may be drawn between the disclosure of a 'preliminary' document which contains criticism of a specific individual and a 'preliminary' document which reflects a stage of thinking in the policy making process ... It is true that the documents to which access is currently sought are different from the documents in **Harris and Kavvadias** and the rationale for the public interest findings in those cases is not directly applicable here. Moreover, the documents here relate to a continuing administrative process. It will rarely be possible to say of any policy document that it reflects the ultimate view of government from which there will be no departure. If the fact of a document not accurately reflecting current government policy were a determinative public interest consideration, no policy document would ever be released, for it is always possible that some person some day might read such a document in the mistaken belief that it represents current thinking. There will no doubt be instances where an interim document by its very nature, or because of circumstances surrounding it, ought not be released. **Harris and Kavvadias** afford two such examples. But it will not be enough for a respondent to rely on the mere fact of the contents of a document being subject to change to support a claim that disclosure would be contrary to the public interest."²⁹⁸*

7.47 In the opinion of the Information Commissioner:²⁹⁹

- Criteria 2 and 4 of the Howard criteria were wrong in principle;
- Criteria 1, 3 and 5 should not be applied without the qualifications he described in his decision.

Reception of Eccleston In Other Australian Jurisdictions

7.48 Reference has already been made to decisions in other Australian jurisdictions where the principles and analysis of the public interest in

²⁹⁷ As, the Information Commissioner pointed out, was held in **Harris v Australian Broadcasting Corporation** (1983) 50 ALR 551, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1104.html; (1984) 1 FCR 150 (Full Court) and in **Kavvadias v Commonwealth Ombudsman** (1984) 2 FCR 64, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1553.html

²⁹⁸ **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589, quoted at paragraph [138] of the decision

²⁹⁹ At paragraph [139] of the decision

Eccleston have been followed.³⁰⁰ In this section, those decisions are examined more closely.

New South Wales Court of Appeal

General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales³⁰¹

This was an important decision of the New South Wales Court of Appeal. While the Court did not review the decision in **Eccleston** in a detailed manner, it approved the view of the Queensland Information Commissioner that FOI applications should not be determined by a mechanistic application of the **Howard** factors but rather by a consideration of what tangible harm would flow from release of the requested material. Consideration of the **Howard** factors should be tempered by the understanding that they emerged in a context heavily influenced by doctrines of Crown privilege, and they should be looked at as empiric conclusions, not as determinative guidelines.

Commonwealth Administrative Appeals Tribunal

Re Chapman v Minister for Aboriginal and Torres Strait Islander Affairs³⁰²

In this decision, the AAT agreed with the analysis of the Information Commissioner as to whether or not the Howard criteria were fixed. The Tribunal said Davies J. in **Re Howard** “did not see the principles as being immutable, but rather envisaged a flexible approach governed by time and experience being taken.”³⁰³

Dunn and Department of Defence³⁰⁴

Although the decision in this case was not to release the documents, the AAT agreed with the view that the authorities discussed in **Eccleston** tended to regard the Howard criteria as “empiric conclusions...not intended to be used as determinative guidelines for the classification of information.”³⁰⁵ The Tribunal also agreed³⁰⁶ with the principle that the circumstances of each case must be examined, which it regarded also as the view of Davies J. in **Howard**.³⁰⁷

Martin Saxon v Australian Maritime and Safety Authority³⁰⁸

In this case, the AAT referred to the “exhaustive” examination of the **Howard** criteria in **Eccleston**. While stating that it did not agree with all of the **Eccleston** criticisms of the **Howard**

³⁰⁰ See paragraph 7.2, and see also chapter 9 for a discussion of the 2006 NSW Court of Appeal decision in **WorkCover**

³⁰¹ **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales** [2006] NSWCA 84 (24 April 2006), <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/84.html>

³⁰² **Chapman v Minister for Aboriginal and Torres Strait Islander Affairs No. S95/220 Freedom of Information** (1996) 23 AAR 142. AAT No. 10551A, <http://www.austlii.edu.au/au/cases/cth/aat/unrep6244.html>, also discussed in chapter 6

³⁰³ At paragraph [26] of the decision

³⁰⁴ **Dunn and Department of Defence** [2004] AATA 1040, <http://www.austlii.edu.au/au/cases/cth/aat/2004/1040.html>, also discussed in chapter 6

³⁰⁵ A phrase taken from **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589 at 597

³⁰⁶ At paragraph [76] of the judgment

³⁰⁷ See **Eccleston** on this point in paragraph 7.31

³⁰⁸ **Martin Saxon v Australian Maritime Safety Authority No. A94/167 Freedom Of Information** [1995] AAT No. 10235, <http://www.austlii.edu.au/au/cases/cth/aat/unrep5795.html>

criteria, the Tribunal did agree that deliberative process or internal working documents were exempt only to the extent that the particular disclosure is contrary to the public interest.³⁰⁹ The Tribunal also accepted that the preservation of frankness and candour in communications between public servants “is not often a circumstance of significant weight.”³¹⁰

Purcell and Veteran’s Review Board³¹¹

In this decision, the AAT member who also decided **Dunn** (described above) expressed the same views she later expressed in **Dunn**.³¹²

Patricia Hudson and Child Support Registrar³¹³

The Tribunal agreed with the description of the public interest in **Eccleston** that although amorphous, it meant something of serious concern to the public, not merely of individual interest.³¹⁴

Mijares and Minister for Immigration & Multicultural Affairs³¹⁵

In this decision, the AAT approved the analysis of the Tribunal in **Chapman** which had, in turn, approved the analysis in **Eccleston**.³¹⁶

Mulder and Commonwealth Director of Public Prosecutions³¹⁷

The AAT referred³¹⁸ to the Memorandum issued by the Commonwealth Attorney-General’s Department “Freedom of Information Memorandum No. 98 – Exemptions Sections in the FOI Act”³¹⁹ which referred to **Eccleston** as authority for the principle³²⁰ that a draft report upon which the other side had not had an opportunity to comment ought not, in the public interest be released.³²¹

³⁰⁹ At paragraph [41] of the decision

³¹⁰ At paragraph [56] of the decision

³¹¹ **Purcell and Veteran’s Review Board** [2002] AATA 163, <http://www.austlii.edu.au/au/cases/cth/aat/2002/1163.html>

³¹² Deputy President Forgie did the same in **Toomer and Department of Agriculture, Fisheries & Forestry and Ors**, <http://www.austlii.edu.au/au/cases/cth/aat/2003/1301.html>, discussed in chapter 6

³¹³ **Patricia Hudson and Child Support Registrar** [1998] AATA 863, <http://www.austlii.edu.au/au/cases/cth/aat/1998/863.html>

³¹⁴ At paragraph [27] of the decision

³¹⁵ **Mijares and Minister for Immigration and Multicultural Affairs** [2000] AATA 214, <http://www.austlii.edu.au/au/cases/cth/aat/2000/214.html>

³¹⁶ As set out in paragraph 7.31; see paragraph [18] of the decision

³¹⁷ **Mulder and Commonwealth Director of Public Prosecutions** [2001] AATA 546, <http://www.austlii.edu.au/au/cases/cth/aat/2001/546.html>

³¹⁸ See paragraph [38] of the decision

³¹⁹ See footnote 3 for information on how to access Memo 98.

³²⁰ See the discussion of **Howard** criterion No. 5 in **Eccleston** at paragraphs 7.44 to 7.46.

³²¹ The same Tribunal member repeated these views in **Schlegel and Department of Transport & Regional Services** [2002] AATA 1184, <http://www.austlii.edu.au/au/cases/cth/aat/2002/1184.html>

Zacek and Australian Postal Corporation³²²

In this decision, another AAT member approved the analysis in **Chapman**.³²³ She agreed with the analysis that the **Howard** criteria are empiric factors to be taken into account upon analysis and are not fixed or immutable.³²⁴

The same Tribunal member repeated her views in two subsequent decisions, **Wallace** and **Terrill**.³²⁵

Sutherland Shire Council and Department of Industry, Science & Resources and Department of Finance & Administration³²⁶

In this decision, another Deputy President of the AAT:

- Approved the analysis in **Chapman**, agreeing that the **Howard** criteria were not fixed or immutable,³²⁷
- Agreed with the principle that a matter which is of interest to the public does not necessarily equate to a matter of public interest, but that there were public interests involved in the interest of a significant section of the public and also in the rights of an individual,³²⁸
- Referred to the “useful” discussion in **Eccleston** of the “resolution of conflict between two competing aspects of the public interest such as the effective and efficient conduct of government business on the one hand, and accountability of government and public participation in government processes on the other.”³²⁹

New South Wales Administrative Decisions Tribunal

Simpson v Director-General, Department of Education & Training³³⁰

In this decision, the NSW Tribunal expressed serious reservations about the third **Howard** criterion, the “candour and frankness” argument. The Tribunal referred³³¹ to Commonwealth AAT

³²² **Zacek and Australian Postal Corporation** [2002] AATA 473, <http://www.austlii.edu.au/au/cases/cth/aat/2002/473.html>

³²³ **Chapman v Minister for Aboriginal and Torres Strait Islander Affairs No. S95/220 Freedom of Information** (1996) 23 AAR 142. AAT No. 10551A, <http://www.austlii.edu.au/au/cases/cth/aat/unrep6244.html>, also discussed above and in chapter 6

³²⁴ At paragraph [69] of **Zacek**

³²⁵ **Wallace and Director of Public Prosecutions** [2003] AATA 119, <http://www.austlii.edu.au/au/cases/cth/aat/2003/119.html> ; **Terrill and the Department of Transport and Regional Services** [2003] AATA 52, <http://www.austlii.edu.au/au/cases/cth/aat/2003/52.html>; see also paragraph [28] of the decision

³²⁶ **Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration** [2001] AATA 718, <http://www.austlii.edu.au/au/cases/cth/aat/2001/718.html>

³²⁷ **Chapman v Minister for Aboriginal and Torres Strait Islander Affairs No. S95/220 Freedom of Information** (1996) 23 AAR 142. AAT No. 10551A, <http://www.austlii.edu.au/au/cases/cth/aat/unrep6244.html>, also discussed above and in chapter 6

³²⁸ At paragraph [29] of **Sutherland Shire Council**

³²⁹ Also at paragraph [29] of **Sutherland Shire Council**

³³⁰ **Simpson v Director-General, Department of Education & Training** (NSW Administrative Decisions Tribunal) [2000] NSWADT 134, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/134.html>, also discussed in chapter 9

³³¹ At paragraph [86] of the decision

authorities³³² which had indicated that this criterion is unlikely ever to suffice as a ground of injury to the public interest that would justify non-disclosure. In doing so it was quoting from the **Eccleston** decision.

National Parks Association of New South Wales Inc. v Department of Lands & Anor³³³

In this case, the same Tribunal member effectively adopted the whole of the analysis of the public interest in **Eccleston** and applied it to the case before him.³³⁴

Law Society of New South Wales v General Manager, WorkCover Authority of NSW (No.2)³³⁵

This was a decision of a full panel of the NSW Tribunal.

The panel referred³³⁶ to the analysis in **Eccleston** critical of the five **Howard** criteria.³³⁷ The panel went on to hold that emphasis should be on the question of what “tangible harm” will result from release of the information in question.³³⁸

The panel accepted the analysis in **Chapman** that the **Howard** criteria were intended to be flexible and that over time the question of which documents would be released in the public interest would become clearer.³³⁹

The panel was also of the opinion that the fact that communications may take place at a high level could “no longer be said to be a determinative or even a highly influential factor in deciding whether it is in the public interest for documents to be disclosed.”³⁴⁰

Gales Holdings Pty. Limited v Tweed Shire Council³⁴¹

In this decision, a single member ADT followed the reasoning of the panel in the **Law Society** decision which had followed **Eccleston**.³⁴²

The Tribunal also pointed out that even where there is evidence that disclosure may lead to confusion and unnecessary public debate or criticism, there must also be evidence to show that this debate or criticism may have an adverse effect on an agency in the performance of its functions.³⁴³

³³² See **Re Alan Sunderland and the Department of Defence No. V86/280 Freedom of Information** [1986] AAT No. 2890, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2528.html>

³³³ **National Parks Association of New South Wales Inc. v Department of Lands & Anor** [2005] NSW ADT 134, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/124.html>, discussed in chapter 9

³³⁴ At paragraph [15] of the decision

³³⁵ **Law Society of New South Wales v General Manager, WorkCover Authority of NSW (No. 2)** [2005] NSW ADTAP 33, (a decision of a Panel of the Tribunal presided over by the President), <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>

³³⁶ At paragraph [67] of the decision

³³⁷ Beginning at paragraph 7.27

³³⁸ At paragraph [68] of the decision

³³⁹ At paragraph [69] of the decision

³⁴⁰ At paragraph [70] of the decision

³⁴¹ **Gales Holdings Pty. Limited v Tweed Shire Council** [2005] NSW ADT 168, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/168.html>

³⁴² **Law Society of New South Wales v General Manager, WorkCover Authority of NSW (No. 2)** [2005] NSW ADT AP 33, (a decision of a Panel of the Tribunal presided over by the President), <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>

³⁴³ At paragraph [37] of the decision

In expressing this view, the Tribunal may have implicitly been responding to the point made in analysis in **Eccleston**.³⁴⁴

Cianfrano v Director-General, New South Wales Treasury³⁴⁵

The NSW ADT accepted,³⁴⁶ in this decision, the principles from **Eccleston** (and the Commonwealth AAT cases cited in **Eccleston**) that:

- The **Howard** criteria are not immutable, but are empiric factors and not determinative ones;
- The circumstances of each case must be considered.

Waite v General Manager, Hornsby Shire Council³⁴⁷

In this decision, the Tribunal accepted that the deliberative processes exemption should be applied, as held in **Eccleston**, in a manner which “accords appropriate weight to the public interest objects sought to be achieved in the FOI Act, which includes the right to obtain access to information held by government.”³⁴⁸

Western Australian Information Commissioner

Veale and Town of Bassendean³⁴⁹

In this early decision, the Western Australian Information Commissioner referred to the **Eccleston** critique of the five **Howard** factors.³⁵⁰

In respect of factor three, “candour and frankness”, the Commissioner pointed out that it was rejected in **Eccleston** and has been rejected consistently in the Commonwealth AAT.³⁵¹ The Commissioner went on to say that in the absence of cogent evidence of a lack of candour having emerged, she also rejected the claim in the case before her.³⁵²

The Commissioner went on to approve the views in **Eccleston** as to the fourth **Howard** criterion.³⁵³

She also went on to agree with the views in **Eccleston**³⁵⁴ that simply because the contents of a document change is not a sufficient reason, without more, to support a claim that disclosure would

³⁴⁴ As set out at paragraph [136] of **Eccleston**; see also the analysis of **Howard** criterion 4 in **Eccleston** at paragraphs 7.42 to 7.43

³⁴⁵ **Cianfrano v Director-General, New South Wales Treasury** [2005] NSW ADT 7, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/7.html>

³⁴⁶ At paragraphs [115]-[116] of the decision

³⁴⁷ **Waite v General Manager, Hornsby Shire Council** [2004] NSW ADT 93, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/93.html>

³⁴⁸ At paragraph [51] of the decision

³⁴⁹ **Veale and Town of Bassendean** [1994] WAICmr 4, <http://www.austlii.edu.au/au/cases/wa/WAICmr/1994/4.html>

³⁵⁰ At paragraph [20] of the decision

³⁵¹ At paragraph [21] of the decision

³⁵² At paragraph [22] of the decision

³⁵³ As set out in paragraphs 7.42 to 7.43

³⁵⁴ See paragraph 7.46

be contrary to the public interest.³⁵⁵ She also approved generally of the views in **Eccleston** concerning the fifth **Howard** criterion.³⁵⁶

Jeanes and Kalgoorlie Regional Hospital³⁵⁷

Once again, the Information Commissioner rejected the “candour and frankness” argument in the circumstances of this case. She did not accept that professional medical people, including medical practitioners, nurses and other clinical staff would not be as candid and frank as they would have been in the absence of any threat of disclosure, in the context of a peer review process concerning the actions of a colleague.³⁵⁸

Ravlich and State Supply Commission³⁵⁹

In this decision, the Information Commissioner followed the **Eccleston** principles and applied them in the manner she had done in **Veale**. The Commissioner rejected a claim made essentially without any supporting evidence that disclosure would inhibit candour and frankness in the context of public service officers providing comments to the relevant Ministers on the effectiveness of a piece of State supply legislation.³⁶⁰

Australian Medical Association Limited and Health Department of Western Australia³⁶¹

In this case, the Information Commissioner agreed with the views in **Eccleston** that:

- The purpose of FOI legislation is to give effect to the public interest in the openness and accountability of a democratically elected government;
- The FOI Act does that by providing a general right of access to government documents (and the information contained in them) except where some harm to the public interest is sufficiently demonstrated;
- While the **Howard** criteria, or at least some of them, may be helpful guidelines to consider in some cases, they do not comprise a prescriptive list.³⁶²

In the result in this case, all but one document was ordered to be disclosed. That was exempt in the public interest because disclosure would reveal certain integral facts of the agency’s negotiating position, which would, in turn, adversely affect the capacity of the agency to achieve a settled result concerning the terms upon which medical practitioners would be engaged to provide services to public patients in public hospitals in the State.³⁶³

³⁵⁵ At paragraph [23] of the decision

³⁵⁶ At paragraph [22] of the decision

³⁵⁷ **Re Jeanes and Kalgoorlie Regional Hospital**, [1995] WAICmr 3, <http://www.austlii.edu.au/au/cases/wa/WAICmr/1995/3.html>

³⁵⁸ At paragraph [29] of the decision

³⁵⁹ **Ravlich and State Supply Commission** [1999] WAICmr 37, <http://www.austlii.edu.au/au/cases/wa/WAICmr/1999/37.html>

³⁶⁰ At paragraphs [31] and [32] of the decision

³⁶¹ **Australian Medical Association Limited and Health Department of Western Australia** [1999] WAICmr 7, <http://www.austlii.edu.au/au/cases/wa/WAICmr/1999/7.html>

³⁶² At paragraph [36] of the decision

³⁶³ At paragraph [55] of the decision

8 Australia: Queensland

Legislative Framework

- 8.1 The Queensland **Freedom of Information Act** 1992 (the Queensland Act or the Act) was enacted in August 1992 and came into operation on 19 November 1992.
- 8.2 The Queensland Act provides rights of access to documents held by Queensland government departments, local authorities, and certain public authorities which have been established for public purposes. These bodies are all agencies for the purposes of the Act.

Administration of the Freedom of Information Act 1992

- 8.3 The Queensland Act is administered by the FOI and Privacy Unit within the state Department of Justice and Attorney-General.

Enforcement of the Act

- 8.4 Applicants have a right of external review to the Information Commissioner, whose Office is established by the Queensland Act. The Information Commissioner has power to overturn agency decisions and to order disclosure.
- 8.5 The Queensland Ombudsman, however, has no power to carry out investigations concerning decisions that are capable of being reviewed by the Information Commissioner.
- 8.6 Decisions of the Information Commissioner may be appealed to the Supreme Court of Queensland by way of judicial review (restricted to points of law) under section 20 of the **Judicial Review Act** 1991 (Qld). If the case is significant enough it could subsequently be the subject of an application for leave to appeal to the High Court of Australia.

Public Interest Provision

- 8.7 The Queensland Act contains three different forms of the public interest test which must be applied by a decision-maker.
- 8.8 The first and most prevalent form of the test is to exempt matter from disclosure unless, on balance, disclosure would be in the public interest. This is the “classic” form of public interest balancing test, and in the Queensland Act, applies to the following exemption provisions:
- relations between the Queensland government and other governments (section 38);
 - conduct of investigations by the Ombudsman, audits by the Auditor-General, and review by the Service Delivery and Performance Commission (section 39(1));

- functions of an agency, including tests and audits, personnel management, and industrial relations (section 40);
- personal affairs (section 44);
- certain business, commercial, and professional information (section 45(1)(c));
- information supplied in confidence where disclosure could prejudice future supply (section 46(1)(b));
- the economy of the State (section 47);
- financial or property interests of the State or an agency (section 49).

8.9 In addition, a limited form of public interest test also occurs in the exemption relating to law enforcement and public safety, section 42(2).

8.10 The second form of the public interest test requires disclosure unless, on balance, disclosure would be contrary to the public interest. This test also requires the respective public interests to be weighed in the balance, but in form and substance, requires a finding that release of information is contrary to the public interest; if that finding cannot be made on the balance of probabilities, then release is required. This form appears in the exemption dealing with documents relating to the deliberative processes of government (section 41).

8.11 The third form of the test appears in provisions in two additional exemptions. Section 48 prohibits disclosure where information is protected by a secrecy provision contained in another enactment. This provision exempts information from release unless disclosure is “required” by “compelling reason in the public interest”. This test is more difficult to satisfy than those which require a balancing of the public interests involved and approximates to certain Canadian provisions (described in chapters 11 to 14). This same stricter test also applies to two specific statutes relating to financial administration, audit, and the efficient delivery of government services to the Queensland public (section 39(2)). Logically, these provisions recognise that where a secrecy provision applies already in another law, it should be more difficult to justify disclosure in the public interest.

Official Guidance

8.12 The web site of the Queensland Information Commissioner³⁶⁴ provides links to world-wide sites of other authorities dealing with Freedom of Information, including the other Australian sites, the United Kingdom, Ireland, Canada, South Africa, Scotland, and a number of United States sites.

8.13 Decisions of the Information Commissioner may also be accessed on the Office’s web site.

³⁶⁴ Queensland Information Commissioner homepage at <http://www.infocomm.qld.gov.au/>

- 8.14 In addition, the Information Commissioner publishes a number of Information Sheets which explain the FOI Act, in less complex language than appears in the FOI Act or in the Commissioner's decisions. These sheets are also available on the Commissioner's web site.³⁶⁵ A specific Information Sheet deals in straightforward language with the public interest balancing tests.³⁶⁶
- 8.15 In addition, the Information Commissioner has published, and makes available online, more detailed analyses in the form of Practitioner Guidelines.³⁶⁷ Guideline No. 4, *Matter communicated in confidence (Section 46)*, contains section 4.5 which deals with the public interest balancing test as it appears in section 46(1)(b) of the Queensland Act.³⁶⁸
- 8.16 The Queensland government maintains a whole-of-government FOI web site which contains general information and a number of national and international links.³⁶⁹

The Standing of the Queensland Information Commissioner

- 8.17 In the thirteen years during which the Queensland Act has been in operation, a very strong FOI culture has emerged in that State. As appears from the web site, the Office of the Information Commissioner has produced much information in the form of decisions and other ancillary material which can be characterised as thoughtful, comprehensive (at the particular level targeted), and most useful to FOI practitioners everywhere. Decisions of the Queensland Information Commissioner are routinely cited with approval by FOI review authorities in other jurisdictions. This is particularly true of seminal decisions such as **Eccleston**³⁷⁰.
- 8.18 The extent and detailed content of the consideration of public interest questions may well be explained partly by the fact that the Queensland Act does not contain provision for a conclusive certificate in respect of internal working/deliberative processes documents. By way of contrast, certain jurisdictions provide for a certificate to be issued by a Minister conclusively determining that disclosure of documents or information is (subject to review that there are reasonable grounds for the certificate to be issued) contrary to the public interest. For example, see:
- section 36(3) Commonwealth of Australia Act;
 - section 59 of the NSW Act, which permits the Minister to determine not only the public interest but that any document is a restricted document under the exemption provisions of Part 1 of Schedule 1;

³⁶⁵ <http://www.infocomm.qld.gov.au/?p=13>

³⁶⁶ <http://www.infocomm.qld.gov.au/indexed/pdf/Info%20Sheet%20public%20interest%20.pdf>

³⁶⁷ <http://www.infocomm.qld.gov.au/?p=17>

³⁶⁸

<http://www.infocomm.qld.gov.au/indexed/html/Section%2046%20final%20html%20version%20Jan05.html>

³⁶⁹ <http://www.foi.qld.gov.au/>

³⁷⁰ See chapter 7 for a thorough discussion of this case and its application in other jurisdictions.

- section 36 of the Western Australia Act;
- sections 59-62 of the Northern Territory **Information Act** 2002, in which jurisdiction the exemption certificate may not be reviewed at all.

Judicial Reviews in Queensland: Case Law

- 8.19 Decisions of the Information Commissioner may be the subject of review by the Supreme Court of Queensland, but only on a point of law.³⁷¹ There have been seven applications for judicial review by the Supreme Court and these are collected on the Commissioner's web site.³⁷² None of the applications for review has been successful.
- 8.20 Only one of these decisions, discussed immediately below, bears on a public interest question.

Whittaker v Information Commissioner and Auditor-General of Queensland³⁷³

The applicant sought access to certain information which was protected by a secrecy provision contained in section 92 of the **Financial Administration and Audit Act** 1977 (Qld). The case therefore came within section 39(2) of the Queensland FOI Act, and the only question for the Court was whether the Information Commissioner had made an error of law in holding that the expression "required by a compelling reason in the public interest" required that there be in existence

...one or more identifiable public interest considerations favouring disclosure which are so compelling (in the sense of forceful or overpowering) as to require (in the sense of demand or necessitate) disclosure in the public interest.

Moynihan J. held that there was no error of law in the Commissioner expressing these views. His Honour also held that it was not unreasonable on the part of the Commissioner to conclude that this test had not been satisfied in the case before the Court.³⁷⁴

This case is discussed in more detail in the section below dealing with decisions of the Information Commissioner.

Queensland Information Commissioner: Case Law

- 8.21 As described in paragraph 8.13, the decisions of the Information Commissioner are available on the web site of the Office, as well as in AustLII. A number of the decisions (as is the case with the decisions of the Commonwealth Administrative Appeals Tribunal decisions published in Federal law reports) are also contained in official published law reports for the State of Queensland.
- 8.22 The most important decision relating to the public interest, **Re Eccleston**³⁷⁵, forms the focus of the preceding chapter. Other decisions concerning public

³⁷¹ Sections 4 and 20 **Judicial Review Act** 1991 (Qld)

³⁷² <http://www.infocomm.qld.gov.au/?p=27>

³⁷³ **Whittaker v Information Commissioner and Auditor-General of Queensland** [2002] 2 Qd R 557, (2001) 6 QAR 90; http://www.infocomm.qld.gov.au/indexed/decisions/html/R_05-2001.htm

³⁷⁴ Paragraph [13] of the Court's judgment

interest topics (apart from cases dealing with the personal affairs exemption) are now discussed. In these decisions, the Information Commissioner has explored in detail questions arising from the central concept of the public interest; these draw substantially from the basic principles laid down in **Eccleston**.

8.23

It assists in understanding the approach taken by the Queensland Information Commissioner to note that he has, from time to time, given consideration in an FOI context to academic writing on constitutional and public affairs and the relationship between citizens and government. In the *Annual Report 1995-96* issued by the Office of the Information Commissioner,³⁷⁶ the Commissioner referred to and quoted from:

- an essay by Professor Paul Finn,³⁷⁷ in which Professor Finn wrote:³⁷⁸

The fact that a system of government has been constituted by the people to serve their interests has its own imperatives. These, in my view, provide our constitutional bearings and are manifest in five core ideas. They should be noted individually at the outset. The first is our conception of democracy itself and of its relationship to government. I noted earlier Sir Anthony Mason's description of the "evolving concept of a modern democracy" with its emphasis upon "the fundamental rights and dignity of the individual". This provides one dimension of what I will describe as the "democratic principle". The other dimension relates to how the democratic will is expressed in, and to, government. The second expresses the idea that government is a trust: all who exercise the devolved power of the public do so as servants of the public. This, the "public servant" principle, provides the proper basis for characterising the fundamental role and responsibility of our officials of all stations. It is of particular moment today, as I will indicate, both for Public Service officers and for the members of statutory authorities and government business enterprises... The third is a consequence of public service and relates to the standards to be expected both in the practices and procedures of government and in the conduct of our officials themselves [the "integrity principle"]. The fourth begins to bring government back to the people. It is the "open government principle", a relatively recent arrival in our constellation of principles, governments for much of our history being practitioners of that form of official secrecy which properly can be described as information paternalism. The fifth idea is that of accountability to the public, and I emphasise "to the public". For many of our officials there is a variety of bases on which accountability may be exacted—as an employee and to the employing authority; as a professional and to the appropriate professional body; as a parliamentary representative of a political party and to that party; and as a servant of the public and to the public. Though often confused, and in ways that diminish the last of these, it is the last which expresses a basal principle of government itself...

³⁷⁵ **Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs** [1993] QICmr 2, (1993) 1 QAR 60, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html>; see chapter 7

³⁷⁶ <http://www.infocomm.qld.gov.au/indexed/annual/AR95-96.pdf>

³⁷⁷ Subsequently a judge of the Federal Court of Australia

³⁷⁸ See paragraph 3.10 of the 1995-1996 *Annual Report* referring to the article, "A Sovereign People, A Public Trust" in Finn, P. 1995, *Essays on Law and Government* (LBC 1995) at 1-32

- an essay by Mr. Justice Thomas of the High Court of New Zealand, in which the judge wrote:³⁷⁹

The primary foundation for insisting upon openness in government rests upon the sovereignty of the people. Under a democracy, parliament is "supreme", in the sense that term is used in the phrase "parliamentary supremacy", but the people remain sovereign. They enjoy the ultimate power which their sovereignty confers. But the people cannot undertake the machinery of government. That task is delegated to their elected representatives together with such powers as are necessary to carry it out. But sovereignty remains with the people, and the elected government remains answerable to the people for the exercise of its delegated powers. In this way the government can be perceived as the agent or fiduciary of the people, performing the task and exercising the powers of government which have been devolved to it in trust for the people. On this view, the information held by the government is essentially the people's information being held on their behalf pursuant to this devolution of authority. Nothing in the concept of popular sovereignty suggests that the people have delegated to the government the power to carry out the task of government in secret. It does not matter much, therefore, whether the people's claim to official information is based on their ultimate ownership of the information, or whether it is perceived as a condition of the delegation of the power of government to its elected representatives, or as a trust in favour of the people arising out of that devolution of power. The people's sovereignty ultimately determines their right to insist upon openness in government.

At the heart of the problem of secrecy in government is the question of power. Power and information are inextricably linked. Unequal access to information confers unequal power, so that the Executive, which possesses the information and the ability to make selective disclosure in the form and at a time to suit the government, continues to have an advantage over the public. The move towards open government can be perceived as an attempt to redress the imbalance in power by securing for the citizen greater access to official information. Open government, therefore, is essentially about a shift in power from the government to the people, so that the democratic sovereignty of the people is not diminished by being reflected imperfectly in the machinery of government. In essence, the sovereignty of the people is eroded to the extent that they are not privy to the information possessed by their elected representatives. This perspective explains the drive for greater openness in government and reflects the people's desire to hold the government accountable for what it does in their name and on their behalf. The impulse of the governed for greater accountability ensures that the demand for a system in which government is truly open will be insistent. It tends to be more intense following the revelation of government maladministration which, it is thought, might have been avoided but for the secrecy which prevailed, or of unsuccessful attempts to cover up maladministration. Demand for more openness in government is also manifest in the wake of the discovery of corruption committed by government officials or agencies, the public's instinct correctly perceiving that public vice and impropriety are more likely to take root under the

³⁷⁹ See paragraph 3.11 of the 1995-1996 *Annual Report* referring to the article, "Secrecy and Open Government" in *Essays on Law and Government*, *op. cit.* at 182-227

shelter of structures and procedures which are protected from the light of public scrutiny. Aware that undue secrecy allows politicians in government to pursue what is seen as their own ends without ostensible regard to the public interest, the public are alert to the fact that political expediency may favour an attempt to conceal mistakes or abuses. ... Of equal concern to the government's stockpile of information is the fact that it is the government that controls the form in which information is released and the timing of its release. Exclusive possession of official information enables a government to determine when and how it will lift the veil of secrecy. The scope for the manipulation of information by presenting it in a limited or sanitised form, or delaying its release to further the government's interests, is plain to see.

What is the effect on a claimed exemption of the existence of other means of making an agency accountable?

Director-General, Department of Families, Youth & Community Care and Department of Education³⁸⁰

- 8.24 In this “reverse-FOI” application, a guardian of two youths challenged the decision of the Department to give the applicant access to documents concerning the behaviour management processes used by the respondent Department in respect of the two youths during their attendance at government schools. The applicant had been a teacher at one such government school when she allegedly was assaulted by one of the youths.
- 8.25 The Information Commissioner identified, as a factor favouring disclosure, a public interest “in enhancing the accountability of the Department both with regard to its functions in managing student behaviour and in ensuring that teachers and students have an appropriate and safe environment in which to work and study.”
- 8.26 The applicant argued that published departmental guidelines were sufficient to satisfy the public interest in this case. The Commissioner rejected this argument, stating:
- While published guidelines can be of assistance to members of the community in assessing the performance of an agency, I do not consider that they wholly satisfy the public interest in promoting public scrutiny of agency operations. One cannot, merely by reading guidelines, discover whether those guidelines are apt for the task they are intended to perform, or whether they are complied with by agency personnel, or properly applied. In saying this, however, I accept that there may be occasions (particularly where the privacy interest attaching to personal affairs information is a strong one) when the balance of the public interest favours release of only limited information about agency performance in a particular case.³⁸¹*

³⁸⁰ **Director-General, Department of Families, Youth & Community Care and Department of Education; Perriman (third party)** [1997] QICmr 2, (1997) 3 QAR 459, <http://www.austlii.edu.au/au/cases/qld/QICmr/1997/2.html>

³⁸¹ At paragraph [19] of the decision

- 8.27 The applicant also submitted that other accountability mechanisms existed to which the requester could have recourse, such as the courts, the relevant Minister, local elected representatives, the Ombudsman and the Criminal Justice Commission.
- 8.28 The Commissioner rejected this submission on similar grounds, holding that the existence of other accountability mechanisms did not diminish the public interest in disclosure under the FOI Act and that the Act was not an accountability measure of last resort. He stated:
- I do not accept that the existence of other accountability mechanisms can be used as a basis for any significant diminution of the public interest in disclosure of information under the FOI Act in order to promote the accountability of government agencies.*
- The FOI Act was intended to enhance the accountability of government (among other key objects) by allowing any interested member of the community to obtain access to information held by government (subject to the exceptions and exemptions provided for in the FOI Act itself). The FOI Act was not introduced to act as an accountability measure of last resort, when other avenues of accountability are inadequate. The FOI Act gives a right to members of the community which is in addition to, and not an alternative for, other existing rights. Indeed, applications are frequently made under the FOI Act to enable members of the community to arm themselves with the information necessary to afford a meaningful opportunity to pursue some of the other accountability mechanisms referred to by the applicant.³⁸²*
- 8.29 In the result, the Information Commissioner affirmed the decision to release the documents.³⁸³

How should one approach a claim that public confusion and unnecessary debate will arise from disclosure?

Re Criminal Justice Commission and Director of Public Prosecutions³⁸⁴

- 8.30 The Criminal Justice Commission made a “reverse-FOI” application to withhold from disclosure two documents, a letter concerning the requester and a draft public statement prepared for the consideration of the Chairman of the Commission.
- 8.31 In the course of his decision, the Commissioner described the contention that public confusion and unnecessary debate would result (the fourth **Howard** criterion) as “now largely discredited”.³⁸⁵ He went on to state that in his opinion, members of the public were sufficiently aware of the

³⁸² At paragraph [19] of the decision

³⁸³ The Information Commissioner repeated his views in this case in **Seeney and the Department of State Development; Berri Ltd (third party)** [2004] QICmr 4, <http://www.austlii.edu.au/au/cases/qld/QICmr/2004/4.html>

³⁸⁴ **Re Criminal Justice Commission and Director of Public Prosecutions; Harris (third party)** [1996] QICmr 12 (1996) 3 QAR 299, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/12.html>

³⁸⁵ At paragraph [34] of the decision

procedures of governments to be able to distinguish draft documents from final statements of position and said further that there was a public interest in the public having access to drafts:

On the contrary, I consider that there may be significant benefits to the public in obtaining access to draft material, so as to further the accountability, and public understanding of, the operations of government organisations (cf. s.5(1)(a) and (b) of the FOI Act). In my view, disclosure of this type of material allows members of the public to examine the processes by which an agency has come to its final conclusion. It shows the alternatives that were considered, the differing views that were taken account of, and the reaction of those within the organisation to those views. In addition, disclosure of drafts and working documents can educate members of the public about the many inputs that can go into the process of government decision-making, thereby promoting a better understanding that working documents do not represent a final agency decision. (And, provided access can be obtained at a timely stage in the process, access by interested members of the public to draft and interim documents relating to policy proposals in development, is essential if the FOI Act is to achieve one of its major objects, namely, fostering informed public participation in the processes of government.)³⁸⁶

Re Coulthart and Princess Alexandra Hospital and Health Service District³⁸⁷

- 8.32 The applicant journalist sought review of a decision to refuse access to parts of a document containing a statistical table of adverse outcomes from carotid artery surgery at the hospital.
- 8.33 The hospital submitted that disclosure of the raw figures for surgical outcomes, without risk adjustment (for individual patient risk factors) would mislead the public by giving a misleading impression of the surgical competence of one particular surgeon and would be unfair to that surgeon.
- 8.34 The Commissioner considered that a claim of reliance on the alleged misleading nature of information sought should be treated with scepticism. He pointed out that some years before the Australian Law Reform Commission and Administrative Review Council had regarded the “confusion” or “misleading” claim as irrelevant to the public interest.³⁸⁸
- 8.35 The Commissioner identified two reasonable bases for not accepting claims of this kind.³⁸⁹
- The fact that a citizen who has been interested enough to seek out the information is able to seek assistance in understanding it;

³⁸⁶ At paragraph [37] of the decision

³⁸⁷ **Coulthart and Princess Alexandra Hospital and Health Service District** [2001] QICmr 6, (2001) 6 QAR 94, <http://www.austlii.edu.au/au/cases/qld/QICmr/2001/6.html>

³⁸⁸ Joint report *Open Government: a review of the Federal Freedom of Information Act 1982* cited at paragraph [73] of the decision.

³⁸⁹ See paragraphs [75]-[77] of the decision

- Where it is within the power of the agency, without causing undue harm to the public interest, to disclose additional or clarifying information that could mitigate or avoid confusion. In this case, the hospital could prepare risk-adjusted data.

8.36 The Information Commissioner reiterated the principles from **Coulthart and the Criminal Justice Commission** case in a 2004 decision.³⁹⁰

Circumstances in which there is a public interest in a particular applicant having access to information

Pemberton and the University of Queensland³⁹¹

8.37 This was a lengthy decision dealing with various exemption provisions of the Queensland Act. It involved a claim by an academic for access to certain referee reports provided in connection with applications for promotion made by the requester.

8.38 For present purposes, the Information Commissioner recognised the existence of a body of law under the Commonwealth and Victorian FOI Acts which holds that when considering the public interest:

*...it is possible in an appropriate case to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest consideration would be present when disclosure to other applicants was in contemplation.*³⁹²

8.39 The Commissioner considered that:

*Such an approach is justifiable in conceptual terms, having regard to the objects of freedom of information legislation, and seems to me to be a necessary and justifiable response by courts and tribunals to the need for a degree of flexibility to do justice according to the circumstances of an individual applicant, in an appropriate case.*³⁹³

8.40 He went on to state that a public interest in the disclosure of documents to a particular applicant is capable of being a public interest consideration of determinative weight, depending on the factors favouring non-disclosure.³⁹⁴

8.41 In this regard, the Commissioner referred to the view of the Commonwealth AAT in **Re Burns and Australian National University (No. 1)** to the effect that where an individual's "need to know" in a particular case was large, then the public interest would be commensurately enlarged.³⁹⁵

³⁹⁰ **Johnson and Queensland Transport; Department of Public Works (third party)** [2004] QICmr 1, <http://www.austlii.edu.au/au/cases/qld/QICmr/2004/1.html>

³⁹¹ **Pemberton and the University of Queensland** [1994] QICmr 32, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/32.html>

³⁹² See paragraph [164] of the decision

³⁹³ At paragraph [171] of the decision

³⁹⁴ At paragraph [172] of the decision

³⁹⁵ (1984) 6 ALD 193 at 197, discussed in chapter 6

- 8.42 This principle is to be distinguished from the fundamental principle of FOI legislation that “it is not necessary for an applicant to establish a particular “need to know” in order to establish a right to access.”³⁹⁶
- 8.43 There remains controversy as to whether it is appropriate, in reaching an access decision, to take into account a public interest identified in relation to the applicant which would not be present if the request were to be made by a different applicant. One point of view is that there can be no difference in principle between different requesters, inasmuch as release under the FOI Acts to a requester is effectively release to the world at large. In one case, a full Court of the Federal Court of Australia said:
- 8.44 The Commissioner expressed the view that comments such as these by the Courts were *dicta*, not binding, and were apparently not based on any detailed consideration of all the consequences of such an approach.³⁹⁸ In the view of the Commissioner, application of this approach as an inflexible rule could lead to an absurd result.³⁹⁹
- 8.45 In the view of the authors, the reasoning of the Commissioner on this issue is persuasive, and the views he expressed warrant being set out in detail:

164. There is a large and respectable body of precedent in the case law under the Commonwealth FOI Act and the Freedom of Information Act 1982 Vic (the Victorian FOI Act) which holds that when an exemption provision contains a public interest balancing test, it is possible in an appropriate case to recognise a legitimate public interest which favours disclosure of particular documents to a particular applicant for access, even though no such public interest consideration would be present when disclosure to other applicants was in contemplation (see the cases reviewed at paragraphs 173-190 below).

*165. In some respects, this does not sit comfortably with the orthodox approach to the application of exemption provisions which turn on the prejudicial effects of disclosure of particular documents (as opposed to whether documents fall within a prescribed class). That orthodox approach ordinarily requires that the motives of a particular applicant for seeking the documents in issue are to be disregarded, and the effects of disclosure were to be evaluated as if disclosure was to any person entitled to apply for the documents. Thus in **Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor** (1992) 108 ALR 163 at p.179, a Full Court of the Federal Court of Australia said:*

³⁹⁶ At paragraph [179] of the decision citing **Re Mann and Australian Tax Office No. A84/76 Freedom of Information** (1985) 7 ALD 698 at 700, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1998.html>

³⁹⁷ **Searle Australia Pty. Ltd v Public Interest Advocacy Centre** (1992) 108 ALR 163 at 179, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep5541.html

³⁹⁸ At paragraph [168] of the decision

³⁹⁹ See paragraph [169] of the decision; one such case is among those discussed in chapter 6, **Re Saunders and the Commissioner of Taxation** [1988] AAT No. 4508, <http://www.austlii.edu.au/au/cases/cth/aat/unrep3454.html>

“Disclosure under the FOI Act is, of course, disclosure to the public, and the particulars and personality of the applicant are of no significance. See s.11 of the [Commonwealth] FOI Act, which provides that ‘every person has a legally enforceable right to obtain access in accordance with this Act’.”

166. Provisions like s.11 of the Commonwealth FOI Act, and its counterpart, s.21 of the Queensland FOI Act, are important in establishing that there is no test of standing to gain access to documents under the FOI Act, i.e. an applicant for access need not show a special interest in obtaining the information which the applicant seeks. In my opinion, however, the words of s.11 of the Commonwealth FOI Act, or s.21 of the Queensland FOI Act, carry no necessary implication that an applicant having a personal stake or involvement in the subject matter of particular documents, which is greater than other members of the public, has no greater right to obtain them than anyone else.

*167. A more logically satisfying justification for the orthodox approach of applying exemption provisions by reference to the consequences of disclosure to any person, rather than to the particular applicant for access, was given by Jenkinson J in **Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) & Anor** (1987) 74 ALR 428 at p.431:*

“The Freedom of Information Act 1982 confers no power to exact any undertaking, or to impose any condition, concerning the use to which a person granted access to a document under that Act would put the document, or information contained in it.”

*168. I do not think, however, that it is appropriate to erect any rigid or inflexible rule based upon these dicta of the Federal Court, which do not appear to have been based on any detailed consideration of all the consequences of such an approach. The justification for the orthodox approach of assessing the effects of disclosure as though disclosure could be to any person, seems to me to be at its highest in respect of those exemption provisions which have specific reservations to make it clear that the exemption is not to apply as against the person whom the information in issue concerns: see s.44(2), s.45(2) and s.45(4) of the Queensland FOI Act. It is proper, therefore, to assess the effects of disclosure of information relating to the business or commercial affairs of a person or organisation, for the purposes of s.45(1) of the FOI Act, as if the contemplated disclosure were to a competitor of that person or organisation, either because any person, including a competitor, is entitled to apply under the FOI Act for the same information, or because there is nothing to prevent the particular applicant, once having obtained the information, from disclosing it to a competitor of the person or organisation whose business or commercial information was in issue: see **Re Cannon and Australian Quality Egg Farms Limited** (Information Commissioner Qld, Decision No. 94009, 30 May 1994, unreported) at paragraph 84.*

169. However, it is necessary to sound a note of caution against any rigid or inflexible adherence to the orthodox approach because, in many instances, it would lead to absurd results which could not, in my opinion, have been intended by the legislatures which have enacted freedom of information legislation. The terms of a particular exemption provision, and the nature of its sphere of operation, may permit account to be taken of the position of the

particular applicant for access. There are several examples in reported cases where tribunals have considered the prejudicial effects of disclosure by reference to disclosure to the particular applicant, rather than to any person who could have applied for the documents, because to do otherwise would have been absurd in the context of the particular case and the particular exemption provisions in issue: see, for example, **Re Lander and Australian Taxation Office** (1985) 85 ATC 4674 (analysed by P Bayne in "Freedom of Information and Access for Privacy Purposes" (1990) 64 ALJ 142 at pp.142-143); **Re Saunders and Commissioner of Taxation** (1988) 15 ALD 761 (considered at paragraphs 186-187 below). Also, in **Re "B"** at paragraphs 103-4 and 153, I explained that the exemptions in s.46(1)(a) and s.46(1)(b) could not be applied against a particular applicant to whom disclosure would not be an unauthorised use of the confidential information in issue, even though disclosure to the "world at large" would be an unauthorised use, justifying exemption.

170. **In Ryder & Anor v Booth; State Superannuation Board v O'Connor** [1985] VR 869, a Full Court of the Supreme Court of Victoria considered the issue of whether disclosure of confidential medical reports to the persons who were the subjects of those reports would be contrary to the public interest under s.30(1) of the Victorian FOI Act. The exemption provisions were applied solely by reference to the effects of disclosure of the confidential medical reports to the applicants for access, rather than to any person who might have applied for them (which doubtless would have raised different considerations) as was acknowledged by Young C J at the end of the first paragraph of his judgment (at p.870):

"In each case, the confidential medical reports related to the respective respondents [who were applicants for access under the FOI Act]. No doubt considerations other than those argued might be relevant if the reports had been sought by a third party.

171. A further consequence which tells against any rigid adherence to what I have described above as the orthodox approach to the application of exemption provisions which turn on the prejudicial effects of disclosure, is that it would mean that a person who could demonstrate a particular interest or concern in respect of particular documents (perhaps amounting to a justifiable "need to know" that was more compelling than for other members of the public) would have no greater right to obtain access than anyone else. The need to take account of such circumstances probably explains the development by tribunals of the principle outlined in paragraph 164 above. Such an approach is justifiable in conceptual terms, having regard to the objects of freedom of information legislation, and seems to me to be a necessary and justifiable response by courts and tribunals to the need for a degree of flexibility to do justice according to the circumstances of an individual applicant, in an appropriate case. (Agency decision-makers at first instance have that flexibility through the discretion conferred on them by provisions like s.28 of the Queensland FOI Act, which means that the power to refuse access to exempt matter or exempt documents, may be exercised or not exercised at the discretion of the relevant decision-maker: see **Re Norman and Mulgrave Shire Council** (Information Commissioner Qld, Decision No. 94013, 28 June 1994, unreported) at paragraphs 21-26. That discretion has generally been denied to the independent external review authorities under the various Australian freedom of information

statutes, which possess the power to undertake full merits review but only of the question of whether or not documents claimed to be exempt are in fact exempt: see, for example, s.58(2) of the Commonwealth FOI Act; s.88(2) of the Queensland FOI Act).

172. A public interest in the disclosure of particular documents to a particular applicant, is capable of being a public interest consideration of determinative weight (depending on the relative weight of competing public interest considerations favouring non-disclosure). This means that if it is to overcome the weight of a public interest consideration favouring non-disclosure which is inherent in the satisfaction of a test for prima facie exemption (where the "orthodox approach" described above has been applied) there must be some implicit judgment that the public interest in the particular applicant obtaining access is strong enough to outweigh any potential prejudicial effects of any wider dissemination by the particular applicant of the documents in issue. (I note that in *Re Stewart* at p.3, I suggested that the rationale for the exception to the "orthodox approach" made by s.6 of the Queensland FOI Act was because the applicant is the appropriate person to exercise control over any use or wider dissemination of information relating to the applicant's personal affairs, which has been obtained under the FOI Act.)

189. In *Re B and Medical Board of the ACT* (1993) 33 ALD 295, Professor Curtis (President) of the ACT AAT, after reviewing some of the Commonwealth decisions outlined above, said (at pp.303-4):

In those cases where considerations of public interest enter into the scope of the exemption, whether by way of being part of the definition of the exemption, as in ss.36 and 44, or by way of cutting down the scope of an exemption, as in ss.39 and 40, the public interest in a person having access to what is recorded about him or her is to be taken into account in determining the scope of the public interests involved. In the case of other exemptions, which do not involve an inquiry into the public interest, there is no scope to introduce that specific public interest into determining whether or not a document is exempt.

190. The kind of public interest consideration dealt with in the above cases is closely related to, but is potentially wider in scope than, the public interest consideration which I identified in *Re Eccleston* at paragraph 55, i.e., the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government. This was based on the recognition by the courts that: "The public interest necessarily comprehends an element of justice to the individual" (per Mason C J in *Attorney-General (NSW) v Quin* (1989-90) 170 CLR 1 at 18; to similar effect see the remarks of Jacobs J from *Sinclair v Mining Warden at Maryborough* quoted at paragraph 178 above). It is also self-evident from the development by the courts of common law of a set of principles for judicial review of the legality and procedural fairness of administrative action taken by governments, that compliance with the law by those acting under statutory powers is itself a matter of public interest (see *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746 at p.750). The public interest in the fair treatment of persons and corporations in accordance with the law in their dealings with government agencies is, in my opinion, a legitimate category of public interest. It is an interest common to all

members of the community, and for their benefit. In an appropriate case, it means that a particular applicant's interest in obtaining access to particular documents is capable of being recognised as a facet of the public interest, which may justify giving a particular applicant access to documents that will enable the applicant to assess whether or not fair treatment has been received and, if not, to pursue any available means of redress, including any available legal remedy.

198. Dr Pemberton is a researcher (and teacher) in a field of science (molecular microbial genetics) where progressive research is capable of producing significant benefits for the wider community. His duties include supervising research undertaken by graduate students in his specialist field. If senior academics, of Professorial calibre, hold opinions to the effect that Dr Pemberton's work on behalf of the University (and indirectly on behalf of the wider community) has shortcomings, or needs to be redirected or improved in some way in order for him to be assessed as having made a sufficiently distinguished contribution to the University, and his academic discipline, as to make him worthy of promotion to Professor, then I consider it to be not only in Dr Pemberton's personal interest, but in the wider public interest, that those opinions be conveyed to Dr Pemberton. Significant sums of public money are contributed to fund research of the kind in which Dr Pemberton is engaged, and to fund the employment of academics generally. It is in the public interest that academics and researchers direct their efforts in a way that optimises the benefit to the wider community from the investment it makes in the tertiary education sector and in scientific research.

Information Commissioner Decisions

8.46 There are a significant number of decisions of the Queensland Information Commissioner in which different examples of the public interest have been identified. These include decisions both in favour of and against disclosure.

Decisions in favour of disclosure

Cairns Port Authority and Department of Lands⁴⁰⁰

This was a “reverse FOI” application by the Cairns Port Authority objecting to a decision of the Department of Lands to provide access to the applicant to certain documents consisting of valuation reports (and drafts of such reports) on a parcel of land which was leased to the applicant.

The Information Commissioner considered that there were a number of public interests in favour of disclosure, as follows:

- A public interest in the applicant being able to satisfy itself that the valuations of the land did not proceed on a fundamentally erroneous basis, or if they did, to take any appropriate remedial action which the law permits;
- Disclosure would also further a public interest in accountability of the staff of the Office of the Valuer-General for the discharge of their functions under the relevant valuation legislation;

⁴⁰⁰ **Cairns Port Authority and Department of Lands; Cairns Shelfco No. 16 Pty Ltd (third party)** [1994] QICmr 17, (1994) 1 QAR 663, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/17.html>

- There was a public interest in the applicant company obtaining access so as to determine whether it had legal rights which could be asserted and vindicated through the courts.

The Commissioner held that the review decision was correct and that the documents should be disclosed.

Pope & Queensland Health⁴⁰¹

This was a “reverse FOI” application by Dr. Pope opposing decisions of the respondent agency to release a report investigating a complaint that Dr. Pope had engaged in scientific fraud by publishing invalid research studies in an international scientific journal.

The Information Commissioner referred to the example of a case where allegations of improper conduct were clearly unfounded and damaging, in which case premature disclosure of such allegations which had not been properly investigated would be contrary to the public interest in the fair treatment of individuals. On the other hand, and this was the case with which the Commissioner was dealing, this was a report into allegations of improper conduct made by an independent investigator who had allowed Dr. Pope a reasonable opportunity to answer any adverse materials. In those circumstances, the public interest in the fair treatment of the individual had to be weighed against the clear public interest in ensuring that allegations of improper conduct against government agencies and government employees, which appeared to have some reasonable basis, were properly investigated, and that appropriate corrective action is taken. In this case, where the procedure had been fair to Dr. Pope, the Commissioner held that the weight of the relevant public interest considerations clearly favoured disclosure of the report.

The Commissioner considered that the fact that the relevant events occurred some 8 or 9 years previously did not lessen to any significant extent the weight to be accorded to the public interest in disclosure. The Commissioner noted in this regard that the FOI Act permitted access to a document regardless of when the document came into existence. Nor was it the case that the eminence of a person’s reputation entitled the person to be excused from continued scrutiny of his performance as an employee of a publicly-funded institution. When stripped to its essentials, the Commissioner considered that the case was one about the accountability of a government employee for the conduct of his employment duties at a body established with public funds to pursue medical research in the interests of the Queensland community.

Cardwell Properties Pty. Limited & Williams and Department of the Premier, Economic & Trade Development⁴⁰²

This was also a “reverse FOI” application in which the applicant property developers sought review of the respondent Department’s decision to give the North Queensland Conservation Council access to certain documents produced during the course of negotiations over various permits and approvals which the applicants required in respect of a proposed tourist development in North Queensland.

The Information Commissioner referred to the example of a significant public interest in enhancing the accountability of government agencies and officials in respect of the performance of their functions in dealing with the proposal for the large scale development which was likely to have substantial social, economic and environmental effects on the region. Such public interest extended not only to reports of experts about the possible effects of such a development but also to factors

⁴⁰¹ **Pope & Queensland Health; Hammond and Robbins (third parties)** [1994] QICmr 16, (1994) 1 QAR 616, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/16.html>

⁴⁰² **Cardwell Properties Pty. Limited & Williams and Department of the Premier, Economic & Trade Development; North Queensland Conservation Council (third party)** [1995] QICmr 19 (1995) 2 QAR 671, <http://www.austlii.edu.au/au/cases/qld/QICmr/1995/19.html>

which may have influenced government agencies and officials in deciding whether to approve a particular land use and what conditions should apply to that land use. On the other hand, there was a public interest in commercial organizations legitimately being able to protect commercially sensitive information, which was required to be taken into account in the balancing process.

However, on the facts of the case, the necessary permits and approvals for the development had been issued and a major deed executed between the parties and released into the public domain. In addition, the property to be developed was already in the possession of the applicants. In those circumstances, it was difficult to find a reasonable basis for an expectation that disclosure of the information could have an adverse effect on the legitimate business, commercial or financial affairs of the applicants. Since the public interest factors were very strong in this case in favour of disclosure, the Information Commissioner held that they outweighed the public interest grounds against disclosure.

Shaw & the University of Queensland⁴⁰³

At issue in this decision were certain documents relating to disputes between some members of staff in a faculty at the University of Queensland. With a minor exception, the Information Commissioner upheld the review decision to grant access to the documents to the requester.

The Information Commissioner regarded as decisive in this case the public interests in the requester having access to documents which concerned her as an individual, to which was allied the public interest in the fair treatment of an individual against whom allegations damaging to professional reputation and career prospects had been made. The Information Commissioner rejected arguments that disclosure would inhibit the candour and frankness with which opinions would be expressed within the university community. Nor did the Commissioner accept that a substantial adverse effect on the management or assessment by the university of its personnel could reasonably be expected from disclosure.

With respect to one document, the Information Commissioner accepted that there may be (according to the circumstances of a particular case) a public interest in an employee of an agency being able to raise with the Chief Executive of the Agency, issues of concern as to his or her treatment, without unnecessary further disclosure of those concerns. However, if the employee expects action to be taken on the concerns expressed, then a degree of further disclosure will ordinarily be necessary. In the case of this document, however, because disclosure would not have assisted the applicant's understanding of the university's handling of the dispute, the public interest required that it not be disclosed since the document dealt with the effects on another academic of the university's handling of the dispute.

Richardson and Queensland Corrective Services Commission⁴⁰⁴

The applicant sought documents relating to the termination of his employment by the respondent agency and was initially refused access. Upon review, the Information Commissioner held that the documents should be released in the public interest.

As is the case in almost all decisions involving the concept of "public interest" decided after 1993, the Information Commissioner applied the principles in **Eccleston**.

In this case, the respondent agency did not establish on a particular basis that candour and frankness would be inhibited by disclosure of the information nor that tangible harm to the public

⁴⁰³ **Shaw & the University of Queensland; L'Estrange (third party)** [1995] QICmr 32, (1995) 3 QAR 107, <http://www.austlii.edu.au/au/cases/qld/QICmr/1995/32.html>

⁴⁰⁴ **Richardson and Queensland Corrective Services Commission** [1996] QICmr 15, (1996) 3 QAR 338, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/15.html>

interest would arise from such inhibition. The Commissioner said, in respect of the possible effect of disclosure on the work of the public servants:⁴⁰⁵

Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice being prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.

The documents ordered to be released included an internal memorandum of the respondent concerning the applicant and a briefing note to the relevant Minister. Since matters concerning the employment of the applicant had been resolved, the negotiating position of the respondent could not be affected and there was nothing in the information that could prejudice similar negotiations in the future.

Little and Department of Natural Resources⁴⁰⁶

This case involved a request for access to a report on a valuation of land owned by the applicants in North Queensland, which had been prepared for the purposes of proposed acquisition of the land by the respondent department. The Information Commissioner decided that the report should be released in the public interest.

The Information Commissioner took the view that the object of the exercise being engaged in by the respondent was to determine a fair amount of compensation for acquisition of the property and he could see no reason in the public interest why a land owner should not have an opportunity to subject the respondent's valuation report to detailed critical analysis. He rejected an argument that this would give the land owner a significant negotiating advantage. The respondent's professional valuers could be expected to defend and justify their assessments if satisfied they had not erred. In addition, the respondent would be ordinarily in a superior bargaining position by virtue of its ability to acquire the land by compulsion if a sale could not be achieved by negotiation.

The Information Commissioner held that there was a public interest in the fair treatment of individuals by government in the course of acquisition processes. This was one of the most intrusive powers which a government was able to exercise against a citizen and it was a fundamental principle of Australia's system of law and government that, in the absence of exceptional circumstances, the State ought not compulsorily acquire the property of a citizen on other than just terms. The Commissioner held that the balance of the public interest was on the side of ensuring that the process of acquisition was as transparent as possible for the affected citizen and in this respect, the applicant should be permitted access to information that would assist an assessment of whether fair compensation was proposed to be paid for the property.

⁴⁰⁵ At paragraph [134] of the decision

⁴⁰⁶ **Little and Department of Natural Resources** [1996] QICmr 2, (1996) 3 QAR 170, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/2.html>

Trustees of the De La Salle Brothers and Queensland Corrective Services Commission⁴⁰⁷

This review involved an application for access to certain documents relating to a half way house which, contrary to town planning laws, might have operated at a relevant time, as a community corrections facility. The deliberative processes documents sought consisted of certain briefing notes to the relevant Minister and internal memoranda between public servants relating to the facility.

The Information Commissioner found that the case put by the respondent was vague and unsubstantiated by evidence. While there was certainly a public interest in the effective working of government, the respondent had not explained precisely how disclosure of the matter in issue would harm the public interest. In addition, the argument was put that disclosure “would impede the proper flow of information between public servants and the Minister”. In the view of the Commissioner, this was an attempt to re-state the “candour and frankness” argument and the Commissioner repeated his comments in **Eccleston** concerning that argument. The Information Commissioner did not regard any of the matters remaining in issue as being of particular sensitivity the disclosure of which could harm the public interest. He accepted that certain comments in the material might have been more delicately expressed if the author had realised that they might be disclosed, but there was nothing in this material that could justify a finding that harm would occur to the effective working of government by disclosure.

In addition, the Commissioner found that there was a genuine public interest favouring disclosure of the matter for the purpose of enhancing the accountability of the agency and organizations which conduct community correction centres on behalf of agencies. The punishment and rehabilitation of criminal offenders, the effectiveness of the administration of systems established for that purpose, and their cost to the public, were matters of real public interest.

Australian Rainforest Conservation Society Inc. and Queensland Treasury⁴⁰⁸

The applicant Society sought access to certain minutes of meetings and notes taken at those meetings which dealt with preparatory work for the proposed corporatisation of the Forest Service operated by the Department of Primary Industry. Access to these documents was refused upon the request and on internal review.

The Information Commissioner regarded as strong a public interest in enhancing the accountability of government in this case. He pointed out that the state legislation dealing with corporatisation reinforced the idea of accountability as an objective of the corporatisation process. In his opinion, disclosure of the matter in issue would give insight into the operations of the committee charged with investigation of corporatisation. There was also an important public interest inasmuch as disclosure would provide valuable insights into issues relating to the conservation, use and management of forests in Queensland by giving the public access to the views of public servants and a publicly remunerated consultant with considerable experience in these areas. In that sense, the Commissioner held that disclosure would further the public interest in promoting informed community debate relating to the government’s forest policy in the future.

Against what he termed these “very strong” public interest considerations, the respondent Department had not produced any evidence of tangible harm.

The Department had attempted to raise a “candour and frankness” argument in claiming that if the minutes and notes were disclosed, the future free-flow of information might be disrupted.

⁴⁰⁷ **Trustees of the De La Salle Brothers and Queensland Corrective Services Commission** [1996] QICmr 4, (1996) 3 QAR 206, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/4.html>

⁴⁰⁸ **Australian Rainforest Conservation Society Inc. and Queensland Treasury** [1996] QICmr 5, (1996) 3 QAR 221, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/5.html>

However, there was no evidence or explanation as to why the material at issue was of particular sensitivity or more sensitive than the matter which had already been disclosed to the applicant. In the circumstances, the Commissioner could not find any public interest consideration against disclosure on the case presented by the Treasury, but he said that even if such a ground had been demonstrated by evidence, the public interest in disclosure would in any case have prevailed.

Baldwin and Department of Education⁴⁰⁹

This was an application for access to documents relating to the selection process for a position in the Queensland Public Service. The initial decision and the decision on internal review was to exempt all matter relating to the identities of unsuccessful applicants for the position.

The Information Commissioner held that the making of an unsuccessful application for employment is a personal affair of the unsuccessful applicant and therefore covered by that exemption provision. In this regard, he followed the decisions in two Commonwealth AAT decisions.⁴¹⁰

The Information Commissioner agreed that there were public interest considerations favouring disclosure in the accountability of government for adherence to merit based selection systems, particularly for Senior Executive Service positions, and regarded these considerations as having substantial weight. However, he held that they were not sufficiently strong to outweigh the public interest in protecting the identities of unsuccessful applicants for employment.

Willsford and Brisbane City Council⁴¹¹

The applicant sought access to the name and address of the registered owner of a dog which collided with her motor vehicle in a suburban street. The collision resulted in the dog's death and damage to the applicant's motor vehicle. Access was refused initially and on internal review.

The Information Commissioner regarded this as a case where there was a public interest in the applicant having information that would enable her to pursue a legal remedy. He said that "in an appropriate case, there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances".⁴¹²

The Commissioner considered that it was not enough for an applicant merely to assert that he or she required the information to pursue a legal remedy. However, nor was it necessary for an applicant to prove the likelihood of success in pursuing that legal remedy in the event of obtaining access to the information. The Information Commissioner said:

It should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that –

- *loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be, available under the law;*

⁴⁰⁹ **Baldwin and Department of Education** [1996] QICmr 8, (1996) 3 QAR 251, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/8.html>

⁴¹⁰ **Re Dyki and Federal Commissioner of Taxation** (1990) 12 AAR 544; **Re Williams and Registrar of the Federal Court of Australia No. N85/125 Freedom of Information** (1985) 8 ALD 219, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2060.html>

⁴¹¹ **Willsford and Brisbane City Council** [1996] QICmr 17, (1996) 3 QAR 386, <http://www.austlii.edu.au/au/cases/qld/QICmr/1996/17.html>

⁴¹² At paragraph [16] of the decision

- *the applicant has a reasonable basis for seeking to pursue the remedy; and*
- *disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing*⁴¹³

The existence of a public interest consideration of this kind would not necessarily be determinative, but the greater the magnitude of the loss, damage or wrong and/or the prospects of successfully pursuing a remedy, then the stronger would be the weight of the public interest considerations favouring disclosure.

In the circumstances, although the damage suffered by the applicant was not great (\$650.00 in repairs) and it was not clear that she had strong prospects of successfully pursuing a remedy, the Commissioner found that she did have a reasonable basis to pursue the remedy and in the circumstances, her interest outweighed the slight privacy interest in the identification of a person as a dog owner, with the result that the information was required to be released.

NHL & The University of Queensland⁴¹⁴

This case involved a request for documents relating to the handling by the respondent university of complaints of sexual harassment made by the applicant and others against an employee of the university.

The Information Commissioner accepted that there was a public interest in a person who has made a complaint of sexual harassment being given access to information which will enable an understanding of how the agency dealt with the complaint, the outcome of the complaint and the reasons for that outcome. This permitted the Commissioner to decide that the information which concerned the shared personal affairs of the alleged sexual harasser and the applicant could be disclosed to the applicant.

However, there were two other categories of information being sought:

- Information which solely concerned the personal affairs of the alleged sexual harasser;
- Information which concerned the shared personal affairs of the alleged sexual harasser and persons other than the applicant.

In respect of these two categories of information, the Commissioner considered that there was a strong public interest in preserving the privacy of individuals other than the applicant. In addition, there was a public interest in an agency responding constructively to incidents of alleged sexual harassment and such response would ordinarily have a greater prospect of success if the process remained confidential to the parties involved. Disclosure under the FOI Act might deter some persons from making legitimate complaints. However, the weight of the public interest did not favour disclosure of that information which did not relate at all to the personal affairs of the applicant.

Myles Thompson and Queensland Law Society Inc.⁴¹⁵

This application involved a request for access to certain documents relating to an investigation undertaken by the respondent Society into a solicitor.

⁴¹³ At paragraph [17] of the decision

⁴¹⁴ **NHL & The University of Queensland** [1997] QICmr 1, (1997) 3 QAR 436, <http://www.austlii.edu.au/au/cases/qld/QICmr/1997/1.html>

⁴¹⁵ **Myles Thompson and Queensland Law Society Inc.** [1997] QICmr 3, (1997) 3 QAR 469, <http://www.austlii.edu.au/au/cases/qld/QICmr/1997/3.html>

The Society made what the Information Commissioner regarded as virtually a “class” claim for non-disclosure of all documents relating to their investigations into allegations of malpractice, professional misconduct or unprofessional conduct due to the inherent sensitivity of the materials. The Information Commissioner followed his approach in **Eccleston** indicating that a “class” claim would not be accepted, but rather consequences of disclosure of the particular matter in issue was to be evaluated in each case.

Apart from this argument, the Society did not raise any public interest consideration capable of applying to the particular matter in issue so as to favour non-disclosure. The Commissioner considered that the documents contained no information of particular sensitivity and no information the disclosure of which could harm the public interest since this was a case where the investigation had concluded (so there was no ongoing sensitivity or prejudice to an investigation). The Commissioner considered that the public interest was in favour of disclosure.

Griffith and Queensland Police Service⁴¹⁶

The applicant sought review of the respondent’s decision to refuse him access to a number of documents relating to disciplinary proceedings taken against an officer of the Queensland Police.

The Information Commissioner found that the Police Service had not set out any cogent grounds for exemption in the public interest of these deliberative process documents. In particular, no such effect could be demonstrated in circumstances where, as the Commissioner found, there had been widespread publication, including in newspapers, of the incident involving the police officer and a youth alleged to have been assaulted. In those circumstances, there was no public interest in the exemption and the information was required to be disclosed.

Burke and Department of Families, Youth & Community Care⁴¹⁷

This case concerned certain documents involving an Anglican Youth Service and the former Director of that Service. Information was sought in respect of the Director who had prior convictions for indecent dealing with young persons. During the course of the review, the former Director was acquitted of other charges in relation to improper dealing with a young person.

In the circumstances, the Information Commissioner considered that there were strong public interest grounds in maintaining the privacy of the affairs of the Director and in the public interest in ensuring that he was treated fairly in respect of allegations of wrongdoing which had not yet been proven in a court of law, and indeed, of which in at least one respect, he had been acquitted.

Against that, however there were also significant public interests favouring disclosure inasmuch as:

- Protection of the welfare of children in care and children “at risk” was one of the more important responsibilities of the State and the respondent agency undertook that function;
- In addition, the agency entered into funding arrangements with community service organisations such as the Service involved, under which public funds were advanced to such organisations. In those circumstances, the respondent had a duty to ensure that public funds were properly targeted to achieve the objects for which the funds were advanced and to see that they were used to achieve desired outcomes;

⁴¹⁶ **Griffith and Queensland Police Service; Thorpe (third party)** [1997] QICmr 13, (1997) 4 QAR 110, <http://www.austlii.edu.au/au/cases/qld/QICmr/1997/13.html>

⁴¹⁷ **Burke and Department of Families, Youth & Community Care; King (third party)** [1997] QICmr 19, (1997) 4 QAR 205, <http://www.austlii.edu.au/au/cases/qld/QICmr/1997/19.html>

- Disclosure of the matter in issue would therefore serve the public interest in accountability for the discharge of the important function of child welfare and child protection and would further the public interest in promoting informed scrutiny and debate on these important issues of community concern.

The Commissioner specifically stated that the public interest considerations for and against disclosure in the case were finely balanced. However, he took the view that the public interest considerations which he had identified as favouring disclosure were the stronger and he found that disclosure of the matter in issue was in the public interest.

Bouly and Department of Natural Resources⁴¹⁸

The applicant sought access to a range of documents relating to a proposal by third parties to build a large dam on a property owned by those third parties in South West Queensland.

The Information Commissioner found that there was a public interest in the applicants having information concerning possible effects which the construction of the dam would have on their own property, which was close to the property on which the dam was to be built. The Commissioner found that there was added weight in this public interest given the location of the project in a part of the country where water was scarce. In the circumstances, the Commissioner applied his decision in **Cardwell** (see above) and found that there was a significant public interest in enhancing the accountability of agencies and officials with respect to what was also in this case, a large scale development likely to have substantial social, economic and environmental impact on the relevant region.

In the circumstances, the Commissioner found that disclosure would on balance be in the public interest. No clear countervailing public interest had been identified by the third party owners of the land on which the dam was proposed to be built.

Queensland Community Newspapers Pty. Limited and Redland Shire Council; numerous third parties⁴¹⁹

The applicants sought access to a report commissioned on behalf of the respondent Council into certain canal wall stability problems being experienced at a Canal Estate within the Council boundaries.

The Commissioner considered that there were a number of public interest considerations in favour of disclosure of the report:

- Problems having been experienced with stability in the Canal Estate, release was important to inform the public as to the true situation rather than to see rumours continue;
- The future residents of the Estate deserved to know what had been revealed through an independent investigation;
- Disclosure of the report would provide peace of mind for residents and potential residents;
- Release of the report might reveal future liability for compensation, which would be a potential burden on all of the Council's rate payers;

⁴¹⁸ **Bouly and Department of Natural Resources; Stevenson Finance Corporation Pty Ltd and Stevenson (third parties)** [1998] QICmr 1, (1998) 4 QAR 236, <http://www.austlii.edu.au/au/cases/qld/QICmr/1998/1.html>

⁴¹⁹ **Queensland Community Newspapers Pty. Limited and Redland Shire Council** [1998] QICmr 2, (1998) 4 QAR 262, <http://www.austlii.edu.au/au/cases/qld/QICmr/1998/2.html>

- The matter of slippages at the Estate had been canvassed in newspaper and radio reports.

The Commissioner considered that these factors pointed to a very strong public interest.

Against this, potential adverse effects on the business, professional, commercial or financial affairs of the third parties (one of which was the developer of the Estate) were minor. The balance of the public interest required disclosure. This would enhance the accountability of the Council in respect of its functions in approving and supervising the construction work on the development of the Canal Estate.

The Commissioner also answered an argument that disclosure might adversely affect the property values of some lot owners on the Canal Estate by pointing out that the public interest would not favour suppression of legitimate information from prospective purchasers of canal front property and it could obviously be argued that such potential purchasers should have access to the results of an independent investigation to allow them to assess their potential investment.

Hobden and Ipswich City Council⁴²⁰

The applicant sought access to certain documents relating to his claim for compensation for injury suffered when thrown from his bicycle as he was riding over an uneven footpath maintained by the Council. The request was refused initially and on internal review.

The Information Commissioner, upon review, decided that the documents should be disclosed to the applicant. He regarded there as being a public interest in the applicant having information which might allow him to pursue a remedy for which he had a reasonable basis, applying his earlier decision in **Re Willsford** (see above).

An argument was put on behalf of the Council that there was a public interest in serving the interests of the majority ratepayers by seeking to avoid loss in a litigation. Council submitted that this far outweighed the interests of a single party. This submission was rejected by the Commissioner, who pointed out that there was not any true conflict between the interests of the individual and the interests of the ratepayers generally when he said:

*The public interest in acting fairly in the interests of the ratepayers of the Council as a whole is not incompatible with the public interest in acting fairly in the interests of an individual who has suffered injury, and who may or may not have a good cause of action against the Council for compensation for that injury. The public interest in not wasting funds levied from the Council's ratepayers is not entitled to paramountcy over the public interest in ensuring that the Council fairly compensates any person to whom it has incurred a legal liability. The greater public interest lies in ensuring that individuals receive fair treatment in accordance with the law in their dealings with government (see **Re Pemberton**).⁴²¹*

The Council's arguments were misconceived in the view of the Commissioner and the public interest did not favour withholding of relevant information from a person who had a potential legal entitlement to compensation.

⁴²⁰ **Hobden and Ipswich City Council** [1998] QICmr 7, (1998) 4 QAR 404, <http://www.austlii.edu.au/au/cases/qld/QICmr/1998/7.html>

⁴²¹ At paragraph [26] of the decision

Queensland Law Society Inc. and Legal Ombudsman⁴²²

This case concerned documents which were subject or potentially subject to exemption on the grounds of legal professional privilege. However, a small number of documents contained matter which was not privileged in this manner and which amounted to deliberative processes material. The case related to a complaint made originally by a well known individual, Sir Lenox Hewitt, concerning a solicitor who had acted on his behalf in a civil proceeding, and in a series of property transactions.

The deliberative processes matter was contained in certain memoranda from the solicitor to the Queensland Law Society but did not qualify for protection as legally professionally privileged documents. The result of the investigation by the Society was that it decided to take no action on the complaint but did not proffer any explanation for this decision.

The Commissioner thought that there was a public interest factor of considerable weight in the accountability of the Society for the discharge of its regulatory functions for the benefit and protection of the public. In this case, the need for accountability was more acute since no action had been taken in respect of the complaint and the complainant had not been given a satisfactory explanation of the reasons for that decision. It followed that the particular interest of the applicant was itself a public interest consideration favouring disclosure of the matter in issue according to the principles in **Re Pemberton** (see above). The Commissioner also pointed out that there was a “natural tendency” for the public to be suspicious of professional bodies which were self-regulating, the suspicion being that there would be a tendency to favour the interests of, or show leniency to, a fellow member of the profession. Against these factors, the Commissioner thought that there was nothing in the documentation that could prejudice the investigative process or which was in any way controversial. He therefore could not find any harm to the public interest in the efficient and effective performance of the Society’s regulatory functions and having regard to the public interest considerations favouring disclosure, he required the documents to be released to the applicant.

Vynque Pty Limited and Department of Primary Industries⁴²³

This case involved a request for access to certain documents relating to permits given to a third party, Urzi, to extract sand and gravel from a quarry which was located on the land of which the applicant was the registered leaseholder.

The case concerned primarily section 45(1) of the Act, the business and commercial affairs exemption. The Commissioner found that there was no basis for a reasonable expectation of adverse effect to the business or commercial affairs either of the respondent department or Urzi. It was therefore not strictly necessary for the Commissioner to consider the application of the public interest balancing test in section 45(1)(c), but he did go on to carry out an analysis of those interests.

The Commissioner considered that there was a strong public interest in scrutinising the department’s dealings with Mr. Urzi to ensure that they had a proper commercial basis and that the department was properly monitoring the extraction operations and discharging its public duties with respect to its responsibility for the management of a public resource. Similarly, disclosure of the information about extractions would allow any interested member of the public to monitor whether Mr. Urzi had complied with the terms of his permits and would safeguard the public interest in the responsible management of a public resource. There was also evidence that the

⁴²² **Queensland Law Society Inc. and Legal Ombudsman; Sir Lenox Hewitt (third party)** [1998] QICmr 5, (1998) 4 QAR 328, <http://www.austlii.edu.au/au/cases/qld/QICmr/1998/5.html>

⁴²³ **Vynque Pty. Limited and Department of Primary Industries; Mario Urzi Sand & Gravel (third party)** [1998] QICmr 6, (1998) 4 QAR 393, <http://www.austlii.edu.au/au/cases/qld/QICmr/1998/6.html>

department was considering a partial resumption of the applicant's land in order to ensure a permanent right of access to the extraction site. In those circumstances, there was a further public interest, the Commissioner found, in a person whose interest in property may be subject to resumption being given access to information concerning the basis for resumption. In addition, as a registered leaseholder of the land, the applicant was in a unique position to monitor compliance with the terms of the permit and had an enlarged "need to know" which was more compelling than that of other members of the public (see **Re Pemberton**, above).

Accordingly, had he been required to do so, the Commissioner would have found that disclosure to the applicant would have been in the public interest.

Webber and Toowoomba City Council; International Generating Company Limited, Normandy Pacific Energy Limited (third parties)⁴²⁴

The applicant sought a review of a refusal by the respondent to provide access to documents concerning an agreement by the Council to sell waste water for use by the developers of a proposed power station. The developers were third parties in the case.

The Information Commissioner found that none of the matter in issue was exempt under section 45(1)(c)(ii) of the FOI Act; that is, he found no reasonable expectation of a prejudice to the future supply of information to government. It was therefore not strictly necessary for the Commissioner to consider the public interest balancing test, but he went on to make some comments in respect of that test.

He considered that there was a public interest in enhancing the accountability of the Council in respect of its decision to enter into the water supply agreement on behalf of ratepayers. As part of that, there was a strong public interest in disclosing to the community the price obtained for waste water, which was a community asset, as well as how that price was reached and under what terms the water would be supplied. Such disclosure would permit the community to assess whether the agreement that was reached on its behalf was fair and reasonable.

Pearce and Queensland Rural Adjustment Authority; Various Landholders (third parties)⁴²⁵

In this case, the applicant sought review of a decision by the respondent Authority to refuse access to the names and addresses of recipients of financial assistance under a Water Infrastructure Development Incentive Scheme administered by the Authority and the dollar amount of the financial assistance which each recipient received.

The Information Commissioner held that disclosure of the matter in issue could not reasonably be expected to prejudice the future supply to government of the information which persons would have to give in order to become recipients of assistance. This meant that section 45(1)(c)(ii) was not satisfied and it was therefore not strictly necessary for the Commissioner to consider the public interest balancing test. Nevertheless, he made certain comments with respect to that test.

The Commissioner considered that there was a strong public interest in enhancing the accountability of the Authority in respect of its administration of the scheme. The public had an interest in scrutinising the way in which public funds were distributed by way of financial assistance for business enterprises so as to ensure that they were distributed in such a manner as to

⁴²⁴ **Webber and Toowoomba City Council; International Generating Company Limited, Normandy Pacific Energy Limited (third parties)** [1999] QICmr 9, <http://www.austlii.edu.au/au/cases/qld/QICmr/1999/9.html>

⁴²⁵ **Pearce and Queensland Rural Adjustment Authority; various landholders (third parties)** [1999] QICmr 8, <http://www.austlii.edu.au/au/cases/qld/QICmr/1999/8.html>

serve the public policy purposes involved. Weighing against this disclosure was the public interest against disclosure of information concerning the personal affairs of identifiable individuals.

In this case, part of the public assessment as to whether the administration of the scheme has been consistent with its stated public policy purposes would be assisted by disclosure of information concerning the geographical distribution of funding made available under the scheme. This would enable scrutiny of any patterns in the distribution of funds by the Authority to particular rural areas. However, the addresses of the properties would be exempt, but not the postcodes, since the information containing the postcodes would be sufficient to permit scrutiny on this basis.

The Commissioner also rejected an argument that other accountability mechanisms existed apart from disclosure under the FOI Act. In this regard, he held that the existence of other accountability mechanisms could not be used to diminish the public interest in disclosure of information under the FOI Act.

Kenmatt Projects Pty. Limited and Building Services Authority; Graham (third party)⁴²⁶

This was a “reverse FOI” application by a building company seeking review of a decision by the respondent Authority to disclose certain files relating to disputes which had arisen involving the company’s building work. Issues were raised under section 45(1)(c) of the FOI Act. The Information Commissioner did not consider that disclosure could reasonably be expected to prejudice the future supply of similar information to government. He was therefore strictly not required to consider the public interest balancing test but made certain comments with respect to that test.

The Commissioner considered that there was a strong public interest in members of the public having access to information which provided an understanding of how the Authority carried out its licensing and compliance functions in relation to builders in Queensland. Disclosure of the matter in issue would further that public interest by enhancing the accountability of the Authority for the manner in which it performed its work. The Commissioner also considered that there was a significant public interest in members of the public having access to information about the performance of builders and their responses to complaints so as to enable them to make informed choices about a builder they choose to engage. Against that, there was some public interest in protecting the building company from adverse effects of disclosure, including the potential for litigation against it.

In the circumstances, the Commissioner would have regarded the public interest considerations favouring disclosure as of such substantial weight as to outweigh any other public interest in non-disclosure.

The names of the complainants however would not be disclosed as that would be invasive of their personal privacy and the Commissioner could see no public interest considerations that favoured identifying those individuals.

In passing, the Commissioner also addressed the argument that the FOI Act should not be used as a means of usurping proper procedures of a court or tribunal relating to discovery of evidence so as to permit or assist a party to commence a legal action. In the view of the Commissioner, the use of the FOI Act could not generally be viewed as usurping the proper procedures of courts or tribunals relating to discovery/disclosure of documents. The FOI Act conferred a separate, substantive legally enforceable right to be given access under the FOI Act (subject to exemptions) to documents of an agency or official documents of a Minister.

⁴²⁶ **Kenmatt Projects Pty. Limited and Building Services Authority; Graham (third party)** [1999] QICmr 7, (1999) 5 QAR 161, <http://www.austlii.edu.au/au/cases/qld/QICmr/1999/7.html>

Villanueva, M and Queensland Nursing Council; A Midwife, Ms. Simone Talbot, and Dr. Michael Gordon (third parties)⁴²⁷

This decision was very similar to the decision in **Circumcision Information Australia** (below). It concerned a request for access to documents relating to a complaint made by the applicant about the conduct of a midwife. The public interest balancing test arose with respect to the personal affairs exemption in the FOI Act, section 44(1).

Once again, the Commissioner was of the view that there was a strong public interest in according procedural fairness to the applicant. Similarly, there was a duty to justify to the midwife the decision reached at the conclusion of the investigation and to demonstrate that it had properly discharged its duty to conduct an adequate and fair investigation. It followed that there was a strong public interest in the accountability of the respondent Council that would be assisted by disclosure of the information concerning the investigation. It was particularly unsatisfactory in the circumstances where the applicant's complaint against the midwife was effectively dismissed by the Council and she was not provided with a sufficient explanation as to why that decision was reached.

Seeney MP and Department of State Development; Berri Limited (third party)⁴²⁸

The applicant sought review of the respondent Department's decision to refuse him access to information concerning a grant of financial assistance made to the third party under an investment incentive scheme administered by the respondent. Exemptions were claimed with respect to various documents on various grounds.

The Information Commissioner held that the matter in issue did not meet the preliminary requirements for exemption under section 45(1)(c)(ii), section 47(1)(a) or section 49 of the FOI Act. It was therefore not strictly necessary for the Commissioner to consider the public interest balancing test but he went on to make some comments in that respect.

The Commissioner rejected a submission from the Department that it was not necessary to know the amount of the third party's grant in order to be able to scrutinise its administration of the incentive scheme and to participate in an informed debate about the costs and benefits of that grant of public monies (which were public interests in favour of disclosure). The Commissioner considered that the dollar amount of a grant was a vital piece of information in conducting an assessment or analysis since knowledge of that would allow experts to assess and to contribute to informed public debate about whether the grant represented value for money for taxpayers. The Commissioner could not discern any reasonably apprehended adverse effects from disclosure of the matter which needed to be weighed against the public interest considerations favouring disclosure. The submission that effective administration by the Department of the relevant incentive schemes would be impaired was a weak one in his opinion.

The Commissioner accepted that in some cases the public interest would not weigh in favour of disclosure where commercial information provided by business in support of applications for grants was of such a character that it possessed genuine and commercial sensitivity and which could be used by competitors of the applicant to the commercial detriment of the applicant. Also, in some circumstances, premature disclosure of information concerning incentive packages might not be in the public interest. However, once a deal had been finalised, the Commissioner considered that there were strong public interest considerations favouring disclosure of relevant details of the

⁴²⁷ **Villanueva, M and Queensland Nursing Council; A Midwife, Ms. Simone Talbot and Dr. Michael Gordon (third parties)** [2000] QICmr 2, <http://www.austlii.edu.au/au/cases/qld/QICmr/2000/2.html>

⁴²⁸ **Seeney MP and Department of State Development; Berri Limited (third party)** [2004] QICmr 4, <http://www.austlii.edu.au/au/cases/qld/QICmr/2004/4.html>

financial assistance agreement (including the total amount of the grant) within a reasonable period of time.

In assessing the competing public interest considerations, the Commissioner took into account general criticisms which had been levied at industry incentive schemes. He considered that these criticisms warranted the bringing of a greater transparency and accountability to selective industry assistance. This would, in turn, enhance levels of probity and propriety, would allow experts to carry out independent analysis of the claimed economic benefits of assistance packages, and would promote greater public trust and confidence in the process and outcomes achieved.

The Commissioner accepted that there were other processes of accountability in relation to the Department's administration of the relevant schemes. However, he repeated his view in the earlier cases (see paragraphs 8.27 to 8.29 above, and the decision in **Pearce**) that this did not diminish in any significant way the public interest in enhancing accountability by way of providing information under the FOI Act.

There was a further enhancement of the public interest inasmuch as there had been public claims that existing businesses competing with the third party grant recipient suffered detriment as a result of a grant made to the third party. This was a matter relevant to the scrutiny of the terms of the grant made to the third party and why the Department assessed it as representing a good investment decision for Queensland.

In the circumstances, had he been required to decide the question, the Information Commissioner would have found that disclosure of the relevant matter would, on balance, have been in the public interest.

[The authors note that following this decision, the Queensland Act was amended by the inclusion of a new section 47A, which now provides for an absolute exemption for matter the disclosure of which could reasonably be expected to disclose information about particular incentives sought, proposed, given, or arranged under an incentive investment scheme.]

Circumcision Information Australia as Agent for DMO v Health Rights Commission; Dr. Harry Stalewski, third party⁴²⁹

Circumcision Information Australia, as agent for an individual, sought review of a decision by the respondent Commission to refuse the individual access to information concerning the response by a doctor to a complaint lodged by the individual with the Commission. The individual was complaining about a circumcision performed by the doctor on the individual's one day old son.

The Information Commissioner expressed the view that the Commission had failed in its duty to accord procedural fairness to the individual in assessing the complaint and deciding whether or not to accept the complaint for action. The Commission had not demonstrated that it had discharged its duty to conduct an adequate and fair assessment of the complaint made to it. Accordingly, there was a strong public interest in the individual being provided with information that was relevant (including background information) to the particular issues of complaint which she had raised with the Commission.

The Information Commissioner considered that there was a public interest in the accountability of the Commission for the discharge of its functions that would be assisted by disclosure of the matter

⁴²⁹ **Circumcision Information Australia as Agent for DMO v Health Rights Commission; Dr. Harry Stalewski (third party)** [2005] QICmr 1, (2005) 6 QAR 30, Decision No. 01/2005 Application 338/03, <http://www.infocomm.qld.gov.au/indexed/decisions/html/01-2005.htm> and <http://www.austlii.edu.au/au/cases/qld/QICmr/2005/1.html>; ignore the additional AustLII page for this case with the wrong case name and year ("Green and Red [2000]")

in issue. The individual had a special interest in scrutinising the Commission's process in assessing complaints on the basis of the decision in **Re Pemberton** (see above); that is to say, she had a particular "need to know".

The Commission argued a public interest ground essentially of prejudice to future supply of information which overlapped with the *prima facie* ground of exemption under section 46(1)(b). The Commissioner acknowledged that the assessment procedures could suffer if persons were reluctant to provide information in a situation where there was no power to compel them to do so. In the circumstances, however, the public interest in according the complainant procedural fairness outweighed the public interest concerns of the Commission.

Decisions where the public interest was against disclosure

B and Brisbane North Regional Health Authority⁴³⁰

In this early decision dealing principally with the exemption for "confidentiality", the Information Commissioner applied the **Eccleston** principles concerning public interest in the context of a request for certain information contained in the applicant's medical records. That information had been supplied by a third party after the third party had sought and obtained an express assurance of confidentiality.

The Information Commissioner accepted that there was a public interest in individuals being able to access their medical records. However, the information in question was not concerned with the applicant's medical treatment, but was entirely non-clinical information expressing an opinion and concerns held by the third party as to the applicant's interests and welfare in a general sense at the time the applicant was hospitalised. The Information Commissioner held that disclosure of this information would do nothing to advance the applicant's knowledge and understanding of the treatment received and therefore the public interest in access to medical records was weak in this particular case.

On the other hand, disclosure of the information would disclose matter concerning the personal affairs of the third party and this was *prima facie* exempt under section 44(1). In the absence of any countervailing strong public interest in disclosure, the Information Commissioner held that the matter was exempt.

Brack and Queensland Corrective Services Commission⁴³¹

This was a request by a prisoner for access to a page of his management file held by the respondent Commission. The respondent was incarcerated serving a life sentence for murder.

The Information Commissioner found a *prima facie* case of exemption of the matter under the confidentiality regime of section 46(1)(b) of the FOI Act. In considering the public interest, the Commissioner considered that there was a public interest in a prisoner having access to documents relevant to his or her incarceration and security classification. There was also a public interest in an individual being given access to the substance of allegations made against the individual so as to enable the individual to present his or her case in answer to such allegations. In this case however, the applicant had probably already been given sufficient access to the substance of the allegations so that this public interest factor was not strong.

⁴³⁰ **B and Brisbane North Regional Health Authority** [1994] QICmr 1, (1994) 1 QAR 279, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/1.html>

⁴³¹ **Brack and Queensland Corrective Services Commission** [1994] QICmr 5, (1994) 1 QAR 414, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/5.html>

The communication from the third party which made up the page which was exempted, concerned communication involving details of threats alleged to have been made by the applicant in respect of the family of his victim. In those circumstances, there was an overwhelming public interest in preserving the confidentiality of the communication from the applicant who had been convicted of a serious crime of violence.

Burton and Department of Housing, Local Government and Planning⁴³²

This was an application for review of a decision to exempt from disclosure to the applicant a document relevant to a complaint made by the applicant to the respondent Department concerning damage allegedly caused to a dividing fence between the property owned by her and another property.

The Information Commissioner accepted that there was a public interest in a person who complains to a government agency having access to documents relevant to the complaint. This public interest consideration was consistent with the notion of accountability of government, as recognised in section 5(1) of the FOI Act and discussed in the Commissioner's decision in **Eccleston (authors' note: provisions now appearing in section 4(2) of the Act)**. There was a related public interest in the applicant having access in order to provide her with an opportunity to verify the accuracy of matter appearing on the file which concerned her personal affairs. However, on the facts, the Commissioner held that disclosure would not have any positive or beneficial consequences for the applicant.

Against that, there would be detriment to the third party who had supplied the information to the Department and would identify the third party (which the third party did not want). In addition, the information provided was of such a kind that there was little doubt that disclosure could reasonably be expected to prejudice the future supply of such information. Accordingly, the Commissioner held that the public interest against disclosure outweighed those considerations identified in favour of disclosure and upheld the decision to exempt the document.

Cannon and Australian Quality Egg Farms Limited⁴³³

Access was sought by the applicant to documents relating to approvals by the Minister in favour of the Egg Marketing Board in respect of use of a particular trade name.

The Information Commissioner was satisfied that the matter concerned the business or commercial affairs of the respondent within section 45(1)(c) of the FOI Act. He was also satisfied that disclosure of matter which would identify a particular customer could reasonably be expected to have an adverse effect on the business or commercial affairs of the respondent by souring the commercial relationship between the respondent and that major customer. This was particularly the case as the document contained certain incorrect information about that commercial relationship. There was a public interest in enhancing the accountability of government in this case. However, it was also in the public interest that the respondent should not be unduly impeded in pursuing initiatives designed to achieve improved economic efficiency for the benefit of both producers and consumers of eggs in Queensland. The Information Commissioner said that the matter in issue while presently commercially sensitive was likely to lose that sensitivity with the passage of time. However, basing the decision (as he was required to do) on the facts at the present time, he held that there were no sufficient public interest considerations favouring disclosure to overcome the public interests embodied by section 45(1)(c)(i) and (ii).

⁴³² **Burton and Department of Housing, Local Government and Planning** [1994] QICmr 6, (1994) 1 QAR 439, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/6.html>

⁴³³ **Cannon and Australian Quality Egg Farms Limited** [1994] QICmr 9, (1994) 1 QAR 491, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/9.html>

Yabsley and Department of Education⁴³⁴

This was a request by the applicant, a teacher formerly employed by the respondent, for access to a document which was a medical certificate relating to one of the applicant's former students. The document was *prima facie* exempt as relating to the student's personal affairs under section 44(1).

Nothing in the document was of a character which would allow the applicant to pursue his grievance with the respondent Department. There were no other public interest considerations favouring disclosure that would overcome the exemption based on personal affairs and the document was withheld.

Green and Parliamentary Commissioner for Administrative Investigations⁴³⁵

This was a review of the request by an applicant for access to two pages of an investigation report concerning a matter which involved a complaint by the applicant against Queensland Rail.

The information in question was provided by a third party to Queensland Rail in the course of investigation of a complaint made by the applicant, and, the Commissioner held, was subject to confidentiality under section 46(1)(a). It was accordingly exempt under that section and strictly the Commissioner did not need to consider the public interest question.

However, he went on to find that there was a *prima facie* case of exemption also under section 46(1)(b). The Commissioner accepted that there was a public interest in a person who complained to a government agency having access to documents relevant to that complaint. However, on the facts, the information in question was totally unrelated to the complaint against Queensland Rail and would not assist the applicant to pursue any claim or remedy. In those circumstances, the public interest in accountability, although real, was not of sufficient substance to outweigh the detriment to the third party nor the potential detriment to the future supply of such information under section 46(1)(b).

P and Brisbane South Regional Health Authority⁴³⁶

This was another decision concerning the public interest balancing test in section 46(1)(b) of the FOI Act. The decision concerned information relating to the applicant's admission and regulation at a public hospital under mental health legislation. The matter in issue comprised notes made by a doctor concerning his phone calls with two third parties and also two pages of a report prepared by the doctor after discharge of the applicant which also recorded details of conversations with those third parties.

The Information Commissioner accepted that there was a public interest in a person having access to information concerning his or her medical treatment which was an aspect of that individual's personal affairs (see **Re B** above). However, on the facts of the case, disclosure of the information would not have any positive or beneficial consequences for the applicant and certainly no consequences, the Commissioner held, to outweigh the detriment that would be caused to those third parties. The Commissioner said that this was a case where persons would be reluctant to

⁴³⁴ **Yabsley and Department of Education** [1994] QICmr 14, (1994) 1 QAR 587, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/14.html>

⁴³⁵ **Green and Parliamentary Commissioner for Administrative Investigations** [1994] QICmr 15, (1994) 1 QAR 598, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/15.html>

⁴³⁶ **P and Brisbane South Regional Health Authority** [1994] QICmr 24, (1994) 2 QAR 159, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/24.html>

provide information in the future and that the exemption in section 46(1)(b) applied and in the absence of any strong public interest favouring disclosure, the matter was exempt.⁴³⁷

H and Legal Aid Office (Queensland)⁴³⁸

The applicant sought access to information relating to an assessment of the merits of his opponent's legal aid application in a custody and access dispute. Essentially, the applicant sought access to information concerning how much legal aid money had been made available to his opponent (so that he could compare with the money made available to him) and to the assessment of his opponent's legal aid application.

The Information Commissioner accepted that there was a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government and in obtaining access to documents enabling an assessment as to whether or not fair treatment has been received and, if not, to pursue any available means of redress. However, in the present case, the information which the applicant sought, in particular the amount of money paid to his opponent, would not be relevant in any sense to whether or not he had received fair treatment. The applicant had already had access to all documents held on his file relating to his application for legal aid. In the circumstances, there were no public interest considerations favouring disclosure which could outweigh the public interest in non-disclosure given that the information sought related to the personal affairs of the applicant's opponent and was exempt under section 44(1).

Prisoners' Legal Service Inc. and Queensland Corrective Services Commission⁴³⁹

The applicant organisation sought a review of the respondent Commission's decision to refuse access to a report prepared by an employed Director of the respondent into the death of a prisoner. There were various grounds of exemption relied upon in the review.

With respect to the deliberative processes exemption, section 41(1), the Commissioner regarded the report as *prima facie* exempt under that provision (excluding certain merely factual matter). The essential argument of the respondent was that the comprehensiveness and reliability of reports prepared by inspectors would be prejudiced if there were to be disclosure, since sources of information would be reluctant to co-operate with inspectors and the ability of the Commission to take appropriate steps for the security and management of prisons and the safe custody of prisoners would therefore be prejudiced. This argument was rejected as the Commissioner did not consider it reasonable to expect that future co-operation with investigations would be prejudiced by disclosure, particularly because such informants would qualify as confidential sources of information in relation to the enforcement or administration of the law and would be protected under section 42(1)(b) of the FOI Act.

There were significant public interests in favour of disclosure including interests of accountability of the Commission where the public interest in disclosure of information relating to penal administration was strong. This was not only an interest of the applicant organisation but also of the public generally.

However, certain of the items in question included information identifying officers of the Commission and in particular information making allegations against one officer. The Information

⁴³⁷ Subsequently the Information Commissioner reached the same conclusion in an almost identical case, **M and Brisbane South Regional Health Authority** [1994] QICmr 29, (1994) 2 QAR 256, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/29.html>

⁴³⁸ **H and Legal Aid Office (Queensland)** [1994] QICmr 31, (1994) 2 QAR 285, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/31.html>

⁴³⁹ **Prisoners' Legal Service Inc. and Queensland Corrective Services Commission** [1997] QICmr 4, (1997) 3 QAR 503, <http://www.austlii.edu.au/au/cases/qld/QICmr/1997/4.html>

Commissioner had adverted to the fact that the informant making the allegations had been proved entirely unreliable by the Crown Prosecutor in respect of a Supreme Court trial and in those circumstances it was contrary to the public interest in the fair treatment of the officer for such severely prejudicial material, which was unreliable, to be disclosed. The Commissioner took a similar view with respect to five other officers who were not the subject of allegations but whose interests in fair treatment represented a strong public interest in the circumstances of the case. With respect to those officers, the Commissioner ordered that identifying references from the report be removed.

Mentink and Queensland Corrective Services Commission⁴⁴⁰

This was an application by a prisoner for review of a decision by the respondent Commission refusing him access to certain documents on his professional management file. The matter primarily consisted of correspondence from third parties, including the relevant Minister, a school principal and the general manager of a correctional centre written to the family of a youth against whom the applicant was convicted of committing sexual offences. Each of the third parties objected to disclosure of the matter in which they had an involvement.

The Information Commissioner considered that there was a public interest in a prisoner having access to documents relevant to her or her incarceration and security classification (see **Brack**, above). There was also a public interest in an individual being given access to allegations adverse to that individual with a view to enabling that individual to present his or her case in answer to such allegations. However, this adverse material had already been disclosed to the applicant by the Commission and did not carry any substantial weight in the case. However, there was a very strong public interest in protecting the privacy of victims of crime and their families especially in circumstances where the victim was a minor and the crime was of a sexual nature. Accordingly, with respect to the letter to the family, the public interest considerations in favour of disclosure were not strong enough to outweigh the public interest in protecting privacy.

The other matter was exempted under section 46(1)(a) on the basis that disclosure would found an action for breach of confidence and it was unnecessary for the Commissioner to consider the public interest questions.

KT and Brisbane North Regional Health Authority⁴⁴¹

This was a request for access to certain matter contained in medical and social worker records concerning the applicant's admission to hospital and the birth at a hospital of her son and his relinquishment for adoption shortly after the birth. The case was one primarily involving the application of the public interest balancing test in the personal affairs exemption, section 44.

The applicant set out a number of submissions arguing that it was in the best interests of herself and her son, in the event they were reunited, that she be fully informed of her son's life while he was not in her care. It was also submitted that it was in the interests of foster parents to know that the mother was concerned for the welfare of her child and it was in the applicant's welfare to be provided with information concerning her son's health and welfare particularly because she had suffered psychological trauma with respect to the loss of her son through adoption. The Information Commissioner held that while these submissions reflected the applicant's strong personal desire to obtain information concerning her son's health while he was in foster care prior to adoption, they did not reflect the broader public interests. The Information Commissioner pointed out that the legislative scheme concerning disclosure of identifying information about the

⁴⁴⁰ **Mentink and Queensland Corrective Services Commission** [1997] Letter decision of the Information Commissioner at <http://www.infocomm.qld.gov.au/indexed/decisions/html/S%2064-95.htm>

⁴⁴¹ **KT and Brisbane North Regional Health Authority** [1998] QICmr 3, (1998) 4 QAR 287, <http://www.austlii.edu.au/au/cases/qld/QICmr/1998/3.html>

parties to adoption carefully set out where the balance of the public interest lay, which was significantly in maintaining the privacy of all persons involved in the adoption process. This also applied under the State legislation to the period in which the applicant's son was in foster care because to provide information concerning the identity of the foster carer could lead to disclosure of information concerning the post-adoption identity of the applicant's son.

In light of these very strong public interest considerations concerning adoption, the material was exempt under section 44(1) and there was no countervailing public interest of a strength which would permit the exemption claim to be overturned. It also followed that there was no "compelling reason in the public interest" for disclosure for the purposes of section 48(1), and since the publication of the matter was prohibited by childrens' services legislation, the public interest in non-disclosure prevailed under that exemption as well.

Dalrymple Shire Council and Department of Main Roads⁴⁴²

The applicant sought review of a decision refusing him access to unit rates and other figures contained in a particular tender submitted to the respondent Department for construction of a road. The applicant council had been a tenderer for certain jobs, as had private contractors and a commercial unit of the respondent Department. The matter which remained in issue on the review was contained in the "In-House Tender" by the unit of the Department and comprised unit rates and other figures appearing in that tender.

The unit rates and other figures qualified as business or commercial information within the exemption provision of section 45(1)(c). The question was whether disclosure was or was not in the public interest.

The Commissioner found that disclosure of the unit rates and other specific figures could reasonably be expected to cause an adverse effect since a competitor in the roadworks construction industry could use the unit rates to assess comparative cost advantages and disadvantages between itself and the Department's unit across a large range of construction items and, in addition, could use the unit rates to predict with greater accuracy future tender bids by the Department's unit. Though such competitive advantage would not be large, it would still be an advantage with a corresponding disadvantage to the Department's unit that was more than minimal. Nor had sufficient time passed for the unit rates to be aged and of historical interest only. The central unit, it should be noted, was awarded a contract to perform some segments of the roadworks that had been put out to tender.

Moreover, since the Department's unit was part of the Government of Queensland, it could not bring an action for breach of confidence against the State and therefore could not fall within the exemption contained in section 46(1)(a). Nor could it argue section 46(1)(b), since it could not succeed in a claim that disclosure could reasonably be expected to prejudice future supply since quoting in unit rate prices was inevitably required in many tenders and persons would not exclude that matter from tenders merely because of potential disclosure under the FOI Act.

There were public interests involved in disclosure in enhancing the accountability of the respondent for the efficient and effective performance of its functions and also in ensuring that its "In-House bidder" was not unfairly advantaged in competition for the award of contracts over other tenderers. The Queensland Government had committed to a "level playing field" in this regard by implementation of a State purchasing policy. There was also a public interest in the accountability of the Department in respect of the awarding of the particular contract so that the public could have information concerning the process of selection for projects upon which public funds were expended. That interest extended to disclosure of the total price tendered by the successful

⁴⁴² **Dalrymple Shire Council and Department of Main Roads** [1998] QICmr 10, (1998) 4 QAR 474, <http://www.austlii.edu.au/au/cases/qlld/QICmr/1998/10.html>

tenderer. However, it did not in the view of the Information Commissioner, extend to the disclosure of unit rates. The total tender price would address the particular public interest considerations involved in disclosure, particularly because this was not a case where the contract was to be awarded for the performance of individual items which were being quoted in detail. Unit rates were required because quantities per item were only estimates.

Ultimately, the Commissioner held that although the public interest in non-disclosure was not particularly weighty, although it was of commercial significance, he was not satisfied that there were sufficiently strong public interest considerations favouring disclosure to overcome the former considerations and the matter was held exempt under section 45(1)(c).

Ainsworth and Criminal Justice Commission; A & B (third parties)⁴⁴³

This was a wide-ranging request for all documents pertaining to the two applicants, an individual and a company controlled by him. In particular, they sought access to documents pertaining to a report prepared by the respondent Commission in 1990 on gaming machines and concerns in relation thereto. The applicants were involved in the gaming machine industry in the State of Queensland and elsewhere.

In this case, the exemption in issue with respect to the public interest balancing test was that relating to a reasonable expectation of damage to relations between the State and another government or the disclosure of confidential information communicated in confidence on behalf of another government under section 38. The documents were obtained by the respondent Commission from the Victoria Police and did not primarily deal with the applicants at all, but only in passing.

The essential argument for public interest in disclosure made by the applicants was that fairness required that they be given the opportunity to demonstrate that their reputations had been damaged in a way that was not only procedurally unfair but substantively unfair because the slurs to their reputations were based on information that was inaccurate, incomplete and misleading.

However, the Information Commissioner pointed out that the documents were in the nature of criminal intelligence gathering, even although it may be information collected about suspected illegal activity that turned out to involve no illegality or in respect of which there was not enough evidence to prove the commission of criminal offences. Nevertheless, it was strongly in the public interest that information about suspected illegal activity and its participants be collected and exchanged between law enforcement agencies, and efforts to obtain sufficient evidence were more likely to prove fruitful if the information were kept confidential to law enforcement officers. While it was a superficially attractive argument that a person whose reputation had been maligned in an unfair manner should have access to such information, the Information Commissioner pointed out that a person heavily engaged in illegal activity or suspected of such (although never convicted) would be significantly advantaged by the opportunity to ascertain the nature and extent of the information held by law enforcement authorities. In those circumstances, the public interest considerations favouring disclosure which the applicants had raised were not sufficiently strong to overcome the *prima facie* exemption under section 38 and those identified by the Commissioner in the decision.

⁴⁴³ **Ainsworth and Criminal Justice Commission; A & B (third parties)** [1999] QICmr 10, <http://www.austlii.edu.au/au/cases/qld/QICmr/1999/10.html>

The Test of “Compelling Reason In The Public Interest”

Whittaker and Queensland Audit Office⁴⁴⁴

- 8.47 Reference has already been made to the decision of the Queensland Supreme Court dismissing an application for review on a point of law of the decision of the Information Commissioner in this case (see paragraph 8.21 above).
- 8.48 In his decision, the Information Commissioner affirmed a decision to grant exemption under section 39(2) of the FOI Act, that is that disclosure was prohibited by the Financial Act referred to in that sub-section and disclosure was not required by a “compelling reason in the public interest”.
- 8.49 The original request was by an applicant journalist seeking access to documents relating to an audit of outstanding debtor balances of the individual members of the Legislative Assembly of the Queensland Parliament. Since the material was protected information under section 92 of the **Financial Administration & Audit Act**, the question for the Commissioner was whether disclosure was required by a “compelling reason in the public interest”.
- 8.50 This expression was not defined in the FOI Act. The Commissioner considered that it was clear that the Parliament intended to depart from the usual public interest balancing test appearing in most of the exemption provisions. The Commissioner pointed out that the Parliament had already decided under section 39(2) of the FOI Act that this information was of a kind in respect of which disclosure should be prohibited unless special reasons existed. Accordingly, the Information Commissioner interpreted the language of the section as requiring that there be identifiable public interest considerations favouring disclosure “which are so compelling (in the sense of forceful or overpowering) as to require (in the sense of demand or necessitate) disclosure in the public interest”.⁴⁴⁵
- 8.51 The Commissioner was of the view that disclosure of the matter in issue would give the public some insight into the way the Auditor-General conducted an audit and would also give some limited insight into the past operations of the Legislative Assembly in terms of giving credit to members of the Assembly and in recovering debts. However, he pointed out, the reports issued by the Auditor-General had already gone a significant way towards satisfying those public interest considerations. The applicant put most weight on the public interest consideration that disclosure of the identities of, and amounts owed by, those debtors who were members of Parliament was strongly in the public interest. However, the fact that a member of Parliament might owe a certain amount of money and the fact that the debt might have been outstanding for some time, did not, in the view of the Commissioner, raise a public interest consideration favouring disclosure of information about the debt. All individuals might, from time to time, fall behind on payments of debts and this was not unlawful or

⁴⁴⁴ **Whittaker and Queensland Audit Office** [2001] QICmr 5, <http://www.austlii.edu.au/au/cases/qld/QICmr/2001/5.html>

⁴⁴⁵ At paragraph [30] of the decision

improper. However, where credit had been extended by the Legislative Assembly, there was an interest in the public knowing the cost to the public purse and what action was being taken to recover debts. There was also a public interest in members of Parliament being accountable for inaction in repayment of long standing debts.

8.52

Notwithstanding those strong public interest considerations, the Commissioner found that he could not regard those considerations as constituting a compelling reason in the public interest requiring disclosure of the matter in issue. Disclosure was not so important as to warrant that description in circumstances where the Auditor-General had investigated the matter and recommended improvements to systems and procedures for recovering debts of this kind and where his most recent report had indicated that the problems appear to have been resolved. In those circumstances, the primary exemption in section 39(2) applied.⁴⁴⁶

⁴⁴⁶ The Information Commissioner had earlier reached the same view as to the meaning of the expression “a compelling reason in the public interest” as it appears in section 48(1) of the Queensland Act. For the facts of that case, see **Re KT** (above).

9 Australia: New South Wales

Legislative Framework

- 9.1 The New South Wales **Freedom of Information Act** 1989 (the NSW Act or the Act) was assented to on 21 March 1989 and commenced on 1 July 1989.
- 9.2 At the time the NSW Act was enacted, New South Wales did not have in place a general administrative review tribunal. To take an example from the Commonwealth, when the Commonwealth FOI Act was enacted in 1982, there had been in place for some years the Administrative Appeals Tribunal and an extensive statutory regime for judicial review in the Federal Court of Australia under the **Administrative Decisions (Judicial Review) Act** 1977. By contrast, in 1989 the state of New South Wales had no administrative review tribunal and challenges to administrative decision-making by way of judicial review were based entirely on common law doctrines.
- 9.3 While New South Wales did not create the office of Information Commissioner (as the Commonwealth did not, but unlike Queensland, which did create the office), the Commonwealth Act was in the circumstances able to provide for review by the Administrative Appeals Tribunal.⁴⁴⁷ That course was not available in New South Wales for some years, as discussed further below.

Administration of the Freedom of Information Act 1989

- 9.4 The NSW Act is administered by the Premier's Department.

Enforcement of the Act

- 9.5 The NSW Act provides for two avenues of enforcement. To the extent applications for access are refused upon request and on internal review, an applicant may apply to the NSW Administrative Decisions Tribunal (ADT) for a review of the decision: section 53(1). In addition, an applicant may complain to the NSW Ombudsman concerning the conduct of any person or body in relation to a determination made by an agency: section 52.
- 9.6 The Administrative Decisions Tribunal has the power to make a fresh decision as if it were the primary decision-maker and therefore, for example, to allow access to documents under the NSW Act: section 37 **Administrative Decisions Tribunal Act** 1997.
- 9.7 The Ombudsman is given powers of investigation by the NSW Act but the Act also provides that the Ombudsman cannot investigate if any review proceedings are before the ADT: section 52(2)(c). Nor can the Ombudsman investigate where the decision is subject to internal review or where the applicant has not taken advantage of the internal review procedure: section 52(2)(a) and (b).

⁴⁴⁷ Chapter 6 discusses key decisions of the Administrative Appeals Tribunal bearing on public interest questions under the Commonwealth Act.

- 9.8 It is important to note that the ADT only commenced to operate in NSW on 6 October 1998. Prior to that time, an appeal was available from an internal review decision to the District Court of New South Wales, which is the intermediate court in that State's court system, between the local courts (magistrates' courts) and the Supreme Court of New South Wales. Decisions of the District Court are not widely reported in official law reports, nor are they available online. The Decisions of the ADT (constituted by a single member, or sometimes by an Appeal Panel of three, presided over by a Judicial Member) are available online.⁴⁴⁸ Decisions of the ADT concerning FOI matters are dealt with in the General Division of the Tribunal.
- 9.9 The decision of a single member of the ADT may be appealed to the Appeal Panel of a Tribunal:
- on a point of law: section 113(2)(a) **Administrative Decisions Tribunal Act**
 - with the leave of the Appeal Panel, also on the merits of the decision: section 113(2)(b) **Administrative Decisions Tribunal Act**
- 9.10 There is a further appeal from a decision of an Appeal Panel, on a point of law, to the Supreme Court of New South Wales: section 119(1) **Administrative Decisions Tribunal Act**. In a case of significant public interest, there is the possibility of a further appeal, with leave, to the High Court of Australia.

Official Guidance

- 9.11 An important resource (though now some years old) is the *FOI Procedure Manual* (3rd edition, 1994) issued by the Premier's Department.⁴⁴⁹ The Manual is a substantial document which goes through all of the important provisions of the NSW Act for the benefit of agencies and decision-makers. Chapter 7, which deals with the exemptions in the Act, discusses the concept of the public interest in multiple places.
- 9.12 The NSW Ombudsman has also published a guide entitled *FOI Policies and Guidelines* (2nd edition, 1997).⁴⁵⁰ The guide is used by the Ombudsman and staff of the Office in the review of complaints under the NSW Act. In the guide, the Ombudsman expresses the view that the exemption provisions in the NSW Act should be interpreted narrowly, so as to limit the scope of the exemption to the minimum the statutory language permits. The Ombudsman also makes the point that the exemption provisions in NSW are optional, not mandatory, and that agencies should not exempt documents from release merely on technical grounds, but only where some good purpose is served by non-disclosure.⁴⁵¹

⁴⁴⁸ http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_index

⁴⁴⁹ http://www.premiers.nsw.gov.au/our_library/foi/man13_2.pdf

⁴⁵⁰ <http://www.nswombudsman.nsw.gov.au/publication/PDF/guidelines/FOI%20Full%20Document.pdf>

⁴⁵¹ See paragraph 9.1 of the guide

9.13 In a fact sheet published for the benefit of NSW Public Sector Agencies entitled *Frankness and Candour*⁴⁵² the Ombudsman indicated that he regarded the argument that transparency would inhibit the frankness and candour in decision-making as substantially discredited, as “contrary to common law obligations and codes of conduct”, and stated that the making of such claims demonstrated “a lack of proper understanding of official roles and duties”. The Ombudsman referred to the comments of Mason J. in **Sankey v Whitlam** (1978) 142 CLR 1 at 97 where his Honour said:

*I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.*⁴⁵³

9.14 The Ombudsman also refers to a 1998 decision of the District Court of New South Wales, which was also critical of the “frankness and candour” argument.⁴⁵⁴ The Ombudsman did accept that an argument could be made that confidentiality was a valid prerequisite for frankness and candour in four areas:

- high level decision-making and policy-making
- legal professional privilege
- to a limited extent, for internal working documents (prior to a decision being made)
- possibly sensitive personal information

9.15 Even in such cases, a detrimental effect should be able to be reasonably anticipated in similar deliberative processes, or that disclosure would give unfair advantage or improperly undermine the effectiveness of a decision.

Purpose and Onus

9.16 A stated objective of the NSW Act is to extend, as far as possible, the rights of the public to obtain access to information held by the Government: section 5(1)(a). One means by which this object is to be achieved is by conferring on each member of the public a legally enforceable right to be given access to documents held by Government, subject to such restrictions as are necessary for the proper administration of the Government: section 5(2)(b).

9.17 There is a strong statement in the Act that it is the intention of Parliament:

- that the Act be interpreted and applied so as to further the objects of the Act; and

⁴⁵² <http://www.nswombudsman.nsw.gov.au/publication/PDF/factsheets/Frankness%20and%20Candour.pdf>

⁴⁵³ See paragraph 7.37

⁴⁵⁴ **Helen Hamilton v Environmental Protection Authority** (District Court of NSW, No. 367 of 1997, 5 August 1998, unreported), discussed further below

- that the discretions conferred by the Act are to be exercised, as far as possible, to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information: section 5(3).

9.18 Section 61 of the Act provides that in any proceedings under the Act concerning a determination by an agency or Minister, the agency or Minister has the burden of establishing that the determination is justified.

9.19 Section 59A is of great importance in the Act. This section provides that two factors sometimes cited as public interest factors against disclosure are irrelevant to the question of whether disclosure would be contrary to the public interest.⁴⁵⁵ These factors are:

- embarrassment to or loss of confidence in the Government; and
- the applicant potentially misinterpreting or misunderstanding the information in the document because of an omission in the document or for any other reason.

9.20 In his important judgment in **Commissioner for Police v District Court of NSW (Perrin's case)**⁴⁵⁶, Kirby P. (as he then was) looked to the purposes of the NSW Act in construing the exemption for personal information. Kirby P. said, in relation to the argument that the names of certain police officers who had put their name to a report be withheld, that the argument was:

*...contrary to the achievement of the purposes of the Act. In particular it is contrary to the minister's statement that the government was committed, by the Act, to remedy the situation produced by the "feeling of powerlessness" derived from decisions vitally affecting individuals made, in effect, by "anonymous public officials". How can the fundamental principles of "openness, accountability and responsibility" be achieved to remedy that situation if the anonymity which was said to be part of the problem is preserved by the construction of cl 6(1) urged upon this Court?*⁴⁵⁷

9.21 Kirby P. also took the view that the burden of proof imposed by section 61 of the Act pointed in favour of a presumption in favour of disclosure under the Act. His Honour said:

*Prima facie, the document in its entirety must be disclosed. To withhold disclosure, it is for the agency to make out the application for an exemption. Thus the question is not why the information should be disclosed but why it should be exempted.*⁴⁵⁸

9.22 These views of Kirby P. were referred to with approval by the Appeal Panel of the New South Wales ADT in **Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No.**

⁴⁵⁵ See paragraph 2.21

⁴⁵⁶ **Commissioner for Police v District Court of NSW (Perrin's case)** [1993] 31 NSWLR 606

⁴⁵⁷ At pages 625-6 of the decision

⁴⁵⁸ At page 625 of the decision. See also the discussion of whether the NSW Act contains a presumption in favour of disclosure in Anne Cossins, *Annotated Freedom of Information Act New South Wales* (1997), at pages 46-51.

2).⁴⁵⁹ The Appeal Panel was expressly of the opinion that in construing the exemption in the case (clause 12(1)), a purposive approach was required to be taken, one which ensured that the objectives of the Act were maintained.⁴⁶⁰

9.23 Kirby P. went on to state that he tended to favour the view that the Act, particularly having regard to section 5, should be approached by decision-makers with a general attitude favourable to provision of the access claimed.⁴⁶¹

9.24 In one case⁴⁶² involving the interpretation of the Victorian **Freedom of Information Act** 1982, the High Court of Australia was called upon to reconcile two apparently inconsistent provisions in that legislation. While the case is therefore remote from the NSW context, it is nonetheless significant that the Court said, in relation to provisions very similar to section 5 of the NSW Act:

*In the light of these sections, it is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information.*⁴⁶³

9.25 Significantly, in the 2006 decision in the **WorkCover** case, the NSW Court of Appeal applied these words to the NSW Act and held that the Act should be applied and interpreted so as to further its objects.⁴⁶⁴

9.26 The matters discussed in this section suggest that a purposive approach to the Act will require decision-makers to approach the exemption provisions with a slight presumption in favour of disclosure as against the withholding of information. This does not of course mean downplaying or diluting the meaning of the language used in the Act. Rather it means that in construing the Act as applying to particular circumstances there would be justification for inclining in favour of disclosure where, for example, the respective public interests are finely balanced or where their effects may be unclear.

9.27 Indeed, at least one commentator goes further in stating in respect of the provisions of section 5 and section 59A of the Act that:

⁴⁵⁹ **Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No. 2)** [2005] NSWADTAP 33 at para [138], <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>; the case is discussed further in **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales** [2006] NSWCA 84 (24 April 2006), <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/84.html>

⁴⁶⁰ At paragraph [137] of the decision

⁴⁶¹ At page 627 of the decision

⁴⁶² **Victorian Public Service Board v Wright** (1986) 160 CLR 145, <http://www.austlii.edu.au/au/cases/cth/HCA/1986/16.html>

⁴⁶³ In the joint judgment of Gibbs CJ., Mason, Wilson, Deane, and Dawson JJ., at page 153

⁴⁶⁴ Decision of the New South Wales Court of Appeal in **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales** [2006] NSWCA 84 (24 April 2006), <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/84.html>, and in the Tribunal below, the decision of the full Panel of the New South Wales Administrative Decisions Tribunal in **Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No 2)** (GD) [2005] NSWADTAP 33 (23 June 2005), <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html> at para [148] of the judgment

These provisions weigh heavily in favour of disclosure and require clear and unambiguous words to the contrary for documents to be considered exempt and consequently withheld.⁴⁶⁵

Public Interest Provision

9.28 There are 27 clauses in Schedule 1 of the NSW Act which set out the exemption provisions. The “classic” public interest balancing test appears in seven of these clauses. Six of these clauses provide for exemption once the document satisfies the relevant description, the “harm test” (where applicable), and the requirement that disclosure would, on balance, be contrary to the public interest. The clauses in which that test appears in this form are:

Clause 5	inter-governmental relations;
Clause 9	internal working documents;
Clause 13(b)	information provided in confidence;
Clause 14	economy of the State;
Clause 15	financial or property interests of the State or an agency;
Clause 16	functions, methods, examinations of an agency

9.29 The second form of the “classic” public interest test reverses the emphasis and permits disclosure if such disclosure would, on balance, be in the public interest. The effect is that an onus is placed effectively on an applicant to show that disclosure is in the public interest. While the agency still bears the onus under section 61 of establishing that its decision was justified, it will be slightly easier to do so where the public interests are finely balanced. This form of the test appears in clause 4(2)(b) and clause 4A(3) of Schedule 1, which refers to documents which consist of:

- documents which reveal that a law enforcement investigation has exceeded the limits imposed by law; or
- a report on a law enforcement investigation that has already been disclosed to the subject (person or body) of the investigation; or
- certain other general reports.

9.30 The exemption concerning personal affairs (clause 6) makes exempt documents which contain matter the disclosure of which would involve the unreasonable disclosure of information containing personal affairs. It is well established that the term “unreasonable” involves an inquiry that has “at its core public interest considerations”.⁴⁶⁶ In other words, the question of whether or not to disclose (and to what extent) will involve a consideration

⁴⁶⁵ Mark Robinson, *New South Wales Administrative Law* (looseleaf) at paragraph 30.120

⁴⁶⁶ **Colakovski v Australian Telecommunications Corporation** (1991) 29 FCR 429, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep4736.html. The NSW Ombudsman also accepts this view: see *FOI Policies and Guidelines (2nd edition)* at para 9.3.13 (page 71), <http://www.nswombudsman.nsw.gov.au/publication/PDF/guidelines/FOI%20Full%20Document.pdf>

of applicable public interest factors in reaching a conclusion as to whether or not disclosure would be unreasonable.

9.31 The following provisions, on their face, confer absolute exemption:⁴⁶⁷

Clause 1	Cabinet documents;
Clause 2	Executive Council documents;
Clause 4(1)	law enforcement, security of persons and buildings, prejudice to investigations;
Clause 4(3)	intelligence and counter-terrorism;
Clause 4(3A)	State Crime Command branch of NSW Police;
Clause 4A(2)	counter-terrorism, other intelligence;
Clause 7	commercial, financial, business, or professional affairs;
Clause 10	legal professional privilege;
Clause 11	court documents, judicial functions;
Clause 12	secrecy provisions in other Acts;
Clause 13(a)	action for breach of confidence;
Clause 17	contempt of Court or other body, privileges of Parliament;
Clause 18	certain companies and securities documents;
Clause 19	restricted documents in public libraries;
Clause 20	miscellany, including adoption procedures, fines policies, protected disclosures, Ministerial Code of Conduct;
Clause 21	exemptions under other Australian FOI Acts;
Clause 22	confidential Olympics documents;
Clause 22A	International Masters Games;
Clause 23	threatened species, Aboriginal objects, and Aboriginal places;
Clause 24	certain confidential species documents;
Clause 25	plans relating to places or items of Aboriginal significance;
Clause 26	complaints under health legislation;

Case Law

9.32 Relevant decisions are considered in descending order in the judicial/administrative decision-making hierarchy. In common with the emphasis of other chapters, many decisions involving the personal affairs exemption have not been included.

⁴⁶⁷ It has been argued that apart from exemptions such as clause 6, public interest considerations may also be relevant to construing provisions which incorporate as part of the “harm” test, an unreasonable adverse effect on certain interests or affairs, such as clause 7 (unreasonable adverse effect on business and commercial affairs) and clause 8 (unreasonable adverse effect on research of an agency). This, it is argued, is consistent with the presumption in favour of disclosure unless the public interest requires information to be withheld: see Cossins, *op. cit.*, at pages 341-2, 346-7. The authors note that while there is much logic and some support for this view as a matter of FOI principle, it has not become accepted as a conventional approach to construing such provisions, although decision-makers may in practice employ public interest factors in their reasons as to what might be “unreasonable”.

New South Wales Court of Appeal

- 9.33 Reference has already been made to the decision of the New South Wales Court of Appeal in **Perrin's case**.⁴⁶⁸ That case was decided at a time when the only external review of an FOI decision permitted under the NSW Act was to the District Court, and there was no further right of appeal under the Act to the Supreme Court (nor subsequently to the Court of Appeal). The case was an application by the Commissioner of Police by way of judicial review at common law seeking to quash the decision of a District Court judge to make available to an applicant the names of certain NSW police officers who had been involved in preparing certain reports concerning a Mr. Ainsworth and supplying that information to the Criminal Justice Commission of Queensland.
- 9.34 **Perrin's case** decided that in the circumstances the disclosure of the names of the police officers would not amount to disclosure involving "information concerning the personal affairs of any person" under the exemption in clause 6(1) of Schedule 1 to the NSW Act. This was not an absolute rule, but a question of fact depending on the particular circumstances of each case.⁴⁶⁹
- 9.35 The Court was therefore strictly not required to consider whether disclosure would be unreasonable. However, one question which was not really explored in the case⁴⁷⁰ was nevertheless subject to some comment. This concerned the motive of an FOI applicant. Mahoney JA. said that, while it was not necessary to decide the question, great care would need to be taken in any case where the purpose for which the document was sought was to harass the persons whose information would be revealed by disclosure.⁴⁷¹ Clarke JA. was of the view that where an applicant wishes to have the information for mischievous purposes, "it would undoubtedly be relevant for the tribunal to balance the competing claims in order to determine whether disclosure would be unreasonable."⁴⁷²
- 9.36 Such an approach, of course, recognises that public interest criteria are at the heart of a personal affairs exemption such as clause 6(1), as has already been stated.⁴⁷³ In the view of the present authors, it may be misleading to refer to "motive" or "purpose" in this context. While the NSW Act does not contain an express provision stating that an applicant's right of access is not affected by the reasons for seeking such access,⁴⁷⁴ it is accepted that the reasons or motives of the applicant are not relevant. It is not so much a question of reasons or motives, but a question of whether disclosure to the world at

⁴⁶⁸ Above this case, **Commissioner for Police v District Court of NSW (Perrin's case)** [1993] 31 NSWLR 606, is discussed in regard to the question of whether there is a presumption in favour of disclosure in the NSW Act.

⁴⁶⁹ Per Kirby P. at page 624 and per Clarke JA. at page 644

⁴⁷⁰ As Kirby P. said at page 627

⁴⁷¹ At page 639

⁴⁷² At page 645. In a similar vein, Heerey J. stated in **Colakovski v Australian Telecommunications Corporation** (1991) 29 FCR 429 at 441, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep4736.html, that where disclosure "was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed," such disclosure would be unreasonable.

⁴⁷³ See paragraph 9.34

⁴⁷⁴ Unlike the Commonwealth Act, which does contain such a provision, section 11(2)

large⁴⁷⁵ would be unreasonable. The applicant's reasons are irrelevant in the analysis, but what is relevant is the extent to which those reasons provide evidence of an *effect* which disclosure would or might have. It is the potential effect which might make a particular disclosure unreasonable, and not the motive or reasons of the applicant, even if the motive is to produce that specific effect. It could hardly be said to be a relevant factor to take into account the properly and entirely innocent reasons that one requester may have in seeking access as a counterweight to a potentially harmful use which persons other than the applicant might make of the information.⁴⁷⁶ The analysis proposed by the authors avoids examination of the motives of an FOI applicant while focusing attention on what are the true public interest considerations which may not favour disclosure, namely the undesirable effects capable of being produced by disclosure, and then weighing those effects as public interest factors against the public interest factors in favour of disclosure.

- 9.37 **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales**⁴⁷⁷ was an appeal by way of a review for alleged error of law from the decision of an Appeal Panel of the New South Wales Administrative Decisions Tribunal. The facts of the case appear in the discussion of the decision of the Appeal Panel.⁴⁷⁸
- 9.38 The Court of Appeal handed down a most significant judgment concerning the internal working documents exemption in clause 9 of Schedule 1 to the NSW Act. The Court of Appeal found no error in law in the decision of the Appeal Tribunal on this issue, nor with respect to the other exemption provisions relied on by the appellant, clause 12 (secrecy exemption), clause 13(b)(i) (information given in confidence), and clause 10 (legal professional privilege).
- 9.39 The leading judgment of the court was given by McColl JA.⁴⁷⁹ The Court referred to the views of the High Court of Australia as to the discretionary value judgment inherent in the expression "in the public interest".⁴⁸⁰ The Court also referred to another case in which the views of the High Court were that determining where the public interest lies is a question of fact and degree.⁴⁸¹
- 9.40 As a matter of judicial comity, the Court decided that it would follow the approach of the full Federal Court to the effect that it would lean towards a narrow, rather than a wide, interpretation of exemption provisions in the FOI

⁴⁷⁵ Since this is the basic premise of release under FOI legislation

⁴⁷⁶ In this context, embarrassment or exposure to criticism is relevant to an individual, though not to the government: **Commonwealth v John Fairfax & Sons Limited & Ors** (1980) 147 CLR 39, <http://www.austlii.edu.au/au/cases/cth/HCA/1980/44.html>

⁴⁷⁷ **General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales** [2006] NSWCA 84 (24 April 2006), <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/84.html>

⁴⁷⁸ At paragraphs 9.22 and 9.53

⁴⁷⁹ With whom Handley JA. and Hodgson JA. agreed

⁴⁸⁰ See paragraph 2.9, cited at paragraph [146] of the judgment

⁴⁸¹ **Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia** (1987) 61 ALJR 393 at 395, <http://www.austlii.edu.au/au/cases/cth/HCA/1987/27.html>, cited at paragraph [146] of the Court's judgment

legislation.⁴⁸² The Court expressed the view that such an approach was consistent with the obligation in section 5(3) of the NSW Act to interpret and apply the Act so as to further its objects.⁴⁸³

9.41 The Court of Appeal went on to refer to the **Howard** factors. The Court pointed to the comments of Davies J. in **Re Howard**⁴⁸⁴ to the effect that over time, the extent to which disclosure of internal working documents is in the public interest will more clearly emerge.⁴⁸⁵

9.42 Notwithstanding that observation, the Court made two important statements concerning the **Howard** factors:

- That they had been laid down in the era in which “the administrative tradition of New South Wales followed that of Britain, from which it was derived [and] embraced a high measure of secrecy and was far from open”,⁴⁸⁶
- That with the benefit of hindsight it might therefore be said that the Crown privilege authorities referred to in **Re Howard** were not an apt point of reference.⁴⁸⁷

9.43 The Court went on to state:

*Freedom of Information legislation was intended to cast aside the era of closed government and principles developed in that era may, with the benefit of twenty or more years of experience, be seen as anachronisms.*⁴⁸⁸

9.44 The Court referred to the decision in **Re Eccleston**.⁴⁸⁹ It approved the views of the Queensland Information Commissioner that freedom of information applications should not be determined by a mechanistic application of the **Howard** factors but, rather, should consider, in the particular case, whether “tangible harm” would flow from disclosure of the contents of the documents sought.⁴⁹⁰ The Court took the view that this approach required that claims for exemption based on public interest factors should have a “demonstrated factual basis rather than baldly iterate one or other of the

⁴⁸² **News Corporation Ltd v National Companies and Securities Commission (No. 4)** (1984) 1 FCR 64 at 66, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep1494.html, cited at paragraph [150] of the judgment

⁴⁸³ At paragraph [151] of the judgment

⁴⁸⁴ **Re Howard and Treasurer of the Commonwealth No. A.84/154 Freedom of Information** (1985) 3 AAR 169 at 178, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1940.html>

⁴⁸⁵ At paragraph [153] of the Court’s judgment

⁴⁸⁶ Quoting the words of Kirby P. from **Commissioner of Police v District Court of New South Wales & Anor** [1993] 31 NSWLR 606 at 611 (**Perrin’s case**) at paragraph [154] of the judgment

⁴⁸⁷ At paragraph [154] of the judgment

⁴⁸⁸ *Ibid.*

⁴⁸⁹ See chapter 7

⁴⁹⁰ At paragraph [156] of the judgment, referring to paragraphs [139] - [140] and [150] of the decision in **Re Eccleston**

Howard factors”.⁴⁹¹ Further, the Commissioner was indicating that the public interest test should not be circumscribed.⁴⁹²

9.45 For New South Wales, the Court held that the operation of clause 9(1)(b) should not be constrained by rigid rules. It did not follow that the **Howard** factors should be discarded as guidelines, but their historic context should always be considered and they might be regarded as “empiric conclusions...not determinative guidelines”.⁴⁹³

9.46 The Court rejected the appellant’s argument that the Appeal Panel had substituted an impermissible “tangible harm” test for the public interest balancing exercise. The Appeal Panel did balance those factors, and

- rejected the proposition that the question could be resolved by formulaic recourse to the **Howard** factors; and
- its references to “tangible harm” were intended to refer to the appellant’s obligation to demonstrate, as a factual rather than a theoretical proposition, that disclosure would be contrary to the public interest.⁴⁹⁴

9.47 In the opinion of Hodgson JA., the reference to “tangible harm” was intended by the Appeal Panel to indicate that greater weight would be given to detriment shown to be probable or at least a realistic possibility, than to detriment which is merely a matter of theory or speculative possibility.⁴⁹⁵

9.48 The Court also rejected the appellant’s argument that the Appeal Panel had failed to apply a principle that disclosure of an interim or draft report might mislead the public, who would not know the response of the other party. The Court referred to section 59A of the NSW Act which provided that the possibility that disclosure might mislead the applicant was irrelevant to a consideration of where the public interest lies. In context, this was sufficient, and there was no need to go on and consider whether there was some theoretical possibility that wider disclosure to the public thereafter might mislead.⁴⁹⁶

⁴⁹¹ At paragraph [156] of the judgment

⁴⁹² *Ibid.*

⁴⁹³ **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589 at 597, cited at paragraph [157] of the judgment

⁴⁹⁴ At paragraph [158] of the judgment

⁴⁹⁵ At paragraph [9] of the judgment. There is a question as to whether these observations of Hodgson JA. are consistent with his agreement with the reasons of McColl JA. (see paragraph [2] of the judgment). The judgment of the Court suggests that no weight ought to be given to speculative or theoretical possibilities, whereas in this paragraph Hodgson JA. contemplates that some little weight might be given to such possibilities.

⁴⁹⁶ At paragraph [162] of the judgment. The Court said that the facts of the particular application were decisive in the case of section 59A(b); the fact that the provision refers only to the applicant and not to the public as a whole directs the inquiry, on this view, to the question only of whether the applicant would be misled, a matter on which there could be evidence. Inferentially, the Court may be saying that anything else is theoretical and could not be the subject of evidence. Nevertheless it may be that section 59A(b) could be more clearly expressed in conformity with the judgment if it read “cause the applicant **or any other person** to misinterpret or misunderstand the information” (authors’ emphasis).

- 9.49 The Court also noted an observation made by the Appeal Panel that WorkCover could issue a correcting statement if necessary,⁴⁹⁷ and rejected the appellant's argument that this could never be a relevant consideration.⁴⁹⁸ The Court took the view that the potential of a document to mislead (in the sense described by the Court) must be weighed in the balance, as must the potential to correct any misleading impression.⁴⁹⁹
- 9.50 Since the question of where the public interest lies is a question of fact and degree, the Court rejected an attempt by the appellant to attack the matters the Appeal Panel took into consideration on the public interest; this raised issues of fact, not of law.⁵⁰⁰
- 9.51 This decision of the New South Wales Court of Appeal now stands as one of the most significant decisions of an Australian superior court on issues of the public interest as applicable to the internal working documents and deliberative processes exemptions which, in one form or another, appear in virtually all FOI jurisdictions. Part of its importance lies in the fact that it reconsiders those questions in a twenty-first century context remote from the Crown privilege cases decided in the first seven or so decades of the twentieth century, and does so after almost 25 years' experience of FOI decision-making in Australia. The case stresses the need for demonstrable, tangible effects to be established if detriment to the public interest is to be relied upon by decision-makers. It is fair to say that in some instances the early consideration of the public interest owes much to such ideas or possibilities as may rationally occur to a decision-maker at first instance, or even to an Ombudsman or Information Commissioner upon review. In the view of the authors, the case stands as an authority for the proposition that simply because an effect to the public interest may be **conceived of** does not mean that the effect has been **demonstrated** as a probability or possibility, based on cogent evidence.

District Court of New South Wales

- 9.52 Until 1998, the right of external review under the NSW Act was to the District Court. Very few appeals were pursued as far as the court, but there are several decisions which should be noted.

Wilson v Department of Education⁵⁰¹

The applicant sought access to documents relating to a proposal by the respondent Department to close Castle Cove Infants' School. The applicant was a member of a concerned group who sought to oppose the closure.

The Department refused to provide access to a number of high level communications between Ministers and Department Heads, and relied upon the decision of the Commonwealth AAT in **Re**

⁴⁹⁷ A view earlier expressed by the Queensland Information Commissioner in **Re Coulthart and Princess Alexandra Hospital and Health Service District** [2001] QICmr 6, (2001) 6 QAR 94, <http://www.austlii.edu.au/au/cases/qld/QICmr/2001/6.html>

⁴⁹⁸ At paragraph [167] of the decision

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ District Court of NSW, unreported, Smyth DCJ., 21 December 1989

Howard and Treasurer of the Commonwealth of Australia.⁵⁰² The argument of the Department was summarised by Smyth DCJ.:

*The Department has made it perfectly clear that it does not contend that any particular document within that group is of itself, or does contain, material of a sensitive nature and bases its argument on the claim that it is a class of document which it would be against public interest to disclose...*⁵⁰³

Smyth DCJ. did not accept that a “class” claim could succeed under clause 9 of Schedule 1, the internal working documents exemption. In that regard, Smyth DCJ. said:

*...in my view where such a claim is made under cl 9 the obligation on the court is to consider each such document and to make a value judgment as to whether that particular document is one which would be against the public interest to disclose.*⁵⁰⁴

In the result, Smyth DCJ. held that none of the documents that had been exempted were properly exempted in the public interest and ordered their disclosure. There was a very strong public interest in the public having information about the closure and the factors influencing government deliberations in the relevant respects.

Ainsworth v Department of Gaming and Racing⁵⁰⁵

The applicant sought access to a number of internal working documents of the respondent Department, which was charged with the responsibility of approving the applicant as the holder of some gaming licenses.

The Court identified the public interest, on the one hand, of the applicant having access to the documents (to which access had been refused) on the basis that persons should be aware of the reasons of public officials for decisions made affecting those persons. There was also a public interest in the applicant being able to correct any inaccurate or out of date information.

However, in this case the public interest factors in non-disclosure were stronger. Cooper DCJ. said:

*There is a strong public interest in having clean gaming, liquor and club industries. There is always a very real risk that undesirable elements may infiltrate these industries. If this were to happen, the interests of the public would be adversely affected. The evidence satisfies me that an important means of preventing this infiltration, and of taking action to reverse it once it does happen, is by the obtaining of information which is given and received on the basis of confidentiality.*⁵⁰⁶

The Court also was of the view that the public interest in the applicant checking to see whether records held about him were accurate was lessened by the fact that it was not the Department but the licensing court which would make the decision as to the applicant’s suitability as a licensee, and at that later time, the applicant would be able to lead his own evidence.

⁵⁰² The case and the five “**Howard** factors” are discussed in chapters 6, 7, and 8 and in this chapter at paragraphs 9.45 to 9.50

⁵⁰³ At paragraph [5] of the judgment

⁵⁰⁴ *Ibid.*

⁵⁰⁵ District Court of NSW, unreported, Cooper DCJ., 6 June 1997

⁵⁰⁶ At page 14 of the judgment

Hamilton v Environment Protection Authority⁵⁰⁷

In this decision, another District Court judge rejected exemption on a “class” basis and required that individual consideration be given to each document.

Administrative Decisions Tribunal: Appeal Panel

9.53 The case law in the Administrative Decisions Tribunal, Appeal Panel, are now considered, followed by decisions of the Administrative Decisions Tribunal constituted by a single member.

Cases where the public interest favoured disclosure

Documents concerning a disciplinary inquiry⁵⁰⁸

The respondent to the appeal had originally applied for certain documents concerning a disciplinary inquiry into an incident at a group home where he had been employed. The documents related to his application for workers compensation and investigations into the conduct of the respondent. Originally, the appellant agency refused access to approximately half the pages sought by the respondent. On review by the Tribunal, the Tribunal set aside the decision of the agency in respect of 64 pages and the agency appealed to the Appeal Panel in respect of three documents consisting of 29 pages.

Before the Panel, the exemption in question was clause 9 of Schedule 1 (internal working documents). The Panel pointed out that the Tribunal below had considered matters such as whether a final and operative decision had been made and whether the document revealed the agency’s thought processes as factors going to the public interest analysis. The Panel regarded these matters as ones relevant to be taken into account by the Tribunal when balancing the public interest. The Panel held that the Tribunal had not adopted a blanket opinion that the balance of public interest must always favour disclosure of documents when decision-making has concluded. The Tribunal had said that once a decision had become final or operative, it would “be much more difficult” to establish that disclosure would be contrary to the public interest. The Panel regarded this view as not expressing any opinion on the part of the Tribunal that an agency can not establish a public interest in non-disclosure when decision-making has concluded.

The Tribunal had also properly taken into account the public interest in maintaining the secrecy of fact-finding investigations which did not produce any disciplinary action (as was the case in the present circumstances) and the public interest in an employee knowing how his employer has investigated adverse allegations concerning his personal behaviour, which could be reflected upon the employee’s file. Accordingly, the views of the Tribunal were not affected by error of law.

Documents relating to workers compensation reforms⁵⁰⁹

This was an appeal on the merits from the decision of the Tribunal which had exempted certain documents from disclosure on the grounds of legal professional privilege. The Tribunal had not dealt with the other ground of exemption claimed by the respondent Authority, internal working documents (clause 9). The documents to which access was sought concerned advice given to the respondent Authority by a costs consultant relating to the introduction of a new scale of legal costs

⁵⁰⁷ District Court of NSW, unreported, Ainslie-Wallace J., 5 August 1998

⁵⁰⁸ **Director General, Department of Community Services v Latham** [2000] NSWADTAP 21, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2000/21.html>

⁵⁰⁹ **Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No. 2)** [2005] NSWADTAP 33, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>

for workers compensation matters in New South Wales, a matter in which the Law Society was most interested.

The Appeal Panel regarded the documents as falling clearly within the category of documents that would disclose opinions, advice and recommendations in the course of the decision-making functions of government and therefore within clause 9(1)(a)(i). The real question in respect of this exemption was whether disclosure would be contrary to the public interest.

The Appeal Panel approved the views expressed in an earlier decision by the Tribunal that a public interest consideration in favour of disclosure was “the fulfilment of the democratic objectives of the FOI Act to promote openness, accountability and responsibility of government”.⁵¹⁰

The Appeal Panel regarded such objectives as promoted by transparency of government decision-making processes, even when such transparency involves the revelation of information embarrassing to or critical of a government agency.⁵¹¹ The Appeal Panel referred to a statement of principle in the High Court:

*The traditions and standards of our society dictate a conclusion that, putting to one side times of war and civil unrest, the public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the legislative, executive or judicial organs of government or of the official conduct or fitness for office of those who constitute or staff them...Suppression of such criticism of government and government officials removes an important safeguard of the legitimate claims of individuals to live peacefully and with dignity in an ordered and democratic society. Indeed, if that suppression be institutionalised it constitutes a threat to the very existence of such a society in that it reduces the possibility of peaceful change and removes an essential restraint upon excess or misuse of governmental power.*⁵¹²

The Authority relied on the decision in **Re Howard**⁵¹³ and the Appeal Panel set out the five **Howard** factors for consideration.⁵¹⁴ Effectively, the Authority argued that despite criticism of the **Howard** factors, they remained authoritative. In reply, the Law Society submitted that the mere fact that the communications in this case were at high level (for the purpose of advising the Minister) was not a sufficient basis for exemption in circumstances where the review was being undertaken in co-operation with the Law Society. In addition, the Law Society challenged the authority of **Howard** on this point.

The Appeal Panel gave consideration to the discussion of the decision in **Howard** by the Queensland Information Commissioner in **Eccleston**.⁵¹⁵ The Appeal Panel referred to the criticism in **Eccleston** that the Administrative Appeals Tribunal had made an “ill-advised attempt to formulate a list of five general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest” and went on to refer to the view of the Queensland Information Commissioner that the fact that documents were “high-level” was irrelevant in itself as an indicator that disclosure of the documents might be contrary to the public interest, although it was an indicator to be alert as to the possibility that the documents might

⁵¹⁰ **Simpson v Director-General, Department of Education & Training** [2000] NSWADT 134 at para [84], <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/134.html>

⁵¹¹ At paragraph [61] of the decision

⁵¹² **Nationwide News Pty. Limited v Wills** (1992) 177 CLR 1, per Deane and Toohey JJ., quoted at paragraph [62] of the decision

⁵¹³ **Re Howard and Treasurer of Commonwealth of Australia** (1985) 7 ALD 626, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1940.html>

⁵¹⁴ Refer in particular to the discussion of these factors in Chapter 7

⁵¹⁵ **Re Eccleston and Department of Family Services & Aboriginal & Islander Affairs** (1993) 1 QAR 60, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html>; see the discussion in Chapter 7 of **Eccleston** and its approach to the five **Howard** factors.

require more careful scrutiny for factors that may point to tangible harm which would follow from disclosure of the actual contents of the documents.⁵¹⁶

The Appeal Panel agreed that emphasis should be more on the question of what “tangible harm” would result. The Appeal Panel also went on to refer to the decision of the Commonwealth AAT in **Re Chapman**.⁵¹⁷ The Appeal Panel pointed out that the view of the Tribunal in **Re Chapman** was that Davies J in **Re Howard** had envisaged a flexible approach to the identification of what was contrary to the public interest and that he had qualified his statement of principle by pointing out that the extent to which disclosure of internal working documents would be in the public interest would “more clearly emerge” over time.

The Appeal Panel then expressed its view that:

*The high level at which communications take place can no longer be said to be a determinative or even a highly influential factor in deciding whether it is in the public interest for documents to be disclosed. This is consistent with the object of the Freedom of Information Act to extend, as far as possible, the rights of the public to obtain access to information held by the Government.*⁵¹⁸

The Appeal Panel went on to point out that the policy formulation process had not yet concluded and that there was always a public interest in maintaining the confidentiality of documents when internal deliberations have not been finalised. The Law Society submitted that after passage of the new regulation in early 2003, the 2002 review process was at an end. The Appeal Panel said that the question as to whether deliberations can be regarded as finalised is a question of degree as appeared from certain earlier decisions of the Tribunal. **Tunchon**⁵¹⁹ was a case where access was sought to a report relating to the re-structuring of the Police Service and where the Tribunal considered that since the Commissioner was still involved in making certain decisions, release could seriously impair the decision-making process. In **Simpson**⁵²⁰ the applicant sought access to a draft report relating to a review of rates of pay and conditions of casual teachers. The draft report was never finished as negotiations between the agency and the relevant union broke down. The question of access was being determined about six years after the report was created and the Tribunal in those circumstances pointed out that the material contained in the report had been overtaken by further negotiations and the conclusion of new agreements at the later time. In that case therefore, public interest considerations favoured disclosure.

The Appeal Panel regarded events in the present case as having moved on from 2003 when discussion about reform was very heated, following passage of a regulation and a further review by a retired Supreme Court judge. The parties were now dealing with each other in a positive way. In those circumstances, the Panel held that the exemption had not been made out in the public interest. In so doing, the Panel also rejected another argument of the Authority to the effect that because the Law Society did not have to reveal information or documents concerning its thinking in the review process, there was an “imbalance” if the Authority had to do so and this was a relevant public interest factor. In response to this argument, the Appeal Panel said that it regarded such an imbalance as not being of any significant weight. It was itself a necessary result of a legislative policy of confining the right of access to official documents of the government and not extending such rights to other organisations. The question was always whether some tangible harm might

⁵¹⁶ Quoted in paragraph [67] of the decision

⁵¹⁷ **Re Chapman and Minister for Aboriginal & Torres Strait Islander Affairs** (1996) 43 ALD 139, <http://www.austlii.edu.au/au/cases/cth/aat/unrep6244.html>, referred to in paragraph [69] of the decision

⁵¹⁸ At paragraph [70] of the decision

⁵¹⁹ **Tunchon v Commissioner of Police (New South Wales Police Service)** [2000] NSWADT 73, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/73.html>

⁵²⁰ **Simpson v Director-General, Department of Education & Training** [2000] NSWADT 134, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/134.html>

result to a negotiation process between a government and a non-government party, not the existence of the imbalance.

The Authority also relied on clause 13(a) of Schedule 1 (disclosure founding an action for breach of confidence). There was a clause in the contract between the Authority and the costs consultant requiring the consultant to maintain confidentiality. The Authority submitted that there was an implied term of the contract that draft reports would not be disclosed by the Authority to third parties. The Panel rejected the argument of the Authority, finding no basis to imply an obligation of confidence binding upon the Authority not to disclose the report; that is to say, the circumstances did not import an obligation of confidence in equity and no implied term could be read into the contract. For similar reasons, a claim under clause 13(b) (information given in confidence) was also rejected.

In considering a further argument of the Authority with respect to clause 12 (secrecy provisions) which did not contain a public interest test, the Appeal Panel nevertheless pointed to the decision in **Perrin's Case**⁵²¹ and repeated the statement of Kirby P. to the effect that "the question [in relation to each exemption] is not why the information should be disclosed but why it should be exempted".⁵²² The Panel also referred to the stated objects of the New South Wales Act in section 5 and to the fact that under section 61 the onus was upon the agency to justify a determination. In referring to the views of Kirby P. and the relevant provisions of the Act, the Appeal Panel expressed the opinion that a purposive approach was required to be taken in relation to the application of an exemption, being in this case an application which ensured that the objectives of the FOI Act were maintained, especially in situations where the secrecy provision relied upon did not refer specifically to the kind of information for which the exemption was claimed.⁵²³ **[In the view of the authors, there seems to be no reason why the purposive approach to which the Appeal Panel made reference should not equally apply to other exemption provisions of the legislation.]** The Appeal Panel pointed out that a very broad interpretation such as that advanced by the Authority, which argued that a requirement in a statute that information be kept confidential triggered the exemption, would, as a practical matter, have the effect that the New South Wales Act would cease to apply to many parts of the public service. In the result, the exemption under clause 12 was not made out. The Appeal Panel concluded that the only significant claim had been that made under clause 9 and this had not been accepted by the Panel although some two years earlier there would have been stronger grounds for considering that the exemption applied.

Cases where the public interest did not favour disclosure

Documents relating to an alleged corrupt selection process in a public school⁵²⁴

In this appeal, the Department appealed against a decision of the Tribunal which had set aside (with one exception) the initial decision of the Department to refuse to release to the applicant the whole of a particular investigative report relating to allegations of corruption in a merit selection process in a public school. The respondent to the appeal (who had been the FOI applicant) was a member of a panel determining selection of a principal at a New South Wales country primary school and had raised certain allegations to the Department. The report was prepared as a result of those investigations. One of the parties joined to the appeal was an unsuccessful candidate for the position of principal.

⁵²¹ **Commissioner for Police v District Court of NSW (Perrin's case)** [1993] 31 NSWLR 606. See paragraphs 9.20 to 9.23 and 9.33 to 9.36

⁵²² At paragraph [138] of the decision

⁵²³ At paragraph [137] of the decision

⁵²⁴ **Director General, Department of Education & Training v Mullett & Anor** [2002] NSWADTAP 13, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2002/13.html>

The Department, in the original decision, had relied on the exemptions in clause 13(b) (confidential matter), clause 16 (operations of agencies), and clause 6 (personal affairs). Each of these exemptions raised the public interest for consideration.

The Appeal Panel made certain findings with respect to each of the exemptions claimed. For example, it applied the decision in **Perrin's Case**⁵²⁵ and found that documents involving disclosure of the identities of members of the interview panel did not involve the "personal affairs" of those persons, but rather the official business of an agency. In respect of the public interest, the Appeal Panel said that this concept could include reference to such matters as:

- the benefit that disclosure would have on the local community;
- the restoration of harmony; and
- with caution, the particular interests of the applicant in being granted access.

The Panel regarded the Tribunal's analysis of the public interest as very limited and not involving a systematic evaluation of any public interest factors which could be said to make disclosure contrary to the public interest. The reasons given by the Tribunal were not adequate in the view of the Appeal Panel. In particular, the Tribunal did not adequately evaluate the arguments pertaining to good government made by the Department in assessing where the balance of the public interest lay. These arguments of the Department related primarily to the submitted strict confidentiality in which such selection processes ought to occur where allegations of wrongdoing or complaints were in issue. Accordingly, some of the grounds of appeal of the Department succeeded due to the inadequacy of the formulation of the public interest analysis by the Tribunal at first instance. These errors were errors of law.

Merits review of decision concerning selection process documents⁵²⁶

This was a review on the merits by the Appeal Panel following the above decision reviewing the Tribunal decision for error of law.

In respect of the exemption under clause 13(b), the Appeal Panel accepted the evidence from the Department that statements were provided to investigations of this type in confidence and that they were only released for the purpose of legal proceedings. Disclosure would seriously prejudice the prospect of future co-operation. The Panel commented on the public interest balancing exercise in the following terms:

The balancing exercise in which the Tribunal is asked to engage must commence by giving great weight to the public interest reflected in the passage of Freedom of Information legislation – the advancement of the democratic objective by recognising the right of the citizen to be informed (through an access to documents regime) about the basis for government actions, conduct, policies and decisions. Access also allows citizens to check whether governments have conducted themselves properly in relation to particular conduct or in formulating and implementing wider ranging policies.

The community's interests are also served by government having processes which examine and investigate thoroughly allegations that its officials have broken the law or not adhered to proper standards. Government has many ways of investigating allegations of official misconduct. They

⁵²⁵ **Commissioner for Police v District Court of NSW (Perrin's case)** [1993] 31 NSWLR 606; see paragraphs 9.20 to 9.23 and 9.33 to 9.36

⁵²⁶ **Director General, Department of Education and Training v Mullett and Randazzo (No. 2)** [2002] NSWADTAP 29, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2002/29.html>

*range from police investigation to special commissions, or they may be undertaken internally (as here) or by an external agency such as the Ombudsman.*⁵²⁷

In addition, the Panel considered that there was a public interest in according a form of procedural fairness to a person in the position of the third party who had been the subject of comments by the District Superintendent (which comments had not been revealed to him).

Against those factors, however, there were public interests in the need to protect persons interviewed and to preserve confidentiality in the investigative phase of the process (to be distinguished from a later phase where, for example, some charge might be levelled). In the circumstances, the Panel considered that the public interest factors opposing disclosure outweighed those favouring disclosure.

When considering the exemption under clause 16 (operation of agencies), the Panel noted (as it had in the original decision, see above) that while the text of the public interest test was the same in relation to both clause 13 and clause 16, it did not follow that the one set of considerations applied equally to each head of claim. The key exemption under clause 16 was category (iii), where disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel. The Panel noted that the expression "substantial adverse effect" involves a higher test than, for example, mere prejudice. In this case, the Panel considered that release of the confidential statements made by members of a selection panel could have a substantial adverse effect on the conduct of future selection panels, which were surrounded by strict requirements of confidence.

Where, as was the case here, the internal inquiry did not find that any form of action needed to be taken, the public interest also favoured non-disclosure. There was a strong public interest in preserving good personnel management practices and protection of confidentiality was only one important aspect of such protection. The Panel referred to the fact that confidential consultation with the District Superintendent was routinely undertaken by selection panels for principal positions and that the comments of the Superintendent were not necessarily conveyed to an applicant. The Panel also made the point that the exercise of the public interest discretion in the context of a single case will often not be suited to dealing with arguments relevant to the soundness of established administrative practice. Here there was no strong public interest favouring disclosure since no corrupt conduct was found and no further action was to be undertaken.

Document containing a list of grievances⁵²⁸

This was a decision of the Appeal Panel concerning a single document compiled by certain employees in the Revenue Protection Unit of the appellant Authority at Wyong containing a list of grievances about the conduct of two of their colleagues. One of those colleagues was the applicant for access and the respondent to the appeal. The Authority relied on clause 6 (personal affairs), clause 13(b) (information provided in confidence) and clause 16 (performance of agency's functions) in refusing access to the document.

The Tribunal found against the Authority and decided that the document should be released on the basis that the relevant harm tests were not made out for clause 13(b) and clause 16 and that the document did not contain personal affairs information for the purposes of clause 6. The Tribunal, accordingly, did not need to consider the public interest. The Authority then appealed to the Panel against the requirement of disclosure of the report.

⁵²⁷ At paragraphs [55] and [56] of the decision

⁵²⁸ **Chief Executive Officer, State Rail Authority v Woods** [2003] NSWADTAP 25, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2003/25.html>

The Panel found that the approach taken by the Tribunal resulted in a number of errors of law. An important error was that the Tribunal took the view that natural justice was required to be given to the applicant at an early stage. The submission of the Authority, accepted by the Panel, was that the policy properly construed only provided for the grievance to be disclosed to the subject of the grievance at a later time when the Authority had determined to take action in relation to the substance of the complaint; that is, at the disciplinary phase rather than the investigative phase. In the circumstances, the decision of the Panel was to set aside the decision of the Tribunal below.

Review of the merits of release of the grievance report⁵²⁹

This was the decision on the merits following the setting aside of the decision of the Tribunal in the above case and the grant of leave by the Tribunal to extend the appeal to the merits.

The Panel therefore determined the question of access to the report document. For the purposes of clause 13(b), the Panel noted the continuing desire of the persons involved in the preparation of the report to maintain confidentiality. The Panel thought that there would be an undermining of confidence in the confidentiality assurances given by management should disclosure be ordered and that it would be contrary to the public interest in maintenance of personnel management practices of the agency for the document to be released.

While there was some public interest in procedural fairness being provided to Mr. Woods, that was lessened in the current circumstances since no further action was proposed to be taken against Mr. Woods. The opinions expressed by the co-workers also fell within the personal affairs exemption in clause 6, being genuinely held views about a colleague at the same level and not, for example, the official views of a manager commenting on a subordinate. It would be unreasonable in the circumstances not to abide by the wishes of the petitioners for privacy. If disclosure were to be ordered, there would be likely to be further disputation between the respondent and the Authority in a situation which had been a volatile industrial one and which remained so even though some of the signatories had left the Wyong area and some had left the Authority altogether.

In the result, the decision of the Panel was that the document not be released.

List of members of a political party⁵³⁰

The FOI applicant had been an applicant for registration of a political party in New South Wales and submitted a list of more than 750 members (the minimum required for registration of a party) to the Electoral Commissioner. The Commissioner wrote to a random selection of persons so as to establish that they were proposed party members. The claim for registration was rejected when the Commissioner received an insufficient number of positive responses. The applicant subsequently sought access to the list of names of the persons to whom the Electoral Commissioner had written.

The Appeal Panel agreed to hear the appeal by way of merits review. The Tribunal had set aside the decision of the Commissioner not to release the document, the Commissioner having relied on clause 16 (operation of agencies).

The Panel considered that disclosure of the identity of those selected in the sample could reasonably be expected to prejudice the effectiveness of the test method under clause 16(a)(i), being a confidential sample survey of attitudes. The Panel took the view that disclosure could result in prejudice in circumstances where an applicant for registration might seek to follow up those persons and those persons might feel pressured to give a positive response as to whether or not they

⁵²⁹ **Chief Executive Officer, State Rail Authority v Woods (No. 2)** [2003] NSWADTAP 39, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2003/39.html>

⁵³⁰ **Electoral Commissioner, State Electoral Officer v McCabe** [2003] NSWADTAP 28, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2003/28.html>

were bona fide members of the party in question. On the question of the public interest, the FOI applicant argued that there was a public interest in ensuring that organisations such as his should not be frustrated unduly in their attempts to gain registration and that the democratic objective was served by disclosure of the names of the people surveyed. On the other hand, the Electoral Commissioner argued that the strict confidentiality of the processes adopted by him were in the public interest as conducing to the orderly conduct of elections, for example, the need to contain the phenomenon of a handful of persons registering as a political party which, if repeated, could lead to enormous ballot papers particularly for election to the New South Wales Upper House. In the circumstances, the Panel preferred the views of the Electoral Commissioner and determined that the public interest did not lie in disclosure.

Decisions of the Administrative Decisions Tribunal

Decisions where the public interest in disclosure outweighed the harm likely to arise from disclosure

Documents concerning an allegation of animal cruelty⁵³¹

In this case, the applicant sought access to two documents which would reveal the address of a neighbour who had made a complaint about him concerning possible cruelty to animals in the applicant's care. It was accepted that the complaint, upon investigation, turned out to be unfounded and frivolous. Access was refused by the respondent to all the documents covered by the request on the basis of the exemption in clause 4 of Schedule 1 (law enforcement). The applicant sought review by the Tribunal of the decision.

The Tribunal found that the documents exempted contained matter which was exempt pursuant to clause 4, consisting of the name, address and telephone number of the informant to the Society. The documents were within clause 4(1)(b) inasmuch as disclosure would enable the existence or identity of a confidential source of information in relation to the enforcement or administration of the law to be ascertained. This was so even though the information received by the Society was in all probability false. The Tribunal referred to an earlier decision of the Federal Court which emphasised that confidentiality given to informers might operate to the advantage of the untruthful or malicious but nevertheless immunity might be necessary in the public interest.⁵³²

The Tribunal was required then to consider the public interest test in clause 4(2)(b). In doing so, the Tribunal said:

*The public interest test set out in this clause of the FOI Act is different in terms to public interest tests contained in other provisions of the FOI Act – see for example, the tests contained in clauses 5, 9 and 13 of Schedule 1. The test is specific to documents affecting law enforcement and public safety in clause 4. It creates a presumption that documents covered by this section are to be considered exempt **unless** the disclosure would be in the public interest. Such a presumption runs counter to other public interest tests contained in the Act which suggest that documents are **not** exempt unless their disclosure is considered to be in the public interest.*⁵³³

⁵³¹ **Taylor v Chief Inspector, RSPCA** [1999] NSWADT 23, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/1999/23.html>

⁵³² **McKenzie v Department of Social Security** (1986) 65 ALR 645, a decision of Muirhead J., http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep2261.html, referred to in paragraph [39] of the decision

⁵³³ At paragraph [44] of the decision

The authors note that there is a difficulty with the phrasing in the final sentence of this passage from the decision. In referring to the public interest test in clauses such as 5, 9 and 13, the Tribunal states that, under those clauses, documents are not exempt unless their disclosure is considered to be in the public interest. It would be preferable to refer to those clauses as stating that documents are exempt if their disclosure is contrary to the public interest, language which follows the language of the provisions themselves.

The Tribunal considered that those parts of the documents should be released to the applicant which related to an unjustified criminal complaint against him and it was in the applicant's interest and in the public interest to view the details of such a complaint. However, those parts of the documents which might have disclosed the identity of the complainant (a confidential source) should be withheld.

Documents identifying name and address of a complainant ⁵³⁴

This was a dispute, ultimately before the Tribunal, concerning two documents from which the name and address of a complainant to the respondent Council had been deleted. The complaint related to proposed development of the property owned by the applicant in the Council district. Exemption was claimed by the Council under clause 13(b) (information given in confidence) and clause 6 (personal affairs) of Schedule 1 to the Act.

The Tribunal found that in the context of a small community and where a meeting had been held to voice the concern of residents, that the name and address of the complainant did concern that person's personal affairs. This was not a case where the name of the person was associated with their employment or the performance of a public duty, unlike **Perrin's Case**.⁵³⁵

The Tribunal considered the public interest factors both in relation to the question of whether disclosure would be unreasonable under clause 6 and directly under the test contained in clause 13. The Tribunal accepted that there might be the relevant prejudice to Council in that complainants would be reluctant to approach Council on a confidential basis if disclosure were ordered. However, as a matter of public interest, the Tribunal took the view that full and frank disclosure of details of complaints made to Council might be said to discourage vexatious complaints and to facilitate the resolution of genuine complaints by permitting Council to investigate the complaint properly and to bring parties together openly to resolve it.

Against that, there was no evidence of any risk to the safety of persons who had complained or that they would be harassed by the applicant. The Tribunal regarded information provided to Council in the form of general complaints to be in a different category from that provided in the context of a law enforcement agency or in the context of other regulatory functions of Council. A complaint on its own did not affect the determination of any rights or entitlements, nor was it relevant to any decision of Council which was pending. Against that, the applicant who was the subject of the complaint, might reasonably be concerned that an unfavourable impression left with Council might influence decisions of Council in relation to that person's future rights or entitlements. In those circumstances, the Tribunal was of the view that disclosure of the name and address of the complainant was not, on balance, contrary to the public interest. For the same reasons, the Tribunal ruled that disclosure should be ordered as not being unreasonable in the circumstances. It was not unreasonable for the applicant to seek disclosure of the name and address of the complainant so as to better understand the complaint and to be able to respond to it. This outweighed the concern of the complainant about being identified.

⁵³⁴ **Gilling v General Manager, Hawkesbury Shire Council** [1999] NSWADT 94, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/1999/94.html>

⁵³⁵ **Commissioner for Police v District Court of NSW (Perrin's case)** [1993] 31 NSWLR 606; see paragraphs 9.20 to 9.23 and 9.33 to 9.36

Report concerning an investigation into the examination of a thesis ⁵³⁶

The applicant for access had been a candidate for the Doctorate of Philosophy at the respondent university. His thesis was initially examined in 1983 and rejected in 1990. After series of enquiries, the University Council resolved to award the doctorate to the applicant in 1997. Subsequently, the applicant sought access under the Act to a number of documents including a two page report provided to the University Council which concerned an investigation into some of the circumstances associated with the examination of the thesis. The university refused access to parts of the report, relying upon clause 9 (internal working documents) and clause 13(b) (information given in confidence).

With respect to the exemption under clause 13(b), the Tribunal did not find that disclosure would have an adverse effect on the future supply of such information. The Tribunal followed the approach taken by the Queensland Information Commissioner to the effect that where persons are under an obligation to continue to supply confidential information, then disclosure can not reasonably be expected to prejudice the future supply of such information.⁵³⁷ The Tribunal found that both the employees of the university who had been required to comment on the examination of the thesis and the author of the report would continue to provide the information as employees of the university. Accordingly, there was no need to consider the public interest for the purposes of clause 13(b).

With respect to clause 9, the Tribunal stated that in **Eccleston**⁵³⁸ “the Queensland Information Commissioner undertook a comprehensive examination of the meaning of ‘public interest’ in relation to internal working documents.”⁵³⁹ The Tribunal agreed with the views in **Eccleston** generally and in particular agreed with the view that:

*Unless the exemption provisions, and s.43(1) in particular, (the equivalent of Cl 9 of the NSW FOI Act) are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged.*⁵⁴⁰

The Tribunal went on to quote from the speech of the former Deputy Premier of New South Wales when introducing the FOI Bill to the Parliament in June 1988:

*This Bill is one of the most important to come before this House because it will enshrine and protect the three basic principles of democratic government, namely, openness, accountability and responsibility... It has become commonplace to remark upon the degree of apathy and cynicism which the typical citizen feels about the democratic process... This feeling of powerlessness stems from the fact electors know that many of the decisions which vitally affect their lives are made by, or on advice from, anonymous public officials and are frequently based on information which is not available to the public. The government is committed to remedying this situation.*⁵⁴¹

⁵³⁶ **Bennett v Vice Chancellor, University of New England** [2000] NSWADT 8, <http://www.lawlink.nsw.gov.au/adtjudgments/2000nswadt.nsf/00000000000000000000000000000000/ed49e93fcbaccab8ca25688d001afbbf?OpenDocument>

⁵³⁷ **Re B and Brisbane North Regional Health Authority** (1994) 1 QAR 279, <http://www.austlii.edu.au/au/cases/qld/QICmr/1994/1.html> at paragraph [161]

⁵³⁸ (1993) 1 QAR 60, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html>; see chapter 7

⁵³⁹ At paragraph [47] of the decision

⁵⁴⁰ At paragraph [48] of the decision, citing the views of the Queensland Information Commissioner from paragraph [75] of **Eccleston** (words in the parentheses added by the Tribunal)

⁵⁴¹ Legislative Assembly Debates, New South Wales, 2 June 1988, page 1399, quoted at paragraph [50] of the decision

The Tribunal went on to express disagreement with the views of the Administrative Appeals Tribunal in a case where the Commonwealth Tribunal had sought to compare a debate within a University Council with a debate within Cabinet.⁵⁴² The NSW Tribunal was of the view that if the deliberations of the University Council were to be regarded as similar to those of Cabinet, then it might have been expected that this could have been spelt out clearly in the Act.

The Tribunal went on to criticise the concept of there being a public interest in protecting the “integrity and viability of the decision-making process”.⁵⁴³ The Tribunal agreed with criticism of this concept made in a subsequent AAT decision in that the concept was criticised as too vague and amorphous to be considered a legitimate public interest.⁵⁴⁴

The Tribunal found that there was a public interest in fair treatment being accorded to the applicant in a case where the university awarded him a Doctorate 14 years after it was submitted and seven years after it had been initially rejected. The Tribunal supported the statement of opinion in **Eccleston**,⁵⁴⁵ which had in turn accepted the principle that “the public interest necessarily comprehends an element of justice to the individual.”⁵⁴⁶

The Tribunal also was required to consider an argument from the university concerning a possible adverse effect on “candour and frankness”. The Tribunal shared the view of the Queensland Information Commissioner in **Eccleston**⁵⁴⁷ where the Queensland Information Commissioner said:

*...the ‘candour and frankness’ argument has been viewed with a healthy scepticism by most presiding members of the Commonwealth AAT. Indeed some have made remarks which suggest that inhibition of candour and frankness is unlikely ever to suffice as a ground of injury to the public interest that would justify non-disclosure of documents under FOI legislation....*⁵⁴⁸

There was no clear, specific or credible evidence that the substance or quality of future advice would suffer by threat of disclosure of the report in this case. Embarrassment as a factor was not relevant under the New South Wales Act (section 59A). The suggestion that candour and frankness would be inhibited was no more than assertion and was not demonstrated.

The Tribunal also rejected an argument that the report may not have disclosed the final views of the Council. The Tribunal did not regard any person likely to read the report as coming to that conclusion since the report disclosed who the author was and that he was making recommendations to Council. Nor was this a case where drafts of correspondence were sought to be obtained in respect of which it had previously been held that the integrity of the decision-making process might be affected.⁵⁴⁹

The Tribunal went on to point out that this was not a case where the University Council was being asked to reveal its “thought processes” in coming to a decision; rather, all that they were being requested to do was to provide access to a document representing the views of one Council

⁵⁴² **Re Burns and Australian National University (No. 2)** (1985) 7 ALD 425

⁵⁴³ **Re Murtagh and Commissioner of Taxation** (1984) 6 ALD 112 at 123, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1536.html>

⁵⁴⁴ See paragraphs [53] – [54] of the decision, the Tribunal citing the criticism by Deputy President Todd in **Re Dillon and Department of the Treasury** (1986) 4 AAR 320 at 330

⁵⁴⁵ (1993) 1 QAR 60, www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html; see chapter 7

⁵⁴⁶ **Attorney-General (NSW) v Quin** (1990) 170 CLR 1, <http://www.austlii.edu.au/au/cases/cth/HCA/1990/21.html>

⁵⁴⁷ (1993) 1 QAR 60, www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html; see chapter 7

⁵⁴⁸ At paragraph [62] of the decision

⁵⁴⁹ See paragraph [67] of the decision where the Tribunal cites **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589

member. The Tribunal considered that disclosure of this document could not affect the integrity of the decision-making process in any event, especially where the decision had now been made. If the report was still under consideration, there would have been a stronger argument for non-disclosure.⁵⁵⁰

The Tribunal could find no public interest consequences of relevance. The opinions and recommendations contained in the report did not reflect favourably on the processes of the university, but embarrassment was not a relevant factor. In the circumstances, the Tribunal could find no genuine public interest arguments to outweigh the public interest in disclosure of the relevant passages of the report.

Licences permitting animal cullings⁵⁵¹

The applicant sought access to certain documents identifying a number of addresses to which licences issued by the respondent agency for the culling of flying foxes related. The agency relied on the exemptions in clause 6(1) (personal affairs) and clause 7(1)(c) (business affairs) in refusing the request. The applicant did not seek the names and addresses of the licensees but rather the address to which the licence related, although on the evidence, this did correspond with the actual home address of the licence applicant.

This particular fact meant that, in the opinion of the Tribunal, the release of the addresses would amount to the disclosure of information concerning personal affairs, since although this was a “recurring grey area”⁵⁵² the home address in this case did amount to the personal affairs of the individuals.

In considering whether disclosure would be unreasonable for the purposes of clause 6, the Tribunal did not favour the application of a “leaning” approach in favour of disclosure under this particular exemption. The Tribunal pointed out that the principle of openness, which was the very reason for the existence of the Act was required by the Act to be **subject to** the specific exemptions set out in clause 6(1) in appropriate cases (Tribunal’s emphasis).

The Tribunal did not regard fears expressed by the respondent and orchardists as well founded in relation to the particular applicant, finding that there was no real reason to fear that applicant. The information was proposed to be used for research related purposes, the licences had expired and the information was old and primarily useful only for research purposes. While there was a public interest in maintaining an individual’s privacy, that interest when balanced with the particular motives of the applicant here, and other considerations in favour of disclosure, meant that it was not unreasonable for the applicant to receive the disputed information. Factors in favour of disclosure included the following:

- the information was licence information in respect of a matter of public regulation of protected fauna;
- there was some objective scientific merit in the research proposed;
- the applicant, as a member of the public, had an interest in knowing details concerning the licensing scheme;

⁵⁵⁰ At paragraph [72] of the decision, the Tribunal citing **Re Lianos** (1985) 2 AAR 503

⁵⁵¹ **Humane Society International Inc. v National Parks & Wildlife Service & Others** [2000] NSWADT 133, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/133.html>

⁵⁵² As was said by the Queensland Information Commissioner in **Re Stewart and Department of Transport** (1993) 1 QAR 227 at 259, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/6.html>

- public release of such or similar government information was not unprecedented and in some cases public registers in relation to threatened species had been set up by government.

It should be noted that the Tribunal did take into account the motive in this respect of the applicant in seeking access on the basis that in some cases if the motive was simply curiosity, then disclosure might be considered unreasonable.⁵⁵³

In respect of the business affairs exemption, the respondent agency had failed to make a case for the application of that exemption.

Draft report concerning casual teachers⁵⁵⁴

The applicant sought access to a draft report prepared in 1994 by an officer of the respondent agency concerning the pay, conditions and entitlements of casual teachers. The report had never been published and access was refused both initially and upon internal review by the agency. The agency relied on the exemptions in clause 9 (internal working documents) and clause 16(a)(v) (substantial adverse effect on industrial relations).

The Ombudsman at first considered the matter and expressed a preliminary view that clause 9 did not apply to exempt the report. Subsequently, the Ombudsman also commenced an investigation but that investigation was discontinued, permitting an application to be made to the Tribunal.

The draft report had been prepared in consultation between agency representatives and officers of the New South Wales Teachers Federation. No agreement was reached in relation to the report and the options canvassed in the draft report were never adopted as the official view of either the agency or the Federation. The meetings and discussions were, according to the evidence, held in confidence and on a “without prejudice” basis. Negotiations between the parties simply broke down.

The agency argued that to release preliminary and incomplete opinions and recommendations which were not final positions of the agency would adversely affect the ability of the agency to negotiate and would undermine confidentiality of negotiations relating to industrial matters. Current industrial relations negotiations would be hindered by public disclosure of internal opinions and recommendations in respect of a matter which remained sensitive, the employment and conditions of casual teachers. The applicant submitted that the draft report was over six years old and had never been finalised. Moreover, he stated that the draft report had had no influence on the policy of the agency and that refusal to release the draft might be indicative of a paternalist attitude, an intention to stifle legitimate debate, to avoid justifiable criticism or protect the agency and the Minister from charges of incompetence.

In respect of the harm test of “substantial adverse effect”, the Tribunal summarised the legal position as follows:

- the effect must be “sufficiently serious to cause concern to a properly informed reasonable person”,⁵⁵⁵

⁵⁵³ **Colakovski v Australian Telecommunications Corporation** (1991) 29 FCR 429 at 441, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep4736.html; **Gilling v General Manager, Hawkesbury Shire Council** [1999] NSWADT 94, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/1999/94.html>; **Re Targridge Pty. Limited and Road Traffic Authority** (1988) 2 VAR 604

⁵⁵⁴ **Simpson v Director-General, Department of Education & Training** [2000] NSWADT 134, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/134.html>

⁵⁵⁵ **Re James and Australian National University** (1984) 2 AAR 327 at 341

- the effect must be “real and of substance and not insubstantial or nominal”⁵⁵⁶

The Tribunal rejected the submissions that disclosure would prejudice the ability of the agency to negotiate. Both the agency and the Federation were aware that the document did not represent the final views of either party and it was quite unclear how release of tentative views would affect the ability of the agency to negotiate. The Tribunal also rejected an argument that the “without prejudice” and confidential nature of the discussions meant that disclosure would have the result that officers of the agency or the Federation would be reluctant or unwilling to participate in such discussions in the future. The report was a draft, the views expressed were tentative and it would be highly unlikely that the Federation or any other person or group could use the report to weaken the bargaining position of the agency.

On the clause 9 exemption, the Tribunal held that the contents of the draft report met the description of deliberations recorded in the course of a decision-making function of the agency and Minister. The final question was that of the balance of the public interest. The Tribunal pointed to the public interest considerations in favour of disclosure which related to the fulfilment of the democratic objectives of the Act to promote openness, accountability and responsibility. In this regard, the Tribunal adopted the remarks of the Queensland Information Commissioner in **Eccleston**⁵⁵⁷ that:

...citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them... The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.

The Tribunal regarded **Eccleston** as a decision in which the Queensland Information Commissioner “undertook a comprehensive examination of the meaning of ‘public interest’ in relation to internal working documents.”⁵⁵⁸

The agency also relied on a “frankness and candour” argument, being the third of the **Howard** factors.⁵⁵⁹ In this case, the Tribunal pointed out that the negotiations with respect to casual teachers had progressed considerably since 1994. The contents of the draft report did not represent either the previous or current negotiating position of either party. Even if it did represent some thinking back in 1994, that thinking had long been superseded by further negotiations in the pursuit of award applications in the Industrial Relations Commission. In those circumstances, the Tribunal found that the contents of the report were not in any sense part of the agency’s current “thinking processes” and that there were no public interest considerations against disclosure which outweighed the fundamental public interest factors in favour of disclosure.

Internal memorandum of a corporation⁵⁶⁰

The applicant sought, before the Tribunal, access to a single document, being an internal memorandum of the telecommunications company, Optus, which recorded information about her as a mobile telephone account holder of Optus. The document dealt with a disputed amount for a telephone account and also allegations made by the applicant concerning alleged instances of telephone interception by the police of her mobile telephone. The respondent Service exempted this

⁵⁵⁶ **Ascic v Australian Federal Police** (1986) 11 ALN N184, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2372.html>

⁵⁵⁷ See chapter 7

⁵⁵⁸ At paragraph [84] of the decision of the Tribunal

⁵⁵⁹ See the discussion of the **Howard** factors in **Eccleston**, in chapter 7

⁵⁶⁰ **H v Commissioner of Police, New South Wales Police Service** [2001] NSWADT 202, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2001/202.html>

document under clause 13(b) (information given in confidence) and clause 7(1)(c) (commercial information).

While the Tribunal was prepared to accept that the document would disclose commercial information of Optus, it did not find that disclosure of the memorandum could reasonably be expected to have an unreasonable adverse effect on the business affairs of Optus or prejudice the future supply of such information. Indeed, the document had previously been tendered by Optus in an earlier case in the Fair Trading Tribunal.

The Tribunal was prepared to assume (without deciding) that the memorandum was obtained in confidence and that its disclosure might reasonably be expected to prejudice the future supply of information to the respondent agency. However, the Tribunal was not satisfied that it would be contrary to the public interest to withhold the document in the particular and unusual circumstances of the case. The document had already come into the hands once of the applicant before the Fair Trading Tribunal and the applicant had become aware of further details relating to creation of the document for the current proceedings. There was also a public interest in disclosure of the document since it had been prepared in unusual circumstances where Optus employees had held discussions with the police and had made assumptions that the applicant was somehow known to police in an adverse way, and such information was used to report adverse conclusions about the applicant in the disputed document. In those circumstances, the Tribunal considered that disclosure would not be contrary to the public interest.

Tape recording of a council meeting⁵⁶¹

The applicant made various requests under the FOI Act. This decision dealt relevantly with a tape recording of a council meeting which had been open to the public and to which the applicant sought access. The applicant only sought a copy of the tape recording from the commencement of the meeting up to the end of item 2, which concerned Berowra Valley Bushland Park. The respondent Council provided access to part of the contents of the tape requested but refused access to other parts on the basis of the exemption in clause 9 (internal working documents). The part withheld from the applicant contained oral submissions made by other members of the public and discussions and debate between Council members preceding resolutions in respect of agenda item 2. The Council also referred in its reasons to possible breaches of the **Privacy & Personal Information Protection Act 1998 (NSW)** (“**Privacy Act**”).

Upon review, the Tribunal took the view that as a matter of law, the **Privacy Act** did not affect the operation of the FOI Act: section 5(1) **Privacy Act**. In dealing with the related argument of Council that the tape recording contained personal information about participants at the meeting, the Tribunal found that the tape recording did not contain personal information. The persons addressing Council were not representing their own interests but the interests of the community group of which they were a member. The Council had not, in effect, applied the exemption in clause 6 of the FOI Act and in particular had not consulted with the third parties as section 31 of that Act would require.

The Tribunal found, as a matter of fact, that disclosure of the tape recording would disclose “deliberations” and “recommendations” that were made for the purpose of Council’s decision-making functions in regard to agenda item 2. The tape recording therefore met the description in clause 9 of an internal working document. However, the Tribunal noted that clause 9 had to be applied in a manner which gave appropriate weight to the public interest objects sought to be achieved by the FOI Act.⁵⁶² The Tribunal went on to apply the reasoning in **Tunchon**⁵⁶³ to the

⁵⁶¹ **Waite v General Manager, Hornsby Shire Council** [2004] NSWADT 93, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/93.html>

⁵⁶² Applying the views of the Deputy President in **Bennett v Vice Chancellor, University of New England** [2000] NSWADT 8,

effect that clause 9 must be considered in the context in which the internal working document was created and the extent to which retaining secrecy for the document is necessary for the proper administration of government in that particular decision-making process.

In this case, the tape recording was a recording of a public meeting of Council, an elected body where the participants at the meeting knew it was being recorded. The recording was meant to keep accurate minutes of the meeting so that the exact terms of what was or was not resolved could be established. These factors alone led the Tribunal to consider that the public interest in favour of disclosure outweighed the public interest in non-disclosure. The meeting was a public meeting and reflected the public interest in the transparency of decision-making by an elected body. It could not be said that any decision-making process would be jeopardised as members of the public were invited to attend and address the Council.

List of clubs and hotels⁵⁶⁴

This was a complicated application. However, ultimately before the Tribunal the applicant sought access only to one document held by the respondent Department, a list of the top 200 hotels and clubs in New South Wales by revenue. The respondent Department relied on the exemptions in clauses 4(1)(c) (danger to life or physical safety) and 7(1)(c) (ii) (business affairs) to exempt the document.

The Tribunal did not accept that there was any real prospect of danger to life or physical safety of any person at a hotel or club which would occur by release. It would be apparent to any potential robber that clubs and hotels were businesses through which much cash flowed and criminals would not be persuaded as to which clubs to rob by a top 200 list.

With respect to the business affairs exemption, the information to be disclosed was very limited and the Tribunal was not satisfied that disclosure could reasonably be expected to have an unreasonable adverse effect on the business, commercial or financial affairs of the hotels on the list. The Tribunal commented only briefly on the public interest as it did not formally have to consider that question. The Tribunal noted that suppression of information about hotels and profits made from gambling would mean that there could be no informed and vigorous debate about the impact of the government's policy regarding poker machines in hotels. This was a significant public interest consideration which would have been relevant if that issue had been determinative of the application.

Documents concerning valuation and sale of markets⁵⁶⁵

This was a wide-ranging request for documents concerning the valuation and sale of the Flemington Markets. A number of documents were released while others were exempted under various exemption provisions, including clause 10 (legal professional privilege), clause 7 (business affairs), clause 1 (Cabinet documents), clause 9 (internal working documents) and clause 2 (Executive Council documents).

<http://www.lawlink.nsw.gov.au/adtjudgments/2000nswadt.nsf/00000000000000000000000000000000/ed49e93fcbaccab8ca25688d001afbbf?OpenDocument> which in turn had applied the views of the Queensland Information Commissioner in **Re Eccleston** (see chapter 7)

⁵⁶³ **Tunchon v Commissioner of Police, New South Wales Police Service** [2000] NSWADT 73, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/73.html>

⁵⁶⁴ **Bissett v Director General, NSW Department of Gaming & Racing** [2004] NSWADT 160, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/160.html>

⁵⁶⁵ **Cianfrano v Director-General, Premier's Department NSW & Anor** [2004] NSWADT 255, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/255.html>

The Tribunal considered certain documents only under the clause 9 exemption. The Tribunal applied the views in **Tunchon**⁵⁶⁶ to the effect that the focus should be on the decision-making context of the particular document without any presumption as to secrecy or openness with respect to internal working documents. The applicant argued that there was a public interest in recognising the commercial sensitivity of the documents. Evidence was also given that it was in the public interest that the deliberations and consultations contained in the documents, which were undertaken at a senior officer level, should be allowed to occur in an uninhibited fashion so that the government can achieve the best outcome for the public. While the Tribunal accepted that this would be the case where deliberations and consultations were ongoing, this was a case where the transaction had been completed more than two years earlier. On the same basis, the Tribunal found it difficult to see how the commercial sensitivity could at this time outweigh the public interest in accountability. There was no evidence that there would be prejudice to the decision-making process of government in major commercial transactions or in any other way.

Accordingly, a number of the documents were held not exempt under clause 9.

Reports concerning allegations of scientific fraud⁵⁶⁷

The applicant sought access to a number of reports which had been made concerning allegations made against a university professor of mismanagement, scientific misconduct, scientific fraud and workplace bullying. Two of the reports were provided to the applicant but the university declined to provide the other reports, relying on a variety of exemption provisions of the FOI Act, including clause 20(d) (protected disclosures), clause 13(b) (information given in confidence), clause 16 (adverse effect on industrial relations) and clause 9 (internal working documents).

The Tribunal considered the public interest questions in relation to the clause 9 and clause 16 exemptions. The applicant argued that it was clearly in the public interest to release the reports so as to reveal the processes the university had adopted in relation to the allegations which had received wide publicity in the community generally. The university argued that disclosure would encourage speculative discussion which could cause professional or personal harm to the individuals concerned and a substantial adverse effect on industrial relations at the university.

The Tribunal took the view that the arguments of the university were misconceived. In its view, the future conduct of industrial relations would be enhanced rather than affected adversely by disclosure of the reports. Disclosure would remove any opportunity for speculation as to their contents, and would reveal the integrity or otherwise of the processes adopted by the university. It would also provide a level of transparency in accordance with the objects of the Act. For these reasons, the Tribunal did not accept that disclosure would on balance be contrary to the public interest.

Report on New South Wales National Parks⁵⁶⁸

The applicant, which was an organisation dedicated to seeking to change government policies relating to management of Crown lands, sought access to a report prepared by a firm of chartered accountants for the respondent Department reviewing the current system of Crown land management. The respondent Department refused the request, relying on clause 1 (Cabinet documents) and clause 9 (internal working documents). The applicant Association conceded that the report contained matter the disclosure of which would disclose an opinion, advice or

⁵⁶⁶ **Tunchon v Commissioner of Police (New South Wales Police Service)** [2000] NSWADT 73, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/73.html>

⁵⁶⁷ **McGuirk v University of New South Wales** [2005] NSWADT 113, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/113.html>

⁵⁶⁸ **National Parks Association of New South Wales Inc v Department of Lands & Anor** [2005] NSWADT 124, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/124.html>

recommendation, prepared or for the purpose of the decision-making functions of government. The remaining question was whether disclosure would on balance be contrary to the public interest.

First, the Tribunal noted that in this case, the “merely” factual material under clause 9(2) was inextricably interwoven with statements of opinion, arguments, options and recommendations and it was therefore not practicable to simply extract the factual material.

In considering the public interest, the Tribunal specially stated that it adopted the principles set out by the Queensland Information Commissioner in **Re Eccleston**.⁵⁶⁹ There was a public interest in members of the public being informed about the decision-making processes of government. The Tribunal rejected an argument that because the report had been considered in at least three Cabinet minutes, the content of the documents was of such a “high level” that disclosure would be contrary to the public interest. The Tribunal rejected this “class” claim, stating that the public interest was not to be determined by reference to the content of the document, but rather by reference to the effect of disclosure on the decision-making processes of government. In this case, the report did not record Cabinet deliberations, nor was it prepared for submission to Cabinet. There was a likelihood that the Cabinet decision-making process had finished as far as the contents of the report was concerned. In those circumstances, disclosure of the document was ordered on the basis that it would promote the interests of accountability for decisions and promote public participation in the processes of government decision-making.

The Tribunal also determined that the document was not exempt under clause 1, the Cabinet documents exemption.

Documents relating to a retail development⁵⁷⁰

The applicant sought access to a variety of documents concerning a proposed retail development in the local council area of the respondent Council. The response to the request by Council was not in accordance with the exemption provisions of the FOI Act. The decision was confirmed on internal review and subsequently, taken by way of further review application to the Tribunal.

There were a number of documents still in dispute before the Tribunal and various exemption provisions were relied upon. Relevantly, for present purposes, clause 9 (internal working documents), clause 13(b) (information given in confidence) and clause 16 (prejudice to the operations of agencies) were in issue before the Tribunal.

As a matter of principle, the Tribunal noted and accepted the view of the Appeal Panel in the **Law Society** case⁵⁷¹ to the effect that the **Howard** factors were merely an “indicator to alert one to the possibility that these documents may require more careful scrutiny for factors that may point to tangible harm” if the documents were disclosed. The emphasis should be on the question of what “tangible harm” would result from the release of the document in question.

The respondent Council argued that disclosure would amount to “premature release of partially or tentatively obtained information relating to policy considerations.” The Tribunal understood this to mean that the information was said to be relevant to the Council’s ongoing deliberations into a retail centre strategy and that these deliberations were of a policy nature. However, the Tribunal found that the evidence did not support an ongoing single deliberation, but rather an evolving process in which the Council had made various decisions. In particular, certain of the documents related to a decision made two years earlier and implemented shortly thereafter and therefore those

⁵⁶⁹ (1993) 1 QAR 60, <http://www.austlii.edu.au/au/cases/qld/QICmr/1993/2.html>; see chapter 7

⁵⁷⁰ **Gales Holdings Pty Limited v Tweed Shire Council** [2005] NSWADT 168, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/168.html>

⁵⁷¹ **Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No. 2)** [2005] NSWADTAP 33, <http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2005/33.html>

documents had no relevance other than in a historical sense to any future deliberations of Council. These could not, therefore, be contrary to the public interest to disclose.

Another of the documents was a final report and was not relevant to ongoing inquiries, with the result that the public interest did not lie in a refusal to disclose the report. The report had been provided about a year and a half earlier and there was no evidence of any continuing deliberation in regard to the report. The Tribunal also could not conceive of how release of the information could result in undue pressure being brought to bear upon the Council in its decision-making functions.

None of the other exemptions relied upon by Council were upheld and the decision of the Tribunal was in favour of disclosure of the documents sought.

Minutes of a third party held by an agency⁵⁷²

The applicant sought access to a minute of a special board of directors meeting of the Kingsgrove RSL Club Limited. The minute involved the applicant in that at the meeting, the directors determined to suspend the applicant's membership of the club following an allegation of improper conduct towards a staff member. The applicant therefore became involved in pursuing the matter with the respondent Department, including making the request under the Act.

The agency exempted the minute and relied on clause 13(b) (information given in confidence) to do so.

The Tribunal found that the minute had been provided by the Club to the respondent agency in confidence following the complaint received by the agency from the applicant and another person. In addition, it was the policy of the Club to limit circulation of minutes and not to provide them generally to members. The Tribunal also found that disclosure of the minute could reasonably be expected to prejudice the future supply of such information and this would impact on the regulation by the agency of clubs under the **Registered Clubs Act** 1976. The agency relied on voluntary co-operation and was not always in the position to use coercive powers.

However, in respect of that part of the minute which related to the applicant during his attendance at the meeting, which was a record of what was said by and about the applicant, the Tribunal found that it would not be contrary to the public interest to disclose this information to the applicant. The Tribunal recognised the argument that the minute was that of a private entity and this was a factor to be taken into account in the public interest against disclosure, but not a conclusive one. The agency also relied on the fact that the applicant's period of suspension had now expired. However, the Tribunal found that there was a clear public interest in the disclosure of the information which directly related to the applicant. This was not diminished simply because the period of suspension had expired at the time of hearing. There was still a public interest in the applicant having access in circumstances where he had been the subject of a disciplinary hearing since this would be to provide him with access to the record of the hearing. Accordingly, those parts of the minute were to be released to the applicant.

However, to the extent that the minute contained deliberations of the directors in the absence of the applicant and dealing with other matters not concerning the applicant, there was no public interest in disclosure which would outweigh the public interest against disclosure.

⁵⁷² **Templeton v Department of Gaming & Racing** [2006] NSWADT 36, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2006/36.html>

Decisions where the public interest in disclosure did not outweigh the harm caused by disclosure

Documents concerning an allegation of environmental damage⁵⁷³

This case involved another informer, who had disclosed to the respondent Council information concerning alleged conduct of a farmer in breach of laws concerning the environment and clean water. The farmer was the applicant seeking access to documents concerning the information provided to Council. The allegation made was that the applicant had pushed 14 dead cows into a creek on his farm. The Council refused to provide two items, being the name and address of the informant (who had received information from a third person) and the reference to the third person. The applicant sought review by the Tribunal.

It should be noted that this was a case where the applicant first sought external review by the Ombudsman, who concluded that the decision of Council to exempt the information was reasonable in the circumstances and that such an approach was consistent with the public interest.

The Tribunal in this case also noted the difference between the public interest test in clause 4(2)(b) and that appearing in other clauses of Schedule 1. In those other clauses, the Tribunal noted, the agency must be positively satisfied that disclosure “would, on balance, be contrary to the public interest.”⁵⁷⁴

The Tribunal, after some discussion, accepted that in this case, the informant’s identity should be protected. The evidence from the Council was that it could not say that the complaint had been made knowing that it was false, even though it may have been false in fact. The Tribunal referred to decisions in Queensland and in the Commonwealth protecting the identity of informants as well as to the decision in **Taylor**.⁵⁷⁵ The Tribunal stated that it was critical that investigations be conducted in a confidential manner until any charges are laid and the evidence is then produced publicly. Up to that point, those who give information to law enforcement authorities are entitled to assume the confidentiality of the process. Strict confidentiality protects both witnesses and persons accused, and breaches of confidentiality are capable of causing great harm to the reputations of those named and to affect adversely the conduct of future legal proceedings. The Tribunal also pointed out that the law contains sanctions in relation to lodging false complaints. Identification of the source in this case might prejudice the ability to obtain information in the future.⁵⁷⁶

Land valuation documents⁵⁷⁷

The applicant sought, and was refused, access to certain documents concerning valuations of a pool site which was in the process of being purchased by a football club. The respondent Council exempted the documents under clause 15 (financial or property interests), clause 13 (information provided in confidence) and clause 7 (commercial affairs).

⁵⁷³ **Mauger v General Manager, Wingecarribee Shire Council** [1999] NSWADT 35, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/1999/35.html>

⁵⁷⁴ At paragraph [33] of the decision

⁵⁷⁵ See above

⁵⁷⁶ It is not entirely clear that the Tribunal specifically decided the case on the basis of the public interest test, although implicitly it did do so. The case can also be read as one where the exemption provision in clause 4(1)(b) was applied and the Tribunal did not find that the public interest test arose under clause 4(2)(b) because the document did not fall within clause 4(2)(a). This was not however, in terms, discussed.

⁵⁷⁷ **Freeland v General Manager, Liverpool City Council** [1999] NSWADT 95, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/1999/95.html>

The Tribunal accepted that the valuation documents satisfied the description in each of these exemptions. The valuations were obtained in confidence for the benefit of Council and were covered by confidentiality agreements. Their disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the Council and the commercial value of the valuations could reasonably be expected to be destroyed or diminished by disclosure.

The Tribunal applied the same public interest analysis to all of the exemptions. The contract for sale was conditional and disclosure of the valuations could interfere with completion of the contract. If the football club were to view the valuations, it might rely on rights to rescind the contract if it considered that it was paying too high a price for the site. This would lead to significant financial loss to Council because fresh valuations would be required at a future date for sale to another purchaser. The Tribunal also pointed out that the applicant had no personal interest in the documents. [Authors' note: this last factor would appear to be probably irrelevant or at best very marginally relevant to any public interest inquiry. While FOI decisions in various jurisdictions hold that the personal interest of an individual in having access to documents may amount to a public interest, **there is no general principle that the absence of a personal interest is a matter that should be weighed in the balance against an applicant for access.**]

In the result, the Tribunal upheld the decision of the Council exempting the documents.

Documents concerning an allegation of unfitness to drive⁵⁷⁸

The applicant sought access to all documents concerning an allegation which had been made against his 86 year old father in 1998 concerning the father's alleged unfitness to drive. The father had subsequently died and the applicant pressed the request to the Tribunal when it was rejected by the respondent Authority under clause 4(1)(a) (prejudice to investigation of contravention of the law) and clause 13(b) (information given in confidence).

The Tribunal did not find that the information in question related to a source of information in relation to the enforcement or administration of the law. The Tribunal regarded this expression as requiring a narrow construction and in effect, requiring documents to be "concerned with the process of the enforcement of legal rights or duties".⁵⁷⁹ The Tribunal regarded the language of clause 4(a) as sharing a connection with "law enforcement" in a broad sense of referring to the policing of criminal laws or civil obligations. If given a broad meaning, the Tribunal pointed out, the language was capable of encompassing most activities of any government authority, and this could not be the case. Here, the respondent's late father was licensed to drive and there was no suggestion that he was, or was suspected of being, in breach of any law or legal obligation. Rather, it was a question of the medical fitness of the respondent's late father to continue to be licensed and the information in question was therefore not information from a source in relation to the enforcement or administration of the law.

However, the Tribunal did find that the exemption in clause 13(b) applied. There had been an express request from the informant for anonymity and the informant was assured of confidentiality in a telephone conversation from an officer of the Authority. The Tribunal went on to find that it was reasonable to expect (in the sense of not being irrational, absurd or ridiculous) that dishonouring the undertaking as to confidentiality could prejudice the future supply of information on driver fitness.⁵⁸⁰

⁵⁷⁸ **Watkins v Chief Executive, Roads & Traffic Authority** [2000] NSWADT 11, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/11.html>

⁵⁷⁹ The Tribunal cited the language of Young CJ. in **Accident Compensation Commission v Croom** [1991] 2 VR 322 at 324

⁵⁸⁰ The construction of the expression "could reasonably be expected to prejudice the future supply" as requiring a reasonable expectation as distinct from something irrational, absurd or ridiculous comes from the

In considering the public interest, the Tribunal regarded as clear and weighty the public interest in protecting the supply to the medical unit of the Authority of communications of this kind, since the medical fitness of drivers is a matter of undoubted public concern. There was also a public interest in respecting the confidentiality of the communication from people seeking to assist the Authority in this regard. The position would be different if an informant knowingly gave false information to government, since it would be contrary to good government for an agency to be distracted fruitlessly and brought into disrepute by a mischief-maker. Disclosure to the world would be a deterrent to such a person. However, in the present case, the Tribunal could not find that the present informer acted with a lack of good faith in this sense and that the informer probably thought that the individual may have become unfit to drive and had some grounds for thinking so. There were also objective facts tending to suggest that the individual was not in fact fit to drive at the relevant time. In those circumstances, disclosure of the material was, in the opinion of the Tribunal, contrary to the public interest.

Documents concerning a claim for workers compensation⁵⁸¹

The applicant, who was an employee of the respondent Department, sought access to all correspondence concerning his claim for workers compensation. The decision of the agency was to grant access to some materials while deleting exempt matter from certain materials and denying access to the balance of the documents. The agency relied on clause 9 of Schedule 1 (internal working documents).

The Tribunal decided to affirm the decision of the agency in some respects and to overturn it in others, thereby granting access to additional materials to the applicant. The agency before the Tribunal also relied on clause 4(1)(b) (confidential source of information) to refuse access to certain pages. In relation to the clause 4 (1)(b) exemption, the Tribunal found that it did not apply since the identity of the alleged confidential source was already known to the applicant. In so finding, the Tribunal applied a decision of the Federal AAT.⁵⁸² In any event, the Tribunal found that there was no evidence that the source of information was confidential.

With respect to the exemption claim under clause 9, the Tribunal found that certain materials were purely factual and were therefore, not exempt pursuant to clause 9(2)(b). With respect to other documents where the statutory description was met, the Tribunal had to consider the question of the public interest.

The Tribunal repeated its earlier comments to the effect that the claim that the “integrity and viability of the decision-making process” would be affected was too vague and amorphous to be considered a legitimate public interest.⁵⁸³ The Tribunal gave weight to the public interest objects of the New South Wales Act including the right to obtain access to information held by government in section 5(1)(a) and the legally enforceable right to be given access to documents subject to such proper restrictions as are necessary for the proper administration of government (section 5(2)(b)). In this case, the applicant had an interest as a member of the public in having access to documents concerning him so as to enable him to understand the basis and reasoning of the decisions made in relation to his affairs.

There was, on the other hand, a legitimate public policy interest in an agency being free to “think” about decisions and to record deliberations without having to disclose its thought processes, particularly prior to any final operative decision being made. Disclosure in such circumstances

Federal Court judgment in **Attorney-General's Department v Cockcroft** (1986) 10 FCR 180 at 190, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep2228.html

⁵⁸¹ **Latham v Director General, Department of Community Services** [2000] NSWADT 58, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/58.html>

⁵⁸² **Re Scholes and the Australian Federal Police** (1996) 44 ALD 299

⁵⁸³ **Bennett v Vice Chancellor, University of New England**, see above

would make officers much more circumspect and self-conscious about the content of documents and would inhibit the free flow of ideas and options. However, once a decision became final or operative, it would be much more difficult to establish that disclosure would be contrary to the public interest. In a case where the recommendation was carried out, disclosure of the recommendation would not reveal the agency's "thought processes". Certain documents did contain opinion, advice or recommendations and disclosure would have revealed the agency's thought processes in relation to a number of sensitive issues. With respect to those documents only, the Tribunal found that disclosure would inhibit discussion and recording of such concerns in future, and that public interest consideration outweighed the interest of the applicant in knowing the content of these concerns.

In its analysis, the Tribunal found useful comments made by the Commonwealth Administrative Appeals Tribunal as follows:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action...Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which s.36(1)(a) applies. It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure - documents that might, perhaps, have been more aptly described in the headnote as 'Internal Thinking Documents'.⁵⁸⁴

Report concerning the Police Human Resources Service⁵⁸⁵

The applicant sought access to a report prepared by external consultants detailing advice on the restructuring of the Human Resources Service of the New South Wales Police Service. The respondent Service exempted the report under clause 9(1) (internal working documents). Before the Tribunal, the respondent also relied on clause 16(a)(v) (adverse affect on industrial relations), but the Tribunal did not find it necessary to deal with the latter exemption.

The Tribunal found, without difficulty, that the report met the statutory description in clause 9(1) and clause 9(2)(b) did not apply in that the report did not consist merely of factual or statistical material.

The more difficult question, the Tribunal said, was whether disclosure would on balance be contrary to the public interest. The Tribunal said that choosing between disclosure or exemption must depend upon an assessment of the effects of present disclosure of the document in the particular circumstances in which the document was or will be used in the particular decision-making context. There was, inevitably, some aspect of value judgment as to the "public interest" on what level of openness should accompany or follow the particular decision-making process in question. The Tribunal considered that it was appropriate to make a decision with a general attitude favourable to provision of access and without being influenced by conventions of secrecy and

⁵⁸⁴ **Re J E Waterford and Department of Treasury (No. 2)** No. 83/52, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1476.html> at paragraphs [58] - [61] of that decision

⁵⁸⁵ **Tunchon v Commissioner of Police New South Wales Police Service** [2000] NSWADT 73, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/73.html>

anonymity “which permeated public administration in this country before the enactment of this Act”.⁵⁸⁶

The Tribunal accepted evidence that the report was secret, sensitive and confidential and had been shown only to five people within the Service. The Tribunal also accepted that each particular change referred to in the report could only be put into effect in a staged manner and would require decisions by the Commissioner of Police or the Executive Director of the Human Resource Service. The Tribunal was also satisfied by specific evidence that release of certain parts of the report as well as specific recommendations would inevitably alter the human and political context in which future decisions would be made and seriously impair the continuous process of decision-making. Circumstances of potential hostility to changes under consideration would be created by premature release of the report. Accordingly, there was a clear public interest in continuing the secrecy surrounding some of the contents of the report at least until after the time when further decisions had been made without such prejudice having arisen in the interim.

While there was a public interest in the Police Association (whose representative was the applicant) and other employee representatives in being able to act for their membership in negotiations, such considerations did not outweigh the public interest in maintaining secrecy of the report. In the result, the Tribunal held that disclosure was not warranted and the public interest was in favour of allowing the Police Commissioner to continue his current process of reform unhampered. The Tribunal pointed out that the balance of the public interest could change in favour of disclosure in the future, depending on how events unfolded. The Tribunal also pointed out that its conclusions were based on the final balance in this case based on particularly special, even unique, circumstances concerning the report, and not on any general principle of overriding secrecy in relation to advice to chief executives on restructuring public agencies. The decision under review was affirmed.

Agreement relating to lease of public land⁵⁸⁷

The applicant sought access to a large document which was a Conditional Agreement to Lease public land in the form of the Quarantine Station at North Head in Sydney. The Conditional Agreement had been executed by the relevant Minister and a hotel management company. The request was refused both initially and on internal review on the basis of clause 9(1)(a)(ii) (consultative or deliberative internal working documents) and clause 7(1)(c) (commercial information).

The Tribunal noted that the Minister had not yet made a final decision to lease the Quarantine Station (a site of national and international heritage significance) to the hotel management company. In part, any final decision required the completion of an Environmental Impact Statement, amongst other things. Accordingly, even though in the normal course an executed agreement would not be an internal working document, it was on this occasion. The Tribunal also regarded the Conditional Agreement as containing matter, the disclosure of which would disclose opinions, advice, recommendations, consultations or deliberations for the purpose of decision-making functions of Government. In addition, the Tribunal found that clause 7(1)(c) was activated inasmuch as terms of the Conditional Agreement dealing in particular with financial provisions and the allocation of risk and responsibility between the parties were commercially sensitive. The Tribunal adopted the approach of an earlier Tribunal in considering that the question of “reasonableness” for the purposes in clause 7(1)(c) involved public interest factors to be taken into

⁵⁸⁶ Citing the views of Kirby P. in **Commissioner of Police v District Court of New South Wales** [1993] 31 NSWLR 606 at 627 and relying also on section 5(3)(a) of the Act

⁵⁸⁷ **Bennett v Director General, National Parks & Wildlife Service** [2000] NSWADT 136, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/136.html>

account.⁵⁸⁸ The Tribunal therefore went on to consider the public interest considerations involved in the request.

Extensive submissions were made by both parties and were set out at length by the Tribunal in its decision. In favour of disclosure were the potential involvement of citizens in the decision-making process and the public's right to know, as well as an interest in ensuring that the negotiations were proceeding in a proper and lawful fashion. Against that, the respondent agency submitted that the Conditional Agreement was confidential, commercial and incomplete, that an exhaustive EIS process and public consultation would be completed before execution of any final agreement and that the evidence of prejudice to the State was that if the deal fell through, the State would have to call for tenders again in less favourable circumstances.

The Tribunal found, taking all the factors into account, that release of the remainder of the Conditional Agreement (some parts had been released during the appeals process) would be premature. The factor that weighed most heavily with the Tribunal was the fact that the deliberative process of the agency was not completed and the possibility that the deal might fall through if the documents were released, a possibility which the Tribunal did not regard as remote. This was a sensitive period for both the State and the proposed developer. As well, there was extensive information already available to the applicant and in the public domain which indicated that the applicant was not significantly hindered in making relevant and persuasive submissions to relevant authorities concerning the proposed development. The EIS, when released, would also provide significant new and relevant information. In the circumstances, the decision under review was affirmed.

Documents concerning staff grievances⁵⁸⁹

The applicants sought access to a copy of draft recommendations and a report of investigation into staff grievances within the respondent agency of staff and management based at the Town Hall railway station in Sydney. The report had been prepared by a human resources consultant in December 2000 and followed over 90 individual interviews with then current and former staff and management at the station.

Initially, the respondent agency refused the applicants access to the entire report, but subsequently released an expurgated copy of the report. The respondent relied for exemption on clause 6 (personal affairs), clause 9 (internal working documents), clause 13 (confidentiality) and clause 16 (operations of agencies).

The decision of the Tribunal was that the material exempted should not be released and the Tribunal relied most particularly on the exemption in clause 16. The Tribunal found that exemption was made out on the basis of clause 16(a)(iii), that is to say, that disclosure could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel. The report dealt with the background to the calling of the inquiry and referred to four previous inquiries conducted into issues at the station since 1997. The inquiry was called to deal with ongoing allegations of misbehaviour aired by groups of staff and management. The Tribunal accepted that disclosure of the exempt matter would significantly hamper the existence of proper channels of confidential communication within the Authority because staff would be discouraged from using those channels and this would result in a significant adverse effect on management of personnel. In addition, the Tribunal accepted the submission that an organisation as large as the Authority was reliant on continuing confidential channels of communication between

⁵⁸⁸ The Tribunal followed the approach of the President of the Tribunal in **Raethel v Director General, Department of Education & Training** [1999] NSWADT 108 at paragraphs [43] to [53], <http://www.austlii.edu.au/au/cases/nsw/NSWADT/1999/108.html>

⁵⁸⁹ **Livingstone & Anor v State Rail Authority of New South Wales** [2002] NSWADT 25, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2002/25.html>

staff and management in order to ensure that employees are managed in an appropriate fashion. In addition, the consultant had given undertakings of confidentiality to the third parties he interviewed which were given for and on behalf of the Authority.

While the Tribunal accepted that there was a public interest in release of the materials based on accountability and transparency in the process of information collecting and decision-making, as well as a significant personal interest of each applicant in the release of the full version of the documents, the balance of the public interest favoured non-disclosure. In particular, there was a public interest in the avoidance of industrial action given that the Authority performed an essential public service. The Tribunal also accepted that there were public interests in the Authority attempting to provide a safe workplace free of harassment and intimidation and in seeking to maintain the integrity and viability of the respondent's internal decision-making processes.⁵⁹⁰

Documents concerning a person and her children⁵⁹¹

The applicant sought documents relating to a woman and her children. His purpose in so doing was to assemble information for an attempt to re-open a conviction recorded against him some 13 years before. The woman in question was alleged by the applicant to have been the main witness against him and had previously lived with him. His aim was to establish that the woman had given perjured evidence at his trial and he claimed that he had no interest in the personal affairs of the children.

The request, as ultimately re-formulated, was refused by the respondent agency on the basis of various exemptions, being clause 6(1) (personal affairs), and clause 4(1)(c) (danger to the life or physical safety of a person). The woman also became a party to the proceedings and made submissions to the Tribunal. She expressed fears for her safety and did not consent to release of any information, and the same was true for one of the children, her grandmother, and a man alleged to be the father of one of the children.

The Tribunal considered primarily the exemption claim under clause 6, which was made in respect of all the documents. The Tribunal approved certain views expressed by the Commonwealth AAT concerning the scope of the expression "unreasonable disclosure of information":

*Whether a disclosure is 'unreasonable' requires, in my view, a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...However, consistently with the stated object of the Act (see s3), it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information in documentary form in the possession of an agency and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party whose personal affairs may be unreasonably disclosed by granting access to the document.*⁵⁹²

The Tribunal also cited the well known comments of Lockhart J. to the effect that "what is 'unreasonable' disclosure of information...must have as its core, public interest considerations."⁵⁹³

⁵⁹⁰ In the view of the authors, while the Tribunal in this instance accepted that there was a public interest in the integrity and viability of the decision-making process, other decisions of the Tribunal and other Tribunals such as the Commonwealth AAT and the Queensland Information Commissioner indicate (in the view of the authors, correctly) that this factor is too imprecise and amorphous to be of any genuine weight.

⁵⁹¹ **Saleam v Director General, Department of Community Services & Ors** [2002] NSWADT 41, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2002/41.html>

⁵⁹² **Re Chandra and Minister for Immigration & Ethnic Affairs** (1984) 6 ALN N257 at N259, <http://www.austlii.edu.au/au/cases/cth/aat/unrep1498.html>

⁵⁹³ **Colakovski v Australian Telecommunications Corporation** (1991) 13 AAR 261 at 270, http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep4736.html

The Tribunal went on to consider the Commonwealth AAT decision **Re Green and Australian and Overseas Telecommunications Commission**.⁵⁹⁴ That was a very similar case in which the applicant under the Commonwealth Act sought access to certain records he claimed would assist him in challenging the credibility and motives of a witness at trial, a trial which could lead to his imprisonment upon conviction. In that decision, the Commonwealth AAT said (at a time when the Commonwealth Act had been amended to specifically state that an individual's interests in seeking access were not to be taken into account) that the individual's interest was not relevant. However, in looking at the earlier cases, the Commonwealth AAT took the view that those cases led to the same conclusion even in the absence of the amendment to the Commonwealth Act.

The Tribunal accepted the reasoning in **Re Green**. The Tribunal considered that whether the disclosure would result in the unreasonable disclosure of information concerning a person's personal affairs "must be approached in a relatively abstract way."⁵⁹⁵ The Tribunal said that the wishes of the person to whom the information relates were however, relevant, though not conclusive, and that the purpose of the third party could rarely, if ever, be given consideration. In the case before it, the Tribunal considered that an inquiry into the purpose of the applicant would require the agency and the Tribunal (on review) to engage in an elaborate collateral exercise to determine the reasonableness or otherwise of the applicant's claim that his conviction and sentence may have been tainted because the information had not been available to him. Accordingly, the Tribunal did not consider that the Act established a regime under which agencies can deal differentially as between applicants who make the same request for someone else's personal records and under which agencies can make varying calculations as to the "reasonableness" of disclosure upon such a request.⁵⁹⁶

The Tribunal however went on to recognise that in some authorities it had been held that a point may be reached where the applicant may be able to demonstrate a personal need for the information that is of such strength to amount to a public interest consideration in its own right.⁵⁹⁷

The Tribunal also noted that in Queensland, where a balance of public interest test applied to personal affairs information, the Queensland Information Commissioner had given greater weight to the personal privacy of an individual as against the claim of an applicant that the information could assist him to set aside a conviction.⁵⁹⁸ In the result, the same basis claimed by the applicant in this case was not regarded by the Tribunal as sufficient to permit access and the Tribunal held that disclosure would be unreasonable. Other exemptions were not necessary to be considered in any detail by the Tribunal.

⁵⁹⁴ **Re Green and Australian and Overseas Telecommunications Commission** (1992) 28 ALD 655, <http://www.austlii.edu.au/au/cases/cth/aat/unrep4799.html>

⁵⁹⁵ At paragraph [46] of the decision

⁵⁹⁶ However, in the view of the authors, the views of the Tribunal while appropriate in the personal information context and on the question of "unreasonableness", need to be qualified by reference to the principle expressed in a number of cases that there is a public interest in the individual having access to records in order to pursue a private remedy. While the issue has not been determined conclusively by a superior court, it may be that the better view is that while the public interest is relevant to the question of "unreasonableness" it is not relevant in precisely the same way as it may be relevant to documents which do not record or relate to personal affairs. This would accord recognition to the fact that the language of "unreasonableness" is used in such provisions rather than the balancing of the public interests (though not in Queensland) and would also accord greater weight to the sensitivity of personal information as distinct from information generated by government for public purposes.

⁵⁹⁷ The Tribunal referred to **Re Burns and the Australian National University (No. 2)** (1985) 7 ALD 425 at 438-9 and Cossins, *Annotated Freedom of Information Act New South Wales* (1997) at 313

⁵⁹⁸ **Lovelock and Queensland Health Department** [2001] QICmr 2, <http://www.austlii.edu.au/au/cases/qlld/QICmr/2001/2.html>

Document of advice concerning an FOI internal review ⁵⁹⁹

The applicant sought access to a small number of documents in relation to certain assaults made upon him and claims made by him for victims' compensation. One of the documents to which he was refused access was an internal memorandum of advice from an officer of the respondent agency to the head of the agency. The document gave advice as to the agency's internal review determination (which was itself now under review by the Tribunal), and was said by the agency to contain confidential advice.

The Tribunal accepted that this document contained advice within the meaning of clause 9(1)(a) of Schedule 1, the internal working documents exemption. The Tribunal considered that there was a public interest in agencies being able to receive and consider confidential advice on the exercise of their decision-making powers, including in relation to requests under the FOI Act. There was an interest in not having agencies and officers exposed to criticism and public scrutiny in relation to whether the officer's advice was accepted or not. In the context of the FOI Act, it was the published decision of the relevant decision-maker which counted. For these reasons, the Tribunal held that it would, on balance, be contrary to the public interest for this document to be disclosed, and upheld the exemption.

Documents concerning allegations of corrupt conduct ⁶⁰⁰

The applicant had been a public sector psychologist accused of official corruption in that he was said to have operated a private practice from his rooms. An investigation was conducted at the request of the New South Wales Independent Commission Against Corruption, but no action was subsequently taken against the applicant. The applicant then sought access to all documents and records collected as part of the investigation process or relating in any way to the investigation process. There was a large quantity of documentation and various exemptions were relied upon by the respondent agency, including clause 10 (legal professional privilege), clause 20(d) (protected disclosures), clause 6 (personal affairs) and, most relevantly for present purposes, clause 16(a)(iv) (operations of an agency).

The Tribunal first noted that under clause 16(a)(iv), the focus must be on the future effect on a function of an agency, not on the effect of disclosure in the present case (which was the focus of the submissions of the applicant).⁶⁰¹ The Tribunal found that one of the agency's function was to investigate matters referred to it by ICAC. The Tribunal also found that there was a reasonable expectation that there would be a substantial adverse effect on the performance of that agency's functions by disclosure of the documents in question under this exemption.

The Tribunal accepted submissions from the agency that there was a public interest in ensuring that investigations were not adversely affected in the sense that it was in the public interest that the government operates free from corruption and provides a reporting system where members of the public could disclose sensitive information without fear. Further, it was also in the public interest for investigation of allegations of corruption to be conducted in an efficient and effective manner.

The Tribunal rejected an argument from the applicant that the requirements of natural justice represented a public interest factor in favour of his having access. The Tribunal took the view that the allegations in question had been put fairly and completely to the applicant and in those circumstances the failure to disclose the name of a complainant did not constitute a breach of

⁵⁹⁹ **DF v Director General, Attorney General's Department** [2002] NSWADT 163, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2002/164.html>

⁶⁰⁰ **Robinson v Director General, Department of Health** [2002] NSWADT 222, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2002/222.html>

⁶⁰¹ The Tribunal relied on the decision of the Appeal Panel in **Director General, Department of Education & Training v Mullett & Anor** [2002] NSWADTAP 13 at paragraphs [62] to [64] and [84]

natural justice. The Tribunal found that there were no other public interest factors in favour of disclosure and therefore the public interest in withholding the documents prevailed.

Documents concerning police investigations⁶⁰²

The applicant sought certain records relating to an investigation by the Police Service in relation to alleged paedophile activities for which he was charged. The charges were dismissed at committal in June 2001. A number of documents were exempted by the respondent Service including, for present purposes, under clause 9 (internal working documents) on the basis that they recorded submissions, deliberations and conclusions internal to the Service.

In reviewing this aspect, the Tribunal agreed that the exemption applied to the documents. In applying the public interest test, the Tribunal accepted the submissions of the Service that the efficient administration of the Service would be adversely affected if operational discussions could later be released to alleged offenders once the investigation had concluded. There was a public interest in the police being able to communicate frankly as to the best method of conducting criminal investigations without a concern that an alleged offender might be able to access that information. Even though clause 4 would often apply to documentation of this kind, operational communications falling outside those categories could still be exempt. The Tribunal considered the documents in question to consist of bona fide operational communications in the course of investigation and the public interest required that they be exempted from disclosure.

Documents concerning on-line access to data base of public sector employees⁶⁰³

The applicant sought access to documents concerning password or other access to an on-line data base of New South Wales public sector employees. The request was refused initially on the basis of clause 13(b) (information given in confidence) but subsequently before the Tribunal, the respondent agency sought to rely also on other grounds of exemption, including clause 6 (personal affairs) and clause 16 (operations of agencies).

In the result, the Tribunal did not consider the additional grounds, but found that the data were exempt documents under both clause 13(a) and (b) of Schedule 1. The Tribunal found that strenuous efforts were taken to ensure that data relating to individuals was kept confidential and indeed, the data base did not report the names of individuals, who were given unique identifying numbers instead.

In addition, there was a complex Privacy Code endorsed by the Privacy Commissioner in place in relation to the data. This in itself suggested that the expectation of all concerned was that the personal information obtained would be kept confidential. While there was no direct evidence of actual collection of data from individuals, the circumstances allowed an inference to be drawn that the data was obtained in circumstances of confidence.

There was also evidence that data collection was likely to be jeopardised, with serious results, if public sector employees became aware that data was to be released, contrary to undertakings of confidentiality, and that release might enable at least some of the individuals to be identified. The Tribunal agreed that it was reasonable to assume that the rate of withholding of data (which an employee was entitled to do) would increase somewhat in the circumstances identified in the arguments of the respondent agency. There would be some loss of confidence by public sector employees in the integrity of the data collection system and it would be, in the view of the

⁶⁰² **DZ v Commissioner of Police, New South Wales Police Service** [2002] NSWADT 274, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2002/274.html>

⁶⁰³ **Public Service Association and Professional Officers Association, Amalgamated Union of NSW v Director General, Premier's Department** [2002] NSWADT 277, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2002/277.html>

Tribunal, not in the public interest to allow such loss of confidence. It would also be against the public interest to risk jeopardising in any significant way, such a large statistical project. There were no competing public interests of any strength, with the result that exemption was justified.

Documents concerning an application for admission as a legal practitioner⁶⁰⁴

The applicant sought access to certain documents held by the Legal Practitioners Admission Board relating to applications made by him for admission to practise as a legal practitioner. The respondent Department (standing in the shoes of the Board) disclosed some documents while withholding others in whole or in part. Exemptions were claimed under clause 6 (personal affairs), clause 4(1)(b) (confidential source) and clause 13(b) (information given in confidence). The exemption under clause 13(b) applied to all documents bar one.

First, the Tribunal found that information given to the Board concerning the applicant had been given expressly in confidence, the supplier stating that they desired anonymity or protection from legal action. The Tribunal was also satisfied that disclosure could reasonably be expected to prejudice the future supply of such information, since the Board, as a licensing authority, should be able to rely on intelligence provided to it by members of the public or upon checks and inquiries which the Board itself made. The Tribunal found that receipt of reports from third parties would be prejudiced if it were to become the case that their reports might be released under the Act.

In considering the public interest, the Tribunal referred to the public interest in the public being more fully involved in and understanding the basis for government decisions and actions. Against that, there was a clear public interest in licensing authorities being able to receive information relevant to the character and reputation of the applicant. In many cases, the information obtained would have to be put to the applicant at some stage, for example, at a hearing stage. However, that did not diminish the importance of strict confidentiality continuing to apply at the earlier investigative stage. It was vital that the Board should have available to it information that might show breach of the law or other conduct which would be relevant to a consideration of the applicant's integrity and his or her fitness to practise law.

While the applicant argued that he had been subject to malicious and unfair reports, the Tribunal stated that proceedings under the Act were not the appropriate context in which to engage in an elaborate examination of the bona fides, fairness or reasonableness of confidential and sometimes anonymous reports received by government agencies. Since procedural fairness did not require the materials to be produced at this stage, the public interest in non-disclosure prevailed in the circumstances of the case.

Documents relating to psychological tests⁶⁰⁵

The applicant sought review of a decision refusing him access to certain pages of his file held by the respondent agency. The pages consisted of certain psychological tests conducted upon him (being tests in relation to sex offenders), his answers to the tests and the scoring key. The agency permitted "inspection" access under section 27 of the Act but refused the applicant's request for a copy of the documents. Pursuant to section 27(2) the applicant was entitled to seek access in the form he had requested, and sought review by the Tribunal.

The Tribunal was required to consider the exemption in clause 16(a)(i) (prejudice to effectiveness of tests). There was no doubt, in the view of the Tribunal, that the documents in question related to tests and there was uncontested evidence that prejudice would result by disclosure, such prejudice

⁶⁰⁴ **BY v Director General, Attorney General's Department (No. 2)** [2003] NSWADT 37, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2003/37.html>

⁶⁰⁵ **GU v Commissioner, Department of Corrective Services** [2003] NSWADT 176, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2003/176.html>

being that the assumptions underlying the administration of the tests, would no longer be valid. This would be so because the normal assumption was that a person would provide a spontaneous rather than a planned answer. In addition, psychologists would be unable to plot the progress of sex offenders so as to determine whether treatment had been effective.

When considering the balance of the public interest, the Tribunal noted the promotion of the democratic objectives of the Act as well as the public interest in the applicant having access to information about himself, particularly when that information was used to make a decision. The public interest considerations against disclosure were that the validity of the tests could reasonably be expected to be compromised and the agency would lose the opportunity to share information with the scientific community about the results of the tests. The scientific community would also be reluctant to share information with the agency if the test could not be kept confidential. The information disclosed could undermine the validity of the tests, and the public interest, on balance, did not favour disclosure because the tests were extremely valuable in the assessment and treatment of sex offenders and any diminution in their validity was not in the public interest. In addition, the interests in the applicant having information about himself had been accommodated by the agency permitting him to inspect the documents.

Petition against a manager⁶⁰⁶

The applicant sought access to a petition against her which had been signed by certain employees (including subordinates) and forwarded to a senior manager in the respondent Authority. The Authority refused the request, citing a number of exemptions, including clause 13(b) (information given in confidence) and clause 16 (operations of agencies). It was also significant that the Authority had informed the applicant of the contents of the petition but declined to provide any information concerning the identities of those who had signed the petition.

The Tribunal found that clause 13(b) was made out in its terms. The petition had been provided in confidence and persons who had signed the petition had been given assurances of confidentiality. Senior management received the petition on the understanding that it would be kept confidential and they treated the petition confidentially. The Tribunal also found that disclosure of the petition could reasonably be expected to prejudice the supply of similar materials in future. This was because certain employees perceived that they had been harassed and might be subject to victimisation if their identity was revealed, and in those circumstances, it could reasonably be expected that employees in a similar position would be much less likely to complain in the future if their identity were to be disclosed.

In considering the public interest, factors in favour of disclosure were those concerned with the democratic objectives of the Act in promoting accountability and transparency of the operations of government. As well as having the contents of the petition, the applicant had also been given a fair opportunity to put her side of the story, so there were no additional public interest factors operating in that regard in favour of disclosure. Moreover, the matter had been resolved without any adverse action against the applicant and there would be no utility in her knowing the identity of the signatories. The public interest considerations against disclosure were regarded by the Tribunal as relatively strong. Two of the signatories gave evidence that they feared further harassment and some of the signatories continued to be supervised by the applicant so that there would be opportunity for harassment. It was also in the public interests for the agency to be able to receive information in confidence from employees about the conduct or performance of other employees, thereby giving the opportunity to ensure that management had the fullest picture possible of the inter-personal and other issues existing amongst staff members. If disclosure were to be ordered, the agency would be deprived of information in future which could be critical to the efficiency and

⁶⁰⁶ **Keriakes v Chief Executive Officer, State Rail Authority** [2003] NSWADT 191, <http://www.lawlink.nsw.gov.au/adtjudgments/2003nswadt.nsf/00000000000000000000000000000000/d67eb5dcd5d603aca256d820009a87f?OpenDocument>

well-being of its workforce. In all those circumstances, the Tribunal regarded it as contrary to the public interest to disclose the names of the signatories to the petition.

For the same public interest reasons, the Tribunal reached the same conclusion with respect to the exemption under clause 16, finding that there was a reasonable expectation of a substantial adverse effect on the management by the agency of its personnel.

Documents concerning internal police investigations⁶⁰⁷

The applicant sought access to certain internal police investigations relating to him and to a senior officer with whom he had had a confrontation which had led to his suspension from duty. In addition, he sought access to certain correspondence with the Director of Public Prosecutions. The applicant had resigned from the Police Service and was not amenable to any disciplinary action but was concerned that the other officer had not been subject to any action or prosecution in circumstances where the applicant had taped the meeting between them and had allegedly provided evidence to the authorities of misconduct on the part of the other officer. The second report related to a third officer who investigated the conduct of the senior officer with whom the applicant had had the original meeting.

The respondent Service denied access to the documents relying on certain exemptions, including for present purposes, clause 9 (internal working documents).

The Tribunal noted that there were ongoing investigations in relation to the officers other than the applicant and that those officers ran the risk of dismissal. While there was some public interest in the applicant having access to the documents, the public interest in non-disclosure was greater particularly having regard to natural justice being accorded to the other officers and avoiding adverse publicity to them at this time.

Documents concerning the suitability of an applicant to the Police Service⁶⁰⁸

The applicant sought access to certain documents relating to his application to join the New South Wales Police Service. Certain documents were provided while others were exempted on the basis of clause 13(b) (information received in confidence). It appeared that the information exempted related to information about a possible medical condition of the applicant and/or information provided by his previous employers.

It was agreed between the parties at the hearing before the Tribunal that clause 13(b)(i) and (ii) applied. The only consideration therefore was the balance of the public interest. The applicant clearly had strong interests in seeing the exempt documents in that they concerned him directly. However, the evidence was to the effect that the respondent did not use the information in the exempted documents in any substantial way in coming to the decision not to accept the applicant into the Police Service. Moreover, this was not a case where false or knowingly false information had been peddled to government.⁶⁰⁹ Moreover, the respondent submitted that it was important that the police should be able to properly vet applicants and that this activity ought not to be impeded by disclosure of information received in confidence. The process of receipt of such information existed so as to prevent exposure to the public of an unsuitable applicant. In addition, under the **Police Act** 1990, the Commissioner of Police was required to have confidence in all police officers

⁶⁰⁷ **Edlund v Commissioner of Police, New South Wales Police** [2003] NSWADT 195, <http://www.lawlink.nsw.gov.au/adtjudgments/2003nswadt.nsf/00000000000000000000000000000000/4d2ab238a502f446ca256d83000d1592?OpenDocument>

⁶⁰⁸ **Stiller v Commissioner of Police, NSW Police** [2004] NSWADT 173, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/173.html>

⁶⁰⁹ **Watkins v Chief Executive, Roads & Traffic Authority** [2000] NSWADT 11, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2000/11.html>

at all times. The Tribunal accepted these arguments and in the present case, considered that the public interest in protecting the flow of confidential information to the Police Service Recruitment Branch outweighed any interest which the applicant had in receipt of the information.

Documents concerning a freeway⁶¹⁰

The applicant Council sought access to documents held by the respondent Authority concerning the M4 road and proposed tunnel. There was a large range of documents involved in the request and, for present purposes, certain of the documents were withheld on the basis of clause 9 (internal working documents).

In reviewing the exemption, the Tribunal made the point that the exemption is not activated “merely because they are documents which are internal to the agency which were used for a working purpose”. Rather, an agency was required to show that the way in which the documents were used as working documents and the documents must be individually examined to see whether they disclose a relevant opinion, advice or determination necessary to satisfy clause 9. Not all the documents satisfied the statutory description in this case.

However, some of the documents did satisfy clause 9 and the Tribunal was required to consider the public interest. In the case of certain of the documents, information had already been published in a summary form which was contained in a more extensive form in the documents. On this basis, the Tribunal took the view that these documents should be released. Other documents which fell within clause 9 provided an analysis of modelling of various options applied to road traffic in the inner western suburbs of Sydney. The modelling was quite sophisticated and the type of investigation which a tenderer might undertake in its own investigations as to whether building a road such as the M4 freeway would be worth a tender. Various toll scenarios were also interwoven throughout one of these documents, although the actual toll figures were not mentioned. These documents satisfied the “harm” test in the sense that they would, if disclosed, impact adversely on the tendering process. There was no basis either in the public interest why the documents should be disclosed at this time and the Tribunal upheld this exemption.

Documents relating to rural fires and backburning⁶¹¹

The applicants, who were land owners in an area within the Snowy River Shire in New South Wales, sought certain documents concerning fires in January/February 2003 in areas close to their property. The documents in question were reports provided by certain rural fire service fighters responding to a complaint made by one of the applicants for access. The reports were exempted by the respondent Service under clause 13(b) (information provided in confidence) and clause 16(a)(iv) (adverse effect on agency’s functions).

The Tribunal rejected the clause 16 ground as there was no evidence sufficient to support a finding that there would be an adverse effect on morale amongst members of the local rural fire brigades. The only material before the Tribunal consisted of mere assertions.

The position was different with respect to the clause 13(b) ground. The Tribunal was satisfied that if the reports were disclosed, this could reasonably prejudice the future supply of such information to the respondent. The members concerned were volunteers and the respondent had no coercive powers with respect to them and had to rely on their voluntary co-operation in responding to criticism such as that made by one of the applicants. Such co-operation was provided in confidence particularly where the issues raised were (as in this case) of a sensitive nature. Breach of that

⁶¹⁰ **Leichhardt Municipal Council v Roads & Traffic Authority** [2005] NSWADT 37, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/37.html>

⁶¹¹ **Allen & Anor v Rural Fire Service** [2005] NSWADT 222, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/222.html>

confidence could prejudice the respondent from performing its functions efficiently and effectively in the future, particularly in a case (such as the current case) where no further action had been taken.

The Tribunal noted that generally the motives or purpose of the applicant were rarely of any relevance in considering the question of public interest. Although here the applicants' motives were genuine in seeking to "set the record straight" this factor was not sufficient to outweigh the public interest in the non-disclosure of the documents which had been received in confidence as a result of a complaint made by one of the applicants and which had not been further actioned.

Documents concerning an inquiry into allegations of bullying and harassment⁶¹²

The applicant was employed as an employee relations officer in the Human Resources Division of a State government department. Part of her job was to carry out disciplinary inquiries in relation to employees. During 2003, three employees, including two who were senior to the applicant, alleged that she had bullied or harassed them and also raised issues about her performance. She in turn complained that the two employees senior to her had bullied her or not treated her properly.

Another investigator from outside the Human Resources Division was appointed to investigate all these complaints as part of one inquiry. The investigation was carried out and a number of staff members were interviewed. The report was considered by the Director General of the Department and no disciplinary action was taken against any employee, with TW accepting a voluntary redundancy package in mid 2004.

Subsequently, the applicant applied for documents concerning the inquiry, her subsequent workers compensation claim, her proposed return to work and related documents. A number of documents were released but the Department refused to release a large number of other documents or parts of documents. The Department relied on clause 13(b) (information given in confidence) and clause 16 (adverse effect on agency's operations) for all of the documents exempted and clause 6 (personal affairs) for certain of the documents. The most important documents were the investigator's reports and transcripts of interviews with four employees who had made comments concerning the applicant.

The Tribunal was required to consider in detail the application of the various provisions to the large number of documents involved. With respect to the exemptions in clause 13(b) and clause 16, the Tribunal considered public interest questions once it was satisfied that certain of the documents fell within the respective descriptions in those clauses. The Tribunal found that the information in the interviews was provided by employees confidentially and that disclosure could reasonably be expected to prejudice the future supply of such information to the Department. Disclosure would therefore, on balance, be contrary to the public interest because it would make it more difficult for the Department to comply with its statutory obligations to provide its employees with a workplace that was free from harassment and intimidation. In particular, the employees in question were not disclosing information in a management or supervisory capacity, but merely giving their side of the story to the investigator. People in that position (as distinct from managers) would be much less likely to co-operate with an investigation if they were aware that the information they disclosed might not be kept secret. Each employee had indicated that she did not want the information to be disclosed. Accordingly, the Tribunal considered it was not in the public interest to disclose these documents.

However, with respect to a document provided by a supervisor to the investigator, the Tribunal found that this was not provided in a personal capacity or as a personal reaction, but in a supervisory capacity. People in that position could be expected to continue to provide such information in the course of their duties and therefore no harm for the purposes of clause 13(b) was

⁶¹² **TW v TX** [2005] NSWADT 262, <http://www.austlii.edu.au/au/cases/nsw/NSWADT/2005/262.html>

established with respect to that document. Certain other documents were also written as part of the official duties of other employees and were not exempt for that reason.

On the same basis, the deletions made from the investigator's report were upheld by the Tribunal (the applicant had been given access to most of the report). Again, this exemption was upheld on the basis that details of and information from the persons whose identities had been deleted would, if disclosed, make it much less likely that such persons would co-operate with an investigation in future. For the reasons already given, such a result would, on balance, be contrary to the public interest.

Documents relating to the closure of a high school⁶¹³

The applicant organisation sought access to all documents relating to a high school which had been proposed for closure in June 2001. The request sought access to all documents and communications in relation to that high school from 1 January, 2000 to 28 February, 2005. The respondent Department agreed to release some of the documents but refused access to others, relying on clause 7 (business affairs) and clause 15 (adverse effect on financial or property interests). Of these exemptions, clause 15 raised public interest questions.

The arguments were wide-ranging, but essentially the respondent Department claimed that disclosure of the information sought could reasonably be expected to destroy or diminish the commercial value of the site for the purposes of clause 7, even though it was one government agency selling to another (Landcom). A similar argument applied to the effect on financial or property interests of the State under clause 15.

The Tribunal essentially accepted the arguments of the respondent Department. With regard to clause 15, the Tribunal took the view that if the sale to Landcom did not proceed, disclosure of the information could jeopardise the Department's ability to achieve a comparable sale price in the future or would otherwise undermine the integrity of the tendering process. Those results would, on balance, be contrary to the public interest.

The Tribunal applied this general reasoning to each of the documents in question and found some had been incorrectly exempted while upholding the exemption in respect of others.

⁶¹³ **Retain Beacon Hill High School Committee Inc v NSW Department of Commerce** [2006] NSWADT 129,
<http://www.lawlink.nsw.gov.au/adtjudgments/2006nswadt.nsf/073fc38175c57477ca2570ec0018b950/ea3bc1b31e1046c4ca25715e0016979d?OpenDocument>

10 New Zealand

Legislative Framework

- 10.1 Access to government information in New Zealand is governed by the **Official Information Act 1982** (the OIA). The OIA was enacted on 17 December 1982 and came into force on 1 July 1983. An almost identical regime applies to access to local government information which is governed by the **Local Government Official Information and Meetings Act 1987**. This Act was enacted on 17 July 1987 and commenced operation on 1 March 1988.
- 10.2 The OIA applies to all Ministers of the Crown, central government departments and organisations listed in Parts I & II of the First Schedule to the **Ombudsmen Act 1975** and to those organisations listed in the First Schedule to the OIA.
- 10.3 The OIA operates alongside the **Privacy Act 1993** which governs access to personal information and is enforced by the Privacy Commissioner.⁶¹⁴

Administration of the Official Information Act 1982

- 10.4 The OIA is administered by the Ministry of Justice. The Ministry does not play a day to day role in the operation of the OIA. However, the Ministry has issued a number of publications for the information of the public.
- 10.5 Every two years since 1997 the Ministry has published a *Directory of Official Information*⁶¹⁵. The Directories contain a listing of government departments and other entities subject to the OIA and provide information to the public about the manner of seeking access under the OIA. The Directories are published in compliance with section 20 of the OIA.

Enforcement of the Official Information Act 1982

- 10.6 The OIA is enforced by the Ombudsmen. The New Zealand Ombudsmen have jurisdiction to enquire into both complaints about maladministration and about the availability of information under the OIA. The Ombudsmen are independent Officers of Parliament appointed by the Governor-General on the recommendation of the House of Representatives. They report annually and are accountable to Parliament rather than to the Government of the day. Their staff are not public servants.
- 10.7 The types of decision an Ombudsman can investigate under the OIA include refusals of requests, delays, charges, and other access decisions.

⁶¹⁴ Section 29B of the OIA obliges the Ombudsmen to consult the Privacy Commissioner when investigating decisions involving personal information.

⁶¹⁵ Available on the web site of the Ministry,
<http://www.justice.govt.nz/pubs/reports/2003/DOI-03-05/index.html>

- 10.8 Upon an investigation, the Ombudsmen are empowered to review access decisions made by agencies: section 28 OIA. Under section 30 of the OIA, the Ombudsman has the power to report his opinion and the reasons for his opinion to an agency and make such recommendations as he thinks fit.
- 10.9 Thereafter, the agency comes under a public duty to comply with the Ombudsman's recommendations (e.g., to release information) on the twenty-first working day after the recommendations were made to the agency, unless before that day the Governor-General, by Order in Council, otherwise directs: section 32 OIA.
- 10.10 An applicant may seek a review of the making of an Order in Council in the High Court of New Zealand: section 32B OIA. A further appeal is available from the High Court to the Court of Appeal: section 32C OIA.
- 10.11 The Office of the Ombudsmen has published a number of Guidelines explaining how the OIA works, considering the exemption provisions of the legislation, explaining how an Ombudsman carries out an investigation, and referring to other important provisions of the legislation.⁶¹⁶
- 10.12 Guideline B5 deals with the public interest test set out in section 9 of the OIA.⁶¹⁷
- 10.13 The Office also publishes the Ombudsmen's *Quarterly Review*, which may be accessed online. The web site contains a Consolidated Index of Topics, including the topic of Official Information.⁶¹⁸ The March 1998 issue (Volume 4, issue 1) was devoted entirely to the topic of official information.⁶¹⁹ This issue included a checklist for requesters and holders of official information.

Purpose and Availability

- 10.14 As is the case with much FOI legislation (although not, for example, the UK Act), the OIA has a purpose clause. Section 4 provides that the purposes of the OIA are:
- (a) To increase progressively the availability of official information to the people of New Zealand in order—*
- (i) to enable their more effective participation in the making and administration of laws and policies*
- (ii) to promote the accountability of Ministers of the Crown and officials*
- and thereby to enhance respect for the law and to promote the good government of New Zealand.*

⁶¹⁶ See generally at <http://www.ombudsmen.govt.nz/GuideIndex.htm>

⁶¹⁷ <http://www.ombudsmen.govt.nz/guideB5.htm>

⁶¹⁸ <http://www.ombudsmen.govt.nz/quarterl.htm#Official%20Information%20->

⁶¹⁹ <http://www.ombudsmen.govt.nz/downloads%20Quarterly%20reviews/oqr4-1.pdf>

(b) To provide for proper access by each person to official information relating to that person.

(c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

- 10.15 Sir Brian Elwood, who was until June 2003 the Chief Ombudsman, has commented that⁶²⁰ “Where making available the information requested would assist participation in the making and administration of laws or policies” or “promote the accountability of Ministers...or officials, the public interest becomes more readily identified.”
- 10.16 Except where the OIA expressly requires, the principle of availability enacted provides that any question to be determined under the OIA is to be determined in accordance with the purposes of the Act and the principle that the information shall be made available unless there is good reason for withholding it: section 5 OIA.

The Public Interest Test

- 10.17 The public interest test is set out in section 9 of the OIA. It provides that where a section 9 exemption applies, there is “good reason” to withhold official information unless:
- In the circumstances of the particular case, the withholding of that information, is outweighed by other considerations which render it desirable in the public interest to make that information available.*
- 10.18 This test effectively tilts the balance slightly in favour of withholding information, since the reasons in favour of disclosure must outweigh those supporting non-disclosure.
- 10.19 The public interest test applies only to the exemptions set out in section 9. These relate to personal privacy, commercial interests and trade secrets, confidentiality, the protection of health and safety, national economic interests, material loss to the public, communications with the Sovereign, collective and individual Ministerial responsibility, internal advice, ministerial internal working documents, the free and frank expression by or between or to Ministers, legal professional privilege, commercial activities and negotiations of public bodies, and the prevention of improper gains or advantages.
- 10.20 The public interest test does not apply to the exemptions in the OIA which are categorised in section 6 as “conclusive reasons for withholding information.” These exemptions cover the maintenance of security, information given in confidence at government level between nations, maintenance of law, personal safety, and serious damage to the economy.

⁶²⁰ In a letter to the Constitution Unit dated 28 November 2001

Official Guidance

- 10.21 The New Zealand Cabinet Manual is the authoritative source of advice for the Executive of the New Zealand government. Chapter 6 deals with official information, protection, availability and disclosure.⁶²¹ It does not give specific guidance on the considerations to be taken into account but describes generally the operation of the OIA. Eagles et al. in their book *Freedom of Information in New Zealand*⁶²² wrote some time ago that public authorities in New Zealand usually only consider the public interest in a cursory way.

Case Notes of the Ombudsmen

- 10.22 The case notes of the Ombudsmen have been published in a series of *Compendia*, the latest of which is the thirteenth. The *Compendia* are not available online and *Compendia* prior to the twelfth are also out of print. However, it is accurate to state that most cases where the public interest test has been an issue have been about access to personal information.

Decisions where the public interest in disclosure outweighed the harm likely to arise from disclosure

Information about salary and nature of job: Case No A6737⁶²³

A journalist suspected a university staff member was being paid by a university without having to perform any duties. The journalist asked the university whether the staff member was receiving a salary and for details of her duties. The university refused and argued that her personal information could be withheld to protect privacy.

On appeal to the Ombudsman, it was held that the public interest in the accountability of a public body overrode the staff member's privacy interests.

Health Authority investigations: Cases Nos W38403, W39515 and W39584⁶²⁴

Two newspapers and a member of a victim's family requested an internal report produced by a health authority after a public tragedy involving the death of several people at the hands of a person who had been a patient under the care of the health authority at the time the tragedy occurred.

Although the Ombudsman accepted that there were strong arguments in favour of withholding medical information about the patient given in confidence, and that potentially the supply of similar information in the future would be prejudiced, he concluded that on balance, there was a stronger public interest in the public being assured that a comprehensive inquiry into the tragedy had been held by the health authority. The conclusions in the report provided such an assurance. The health authority released the information to the requesters.

⁶²¹ Available at <http://www.dPMC.govt.nz/cabinet/manual/6.html>

⁶²² Eagles, I; Taggart, M & Liddell, G (1992) *Freedom of Information in New Zealand*, Oxford University Press, Auckland

⁶²³ *12th Compendium*, page 99

⁶²⁴ *12th Compendium*, page 101

Request for letter of resignation of senior manager: Case No. W40876

A senior manager in the Department of Corrections resigned in circumstances where the fact of his resignation received wide publicity. A journalist asked for his letter in the belief that it might reveal reasons for his resignation. The letter was in fact no more than formal notice of resignation. The Department nevertheless argued to withhold it.

The Ombudsman considered that there was a valid privacy interest when an employee writes a letter of resignation to an employer but that in the case of a senior manager there may be a countervailing public interest in making available some details of resignation.

In this case, the letter in fact did not contain any reasons and following a statement to this effect from the Department, the journalist withdrew the complaint to the Ombudsman.

Request for detailed information about Prime Minister's Office staff salaries: Case No. W41517⁶²⁵

A reporter requested details of staff salaries in the PM's office from the Minister responsible for Ministerial services. The Minister refused on the grounds that it was necessary to protect privacy of the individuals concerned.

The Ombudsman agreed that releasing the detailed information would prejudice privacy, but considered that there was a public interest in the office expenditure given that the office was critical to the effectiveness of the PM in the discharge of her role. Following consultations with the Privacy Commissioner it was agreed that the Minister should release the total personnel expenditure and the number of staff involved and withhold details of each individual employee's salary.

Request for name and address: Case No. W41600

A photographer sent his artistic work to Creative New Zealand. Creative NZ subsequently sent it to an independent assessor but wrongly addressed the parcel. The recipient of the parcel put it in the rubbish and it was lost forever. The photographer asked Creative NZ for name and address of the person to whom it was posted. Creative NZ refused on the grounds that it was necessary to protect that person's privacy.

The Ombudsman accepted that the person had a privacy interest, but considered that the public interest in the right to fully informed legal advice (which the photographer intended to seek) overrode the privacy of the recipient of the parcel.

Documents concerning missing funds of an agency: Case No. W43863⁶²⁶

The applicant requested access to certain internal documents and correspondence relating to an alleged shortfall of funds within the New Zealand Fire Service Commission. In particular, the documents related to an investigation concerning a particular employee which resulted in the employee being cleared of any allegation of fraud or misappropriation of funds. The Commissioner withheld the information on the grounds of privacy under section 9(2)(a) of the OIA.

The Ombudsman considered public interest questions under section 9(1). There was a public interest in providing information concerning discrepancies of public monies and the proper investigation of such discrepancies so as to make the outcome a matter of public record. On the other hand, there were privacy considerations pointing towards non-disclosure. The internal audit

⁶²⁵ *12th Compendium*, page 103

⁶²⁶ *13th Compendium*, page 50

however did raise a legitimate concern about the expenditure of public monies and the Ombudsman took the view that without release of some information, the public interest in disclosure would probably prevail.

The matter was compromised effectively by the Commission releasing a brief summary setting out:

- The causes for concern as described in the audit;
- The steps taken to address the internal auditors' concerns; and
- The eventual outcome.

Upon such release, the Ombudsman considered that the public interest would be satisfied and the applicant accepted the summary as resolving the complaint.

Reports concerning the escape of a psychiatric patient from a secure unit: Case No. W45650⁶²⁷

The applicant sought access to an internal report produced by the Capital & Coast District Health Board after a psychiatric patient had escaped from a secure hospital unit. The concern of the applicant was in respect of accountability issues arising as a result of the escape.

There was a great deal of personal information contained in the report however, in particular, information discussing the patient's personal views, relationships and medical history as well as information given by the patient to treating doctors. All of this information was protected as private information within section 9(2)(a) and the public interest under section 9(1) fell to be considered. The Board made only a short press statement and withheld the report in its entirety. Upon review, the Ombudsman took the view that the public interest issue of accountability had not been addressed properly by release of the press statement and the Board subsequently agreed to release a short statement which:

- Described the events leading up to the patient's escape; and
- Provided a comprehensive summary of the report's recommendations.

This statement would not intrude upon privacy concerns and was accepted by the applicant in satisfaction of his request.

Police investigation file: Case No. W39631⁶²⁸

The applicant sought access to a police investigation file of a complaint made of assault. The police had investigated but had decided not to proceed with a prosecution. The applicant sought a copy of the file with a view to pursuing a private prosecution.

Most of the file was released by the police, but the names of two key witnesses were withheld partly in reliance on the privacy exemption in section 9(2)(a) of the OIA.

There was no doubt that the witnesses had a privacy interest in the information and that this subsection applied. In considering where the public interest lay, the Ombudsman noted that Parliament had not granted to the police exclusive prosecuting authority in criminal matters and that there was a substantial public interest in citizens being able to pursue a private prosecution.

⁶²⁷ *13th Compendium*, page 51

⁶²⁸ *13th Compendium*, page 59

The police countered that their investigation suggested that the public interest would not be served by the pursuit of what would be a hopeless case.

The Ombudsman took the view that the public interest in protecting the right to take private prosecutions was sufficient to outweigh the privacy interest of the witnesses. The individual was entitled to prepare a case for prosecution and to ask the court to decide whether the case was sufficiently strong to proceed to trial. In the circumstances, the information concerning the two witnesses was released to the applicant.

Peer review reports on a dentist: Case No. W40440⁶²⁹

There had been an investigation by the Health Disability Commissioner that treating by a particular dental practitioner did not meet accepted clinical standards. Subsequently, the dental practitioner concerned sought access to copies of peer review reports on which the Commissioner had relied to support such a preliminary finding, which was a breach of relevant regulations.

The Commissioner relied on sub-sections 9(2)(ba)(i) (prejudice to the supply of information) and (ii) (otherwise likely to damage the public interest). The principal concern of the Commissioner was that release would jeopardise the obtaining of peer review reports in the future. However, the Commissioner could not provide adequate factual support for any of the grounds of exemption. The Ombudsman formed the view that the interests of justice required that a person who is the subject of an investigation be provided with a full copy of any expert opinion relied upon, along with the identity of the author of the opinion. This was especially the case where the allegations could involve serious consequences for a person's professional career. In preparing such reports, peer reviewers were providing their considered professional opinions and should be willing to have them scrutinised.

When a new Commissioner was appointed, these views were accepted and the information requested was released to the applicant.

Details of rental arrears: Case No. W45412⁶³⁰

The applicant sought details from Housing New Zealand of the top ten rental arrears, but to avoid privacy concerns, said that he did not require the names of the tenants and that the relevant city or town would be sufficient. The request was refused by the agency on various grounds, but upon review it became apparent that the agency's main concern was that release of the information would prejudice its ability to negotiate with tenants regarding repayment of rental arrears. The question therefore was whether section 9(2)(j) (prejudice to negotiations) applied.

The Ombudsman considered that the agency's methods of seeking to reach agreement did amount to "negotiations" even though the agency was able to sue for the arrears in the relevant tribunal. Some prejudice would be caused even though these would not be of a long term nature because persons might assume that they would not be evicted for small debts. Against such considerations, there was a strong public interest in the accountability of the agency for the level of outstanding rental arrears. The Ombudsman took the view that this public interest outweighed the need to withhold the information and the agency agreed to release the information to the applicant.

Risk management plans upon transfer of health responsibilities: Case No. W44924⁶³¹

The applicant sought the risk management plans prepared by the District Health Board Establishment Support Unit which was managing the risks of transition from the Health Funding

⁶²⁹ 13th *Compendium*, page 65

⁶³⁰ 13th *Compendium*, page 74

⁶³¹ 13th *Compendium*, page 86

Authority to 21 District Health Boards. In response, the Ministry of Health released a description of the risk management process but withheld the actual plans in reliance upon section 9(2)(f)(iv) of the OIA (confidentiality of advice tendered by Ministers and officials). The Ministry was concerned that release of the actual plans would present a misleading picture as the actual risks and the steps taken to mitigate those risks could change on a daily basis. The Ministry considered it important to provide advice without undermining the effectiveness of the process by releasing potentially misleading reports.

In the view of the Ombudsman, the exemption provision did apply in order to protect the flow of information between officials and Ministers. The question was where the balance of the public interest lay. There was an identified public interest in the public being aware of the major risks during the risk management process, the potential consequences for the delivery of public health services and the Ministry's strategy for managing those risks. The Ombudsman took the view that an appropriate balance could be struck between the relevant interests by providing a short summary of the risks together with a statement explaining the actions being taken to mitigate the risks and pointing out that those risks would change from time to time. The Ministry agreed to provide this summary and the applicant was satisfied with that decision.

Draft Cabinet paper: Case No. W45017⁶³²

The applicant sought certain information from the Minister for Biosecurity. One draft Cabinet paper was withheld. However, an earlier draft paper had been released in error to the applicant.

When considering the released draft paper and the draft paper now withheld, the Ombudsman found few differences, and those were mainly linguistic. The underlying advice was the same. The view was therefore taken that no prejudice would result from making available the draft paper in that any prejudice would have already occurred by virtue of the release of the earlier draft. Therefore, good reason did not exist for withholding the information.

Information about potentially contaminated sites: Case No. C5637⁶³³

The applicant sought access to a list of all potentially contaminated sites located in a District Council's area. Some information was released but the Council withheld the location of sites which could have been contaminated. This was done on the basis of privacy protection under section 7(2)(a) of the **Local Government Official Information & Meetings Act**.

In the view of the Ombudsman there were significant public interests involved. These related to the potential contamination and the effect on current and prospective owners of the property who would not be aware that their property might include a contaminated site. Work had not been done to establish whether or not the sites posed a safety risk. However, there were also privacy interests to be protected in relation to owners and occupiers of the property concerned. The view formed by the Ombudsman was that the complaint could be resolved by the Regional Council informing the owners of the information it held and releasing the information to the District Council (which had not been advised of the sites). This would protect the privacy of the owners. The applicant was satisfied that release to the District Council would serve the public interest because in the future the relevant information would be available to potential owners of the properties through a Land Information Memorandum provided by the District Council.

⁶³² *13th Compendium*, page 87

⁶³³ *13th Compendium*, page 132

Decisions where the public interest in disclosure did not outweigh the harm caused by disclosure

Access to Psychiatric Records: Case No. W42031⁶³⁴

The applicant asked a hospital for access to her late sister's psychiatric records, including notes from medical professionals and family members. The hospital withheld this information under section 9(2)(a) of the OIA to protect the privacy of the deceased, of family members and of the medical professionals involved.

On appeal, the Ombudsman held that the public interest in a family member's ability to access information about the treatment and diagnosis of a close relative outweighed privacy issues. Relevant factors in the decision included: that the medical staff made notes purely in their professional capacity and had no valid privacy interest to protect, the deceased died intestate, that the applicant was her sister, and that the deceased and the applicant had had a close relationship. The Ombudsman agreed that notes made by the deceased's friends and other family members were rightly withheld by the hospital because it did not have their consent. The Ombudsman agreed that there was no clear public interest in releasing the comments made by the friends and family. The applicant was provided with a summary of the comments.

Request for still photo used in court case: Case No. W42789

A newspaper requested the Police make available a still photo of an individual committing a crime. The individual had been prosecuted. The Police refused on the grounds that it was necessary to protect her privacy.

The Ombudsman agreed that releasing the images would prejudice her privacy and went on to consider public interest considerations. He considered that criminal proceedings occasion much media attention but matters which may be interesting to the public are not necessarily matters which it may be in the public interest to disclose. In this case any public interest surrounding conviction of the individual had been sufficiently met by the criminal proceedings which had been in open court.

Request for details of course attended by a prisoner: Case No. W42556

A journalist asked the Department of Corrections for details of a tertiary course in which a prisoner convicted of murder had been released temporarily to enrol. The Department refused on the grounds that it was necessary to protect the privacy of the prisoner.

The Ombudsman accepted that the prisoner had a right to privacy and that there were no public interest considerations that outweighed this. While details of the course might be interesting to the public, this was not enough to satisfy the test.

Disclosure of the name of a restaurant: Case No. A8727⁶³⁵

A District Health Board had carried out an investigation of a restaurant where a food poisoning outbreak had occurred. The restaurant co-operated with the investigation and an employee infection was considered to be the likely cause of the outbreak. The restaurant took appropriate measures and the Board took the view that there was no continuing risk to public health. In a subsequent publication, the Board described the events and identified the type of restaurant concerned, without naming it.

⁶³⁴ *12th Compendium*, page 97

⁶³⁵ *13th Compendium*, page 62

A trade association considered that the article would be likely to damage the business of all restaurants of that class because the restaurant in question had not been identified, and the association sought the name of the restaurant. The request was refused on the basis of prejudice to commercial affairs under section 9(2)(b)(ii) of the OIA.

The Ombudsman considered that while there was a strong public interest in knowing of real and current risks to public health that might arise from attending a particular restaurant, in this case measures had been taken to remedy the situation to the satisfaction of the public health authorities. On the other hand naming the restaurant would almost inevitably lead to considerable and unreasonable prejudice to its commercial position. In those circumstances, the Ombudsman took the view that the public interest had been satisfied by the release of the information already made available by the Board. The Ombudsman also pointed out that the publicity specifying the class of restaurant concerned had been published outside the control of the restaurant involved and it would be quite unfair for that restaurant to suffer by reason of that publication. This was therefore, in the view of the Ombudsman, not a factor to affect the balance of the public interest one way or the other.

The trade association accepted this reasoning as resolving the matter.

Report of an investigation into a company: Case No. W41711⁶³⁶

A shareholder in a company listed on the Stock Exchange sought access to a copy of a Securities Commission report of an investigation carried out into the company. The investigation had concluded that no action should be taken concerning a share rights issue by the company. The Commission withheld the information, relying, amongst other provisions, on section 9(2)(ba)(i).

The Commission argued that its ability to obtain frank, accurate and complete information from a company or from persons associated with a company would be significantly prejudiced if such persons had reason to believe that information which they provided might be released. This would prejudice the Commission's ability to discharge its statutory functions. The Commission argued that it ought have an unfettered ability to investigate and inquire into suspected market irregularities and that the continued flow of good quality information for this purpose was clearly in the public interest.

Upon investigation, the Ombudsman concluded that some of the information in the report was already publicly available from the Companies Office. It was therefore not confidential and section 9(2)(ba) could not apply with respect to that information. However, with respect to other information, the Ombudsman accepted the arguments of the Commission and found that there would be prejudice to the future supply of information should disclosure take place. The Ombudsman could not identify public interest considerations in disclosure of the information which could outweigh the reasons for withholding information which properly met the harm test in the exemption provisions.

Draft annual District Health Board Plan: Case No. A9003⁶³⁷

The applicant sought access to a District Health Board's draft annual report which the Board had prepared to discuss with the Minister of Health. The Board argued that disclosure would otherwise damage the public interest under section 9(2)(ba)(ii) because it would prejudice the ability of the Minister and Board to reach a reasoned and timely agreement on the ultimate contents of the plan, a requirement which was reflected in section 39(1) of the **Public Health & Disability Act**. The provision contemplated a process of consultation and negotiation prior to an agreement being reached.

⁶³⁶ *13th Compendium*, page 66

⁶³⁷ *13th Compendium*, page 68

The Ombudsman accepted that disclosure of the draft plan would be likely to undermine the ability of the Board and the Minister to reach agreement on the final contents. Release of proposals would be likely to lead to pressure on the parties to adopt a particular position on specific issues, thereby interfering with the consultation and negotiation process. On the other hand, there was a public interest in members of the public being able to comment on proposals concerning health issues and therefore participate in the policy-making process. However, the **Public Health & Disability Act** contemplated agreement between two parties only, the Board and the Minister. On balance, the Ombudsman took the view that the public interest in the Minister and the Board reaching agreement free from additional pressures was not outweighed by any public interest in disclosure and there was good reason under the OIA to withhold the draft annual plan.

Answers prepared to Parliamentary questions: Case No. W44156⁶³⁸

The applicant sought access to copies of all alternative answers to a Parliamentary question which had been provided to the Minister of Housing. Two alternative answers had been prepared and the Minister had decided which one to present. The request was refused by the agency under section 9(2)(g)(i), but during the course of the investigation, this ground was regarded as inapplicable.

However, section 9(2)(ba)(ii) was regarded as applicable. The answers had been prepared and were subject to an obligation of confidence between the Department and the Minister. The question of damage to the public interest was therefore considered.

The Ombudsman took the view that the answer to be presented to Parliament was a decision to be made by the Minister. If alternative answers were to be released, Ministers would be less likely to seek assistance in the future in preparing their answers and this would undermine answers to Parliamentary questions and the quality of accountability to Parliament. This would damage the public interest. It was also considered that release of the alternative answer would place the Department in the political arena and the Minister might lose confidence in the impartiality of the organisation. This result would also damage the public interest.

The content of the alternative answer did not raise any public interest considerations; it did not contradict the answer given in Parliament and was not exceptional in comparison. Accordingly, the only public interest consideration was to ensure that the Minister was accountable for his response to Parliament and this was sufficiently provided for under the Parliamentary process. There was, therefore, no countervailing consideration to overcome the considerations supporting withholding of the information.⁶³⁹

Documents concerning social assistance policy: Case No. W45797⁶⁴⁰

The applicant sought from the Treasury certain work done in relation to the development of social assistance policy. Treasury released some general information but withheld more detailed advice on the basis of the deliberative processes exemption in section 9(2)(f)(iv). It argued that the ability of Ministers to make policy decisions would be hindered if those decisions were to be taken in the context of a political discussion.

The Ombudsman considered that the exemption provision applied and the question therefore was whether the public interest considerations outweighed the need to withhold the information. There was a public interest in promoting the ability of the public to participate in the making of laws and

⁶³⁸ *13th Compendium*, page 71

⁶³⁹ This decision is consistent with the approach taken in the Australian Commonwealth Administrative Appeals Tribunal: see **Re F.E.Peters and Public Service Board and Department of Prime Minister & Cabinet (No. 4) No.A83/53 & A83/77 Freedom of Information** [1986] AAT No. 2751, <http://www.austlii.edu.au/au/cases/cth/aat/unrep2420.html>

⁶⁴⁰ *13th Compendium*, page 90

policy. However, the government had already released a document outlining its intended overall direction in this policy area and had therefore, in the view of the Ombudsman, satisfied the public interest considerations favouring release. Accordingly, the public interest did not outweigh the need to withhold the information in this case.

Hydrological data: Case No. C6482⁶⁴¹

The applicant sought access to hydrological data held by a District Council which had been collected by a resident with the intention of developing a hydro-electric scheme. The applicant sought the information to support a competing resource consent application. The Council argued that the information had been provided in confidence and there would be prejudice to the future supply of similar information in the future if the information were to be released. The site from which the data was collected was unique and there was no other data available. The Ombudsman accepted that on these bases the grounds for withholding under section 7(2)(c)(i) of the **Local Government Official Information & Meetings Act** were satisfied.

Although release of the information was clearly of interest to the requester, no wider public interest in release could be identified, and accordingly, there were good grounds for withholding the information.

⁶⁴¹ *13th Compendium*, page 134

11 Canada: Federal

- 11.1 A consideration of all of the decisions of the courts and the Information Commissioners considering elements applicable to the exemption provisions in the Canadian federal and provincial jurisdictions is outside the scope of this book. The public interest test in the Canadian jurisdictions, where expressly stated in the law, differs from the UK, Australian, Irish, and New Zealand jurisdictions considered in greater detail and a comprehensive examination of the Canadian jurisprudence on this point is beyond the scope of this book.

Legislative Framework

- 11.2 Access to government information in Canada is regulated at both federal and provincial/territorial levels. The federal **Access to Information Act** 1982 (the AI Act) came into force on 1 July 1983. It applies to all government departments and most government agencies with the exception of the commercial crown corporations, Parliament and the Courts.
- 11.3 The purpose of the AI Act is to provide a right of access to information in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.
- 11.4 Access to personal information is governed by the **Privacy Act** 1982.

Administration and Enforcement

- 11.5 Two ministers share responsibility for access to information. The Minister of Justice is responsible for the legislation. The President of the Treasury Board is the Minister responsible for overseeing administration of the Act, the issuance of guidelines and directives to government institutions and for producing a publication (Info Source) containing information about government institutions and their information holdings to assist individuals exercising rights under the legislation.
- 11.6 An interdepartmental task force (the Access to Information Review Task Force) has written a report on access to information legislation, "Access to Information: Making It Work For Canadians".⁶⁴² The Task Force's terms of reference were to conduct an administrative and general legislative review, identify possible adjustments for immediate implementation and report on further recommendations. The Task Force commissioned a report by Barbara McIsaac which considered the public interest override in the AI Act.⁶⁴³ This report also contains a brief discussion of public interest provisions in non-Canadian jurisdictions, though only at a very general level.

⁶⁴² <http://www.atirtf-geai.gc.ca/report2002-e.html>

⁶⁴³ McIsaac, B., 'The nature and structure of exempting provisions and the use of the concept of a public interest override', *Research paper 17 to the Task Force*

- 11.7 The AI Act is enforced by the Information Commissioner who is an independent ombudsman appointed by Parliament. If the government institution does not disclose information as recommended by the Information Commissioner, the complainant or the Commissioner can seek judicial review in a federal court.
- 11.8 It is important to note that the Commissioner operates as an ombudsman under the AI Act and not as a second level decision-maker. The Commissioner investigates complaints made by persons who are dissatisfied with access decisions made by agencies. As part of the investigation, the Commissioner makes findings and recommendations, but has no power to make a new decision in place of the original decision. If the Commissioner is not satisfied with an agency's response to his recommendations, he has the right, with the requester's consent, to ask the Federal Court to review the matter. If the requester is dissatisfied with the results of the Commissioner's investigation, the requester has the right to ask the Federal Court to review the agency's response. Third parties whose information or documents may be part of a request also have the right to seek review from the Federal Court if they are dissatisfied with the results of the Commissioner's investigation. Such third parties, except in most unusual circumstances, will be opposing disclosure.

The Public Interest Test

- 11.9 It has been said by the Supreme Court of Canada that the expression "public interest" includes both the concern of society generally and the particular interests of identifiable groups.⁶⁴⁴
- 11.10 Two mandatory exemptions include specific public interest overrides which allow the head of a government institution to disclose information where this would be in the public interest as defined in the provision.
- 11.11 Section 20(6) permits the disclosure of commercial information from a third party if this would be in the public interest as it relates to health, safety or protection of the environment, and the public interest in disclosure **clearly** outweighs any injury to the third party. The test does not apply to third party trade secrets because the trade secret exemption is absolute.
- 11.12 Section 19 is a mandatory exemption for personal information. It says that personal information may be disclosed if the disclosure is in accordance with section 8 of the Privacy Act. One of the circumstances in section 8 is where "the public interest clearly outweighs any invasion of privacy that could result from disclosure."
- 11.13 The requirement that the public interest in disclosure **clearly** outweigh the reasons for non-disclosure makes the Canadian test different from those in the other Commonwealth jurisdictions and in the UK where it is a question of merely balancing the competing public interests. If the balance is even slightly in one direction, that public interest will prevail. In Canada the

⁶⁴⁴ **RJR-MacDonald Inc. v Canada (Attorney-General)** [1994] 1 SCR 311 at 344, http://www.lexum.umontreal.ca/csc-scc/en/pub/1994/vol1/html/1994scr1_0311.html

decision-maker would probably have to be comfortably satisfied that the balance fell in favour of disclosure, given the different test.

- 11.14 The AI Act does not contain a general public interest override that applies to all the exemptions. A 1987 select committee report reviewing the access to information regime recommended that there should be a more thoughtful balancing of the public interest under the Act.⁶⁴⁵ The McIsaac report to the Task Force also recommended that the legislation be amended to provide for a much broader obligation to release information in the public interest. However, the Task Force recommended that a general public interest override is not necessary because discretionary exemptions already imply a balancing of public interest considerations.

Official Guidance

- 11.15 The term “public interest” is not defined in the AI Act. Canada’s Access to Information Review Task Force is of the view⁶⁴⁶ that the public interest override has been rarely—if ever—used to disclose information that would otherwise have been withheld under a mandatory exemption.
- 11.16 The Treasury Board of Canada Secretariat publishes a manual for government departments on the application of the AI Act. This is formal guidance from the Minister made under the Act and is available on the Treasury Board web site.⁶⁴⁷ Other materials including policy documents, guidelines, and Annual Reports are also collected on the web site.
- 11.17 The manual has a limited discussion of the public interest test. It does not offer guidance on how to carry out the balancing act required by the test or on what criteria should be taken into account.
- 11.18 The manual does offer procedural guidance for departments dealing with requests under the AI Act. Some of this guidance is relevant to the public interest override. The manual suggests departments ensure that third parties are asked to give:
- reasons why their information should be exempted under section 20(1) (third parties’ financial, commercial, scientific and technical information) of the AI Act;
 - reasons why disclosure is not outweighed by public interest considerations in section 20(6) (commercial interests).

Federal Courts Case Law

- 11.19 Judicial interpretation at federal level supports the presumption in favour of access inherent in the AI Act.

⁶⁴⁵ *Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act. Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 1987 Recommendation 3.1

⁶⁴⁶ In correspondence with the Constitution Unit

⁶⁴⁷ <http://www.tbs-sct.gc.ca/>

- 11.20 According to the former Associate Chief Justice of the Federal Court, James Jerome, “public access ought not to be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure.”⁶⁴⁸
- 11.21 However, the courts have shown judicial deference for decision-makers and in particular for provincial Information Commissioners⁶⁴⁹ on the application of the public interest test and refrained from identifying criteria or guidelines. However, it appears that now the Canadian federal courts will review the reports and recommendations of the Commissioners for their correctness, and not just as to whether they are unreasonable.⁶⁵⁰
- 11.22 The Supreme Court of Canada considered the nature of the decision-maker’s discretion to apply public interest considerations. It concluded that the relevant head of the institution need not give extensive reasons for disclosure in the public interest as long as he or she does in fact turn their mind to the issue.⁶⁵¹
- 11.23 In one case, the Federal Court of Appeal had to balance competing public interests where certain information was the “personal information” of more than one person – an individual on the one hand and a group of persons on the other.⁶⁵² The Court considered that relevant “public interests” were the following:

(a) for the group:

- the private interest of the group in hiding the fact that they participated in an inquiry and in keeping confidential certain conversations they had with an investigator;
- the “chilling” effect of disclosure on future investigations.

These interests were not regarded by the Court as significant.

(b) for the individual:

- his private interest in being able to respond to certain allegations made against him;
- the public interest in ensuring procedural fairness in administrative inquiries.

⁶⁴⁸ **Maislin Industries Limited v Canada (Minister for Industry, Trade and Commerce)** [1984] 1 FC 939 (TD)

⁶⁴⁹ See **Canadian Council of Christian Charities v The Minister of Finance**, <http://www.canlii.org/ca/cas/fct/1999/1999fct10799.html>

⁶⁵⁰ **Canada Inc. v Canada (Minister of Industry)** (CA) [2002] 1 FC 421; <http://www.canlii.org/ca/cas/fca/2001/2001fca254.html> AND ALSO **Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)** [2003] 1 SCR 66; <http://www.canlii.org/ca/cas/scc/2003/2003scc8.html>

⁶⁵¹ **Dagg v Canada (Minister of Finance)** [1997] 2 SCR 403, per La Forest at pages 432–433 quoted by McIsaac supra note 32

⁶⁵² **Canada (Information Commissioner) v Canada (Minister of Citizenship and Immigration)** [2003] 1 FC 210 (CA), <http://www.canlii.org/ca/cas/fca/2002/2002fca270.html>

The Court considered these interests as much stronger than the interests of the group in this case and the information was disclosed.

11.24 The argument that the public interest in confidentiality in respect of investigations and the potential “chilling” effect on the investigative process if information were to be disclosed was once again given very little weight by the Federal Court of Appeal in an earlier decision.⁶⁵³

11.25 There is a difference, however, between there being a private and public interest in a person having access to allegations made or statements of witnesses and an interest in having access to notes taken by members of the judiciary or persons conducting an administrative inquiry. There is a strong public interest in such persons being able to take notes freely recording their impressions as a matter proceeds before them, and underlying that interest is the concept of judicial independence.⁶⁵⁴ There is no public interest in access to such notes.

11.26 In a recent case, the Federal Court (Trial Division, Snider J.) had to consider whether certain tapes and transcripts of conversations between air traffic controllers and aircraft personnel in respect of four separate collisions had been properly exempted from disclosure.⁶⁵⁵

11.27 In considering the public interest, the Court said that it could not find that the discretion not to disclose had not been exercised in good faith, that the discretion had not been exercised in accordance with principles of natural justice or that irrelevant considerations were taken into account by the decision-maker. The decision-maker took into account the privacy concerns of the persons speaking on the tapes and in the transcript, the practice in other places as to release or non-release and the fact that the public interest was being served by the official investigations. In those circumstances and applying a “judicial review” standard rather than assessing for itself the competing public interests, the Court could not find that the discretion not to disclose the information was wrong, as a matter of a decision rationally available to the decision-maker on a discretionary basis.

11.28 The public interests pointed to by the Commissioner –

- the fact that the communications took place on public airwaves
- the fact that other jurisdictions did release such information

did not influence the Court to find that the exercise of the discretion under s.19(2) of the AI Act had miscarried. The Information Commissioner appealed to the Federal Court against the refusal to release the information.

11.29 It is possible to envisage a different result if the Court could, as a matter of law, have weighed for itself the competing public interests.

⁶⁵³ **Rubin v Canada (Minister of Transport)** [1998] 2 FC 430 (CA), <http://www.canlii.org/ca/cas/fca/1997/1997fca10222.html>

⁶⁵⁴ **Canada (Privacy Commissioner) v Canada (Labour Relations Board)** [1996] 3 FC 609 (TD), <http://www.canlii.org/ca/cas/fct/1996/1996fct10048.html>

⁶⁵⁵ **Canada (Information Commissioner) v Canadian Transportation Accident Investigation and Safety Board** [2005] FC 384, <http://www.canlii.org/ca/cas/fct/2005/2005fc384.html>

Decisions of the Information Commissioner

11.30 A review of the Information Commissioner's decisions from 1994 to 2005 shows that the Commissioner was required to consider the public interest test in eleven decisions. In three of those decisions it was held that the public interest clearly outweighed either invasion of privacy or harm to third parties. In the balance of the decisions, the public interest did not operate to favour disclosure.

The decisions below are available on the Commissioner's web site in the relevant annual report. The case names below are from those reports.⁶⁵⁶

Decisions where the public interest test operated in favour of disclosure

A whistleblower⁶⁵⁷

An employee of Public Works and Government Services Canada blew the whistle on contracting irregularities and misappropriation of government funds. There was an internal investigation and the employee subsequently asked for all of the papers. The department refused because it wanted to protect the privacy of the wrongdoers, who could be identified even if their names were omitted.

The Commissioner considered that there was a public interest in exposing instances of misappropriation of public funds and that this clearly outweighed any invasion of privacy. He was guided by comments made by Justice Muldoon of the Federal Court in the case of **Bland v Canada (National Capital Commission)**:

It is always in the public interest to dispel rumours of corruption or just plain mismanagement of the taxpayers' money and property. Naturally if there has been negligence, somnolence or wrongdoing in the conduct of a government institution's operations it is by virtual definition, in the public interest to disclose it and not to cover it up in wraps of secrecy.

The Commissioner also noted that as a general rule before a department suppresses information about employee wrongdoing, even to protect privacy, the relative balance between the public interest in disclosure and privacy should be considered by the department's most senior officials.

Reneging on a promise⁶⁵⁸

A journalist complained to the Commissioner because the Transportation Safety Board had refused to release air traffic control tapes and transcripts relating to a plane crash. The Commissioner considered that TSB did not properly consider the public interest override and that the public interest in air safety outweighed any privacy considerations.

Weighing public interest⁶⁵⁹

A journalist requested the audit reports on 21 meatpacking companies from Agriculture Canada. Agriculture Canada consulted the companies and weighed the potential financial loss to competitive interests or interference with contract negotiations with the public interest in safeguarding public health. The journalist complained to the Commissioner of delays and argued

⁶⁵⁶ The Annual Reports also contain much general and statistical information for each year of operation of the Canadian Act.

⁶⁵⁷ A whistleblower, Case 16, 1995, AR 1994–95

⁶⁵⁸ Reneging on a promise, Cases 001 and 002, 2001, AR 2000–01

⁶⁵⁹ Weighing public interest, Case 08, 1994, AR 1993–94

that consultations with third party companies were unnecessary. However, the Commissioner noted that the “only fair and reasonable way to balance public interest and corporate loss is to do some measure of fact finding including facts from corporations.”

Decisions where the public interest test operated in favour of non-disclosure

The grey area of “public interest”⁶⁶⁰

A journalist requested records from Transport Canada relating to violations by commercial pilots of the Aeronautics Act and Regulations. Transport Canada refused the request under section 19(1) to protect the privacy of the pilots. The Commissioner held that the public interest in the protection of health and safety did not in this instance clearly outweigh invasion of privacy because Transport Canada’s regulatory role adequately served the public interest in airline safety.

Refugees and access to legal services⁶⁶¹

The Legal Services Board asked the Citizenship and Immigration Department to routinely make available details of refugees held in detention so that it could more effectively arrange legal representation for those refugees.

The Board argued that any privacy interest of the refugee was outweighed by the public interest in effective legal representation. The Commissioner carefully considered all the circumstances and concluded that a slight invasion of privacy was not warranted because there were other ways of dealing with the Board’s concerns. The fact that the Board wanted a routine release of information signalled that the parties should work together outside the Act to find solutions.

Whose videotapes are they?⁶⁶²

A persistent requester had been using the AI Act for many years to obtain information from Environment Canada. He asked for videotapes which were part of trap research carried out by Environment Canada into the effectiveness of traps for fur bearing animals. He argued there was a public interest in the protection of the environment and that this outweighed any potential damage caused to the fur industry by the release of images of dying animals. The Commissioner was not persuaded the public interest required release of the tapes, primarily because the Department was still developing standards for humane trapping. He noted that once those standards were developed there might be a public interest in allowing the public to see how trapped animals fared in approved devices.

Confidentiality Versus Public Interest⁶⁶³

A University of British Columbia health researcher sought access to certain toxicological data on a disinfectant manufactured by Johnson & Johnson. The data was held by Health Canada and the requester argued that the disinfectant might have an adverse effect on the health of healthcare workers. The Commissioner took the view that Health Canada had carefully weighed the factors for and against disclosure under s.20(6) of the AI Act. He also agreed that no basis had been shown for the suggestion that the disinfectant posed any threat to public health or safety and that the prejudice to commercial and competitive interests of Johnson & Johnson outweighed any issue concerning public health.

⁶⁶⁰ The grey area of “public interest”, Case 13, 1998, AR 1997–98

⁶⁶¹ Refugees and access to legal services, Case 01, 2000, AR 2000–01

⁶⁶² Whose videotapes are they? Case 04, 1996, AR 1995–96

⁶⁶³ Confidentiality Versus Public Interest, Case 06, 2003-04, AR 2003-04

Census Records – Facilitating Research While Protecting Privacy⁶⁶⁴

In one case summary, the Commissioner discussed the proper balance between the public interest in having statistical material available for research and the public interest in maintaining the secrecy of census records so as to encourage participation by citizens in censuses. He regarded the need for secrecy as diminishing progressively over time and thought that the Privacy Regulations properly set the time at which secrecy disappeared altogether at 92 years. While this time will differ according to the statute law of different jurisdictions, the Commissioner's reasoning may be applicable where members of the public take part in voluntary surveys where some assurance of confidentiality is given.

Litigation Disbursements – Should They Be Protected?

In this case, the Commissioner applied, in a novel way, the public interest test of accountability for the use of public funds.⁶⁶⁵ He said that this test should be applied so as to narrow as far as possible the scope of legal professional privilege in a case where the issue was the extent to which disbursements charged by lawyers to the Crown were privileged. While the common law protected communications between client and lawyer for the purpose of legal advice, it did not protect mere facts such as the amount of disbursements charged, except where the statements of charges might reveal legal tactics.

Pan-Pan-Pan⁶⁶⁶

A requester sought access to the audio recording of air traffic communications between certain air traffic controllers and a Swiss Air flight which subsequently crashed, with all on board losing their lives.

The Commissioner assessed whether the public interest in disclosure clearly outweighed the invasion of personal privacy which would be involved in disclosure. The Commissioner observed that any invasion of privacy would be minor in nature, since the content of the communications was publicly known and, at least in one area, many people knew the identity of the air traffic controllers.

However, the Commissioner also considered that the public interest in disclosure was slight since the Canadian Transportation Accident Investigation and Safety Board (TSB) had already released the transcript of the communications and, in addition, was to issue a public report on the results of the investigations.

In those circumstances, even though the potential invasion of privacy was slight, secrecy would be justified unless the public interest in disclosure was clear and compelling.

Private Hurt and Public Good⁶⁶⁷

A requester sought access from Transport Canada of inspection records on the condition of two aircraft. The request was refused. Upon investigation, the Commissioner observed that:

- air carrier general audit reports should be made public since they permit the public to assess the compliance of both the carrier and the department with their lawful obligations;

⁶⁶⁴ Census Records – Facilitating Research While Protecting Privacy, Case 03, 2002-03, AR 2002-3

⁶⁶⁵ Litigation Disbursements – Should They Be Protected, Case 07, 2002-03, AR 2002-03

⁶⁶⁶ Pan-Pan-Pan, Case 01, 1999, AR 1998-99

⁶⁶⁷ Private hurt and public good, Case 02, 1991-92, AR 1991-92

- in some cases, individual occurrence reports should also be released regardless of the harm to the carrier.

In this case, however, the Commissioner thought that release of the inspection/occurrence reports would be detrimental to the carrier because, in isolation, they were open to misinterpretation which could result in unwarranted public alarm. The Commissioner considered that he could not conclude that the public interest in disclosure clearly outweighed the potential harm to the carrier.

This case, it should be said, could well be decided differently today because “misinterpretation” is not generally regarded as a sound basis for exempting information, particularly government information. The approach of the Commissioner may reflect that it was a private business which would suffer due to “misinterpretation”. The case may also have a different outcome where the test is simply the balance of the public interests concerned rather than whether the public interest in disclosure **clearly** outweighs the other relevant interests.

In the following situations the public interest clearly outweighed harm to third parties:

- damage or danger to public health and safety or to the environment;
- political and bureaucratic accountability to the public;
- to enable citizens to participate in the political process; and
- specific and identifiable threat to the public interest posed by non-disclosure.

The following public interest considerations weigh against disclosure:

- unnecessary breaches of personal privacy;
- if request is framed in the form of a ‘fishing expedition’ and does not relate to specific information;
- financial or contractual prejudice resulting from disclosure;
- commercial prejudice where no basis is demonstrated for an adverse effect on public health;
- where information is already publicly available in another form or is to be reported upon by government.

12 Canada: Ontario

Legislative Framework

- 12.1 The **Freedom of Information and Protection of Privacy Act** 1988 (“Provincial FOI Act”) and the **Municipal Freedom of Information and Protection of Privacy Act** 1991 (“Municipal Act”) together establish a system for public access to provincial and municipal government information and for protecting personal information held by provincial and municipal organisations.
- 12.2 Since 1 November 2004, Ontario has had in place the **Personal Health Information Protection Act**, which deals with collection, use of, and access to health information.

Enforcement and Administration

- 12.3 These Acts are enforced by the Information and Privacy Commissioner, Ontario. Unlike the Federal Commissioner, the Ontario Commissioner and the adjudicators determining cases do have the power to make decisions concerning access in place of the original decision.

Official Guidance

- 12.4 The web site of the Commissioner contains a variety of FOI-related materials including advices called IPC Practices and Practice Directions issued by the Commissioner, brochures, a newsletter (published twice a year), and other guidance.⁶⁶⁸

Public Interest Override

- 12.5 The public interest override in section 23 of the Provincial Act provides:
- An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third party information], 18 [economic and other interests of Ontario], 20 [danger to health or safety], 21 and 21.1 [personal privacy] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.*
- 12.6 Section 16 of the Municipal Act is an equivalent provision, referring to the equivalent sections in that Act (7, 9, 10, 11, 13 and 14).
- 12.7 The override does not apply to exemptions covering Cabinet records, law enforcement records, records qualifying for solicitor-client privilege and records relating to the defence of Canada.

⁶⁶⁸ <http://www.ipc.on.ca/>

- 12.8 The test is in three parts and all three must be satisfied: a public interest in disclosure, this public interest must be **compelling**, and this compelling public interest must **clearly outweigh** the purpose of the exemption claim.
- 12.9 Both FOI Acts also provide for a proactive duty to disclose information that “reveals a grave environmental, health or safety hazard to the public”.⁶⁶⁹

Decisions of the Information Commissioner

- 12.10 The case law of the Ontario Commissioner and papers prepared by the Commissioner’s office are a very useful source of information about the application of the public interest test in Ontario.
- 12.11 The Commissioner’s view is that although the issue is frequently raised by requesters and appellants, the threshold for its application is very high and carefully applied on appeal.⁶⁷⁰ A very small proportion of public interest override claims are upheld.⁶⁷¹
- 12.12 An Assistant Information and Privacy Commissioner Ontario has written that⁶⁷² the Commissioner has taken a liberal interpretation of what constitutes a “public interest” and has focused on what makes a public interest “compelling” and whether the public interest “clearly outweighs” the exemption. The Federal Courts have approved the Commissioner’s

⁶⁶⁹ Section 11 Provincial Act, section 5 Municipal Act

⁶⁷⁰ *Submission to the Access to Information Review Task Force: May 2001* by Ann Cavoukian, Information and Privacy Commissioner, Ontario

⁶⁷¹ As examples, some orders of the Ontario Information Commissioner which consider the public interest test include:

PO-1805: <http://www.ipc.on.ca/english/orders/orders-p/po-1805.htm>

M-249: <http://www.ipc.on.ca/english/orders/orders-m/m-249.htm>

M-317: <http://www.ipc.on.ca/english/orders/orders-m/m-317.htm>

M-539: <http://www.ipc.on.ca/english/orders/orders-m/m-539.htm>

M-710: <http://www.ipc.on.ca/english/orders/orders-m/m-710.htm>

P-12: <http://www.ipc.on.ca/english/orders/orders-p/p-12.htm>

P-123: <http://www.ipc.on.ca/english/orders/orders-p/p-123.htm>

P-124: <http://www.ipc.on.ca/english/orders/orders-p/p-124.htm>

P-270: <http://www.ipc.on.ca/english/orders/orders-p/p-270.htm>

P-347: <http://www.ipc.on.ca/english/orders/orders-p/p-347.htm>

P-391: <http://www.ipc.on.ca/english/orders/orders-p/p-391.htm>

P-532: <http://www.ipc.on.ca/english/orders/orders-p/p-532.htm>

P-568: <http://www.ipc.on.ca/english/orders/orders-p/p-568.htm>

P-613: <http://www.ipc.on.ca/english/orders/orders-p/p-613.htm>

P-901: <http://www.ipc.on.ca/english/orders/orders-p/p-901.htm>

P-984: <http://www.ipc.on.ca/english/orders/orders-p/p-984.htm>

P-1175: <http://www.ipc.on.ca/english/orders/orders-p/p-1175.htm>

P-1190: <http://www.ipc.on.ca/english/orders/orders-p/p-1190.htm>

P-1398: <http://www.ipc.on.ca/english/orders/orders-p/p-1398.htm>

P-1406: <http://www.ipc.on.ca/english/orders/orders-p/p-1406.htm>

P-1439: <http://www.ipc.on.ca/english/orders/orders-p/p-1439.htm>

PO-1688: <http://www.ipc.on.ca/english/orders/orders-p/po-1688.htm>

PO-1779: <http://www.ipc.on.ca/english/orders/orders-p/po-1779.htm>

⁶⁷² Mitchinson, T. 2001, *Public Interest and Ontario’s Freedom of Information and Protection of Privacy Act*, http://www.ipc.on.ca/scripts/index_.asp?action=31&P_ID=11573&N_ID=1&PT_ID=15939&U_ID=0 (16/2/01)

approach and held that the interpretation of the public interest test is within the Commissioner's area of expertise. This applies the principle that "reasonableness" is the appropriate standard of review where a permanent, specialised tribunal addresses questions which call for a balance of competing interests.⁶⁷³

Court Review: What is a compelling situation?

- 12.13 In reviewing decisions of the Ontario Commissioner in this area, the courts apply the standard of reasonableness.⁶⁷⁴
- 12.14 In applying this test, the Court determines whether the reasons of the Commissioner stand up to a somewhat probing examination and if there is a line of reasoning that supports the decision, then the Court, on judicial review, should not interfere with the decision.⁶⁷⁵
- 12.15 Effectively, the courts will uphold the decision if it is reasonable even if they would have come to a different view.

Some examples of situations found to be not "compelling":

- another public process or forum to address public interest considerations has been established (Orders P-123/124, P-391, M-539);
- a significant amount of information has already been disclosed and this is adequate to addressing public interest considerations (Orders P-532, P-568);
- a court process provides an alternative disclosure mechanism and the reason to obtain records is for civil or criminal proceedings (Orders M-249, M-317);
- there has already been wide public coverage or debate, and the remaining information would not shed further light on the matter (Order P-613).

Some examples of situations where the public interest was determined to be compelling:

- the integrity of the criminal justice system has been called into question (Order PO-1779);
- disclosure would give the public significant information into the safe operation of petrochemical plants (Order P-1175) or into Ontario's nuclear emergency contingency abilities (Order P-901).

- 12.16 The balancing exercise that must be undertaken in considering whether a compelling public interest **clearly outweighs** the exemption was described in Appeal P-9400822 from Order P-982:

⁶⁷³ **National Corn Growers Assn v Canada (Canadian Import Tribunal)** (1990) 74 DLR (4th) 449 at 456-8, <http://www.canlii.org/ca/cas/scc/1990/1990scc108.html>

⁶⁷⁴ **Ontario (Workers Compensation Board) v Ontario (Assistant Information and Privacy Commissioner)** (1998) 41 OR (3rd) 464 (CA) at page 473, <http://www.canlii.org/on/cas/onca/1998/1998onca10502.html> OR

⁶⁷⁵ **Law Society of New Brunswick v Ryan** [2003] 1 SCR 247 at paragraph 55, <http://www.canlii.org/ca/cas/scc/2003/2003scc20/html>

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. Section 23 recognizes that each of the exemptions listed in this section, while serving to protect vital interests, must yield on occasion to the public interest in access to information held by government. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.⁶⁷⁶

Some examples of situations where the public interest has overridden the exemption

- Where the actions of an elected official were called into question and irrespective of any actual wrongdoing, the public interest in disclosure clearly outweighed the purpose of the personal information exemption claim. (Order M-710)
- Where the public interest in safety of nuclear facilities and public accountability for operation of nuclear facilities clearly outweighed the exemption protecting economic and competitive interests of the company concerned. (Order P-1190, P-1805)
- Where the public interest in informed public discussion about Quebec independence, which was a political issue of virtually unprecedented importance, clearly outweighed the exemption protecting advice and recommendations of the Ministry of Finance and the exemption protecting intergovernmental relations. (Order P-1398) The decision of the Commissioner in this case was ultimately upheld in the Ontario Court of Appeal.

⁶⁷⁶ http://www.ipc.on.ca/scripts/index_.asp?action=31&N_ID=1&P_ID=4209&U_ID=0

13 Canada: British Columbia

Legislative Framework

- 13.1 The British Columbia **Freedom of Information and Protection of Privacy Act** came into force on 4 October 1993. It governs access to official and personal information of public sector bodies.

Administration of the BC Act

- 13.2 The Information Policy and Privacy Branch of the Ministry of Labour and Citizens' Services is responsible for FOI policy.

Official Guidance

- 13.3 The web site of the Ministry contains a major publication, the *FOIPPA Policy and Procedure Manual* for the guidance of government departments in the application of the BC Act.⁶⁷⁷ There is a discussion of the public interest override provision in the BC Act, section 25, which advises that decisions as to the risk of significant harm to the interests protected by section 25 and what constitutes release "without delay" must be made on a case by case basis, as will also be the case with the balancing of the public interests involved.
- 13.4 The web site also contains an easy to read guide to the BC Act and other straightforward advice for the public.⁶⁷⁸

Enforcement of the BC Act

- 13.5 The BC Act is enforced by the Information and Privacy Commissioner who has joint responsibility for FOI issues and personal information. For the information of the public, the Commissioner publishes *A Guide to Access to Information and Privacy Protection Under BC's Freedom of Information and Protection of Privacy Act*.⁶⁷⁹

The Public Interest Test

- 13.6 Section 25 of the BC Act provides for compulsory disclosure by the head of a public body, without delay, to the public, to an affected group of people, or to the applicant, whether or not a request for information is made, of information:

which reveals a risk of significant harm to the environment or to the health and safety of the public or a group of people; or the disclosure of which is, for any other reason, clearly in the public interest.

⁶⁷⁷ <http://www.msar.gov.bc.ca/privacyaccess/manual/toc.htm>

⁶⁷⁸ http://www.msar.gov.bc.ca/privacyaccess/index_toc.htm#Guidelines

⁶⁷⁹ <http://142.31.70.39/pdfs/public/GuideToFOIPPAJune2004.pdf>

13.7 This provision differs from the standard “public interest” provision. It does not establish factors to be weighed in the balance for or against disclosure; rather, it identifies certain specific matters which are obviously and clearly in the public interest to be disclosed, and requires government to disclose them whether or not a request has been made. It is unsurprising that it has rarely arisen specifically, since the matters specified are unlikely to arise in the context of an FOI request, except in the most extraordinary circumstances, because if a public body did have such information in its possession, it would already have been required to disclose it before the request had been made.

13.8 However, the BC Act does contain “public interest” criteria as part of specific exemptions. For example, the s.22 exemption dealing with personal privacy lists as circumstances to be taken into account in making a decision under that section:

- that disclosure is desirable for the purpose of subjecting the activities of the government or a public body to public scrutiny;
- that disclosure is likely to promote public health and safety or to promote the protection of the environment;
- that the personal information is relevant to a fair determination of the FOI applicant’s rights; and
- that disclosure will assist in researching or validating the claims, disputes, or grievances of aboriginal people.

13.9 It should also be remembered that where an exemption provision is discretionary rather than mandatory – that is, stating that a decision-maker **may** refuse access – then public interest considerations could be involved (though not always) in the process by which a decision-maker reaches a decision as to whether or not access should be refused where the information falls within the language of the exemption.

13.10 In the BC Act, discretionary exemptions include

Section 13	advice or recommendations developed by or for a public body or a minister;
Section 14	solicitor-client privilege;
Section 15	law enforcement; harm to property; prejudice to defence, harm to the security of any property or system;
Section 16	harm to intergovernmental relations;
Section 17	harm to financial interests of a public body or of government;
Section 18	conservation of fossil or natural sites and of endangered species;
Section 19	threats to personal or public safety.

13.11 In order to invoke section 25 of the BC Act, which requires release “without delay”, there must be an immediate and pressing need to release the

information as well as circumstances which are intended to be of a “clear gravity and present significance”.⁶⁸⁰

- 13.12 The principles concerning section 25 of the BC Act and the very high threshold which must be met to justify disclosure are set out in a most comprehensive Order of the Commissioner in 2002.⁶⁸¹ The very high threshold means that section 25 will rarely be invoked successfully.
- 13.13 In that very important decision, the Commissioner said (at para 149) that in the case of a discretionary exemption, the decision-maker should always consider the public interest in disclosure of information which might fall within the language of an exemption provision. He identified a number of factors relevant to the exercise of such a discretion, as follows:
- the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;
 - the wording of the discretionary exception and the interests which the section attempts to balance;
 - whether the individual’s request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
 - the historical practice of the public body with respect to the release of similar types of documents;
 - the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
 - whether the disclosure of the information will increase public confidence in the operation of the public body;
 - the age of the record;
 - whether there is a sympathetic or compelling need to release materials;
 - whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
 - when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.
- 13.14 The Supreme Court of British Columbia accepts the expertise of the Information Commissioner and gives appropriate deference. The standard of

⁶⁸⁰ **Office of the Chief Coroner** (order of the Information Commissioner) [2004] CanLII 34268 (BCIPC), <http://www.canlii.org/bc/cas/bcipc/2004/2004bcipc10102.html>

⁶⁸¹ **Office of the Premier and Executive Council Operations and Ministry of Skills Development and Labour** [2002] (BCIPC), <http://www.canlii.org/bc/cas/bcipc/2002/2002bcipc10038.html>

review is reasonableness, not whether the Commissioner is correct or incorrect.⁶⁸²

- 13.15 It has been pointed out that section 25(1) of the BC Act has never been found by the Information Commissioner to apply to records in dispute in an inquiry.⁶⁸³ The issue has arisen, though, as appears in the section which follows.

Decisions of the Information Commissioner

Release of contract between University and sponsor - Order 01-20⁶⁸⁴

In one case where the issue did arise, the Commissioner considered the public interest in making available a contract between a University and a private company sponsor. The applicant requested a copy of a sponsorship agreement between the University of British Columbia and Coca-Cola Bottling Ltd. It argued that because UBC is publicly funded, its decision to accept substantial funds from a private company and the terms of that deal must be open to public scrutiny and debate. The university refused.

The issue before the Commissioner was whether disclosure for any reason (other than environment or health) was clearly in the public interest and if so whether there was an urgent and compelling need for disclosure (which he regarded as a necessary element of the section).

The Commissioner held that public curiosity and interest in disclosure does not necessarily mean that disclosure is in the public interest.

The Commissioner held that, even if “contractual and financial information is capable of being ‘clearly in the public interest’ within the meaning of s25(1)(b), the required elements of urgent and compelling need for publication are not present in this case.”

The Commissioner was also of the view that the test in section 25(1) did not require a balancing with the exception provisions in the Act.

- 13.16 The following table summarises public interest factors recognised in British Columbia cases.

⁶⁸² **B.C. Teachers’ Federation, Nanaimo District Teachers’ Association et al. v Information and Privacy Commissioner (B.C.) et al.** 2006 BCSC 131, <http://www.courts.gov.bc.ca/jdb-txt/sc/06/01/2006bcsc0131.htm>

⁶⁸³ Order 04-04 (16 February 2004) at paragraph [125], <http://142.31.70.39/orders/2004/Order04-04.pdf>

⁶⁸⁴ Order 01-20 (25 May 2001), <http://142.31.70.39/orders/2001/Order01-20.html>

Public interest factors in favour of disclosure:

- public access to operations of government
- maintenance of the integrity of criminal justice system
- access to information relating to industries such as petrochemical plants and the nuclear industry
- accountability for nuclear plant emergency contingency plans
- scrutiny of the operations of public bodies
- improper actions of elected officials
- publicly-funded bodies receiving money from a private source

Public interest factors against disclosure:

- existence of another process or forum to address public interest considerations
- significant amounts of relevant information have already been disclosed
- alternative disclosure mechanisms available
- information already in public eye, and further disclosure would not shed more light on the matter
- need for confidentiality in commercial environment
- privacy rights of persons (including deceased persons)

14 Canada: Alberta

Legislative Framework

- 14.1 The Alberta **Freedom of Information and Protection of Privacy Act** (“FOIP Act”) currently in force commenced on 1 January 2002. This was a re-enactment of the earlier Act of the same name which originally commenced on 1 October 1995. The FOIP Act governs access to official and personal information held by public bodies.
- 14.2 A related piece of legislation is the **Health Information Act** which came into force on 25 April 2001 (“HI Act”). The HI Act provides individuals with the right to access health records in the custody or control of custodians, as well as regulating the collection, use and disclosure of health information by custodians of such information. The FOIP Act does not apply to health information in the custody or control of a custodian, and the HI Act is used in such cases. The HI Act applies to certain persons, including private health care providers paid in whole or in part under the province’s Health Care Insurance Plan, and pharmacies and pharmacists, regardless of how they are paid, as well as persons and private agencies under contract to a custodian.

Administration

- 14.3 The Access and Privacy Branch of the Department of Government Services administers the FOIP Act.
- 14.4 The HI Act is administered by the Ministry of Health and Wellness.

Enforcement

- 14.5 The Information and Privacy Commissioner is responsible for enforcement of both the FOIP Act and the HI Act.

Official Guidance

- 14.6 Alberta Government Services publishes on its web site:⁶⁸⁵
- a brochure for the public about the FOIP Act;
 - a more detailed guide on the legislation, *FOIP: A Guide*;
 - a series of short FOIP Bulletins dealing with a variety of procedural and practical topics;
 - the Annual Reports under the FOIP Act;
 - a substantially more detailed manual for the guidance and advice of public bodies. The current version is called “Guidelines and Practices:

⁶⁸⁵ <http://governmentservices.gov.ab.ca/index.cfm?fuseaction=section:infoaccess>

2005 Edition”.⁶⁸⁶ Chapter 6 of the manual deals with section 32, the express public interest override provision, and refers the reader to the important orders on this topic: IPC Order 97-018, IPC Order 98-019, IPC Order 96-011, and Adjudicator’s Order 96-014.

14.7 The Information Commissioner publishes various materials on the official Office web site,⁶⁸⁷ including:

- orders and investigation reports;
- straightforward explanations about the FOIP Act and the Commissioner’s functions;
- various FOIP Practice Notes and advisories;
- brochures and forms.

The Public Interest Test

14.8 Section 32 of the FOIP Act (previously section 31 of the 1995 Act) is virtually identical to section 25 of the BC Act (see paragraph 13.6 above). It also provides for compulsory disclosure by the head of a public body, without delay, to an affected group of people, to any person, or to an applicant, whether or not a request is made, for information

...about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person, or of the applicant; or the disclosure of which is, for any other reason, clearly in the public interest.

14.9 The HI Act contains a number of provisions which permit an individual’s health information to be disclosed to third parties in certain specified circumstances: see generally sections 31-47 of the HI Act, and in particular, the detailed list of circumstances in which disclosure is permitted in section 35.

14.10 The FOIP Act also contains “public interest” criteria as part of specific exemptions, as follows:

- there are a number of factors set out in section 17(5) which must be taken into account in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party’s personal privacy including:
- that disclosure is desirable for the purpose of subjecting the activities of government or a public body to public scrutiny;
- the personal information is relevant to a fair determination of the applicant’s rights;

⁶⁸⁶ http://www3.gov.ab.ca/foip/guidelines_practices/2005/index.cfm

⁶⁸⁷ <http://www.oipc.ab.ca/home/>

- that disclosure may unfairly damage the reputations of any person referred to in the record requested;
- the disclosure is likely to promote public health and safety or the protection of the environment.

14.11 The view has been taken in Alberta that the courts of that province will apply a standard of correctness, not reasonableness, to the decisions of the Information Commissioner.⁶⁸⁸

Decisions of the Information Commissioner

14.12 The public interest in scrutiny of government factors contained in s.17(5)(a) of the FOIP Act was commented upon in one decision by the Commissioner (under the earlier Act) when the provision was in s.16(5)(a)). In Order 97-002⁶⁸⁹, the Commissioner stated that to fulfil the requirements of this provision, there must be evidence that the activities of the government of Alberta or a public body have been called into question which necessitates the disclosure of personal information. The Commissioner also said in that decision that:

- it was not sufficient for one person to have decided that public scrutiny was necessary;
- the applicant's concern about the actions of one person within the public body are not sufficient; and
- where the public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of a body to public scrutiny, particularly in a case where the public body had already investigated the matter in issue.

14.13 In a later decision, the Commissioner applied these principles, but in a manner which the Alberta Court of Queen's Bench held to be unreasonable. In **University of Alberta v Pylypiuk**⁶⁹⁰ the Court made the very important point that it is an error of law for the Commissioner not to provide any analysis of why the activities of the public body in question should be subject to public scrutiny. This is something decision-makers within public authorities should ensure is always done.

⁶⁸⁸ **Alberta (Attorney General) v Krushell** 2003 ABQB 252,
http://www3.gov.ab.ca/foip/commissioners_orders/judicial_reviews/pdf/JRF2002-022.pdf

⁶⁸⁹ Full text at http://www3.gov.ab.ca/foip/commissioners_orders/orders/full_text/1997/97-002.cfm

⁶⁹⁰ http://www3.gov.ab.ca/foip/commissioners_orders/judicial_reviews/pdf/JR2000-032.pdf

15 Selected Sources of Further Information

Web addresses in this book are accurate as of May 2006.

Updated concordance tables that support this book and other lists of FOI resources are online at <http://www.freedomofinformation.com.au/>.

The Constitution Unit web site at <http://www.ucl.ac.uk/constitution-unit/> lists other publications and programmes of The Constitution Unit.

United Kingdom

Freedom of Information Act 2000: <http://www.opsi.gov.uk/acts/acts2000/20000036.htm>

Data Protection Act 1998: <http://www.opsi.gov.uk/acts/acts1998/19980029.htm>

Office of the Parliamentary and Health Service Ombudsman: <http://www.ombudsman.org.uk/>

The Information Commissioner: <http://www.ico.gov.uk/>

The Information Tribunal: <http://www.informationtribunal.gov.uk/>

The Department of Constitutional Affairs: <http://www.dca.gov.uk/>

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