
**Balancing the Public Interest:
Applying the public interest test
to exemptions in the UK
Freedom of Information Act 2000**

by Meredith Cook

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1 Executive summary

1.1 Section 2 of the UK Freedom of Information Act 2000 applies a public interest test to 17 of the Act's 25 exemption provisions.

1.2 The public interest is not defined. Section 2 merely provides that information can be withheld if the public interest in upholding the relevant exemption outweighs the public interest in disclosure.

1.3 UK decision makers can benefit from experience in overseas jurisdictions which have a similar public interest test in their FOI laws. This paper examines the operation of the public interest test in Australia, Canada, New Zealand and Ireland. It also summarises decisions of the UK Parliamentary Ombudsman under the existing Open Government Code.

1.4 In weighing up the public interest decision makers need to set out the factors telling in favour of disclosure, and those against, before deciding where the balance lies. The report provides check lists of factors from each jurisdiction to help ensure that no relevant factors are overlooked.

1.5 Factors which have been ruled irrelevant in other jurisdictions include:

- Risk of the information being misunderstood (eg because it is incomplete) is not an argument against disclosure
- The class of information requested is not of itself an argument against disclosure
- Public curiosity is not an argument for disclosure: the public interest does not simply mean that which interests the public.

1.6 This paper is based on research carried out in 2001 and does not take account of developments in other jurisdictions since then. It is intended to provide general guidance regarding the issues discussed and to contribute to debate about them. It is not a substitute for specific professional advice and should not be treated as such.

2 Structure and scope of this paper

- 2.1 Chapters 3–5 of this paper explain the public interest test in the UK FoI Act, draw conclusions from overseas jurisprudence and guidance and identify key issues for UK decision-makers.
- 2.2 Chapters 6–13 of this paper summarise the relevant UK Open Government Code decisions and consider the application of a public interest test in Ireland, Canada, Australia and New Zealand. Each chapter summarises the legislative framework, identifies the department with policy responsibility for the legislation, the enforcement mechanism and then explains the relevant public interest test.
- 2.3 There is a huge range of helpful and recent material available on the internet. The websites of the relevant government departments, Information Commissioners, Ombudsmen and courts in each country are all useful sources of information for UK decision-makers. Where possible the website links are included in this paper. This makes for a very long list of footnotes, but this paper is intended to be a source document for future research on this issue.
- 2.4 Summaries of the relevant cases are included in this paper. These should be read with caution because it is inherent in the public interest test that its application will vary from case to case. However, the cases are an essential reference point for UK decision-makers because they are examples of how the balancing of public interest considerations and the interests protected by an exemption can be weighed. Overseas cases and UK Ombudsman decisions reinforce the importance of giving more than just a cursory consideration to the public interest test in the UK FoI Act.

Why study overseas jurisdictions?

- 2.5 The UK legislated nearly 20 years after other Westminster style governments. Australia, New Zealand and Canada have all operated access to information legislation at a federal (Australia and Canada) and provincial level since the early 1980s. Ireland's Freedom of Information Act came into force in 1997. In all of these countries the legislation includes some form of public interest override provision.
- 2.6 Overseas law is not binding on the UK Information Commissioner or the courts. This paper is not intended to convey legal advice on the interpretation of the UK FoI Act. It is intended to give decision-makers in the UK concrete examples of public interest test considerations.
- 2.7 This paper only considers the public interest test in the context of access to government information legislation in four overseas jurisdictions. These countries were chosen because they operate a Westminster style parliamentary system, their legislation is similar to the UK legislation and jurisprudence on the application of the test has developed because the regimes have been in operation for a number of years.
- 2.8 Australia and Canada have federal and state level FoI legislation. This paper does not attempt to consider the application of the public interest test in every state. It reviews case law and government guidance which adds to the understanding of the test.

Weighing privacy and the public interest

- 2.9 Section 40 of the UK FoI Act deals with personal information.
- 2.10 Section 40 channels subject access requests to the Data Protection Act. It provides that third party personal information *may* be withheld if releasing it would contravene any of the data protection principles.
- 2.11 The public interest test in section 2 does not apply to section 40 (section 2(3)(f)) except in narrow circumstances relating to a section 10 damage or distress notice.
- 2.12 The UK FoI Act differs in this respect from Canadian, Australian, New Zealand and Irish legislation. In those countries the release of third party personal information is subject to a public interest test which requires decision-makers to balance an individual's right to privacy with the public interest in release of the information.
- 2.13 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, this analysis is beyond the scope of this paper.

Confidential information

- 2.14 In other jurisdictions the exemption relating to confidential information is subject to the public interest test.
- 2.15 In the UK the "given in confidence" exemption (section 41) is not subject to a public interest test. The public interest test incorporated into the test for breach of confidence may be relevant but close examination of the the law of confidence and its application to the UK FoI Act is beyond the scope of this paper.

- 2.16 Some overseas cases which deal with an "in confidence" exemption are included in this paper because they contain useful commentary on the application of the public interest test in relation to other exemptions.

3 *The public interest test*

What is a public interest test?

- 3.1 Most regimes which govern access to information held by government are based on the same building blocks:
- A general right of access to information held by public authorities.
 - The right of access is subject to a range of exemptions covering issues like security, international relations, formulation of government policy and commercial confidentiality.
 - Some of the exemptions are subject to a public interest test which requires the decision-maker to take public interest considerations into account when deciding whether to release information even where an exemption applies.
- 3.2 This mechanism is referred to as a “public interest override” or “public interest test” because the public interest considerations “override” the exemption.

What does “in the public interest” mean?

- 3.3 The UK FoI Act does not define “in the public interest.”
- 3.4 There is clearly a public interest in access to government information per se. In a well known Australian case the 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”

- 3.5 It is more difficult to identify the public interest in disclosure of the particular information that has been requested.
- 3.6 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 categorically define what is “reasonable.” 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 The Commission did however recommend that guidelines be issued by the Information Commissioner on what factors should or should not be taken into account in weighing the public interest. In 2000, the Attorney General’s Department issued a memorandum on the exemption sections in the FoI Act. This contains lengthy guidance on the application of the public interest test.³ The Task Force that recently reviewed Canadian legislation also concluded that the public interest should not be defined in legislation.

Who is the public?

- 3.7 The “public” is not defined in the UK FoI Act. Overseas the term has been used in the geographic sense. Eg. “the residents of Sydney” or “the citizens of the Australia”. It has also been used in the numeric sense. Eg “the majority of people living in Sydney”. Decision-makers will need to identify which section or sections of society are affected when applying the test.

Who has the burden of proof?

- 3.8 An informed applicant for information will argue that public interest considerations 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 has a responsibility under the Act to make his or her own assessment of the public interest considerations in the particular case and weigh them against the public interest in maintaining the exemption.

What is the role of the Information Commissioner?

- 3.9 Deciding whether and to what extent the public interest is relevant involves the exercise of discretion by the decision-maker. In the UK FoI Act, the Information Commissioner can overrule a public authority's application of an exemption including the application of the public interest test.

4 United Kingdom

Legislative framework

- 4.1 The Freedom of Information Act 2000 received Royal Assent on 30 November 2000. Publication schemes are being rolled out in stages over and the individual right of access comes into force in January 2005.
- 4.2 Subject access requests will continue to be covered by the Data Protection Act 1998. Requests for personal information about third parties are covered by the FoI Act but the Data Protection Act principles are relevant to the decision on whether or not to release information

Administration of the FoI Act

- 4.3 The Department for Constitutional Affairs is responsible for the overall policy.⁴ It prepares legislation, seeks to encourage an increase in openness in the public sector, monitors 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

- 4.4 The FoI Act is enforced by the Information Commissioner. He is responsible for good practice and makes decisions on whether requests have been dealt with in accordance with the Act.
- 4.5 The Information Commissioner has the power to overrule a public authority's application of the public interest test and form his own view of where the balance lies.
- 4.6 However, the "accountable person" 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. This veto only applies to government departments, the National Assembly for Wales and other specifically designated bodies.

- 4.7 The decision to issue a certificate under section 53 must be supported by "reasonable grounds" and is therefore open to judicial review.

The public interest test

4.8 Section 2(2)(b) of the FoI Act provides that information to which an 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.”

4.9 A similar test applies to the decision whether to confirm or deny the existence of information. The section 2 public interest test applies to the seventeen exemptions below:

Section 22 information intended for future publication;
 Section 24 national security;
 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;
 Section 36 effective conduct of public affairs;
 Section 37 communication with Her Majesty, and honours;
 Section 38 health and safety;
 Section 39 environmental information;
 Section 40(3)(a)(i) to personal information where the data subject has a right to prevent processing;
 Section 42 legal professional privilege;
 Section 43 commercial interests.4.10

It does not apply to the eight “absolute” exemptions below. If an absolute exemption applies the decision-maker does not need to consider the public interest in releasing the information.

Section 21 information accessible by other means;
 Section 23 information supplied by security bodies;
 Section 32 court 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 40(3)(a)(i))
 Section 41 information provided in confidence;
 Section 44 prohibited by another enactment.

5 *Lessons for decision-makers in the United Kingdom*

- 5.1 The Code of Practice on Access to Government Information has been in force for nearly 10 years. The Code will continue to function until the FoI Act comes fully into force in January 2005.
- 5.2 The decisions of the Ombudsman on the Code are an essential reference point for all decision-makers. As discussed in Chapter 6, the Ombudsman has applied the public interest test in over 20 cases. Each decision sets out the relevant public interest considerations and explains where the balance lies. Decision-makers who have read the relevant cases will be better equipped to apply the test under the Code and the FoI Act.
- 5.3 The Act was intended to be no less open than the Code. The Long Title states that it is an Act “*for*” the disclosure of information. 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.⁵ This means that where the balance is even, the public interest in the particular disclosure should prevail.

- 5.4 In the other jurisdictions studied (Canada, Australia, Ireland and New Zealand) the same issues have arisen again and again. 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.
- 5.5 The table below shows examples of situations where the public interest has favoured disclosure in each category. The examples are drawn from UK Ombudsman cases and overseas jurisdictions.
- 5.6 Most consideration of the public interest test in overseas countries and in the UK Open Government Code cases has focused on a few exemptions.

Matters of public debate

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 (see page 20 UK Ombudsman decision 11/02)

The issue has generated public or parliamentary debate (see page 20 UK Ombudsman decision 31/01)

Proper debate cannot take place without wide availability of all the relevant information(see page 20 UK Ombudsman decision 31/01)

The government has placed its general assessment and judgment on the public record (see page 20 UK Ombudsman decision 31/01)

The issue affects a wide range of individuals or companies (see page 22 UK Ombudsman decision 21/99)

Views and representations which influence the legislative process should be open to public scrutiny (see footnote 24 Information Commissioner Ireland Decision 98058)

Public participation in political debate

The public interest in a local interest group having sufficient information to represent effectively local interests on an issue (See page 22 UK Ombudsman decision A 31/00)

Facts and analysis behind major policy decisions (see page 22 UK Ombudsman decision A21/99)

Knowing reasons for decisions (see page 49 Australian summary and see page 26 Irish Department of Finance manual)

Political issue of virtually unprecedented importance (see page 41 Ontario Information Commissioner, Order P1398)

Accountability for public funds

Accountability for proceeds of sale of assets in public ownership (see page 17, Decision A5/96 UK Ombudsman)

Accountability for legal aid spending (see 21, Decision A5/97 UK Ombudsman)

Openness and accountability for tender processes and prices (see footnote 23, Decision Irish Information Commissioner 98049)

Availability of up to date cost estimates (see page 21, Decision UK Ombudsman A1/97)

Exposing misappropriation of public funds (see footnote 40 Decision Canadian Information Commissioner)

Accountability of elected officials whose propriety has been called into question (see Order M710 Ontario Information Commissioner, page 40)

Public interest in public bodies obtaining value for money (see footnote 6, Decision 98114 of the Irish Information Commissioner)

Public safety

Air safety (see footnote 41, Decision Canadian Information Commissioner)

Nuclear plant safety (see page 40 P1190-1805, Ontario Information Commissioner)

Public health (see footnote 42, Decision Canadian Information Commissioner)

Contingency plans in an emergency (see P901, P1175 page 40 Ontario Information Commissioner)

Damage to the environment (see British Columbia page 42)

5.7 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 43 (prejudice to commercial interests)
- Section 36 (effective conduct of public affairs)

Section 35: Formulation of government policy etc

5.8 Subject to the public interest balancing test, section 35 allows a public authority to withhold information if it relates to:

- a) The formulation or development of government policy
- b) Ministerial communications (primarily communications between Ministers and Cabinet proceedings)
- c) The provision of advice by Law Officers
- d) The operation of any Ministerial private office.

5.1 Section 35 provides that once a decision on government policy has been taken, the background statistical information cannot be withheld.

5.2 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.⁶

5.3 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.⁷

Section 36: The effective conduct of public affairs

5.4 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 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.

5.5 There may be a public interest in maintaining the frankness and candour of official communications but it will be a high test. In the Eccleston case 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.”⁸

5.6 Just because information is withheld to protect candour, does not mean that the factual information surrounding the advice cannot be released.⁹ 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 the protection of candid advice.¹⁰

5.7 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.

5.8 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.”¹¹

Section 43: Commercial interests

5.9 Subject to the public interest test section 43 of the UK FoI Act allows a public authority to withhold information if:

- it constitutes a trade secret
- disclosure would be likely to prejudice the commercial interests of any person including the authority.

5.10 Overseas experience shows that commercial interests will often be paramount even where there is an obvious public interest in the release of the information. The issue in relation to commercial information is often the *timing* of its release. In an Irish case the Commissioner held that despite the strong public interest, it was premature to release the commercial information concerned, although the authority would be obliged to release it at a later date.

5.11 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.

5.12 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.¹² The Code of Practice under section 45 of the UK FoI Act includes guidance for public authorities on entering into contracts. The LCD’s advice is that public authorities should not include contractual provisions relating to confidence or

commercially sensitive information that are inconsistent with the FoI Act.

5.13 In situations involving public safety (ie nuclear facilities) the public interest is more likely to be strong enough to override the competitive interests of the third party.

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

5.14 A decision-maker should be aware of irrelevant factors when weighing the public interest.

5.15 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.¹³ This is a developing area and a detailed discussion of this case law is beyond the scope of this paper.

5.16 The fact that an applicant or the public may misinterpret or misunderstand the information is not a factor weighing against disclosure. In one Australian case¹⁴ the 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.”

5.17 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 Commissioner held that the fact that a layperson may not fully comprehend a technical report was not a valid reason for denying public access to it.¹⁵

5.18 Embarrassment to the Government or loss of confidence is also irrelevant.

5.19 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.

6 *Decisions of the UK Parliamentary Ombudsman*

6.1 The Open Government Code of Practice on Access to Government Information has been in operation since 1994 and was revised in 1997. It is a non-statutory code enforced by the Parliamentary Ombudsman. The Code is 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.

6.2 The test is set out in Part II of the Code which provides:

“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.”

6.3 The Ombudsman has taken 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.¹⁶”

6.4 The Ombudsman does not have internal guidance on what constitutes a public interest but he does take account of the Cabinet Office guidance on the interpretation of the Code, although he does 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.¹⁷”

6.5 The FoI Act requires a decision-maker to balance the public interest in disclosure with the public interest in maintaining the exemption. This formulation of the test requires the decision-maker to carry out the same balancing exercise required by the Code. The Code balances the public interest in disclosure with the “harm caused by disclosure.” The FoI Act balances the public interest in disclosure with the “public interest in maintaining the exemption.” The public interest in maintaining an exemption is to avoid the harm which the exemption seeks to prevent.

6.6 The Ombudsman’s decisions are not legally binding on the Information Commissioner or the Courts. 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. Unlike overseas adjudicators, the Ombudsman has taken decisions on the public interest in the constitutional and social context of the United Kingdom.

6.7 An analysis of Code decisions between 1994 and 2002 shows the Ombudsman considered the public interest in 21 out of 106 decisions. The 21 cases are summarised below. In the remaining 85 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.

6.8 In 14 of the 21 (approximately 66%) decisions where the public interest test applied, the public interest did not outweigh the potential harm caused by disclosure and the Ombudsman upheld the department’s decision to withhold the information.

6.9 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.

- 6.10 The Ombudsman is less likely to conclude that the public interest in disclosure outweighs the potential harm where the public already has 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.¹⁸ 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 2.¹⁹
- 6.11 In 7 of the 21 (approximately 33%) decisions, the public interest in making the information available outweighed any harm caused by disclosure, and the Ombudsman upheld the applicant's complaint and recommended the information be released.
- 6.12 It is clear from the Ombudsman's decisions that where the information requested relates to a high profile issue that has been in the media and involves accountability for public funds, there will be 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.²⁰
- 6.13 In one case, 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 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 4(e) (law enforcement and legal proceedings) and exemption 7(b) (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 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 held that:

*"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." [my 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 it held relating to the topic of direct to consumer advertising. The 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 is 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.

Decisions where the public interest 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 7(a) (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.31/00 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 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.

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 14(a) (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 does 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

During the Ilisu Dam project there were a number of exchanges between the Minister for Europe and the Chair of the House of Commons Select Committee on International Development concerning human rights issues and the Ilisu Dam project in Turkey. The Chair 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 and therefore the public interest over rode the harm.

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

Public interest in disclosure outweighed harm caused

- 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.

7 Ireland

Legislative framework

7.1 The Irish Freedom of Information Act 1997 (the Irish FoI Act) came into force in April 1998. 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 gives rights to members of the public to seek amendment to records relating to personal information.

Administration and enforcement of the Irish FoI Act

7.2 The Irish Department of Finance administers the Irish FoI Act. The Act is enforced by the Office of the Information Commissioner.

The public interest test

7.3 There are 12 exemptions in the Irish FoI Act. The public interest test applies to the 7 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.”

Section 21 functions and negotiations of public bodies;
Section 23 law enforcement and public safety;
Section 26 confidential information;
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.^{7.4}

A stricter public interest test applies to deliberations by public bodies. This test is set out in section 20 and differs from its more usual use in

other exemptions in that it must be satisfied **before** the exemption can be appropriately invoked. Section 20 provides that deliberations of public bodies can only be withheld if granting the request would be contrary to the public interest because the requester would be aware of any significant decisions the body proposes to make.

Government guidance

7.5 The Irish Department of Finance publishes a Freedom of Information Manual on its website.²¹ The manual is a useful source of guidance and states that:

- 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 accountability of public bodies, and for individuals to know the reasons for decisions made which concern them.

Decisions of the Information Commissioner

7.6 The Information Commissioner publishes the full text of decisions on the website.²² The decisions are searchable on name, date and section of the Irish FoI Act and the database also lists all decisions in which the Commissioner has considered the public interest.

7.7 Between 1998 and 2001, 16 published decisions involved consideration of the public interest test. 6 decisions involved a request by the applicant for personal information.

7.8 In 5 decisions (Case Nos 98049, 98058, 98078, 98114, 99168) the Commissioner concluded that the public interest would, on

balance, be better served by granting rather than refusing to grant the request. In 5 decisions (Case Nos 98099, 98100, 98169, 99273, 99347) the Commissioner concluded that the public interest would be better served by refusing the request. Summaries of these decisions are set out below.

Decisions where the Commissioner held that the public interest was better served by granting the request

Case 98049—Information about successful tenders²³

The requester asked the Office for Public Works for all the documentation relating to a tender for army vehicles. Following consultation with the tenderers under section 29, the Office of Public Works decided to release the Order Form relevant to each of the four parts of the tender, containing the successful tenderer's name, the tender price and the number and type of vehicle involved.

Three of the four successful tenderers applied for a review of this decision by the Commissioner. They argued that section 26(1)(a) applied because the prices were given in confidence, on the understanding that they would be treated as confidential and that disclosure would be likely to prejudice the giving of similar information in the future. It was also argued that disclosure would constitute a breach of a duty of confidence within the meaning of section 26(1)(b). It was also claimed that the tender prices were commercially sensitive information within the meaning of section 27(1) and that the public interest did not require disclosure.

The Commissioner held that the public interest in openness and accountability resulting from disclosing tender prices outweighed any public interest in preventing commercial harm to the tenderers and the tender process.

Case 98058—Information about the legislative process²⁴

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. 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."

Case 98114—Invoices paid by government departments to telecommunications companies²⁵

The requester sought access to copies of invoices paid to telecommunications companies by the Department of Finance. The Department decided to release all the records sought by the applicant.

One of the telecommunication companies applied for a review of this decision under sections 27(1)(b) and 27(1)(c) of the Irish FoI Act. It argued that releasing the information could prejudice its ability to compete for future business from public bodies and that in the case of

some products, it could also prejudice its ability to provide such products to customers who are not public bodies.

The Information Commissioner considered that the public interest in public bodies obtaining value for money and in openness about the expenditure of public funds was not absolute. However, he said that in this case, there was a significant public interest in ensuring that the public bodies concerned obtain value for money in purchasing telecommunication services and that this outweighed any public interest in protecting the telecommunications companies' commercial interests.

Case 98078—Records relating to the expenditure of health boards and voluntary hospitals²⁶

The requester asked the Department of Health and Children for various records relating to expenditure of health boards and voluntary hospitals. The Department refused access to the records and argued in its submission to the Commissioner that the records were exempt under sections 20(1)(a) and (b), 21(1)(b) and (c), 23(1)(a)(ii), 26, 27(1), 28 and 31.

The Commissioner considered the section 20 public interest test which provides that deliberations of public bodies may only be withheld if it would be contrary to the public interest to release the information.

The Commissioner's comments are worth quoting in full because they illustrate that the test in section 20 establishes a high threshold which therefore makes it difficult to justify withholding information.

“The Department has taken a narrow view of the public interest. In the field of health care there are a number of issues to be considered in relation to the public interest...the public interest is not limited to matters of cost efficiency alone. Where cutbacks of major importance to the provision of healthcare services are being made, there is also a public interest in the community knowing what these may be. The Department and the health agencies are administering the health services on behalf of the community. There is a public interest in the community knowing as

much about how the services are being administered as is consistent with the provision of an efficient and effective service. This does not mean that the public has the right to know every proposal that is made. Indeed, there is a strong argument in favour of protecting proposals from release at an early stage in order to allow the public body to properly consider the matter. However, once the decision to proceed with any proposed action is taken, the need to withhold the release of the information weakens. Furthermore the argument advanced that the information once released will be used (or abused) in some particular way or misinterpreted or will not be properly understood reflects an attitude more akin to that which prevailed in an era dominated by the Official Secrets Act rather than one governed by the FoI Act.”

Case 99168—Details of members expenses²⁷

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. The Houses argued that the personal information should be withheld.

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.

Decisions where on balance the public interest was better served by withholding the information

Case 98099—Departmental draft reports into a schools pilot project²⁸

The requester asked the Department of Education and Science for a draft report about a schools pilot project. The Department refused access to some of the information citing sections 20, 21, 26 and 28.

The Commissioner decided that the reports contained matters relating to the deliberative process and was satisfied that the release of the papers

would be contrary to the public interest. If the reports had been prepared by scientific or technical experts, the exemption would not have applied. He decided that the Department's decision to refuse access in accordance with section 21(1)(b) was justified.

The Commissioner accepted *“that there is a public interest in information about schools being available, and in the public having access to records under the FoI Act”* but he added that:

“These aspects of the public interest cannot prevail in all circumstances and regardless of the content of the information or the circumstances in which it was created or procured by a public body.... In saying this I do not wish to suggest that the public's right, under the FoI Act, to information about a pilot project conducted by a public body can always be satisfied by the publication of a final report on the project. However, I am satisfied that access to the individual reports at this stage is not necessary to assist an informed public debate.”

Case 98100—Commercially sensitive information regarding staff redundancies²⁹

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 and information given in confidence.

The Commissioner agreed that the balance of the public interest did not favour disclosure and held that:

“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.”

The Commissioner accepted that release would disclose commercially sensitive information which could prejudice the company's competitive position.

Case 99273—Access to confidential advice given by health professionals³⁰

The requester made a series of complaints to the Health Board about a number of health professionals. The complaints were investigated by an independent person who prepared a report for the CEO of the Health Board.

The requester sought access to the report. The Health Board granted access to the report subject to deletion of the investigator's account of what the health professionals had said to him. It relied on the provisions of section 21(1)(a), 21(1)(b) and 26(1)(a).

The Commissioner held that:

“There is a clear public interest in a health board being able to investigate effectively complaints and allegations against its staff and contractors. It seems to me that there are situations where the best method of dealing with such complaints or allegations will be for a public body to conduct its own internal, informal inquiry, with appropriate assurances of confidentiality to the parties concerned. The choice of the

most suitable procedures in individual cases rests with the public body. Generally speaking, there is no onus on the public body to justify its choice of procedures in individual cases to me as Information Commissioner when claiming the exemption in section 21(1)(a), although I do not rule out the possibility that the use of a seriously defective procedure might bring about a situation in which release of a record might be required in the public interest.

I am satisfied that the public interest is not, on balance, better served by releasing, as a matter of course, confidential statements gathered in the course of an enquiry. I do not rule out the possibility that the public interest might sometimes require this to be done. However, I am not satisfied that the public interest would be better served by such release in the present case.”

Case 98169—Access to records about a teacher’s disciplinary action³¹

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 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 would have an adverse impact on the receipt of similar information from teachers and boards of management in similar cases in the future.

After lengthy consideration of the public interest test the Commissioner concluded that:

“The public interest requires that complaints against teachers be properly investigated with outcomes which are both fair and impartial. I cannot see how release in this case would further this aspect of the public interest. Release is no substitute for the proper discharge of their duties by the Department and the Board of Management. Accordingly, I have decided that the public interest would not be better served by the release of record number 19/3.”

Case 99347—Information about negotiations between a nursing home and third parties³²

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 Commissioner held 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.

The public interest is better served by granting the request where there is a public interest in:

- accountability of the public body
- knowing reasons for decisions
- views and representations which influence the legislative process
- ensuring public bodies obtain value for money

The public interest is better served by refusing a request where:

- 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

8 Canada

Legislative Framework

- 8.1 Access to government information in Canada is regulated at both federal and provincial levels. The Federal Access to Information Act 1982 (the AI Act) came into force 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.
- 8.2 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.
- 8.3 Access to Personal Information is governed by the Privacy Act 1982.

Administration and enforcement

- 8.4 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.
- 8.5 An interdepartmental task force (the Access to Information Review Task Force) has recently released its report on access to information legislation.³³ 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.³⁴

- 8.6 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.

The public interest test

- 8.7 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.
- 8.8 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.
- 8.9 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."
- 8.10 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.³⁵ The McIsaac report to the Task Force also recommends 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.

Government guidance

- 8.11 The term public interest is not defined in the AI Act. Canada's Access to Information Review Task Force are of the view³⁶ that the public interest override has been rarely—if ever—used to disclose information that would otherwise have been withheld under a mandatory exemption.
- 8.12 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 website.³⁷
- 8.13 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.
- 8.14 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

- 8.15 Judicial interpretation at federal level supports the presumption in favour of access inherent in the AI Act.
- 8.16 The then Associate Chief Justice of the Federal Court, James Jerome said:³⁸ *“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.”*
- 8.17 However, the Courts have showed judicial deference for decision-makers on the application of the public interest test and refrained from identifying criteria or guidelines.
- 8.18 The Supreme Court 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.³⁹

Decisions of the Information Commissioner

- 8.19 A review of the Information Commissioner's decisions from 1994 to 2002 shows that the Commissioner was required to consider the public interest test in seven decisions.
- 8.20 In three of those decisions it was held that the public interest clearly outweighed either invasion of privacy or harm to third parties. In four decisions, the public interest did not operate to favour disclosure.
- 8.21 The decisions below are available on the Commissioner's website in the relevant annual report. The case names below are from the annual report.

Decisions where the public interest test operated in favour of disclosure

A whistleblower⁴⁰

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 promise⁴¹

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 interest⁴²

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 complaint to the Commissioner was on a narrower unrelated issue, but the Commissioner noted that the “*only fair and reasonable way to balance public interest and corporate loss is 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”⁴³

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 services⁴⁴

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?⁴⁵

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.

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.

9 Ontario

Legislative Framework

9.1 The Freedom of Information and Protection Privacy Act 1988 and the Municipal Freedom of Information and Protection of Privacy Act 1991 together establish a system for public access to government information and for protecting personal information held by provincial and municipal organisations.

Enforcement and administration

9.2 Both Acts are enforced by the Ontario Information and Privacy Commissioner.

Public interest override

9.3 The public interest override in section 23 of the Provincial Act and section 16 of the Municipal 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.”

9.4 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.

9.5 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.

9.6 Both Acts also provide for a proactive duty to disclose information that “reveals a grave environmental, health or safety hazard to the public”.⁴⁶

Decisions of the Information Commissioner

9.7 The case law of the Ontario Commissioner and papers prepared the Commissioner’s office are a very useful source of information about the application of the public interest test in Ontario.

9.8 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.⁴⁷ A very small proportion of public interest override claims are upheld.

9.9 The Assistant Commissioner of the Ontario Information and Privacy Commission said that⁴⁸ 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 approach and held that the interpretation of the public interest test is within the Commissioner’s area of expertise.

What is a compelling situation?

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).

The balancing exercise that must be undertaken in considering whether a compelling public interest **clearly outweighs** the exemption was described in Order P-1406:

“Section 23 recognises 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.”¹⁰
British Columbia

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 P1190-1805)
- 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 P1398)

Legislative Framework

10.1 The British Columbia Freedom of Information and Privacy Act came into force on October 4 1993. It governs access to official and personal information.

Administration of the BC Act

10.2 The Corporate Privacy and Information Access Branch of the Ministry of Management Services is responsible for Fol policy.

Enforcement of the BC Act

10.3 The BC Act is enforced by the Information and Privacy Commissioner who has joint responsibility for Fol issues and personal information.

The public interest test

10.4 Section 25 of the BC Act provides for compulsory disclosure whether or not a request for information is made :

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.

Decisions of the Information Commissioner

10.5 There is very little jurisprudence from British Columbia on the application of the test and the Information Commissioner considers that the issue of how to apply the public interest test rarely arises.⁴⁹

Release of contract between University and sponsor Order 01-20⁵⁰

10.6 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.

10.7 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.

10.8 The Commissioner held that public curiosity and interest in disclosure does not necessarily mean that disclosure is in the public interest.

10.9 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.”

Government guidance

10.10 The Ministry of Management Services publishes a Policy and Procedures manual for government departments on the application of the BC Act. The manual deals with section 25. It states that the determination of public interest will be made on a case by case basis. It does give some guidance on what constitutes risk to the environment or harm to health and safety.

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.

11 Australia Commonwealth

Legislative framework

11.1 The Australian Commonwealth Freedom of Information Act 1982 (the Commonwealth Act) gives a right of access to personal information and official information.

11.2 All states' Acts are modelled on the Commonwealth legislation.

Administration of the Freedom of Information Act 1982

11.3 FoI policy is administered by the Attorney General's Department in Canberra.

Enforcement of the Act

11.4 The Commonwealth Act provides for two avenues of enforcement. Requesters can appeal direct to the Administrative Appeals Tribunal which has the power to order disclosure. Or they can complain to the Commonwealth Ombudsman who has the power to recommend disclosure, and to investigate complaints about delays or excessive fees.

Public interest provision

11.5 The Commonwealth Act requires a decision-maker to consider public interest factors for and against disclosure. The test operates in three different ways.

11.6 The first 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).

11.7 The second is an explicit presumption 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 it follows that it would be contrary to the public interest to release the information.

11.8 The third formulation of the test relates to deliberative internal working documents. Section 36 provides that deliberative documents must only be withheld where disclosure would be contrary to the public interest.

Government guidance

11.9 The Attorney General's Department publishes a detailed and useful memorandum on the exemption sections of the Commonwealth Act. This includes a lengthy discussion of the public interest test.⁵¹ There is also government guidance available in state governments.

Administrative Appeals Tribunal Case Law

11.10 The Administrative Appeals Tribunal has considered the application of the public interest test in 13 cases (excluding cases which involved a request for personal information.) A summary of these decisions follows.

11.11 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.

11.12 Despite the presumption in favour of disclosure in almost all Tribunal decisions which have applied the public interest test, the Tribunal has not recommended disclosure.

Decisions where the balance lay in favour of disclosure

Information on economic forecasts⁵²

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.

Decisions where balance lay against disclosure

Investigative documents regarding a share acquisition hearing⁵³

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 strategy

The Public Service Board and a Union were in an ongoing dispute over wages. The Union sought access to background correspondence.⁵⁴

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.

Information regarding Government control of public hospital services⁵⁵

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 33(a) (damage to Commonwealth/State relations), section 34 (documents disclosing cabinet deliberations), and section 36 (internal working documents).

The Tribunal upheld the section 33(a) 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.

An unsuccessful candidate requesting information about a successful candidate⁵⁶

The applicant applied for a job at the Australian National Parks and Wildlife Service. He was unsuccessful. He applied for information concerning the work capacity and performance of the successful job applicant.

Access was refused under section 40(1)(c) (adverse effect on the management or assessment of personnel).

The Tribunal held that the public interest in protecting documentation from disclosure under s40 (1)(c) could not be outweighed by the lesser public interest in enabling an applicant to show that a promoted colleague was not competent to perform the duties of an advertised position.

Access to documents relating to a draft bill⁵⁷

The applicant sought access to documents relating to a draft Bill on reorganising the administration of Aboriginal affairs.

The Minister and Department argued that 5 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 regarding uranium stockpiles⁵⁸

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.

Information regarding an environmental assessment⁵⁹

An Environmental NGO requested information about an environmental assessment for proposals for a river mine from the Department of the Environment, Sport and Territories (DEST).

DEST refused and cited exemptions relating to damage to Commonwealth/ State relations, matters communicated in confidence by a State authority, and the fact that the documents were deliberative process documents.

On appeal the Tribunal considered the public interest test in relation to damage to Commonwealth/State relations 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.

Documents regarding advice concerning foreign shareholders⁶⁰

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.

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. A detailed analysis of the relative weight of the

jurisprudence is beyond the scope of this paper. It is not an exhaustive list of all public interest considerations.

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)
- reasons for decisions (*Re Swiss Aluminium and Department of Trade* (1985) 9 ALD 243)
- 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 (*Graham Richardson v Queensland Police*)

The public interest did not outweigh the exemptions in situations where:

- Likelihood of damage to security or international relations of the Commonwealth; (Re Throssell and Departments of Foreign Affairs (1987) 4 ALD 296)
- If 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;
- Disclosure would impact on international relations;
- Need to preserve public agency resources, and 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;
- 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.

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12 New Zealand

Legislative Framework

- 12.1 Access to government information in New Zealand is governed by the Official Information Act 1982 (the OIA). An almost identical regime applies to access to local government information which is governed by the Local Government and Meetings Act 1987.
- 12.2 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 Official Information Act 1982.
- 12.3 The OIA operates alongside the Privacy Act 1993 which governs access to personal information and is enforced by the Privacy Commissioner.⁶¹

Administration and enforcement of the Official Information Act 1982

- 12.4 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.
- 12.5 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.
- 12.6 The types of decision an Ombudsman can investigate under the OIA are:
- a) a refusal to provide information requested;

- b) a delay in responding to a request for information;
- c) an extension of time limits for a reply to a request;
- d) deletion of part of the information requested;
- e) a charge levied to provide the information;
- f) a release of information on conditions;
- g) a release of information in a manner other than that requested;
- h) an inadequate statement of reasons for a decision or recommendation affecting the requester.

The public interest test

- 12.1 The public interest test is set out in section 9 of the OIA. It provides that where a section 9 exemption applies, information may be withheld 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.”

- 12.2 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, ministerial internal working documents, the free and frank expression to Ministers, legal professional privilege, commercial negotiations, and the prevention of improper gains or advantages.
- 12.3 The public interest test does not apply to the exemptions in the OIA which are categorised 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 damage to the economy.

A purpose clause

12.4 Unlike the UK FoI, the OIA has a purpose clause. Section 4 provides that the purposes of the OIA are:

“To increase progressively the availability of official information to the people of New Zealand in order—to enable their more effective participation in the making and administration of laws and policies to promote the accountability of Ministers of the Crown and Officials and thereby to enhance respect for the law and promote the good government of New Zealand to provide for proper access by each person to official information relation to that person to protect official information to the extent consistent with the public interest and the preservation of personal privacy.”

12.5 Sir Brian Elwood, the Chief Ombudsman has commented that⁶² “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.”

Government guidance

12.6 The New Zealand Cabinet Manual is the authoritative source of advice for the Executive of the New Zealand government. It is publicly available on the internet.

12.7 Chapter 6 deals with official information, protection, availability and disclosure.⁶³ It does not give specific guidance on the considerations to be taken into account but it does emphasise the presumption in favour of disclosure inherent in the OIA. It also highlights the often-cited catch phrase that there is a difference between information in the public interest and information which may be of interest to the public. Eagles et al in their book *Freedom of Information in New Zealand*⁶⁴ consider that public authorities in New Zealand usually only consider the public interest in a very cursory way.

Decisions of the Ombudsmen

12.8 There has been no significant Ombudsman decision relating to the application of the public interest test since 1992.⁶⁵ Most cases where the public interest test has been an issue have been about access to personal information.

Access to Psychiatric Records Case No W42031⁶⁶

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 s9(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.

Information about salary and nature of job Case No A6737⁶⁷

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 W39584⁶⁸

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.

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 W41517⁶⁹

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 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 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 pursue) overrode the recipient of the parcel's privacy.

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 enrolled. 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 may be interesting to the public, this was not enough to satisfy the test.

13 Selected sources of further information

United Kingdom

Legislation and Code

Code of Practice on Access to Government Information, 2nd Edition, 1997

www.lcd.gov.uk/foi/ogcode981.htm

Freedom of Information Act 2000

www.legislation.hmsso.gov.uk/acts/acts2000/20000036.htm

Data Protection Act 1998

www.hmsso.gov.uk/acts/acts1998/19980029.htm

Administration and enforcement

Office of the Parliamentary and Health Service Ombudsman

www.ombudsman.org.uk

The Information Commissioner

www.informationcommissioner.gov.uk

The Department for Constitutional Affairs

www.lcd.gov.uk

Case law and orders

Decisions of the Parliamentary and Health Service Ombudsman

www.ombudsman.org.uk

Other sources

Report of the House of Commons Select Committee on Public Administration (July 1999)

www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/57002.htm

Cabinet Office Guidance on Code of Practice on Access to Government Information, 2nd Edition 1997

Birkinshaw P, *Government and information: the Law relating to Access Disclosure and their Regulation*, Butterworths, London, 2001

Constitution Unit publications, available at www.ucl.ac.uk/constitution-unit

Ireland

Legislation

Freedom of Information Act 1997

www.irlgov.ie/oic/foi.htm

Administration and enforcement

Irish Department of Finance

www.irlgov.ie/finance

Irish Information Commissioner

www.oic.gov.ie

Case law and orders

Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office for Public Works (Cases 98049/98056/98057)

Mr ABLI and the North Western Health Board (Case 99273)

Mr John Burns and the Department of Education and Science (Case 98099)

Mr Martin Wall, The Sunday Tribune Newspaper and the Department of Health and Children (Case 98078)

Mr Phelim McAleer of The Sunday Times Newspaper and the Department of Justice, Equality and Law Reform (Case 98058)

Mr Richard Oakley, The Sunday Tribune newspaper and the Department of Enterprise, Trade and Employment (Case 99168)

Mrs ABY and the Department of Education and Science (Case 98169)

Ms Fiona McHugh, The Sunday Times Newspaper and the Department of Enterprise, Trade and Employment (Cases 98100, 1999)

Ms ABT, Mr ABU and the North Eastern Health Board (Cases 99347,99357)

Other sources

McDonagh, Maeve, *Freedom of Information Law in Ireland*, Round Hall Sweet and Maxwell, 1998

Canada

Federal

Legislation

Access to Information Act 1982
www.infocom.gc.ca/acts/default-e.asp

Administration and enforcement

Information Commissioner
www.infocom.gc.ca

Treasury Board of Canada
www.tbs-sct.gc.ca/gos-sog/atip-airp/index_e.asp

Federal Department of Justice
www.canada.justice.gc.ca/en/ps/atip

Access to Information Review Task Force
www.atirtf-geai.gc.ca

Access to Information: Making it work for Canadians Report of the Access to Information Review Task Force, Public Works and Government Services, Ottawa ISBN 0-662-66665-8. Available in PDF on Task Force website

Mclsaac, Barbara, *The Nature and Structure of Exempting Provisions and the use of the Concept of a Public Interest Override* (September 2001)—Report to the Canadian Access to Information Review Task Force

Case law and orders

Dagg v Canada (Minister of Finance) (1997) 2 SCR 403

Maslin Industries Limited v Canada (Minister for Industry, Trade and Commerce) (1984) 1 FC 939 (TD)

Decisions of the Information Commissioner available in the annual report for the relevant year.

A whistleblower, Case 16, 1995, AR 1994 –95

Reneging on a promise, Cases 001 and 002, 2001, AR 2000-01

Weighing public interest, Case 08, 1994, AR 1993-94

The grey area of “public interest”, Case 13, 1998, AR 1997-98

Refugees and access to legal services, Case 01 2000, AR 2000-01

Whose videotapes are they? Case 04 1996, AR 1995-96

All available www.infocom.gc.ca/reports/default-e.asp

Ontario

Legislation

Freedom of Information and Protection of Privacy Act 1988
www.ipc.on.ca/english/acts/acts.htm

Administration and enforcement

Ontario Information and Privacy Commissioner

www.ipc.on.ca

Mitchinson, Tom, “*Public Interest*” and Ontario’s Freedom of Information and Protection of Privacy Act (16 February 2001)

www.ipc.on.ca/english/pubpres/speeches/speeches.htm

Case law and orders

Ontario (Ministry of Finance) v Ontario (Information and Privacy Commissioner) (1988) 107 OAC 341 (Div. Ct.)

Ontario (Ministry of Finance) v Ontario (Information and Privacy Commissioner) (1999) 118 OAC 108

Orders of the Ontario Information Commissioner which consider the public interest test

PO-1805: www.ipc.on.ca/english/orders/orders-p/po-1805.htm

M-249: www.ipc.on.ca/english/orders/orders-m/m-249.htm

M-317: www.ipc.on.ca/english/orders/orders-m/m-317.htm

M-539: www.ipc.on.ca/english/orders/orders-m/m-539.htm

M-710: www.ipc.on.ca/english/orders/orders-m/m-710.htm

P-12: www.ipc.on.ca/english/orders/orders-p/p-12.htm

P-123: www.ipc.on.ca/english/orders/orders-p/p-123.htm

P-124: www.ipc.on.ca/english/orders/orders-p/p-124.htm

P-270: www.ipc.on.ca/english/orders/orders-p/p-270.htm

P-347: www.ipc.on.ca/english/orders/orders-p/p-347.htm

P-391: www.ipc.on.ca/english/orders/orders-p/p-391.htm

P-532: www.ipc.on.ca/english/orders/orders-p/p-532.htm

P-568: www.ipc.on.ca/english/orders/orders-p/p-568.htm

P-613: www.ipc.on.ca/english/orders/orders-p/p-613.htm

P-901: www.ipc.on.ca/english/orders/orders-p/p-901.htm

P-984: www.ipc.on.ca/english/orders/orders-p/p-984.htm

P-1175: www.ipc.on.ca/english/orders/orders-p/p-1175.htm

P-1190: www.ipc.on.ca/english/orders/orders-p/p-1190.htm

P-1398: www.ipc.on.ca/english/orders/orders-p/p-1398.htm

P-1406: www.ipc.on.ca/english/orders/orders-p/p-1406.htm

P-1439: www.ipc.on.ca/english/orders/orders-p/p-1439.htm

PO-1688: www.ipc.on.ca/english/orders/orders-p/po-1688.htm

PO-1779: www.ipc.on.ca/english/orders/orders-p/po-1779.htm

British Columbia

Legislation

Freedom of Information and Protection of Privacy Act 1988
www.qp.gov.bc.ca/statreg/stat/F/96165_01.htm

Administration and enforcement

Ministry of Management Services
www.mser.gov.bc.ca/foi_pop

British Columbia Information and Privacy Commissioner
www.oipc.bc.org

Case law and orders

Release of a contract between University and sponsor

Order 01-20, May 25 2001
www.oipc.bc.org/orders/Order01-20.html

Australia

Commonwealth

Legislation

Freedom of Information Act 1982
www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/

Administration and enforcement

Attorney General's Department
www.ag.gov.au/www/agdHome.nsf

Includes 2000/01 Annual Report on the Operation of the Freedom of Information Act 1982 and Attorney General's FoI Memoranda: Memorandum No 98 Exemption Sections in the FoI Act

Administrative Appeals Tribunal
www.austlii.edu.au/au/cases/cth/aat/

Commonwealth Ombudsman
www.comb.gov.au/default.htm

Commonwealth Ombudsman, "*Needs to Know: Own motion investigation into the Administration of the Freedom of Information Act 1982 in Commonwealth Agencies*", June 1999 available on the web through the AG's Department site.

Office of the Federal Privacy Commissioner
www.privacy.gov.au

Case law and orders

Administrative Appeals Tribunal decisions

Decisions post 1997 are available in the Australian Attorney General's Annual Report for the relevant year on the Department's website. Decisions are also available on the searchable database of AAT decisions.

Re Desmond Heaney and Public Service Board (A83/105) 23/05/84

Re David Miles Connolly and Department of Finance D337 (28/6/94) (AG1993/4)

Re Hyland and Department of Health D152 (7/8/86)(AG1986/7)

Re Ken Aldred and Department of the Treasury D344 (25/10/94) (AG1994/5)

Re News Corporation Ltd, Mirror Newspapers Ltd, Nationwide News Pty Ltd and Control Investments Pty Ltd and National Companies and Securities Commission (N83/543)

Re P Reith MP and Minister for Aboriginal Affairs and the Department for Aboriginal Affairs D227 (21/12/88) (AG1988/9)

Re Paul Gerard Cleary and Department of the Treasury D319 (9/8/93) (AG 1993/4)

Re Robert Hazeltine and Australian National Parks and Wildlife Service D170 (11/2/87) (AG 1986/7)

Re the Environment Centre (NT) and the Department of the Environment, Sport and Territories (DEST) D343 (12/10/94) (AG 1994/5)

Other sources

Australian Law Reform Commission, *Open Government: A review of the Federal Freedom of Information Act 1982*, ALRC 77, 1995

Freedom of Information Advanced Training Module, Australian Government Solicitor's Office, Canberra, Australia 2001, unpublished

New South Wales

Legislation

Freedom of Information Act 1989 (New South Wales)
www.austlii.edu.au/au/legis/nsw/consol_act/foia1989222

Administration and enforcement

Attorney General's Department
www.lawlink.nsw.gov.au/crd.nsf/pages/foiindex

Privacy Commissioner:
www.agd.nsw.gov.au/pc.nsf/pages/index

Administrative Appeals Tribunal
www.agd.nsw.gov.au/adt.nsf/pages/index

Other sources

Cossins, Anne, *Annotated Freedom of Information Act New South Wales*, 1997, Lawbook Co.

Queensland

Legislation

Freedom of Information Act 1992
www.legislation.qld.gov.au/Legislation.htm

Administration and enforcement

Office of the Information Commissioner
www.slq.qld.gov.au/infocomm

New Zealand

Legislation

Official Information Act 1982
www.ombudsmen.govt.nz/official.htm

Privacy Act 1993
www.privacy.org.nz/slegisf.html

Administration and enforcement

Office of the New Zealand Ombudsmen
www.ombudsmen.govt.nz

The Ministry of Justice

www.justice.govt.nz

Case law and orders

Annual Compendium of Case Notes of the Ombudsmen, not available on the website, but available from the Ombudsmen's office.

Ombudsmen cases

W42031

A6737

W38403, W 39515, W 39584

W40876

W41517

W42789

W41600

W42556

Other sources

Eagles, I; Taggart, M & Liddell, G (1992) *Freedom of Information in New Zealand* Oxford University Press, Auckland

Privacy Commissioner

www.privacy.org.nz

New Zealand Cabinet Manual

www.dpmc.govt.nz/cabinet/manual/6.html

State Services Commission

www.ssc.govt.nz

Notes

- ¹ *Re Eccleston and Department of Family Services and Islanders* (1993) 1 QAR 60, Decision of the QLD Information Commissioner No 93002 30 June 1993, page 25
- ² “*Open Government: A review of the Federal Freedom of Information Act 1982*”, ALRC 77, 1995, para 8.13. www.alrc.gov.au/publications/finalreps.htm
- ³ Attorney General’s FOI Memoranda: Memorandum No 98 Exemption Sections in the FOI Act www.law.gov.au/foi/memos/memo98.htm
- ⁴ www.lcd.gov.uk
- ⁵ Birkinshaw P, *Government and information: the law relating to access disclosure and their regulation*, Butterworths, London, 2001 page 21
- ⁶ Decision 98078 of the Irish Information Commissioner
- ⁷ *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 and Eircom Plc and the Office of the Revenue Commissioners* (Cases 98114/98132/98164/98183)
- ⁸ Above note 1
- ⁹ UK Ombudsman decision 15/94
- ¹⁰ Order P1398 Ontario Information Commissioner. See chapter 9.
- ¹¹ Case No A.26/01. See Chapter 6 for further discussion.
- ¹² *Weighing public interest* Case 08 1994 of the Canadian Federal Information Commissioner. See chapter 8.
- ¹³ *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
- ¹⁴ See above, note 1
- ¹⁵ *Coulthart and Princess Alexandra Hospital and Health Service District*, Queensland Information Commissioner, Decision No 06/2001 10 August 2001
- ¹⁶ Case A 7/98
- ¹⁷ Guidance on interpretation 1996, para 0.5
- ¹⁸ Case A.2/98
- ¹⁹ Case A 16/01
- ²⁰ Case A/97
- ²¹ www.irlgov.ie/finance/publications/foi/foiman0.htm
- ²² www.oic.gov.ie
- ²³ *Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office for Public Works* (Cases 98049/98056/98057)
- ²⁴ *Mr Phelim McAleer of the Sunday Times Newspaper and the Department of Justice, Equality and Law Reform* Case 98058
- ²⁵ Above note 7
- ²⁶ *Mr Martin Wall, The Sunday Tribune newspaper and the Department of Health and Children* (Case 98078)
- ²⁷ *Mr Richard Oakley, The Sunday Tribune newspaper and the Dept of Enterprise, Trade and Employment* (Case 99168)
- ²⁸ *Mr John Burns and the Department of Education and Science* (Case 98099)
- ²⁹ *Ms Fiona McHugh, the Sunday Times Newspaper and the Department of Enterprise, Trade and Employment* (Cases 98100, 1999)
- ³⁰ *Mr ABLI and the North Western Health Board* (Case 99273)
- ³¹ *Mrs ABY and the Department of Education and Science* (Case 98169)
- ³² *Ms ABT, Mr ABU and the North Eastern Health Board* (Cases 99347,99357)
- ³³ www.atirtf-geai.gc.ca/report2002-e.html
- ³⁴ Barbara McIsaac “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.
- ³⁵ 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

³⁶ In correspondence with the Constitution Unit.

³⁷ http://www.tbs-sct.gc.ca/gos-sog/atip-aiprp/index_e.asp

³⁸ *Maslin Industries Limited v Canada (Minister for Industry, Trade and Commerce)* [1984] 1 FC 939 (T.D.)

³⁹ *Dagg v Canada (Minister of Finance)* [1997] 2 S.C.R. 403, per La Forest at pages 432–433 quoted by McIsaac above note 34

⁴⁰ A whistleblower, Case 16, 1995, AR 1994–95

⁴¹ Reneging on a promise, Cases 001 and 002, 2001, AR 2000–01

⁴² Weighing public interest, Case 08, 1994, AR 1993–94

⁴³ The grey area of “public interest” Case 13, 1998, AR 1997–98

⁴⁴ Refugees and access to legal services, Case 01 2000, AR 2000–01

⁴⁵ Whose videotapes are they? Case 04 1996, AR 1995–96

⁴⁶ Section 11 Provincial Act, section 5 Municipal Act

⁴⁷ Submission to the Access to Information Review Task Force: May 2001 Ann Cavoukian Information and Privacy Commissioner, Ontario.

⁴⁸ *Public Interest’ and Ontario’s Freedom of Information and Protection of Privacy Act* Published on the web-site of the Ontario Information and Privacy Commissioner (16/2/01) www.ipc.on.ca

⁴⁹ In correspondence with the Constitution Unit, British Columbia’s Information Commissioner, David Loukidelis, noted that the public interest issue “has hardly come up.”

⁵⁰ Order 01-20, May 25 2001, www.oipcbc.org/orders/Order01-20.html

⁵¹ Available in the Memorandums section of the Attorney General’s website at www.ag.gov.au/www/agdHome.nsf

⁵² *Re Paul Gerard Cleary and Department of the Treasury*, D319 (9/8/93) Attorney General’s Annual Report 1993–94 (Appendix O)

⁵³ *Re News Corporation Ltd, Mirror Newspapers Ltd, Nationwide News Pty Ltd and Control Investments Pty Ltd and National Companies and Securities Commission*, Case No: N83/543, 8 ACLR 316

⁵⁴ *Desmond Heaney and Public Service Board*, Case No: A83/105, 1984

⁵⁵ *Re Hyland and Department of Health*, D152 (7/8/86) Australian Attorney General’s case summaries—Annual Report 1986–87 (Appendix O)

⁵⁶ *Re Robert Hazeltine and Australian National Parks and Wildlife Service*, D170 (11/2/87) Attorney General’s Annual Report 1986–87 at Appendix O

⁵⁷ *Re P Reith MP and Minister for Aboriginal Affairs and the Department for Aboriginal Affairs*, D227 (21/12/88) Attorney General’s Annual Report 1988–89 (Appendix P)

⁵⁸ *Re David Miles Connolly and Department of Finance*, D337 (28/6/94) Attorney General’s Annual Report 1993–94 (Appendix O)

⁵⁹ *Re the Environment Centre (NT) and the Department of the Environment, Sport and Territories (DEST)*, D343 (12/10/94) Attorney General’s Annual Report 1994–5 (Appendix O)

⁶⁰ *Re Ken Aldred and Department of the Treasury*, D344 (25/10/94) Attorney General’s Annual Report 1994–5 (Appendix O)

⁶¹ section 29B of the Official Information Act 1982 obliges the Ombudsmen to consult the Privacy Commissioner when investigating decisions involving personal information.

⁶² in a letter to the Constitution Unit dated 28 November 2001.

⁶³ Available online at www.dpmc.govt.nz/cabinet/manual/6.html

⁶⁴ Eagles, I; Taggart, M & Liddell, G (1992) *Freedom of Information in New Zealand* Oxford University Press, Auckland

⁶⁵ Letter to the Constitution Unit from Sir Brian Elwood, Chief Ombudsman dated 28 November 2001

⁶⁶ 12th Compendium, p97

⁶⁷ Compendium, p99

⁶⁸ above, p101

⁶⁹ above, p103



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