CHAPTER 2

EXEMPTIONS WITHIN RIGHT TO INFORMATION LEGISLATIONS IN INTERNATIONAL PERSPECTIVE: A COMPARATIVE STUDY

2.1 Concept of exemptions in context of right to information:

Every access law identifies exemptions¹ to the right of access - that is, provisions that permit institutions to withhold certain kinds of information. Exceptions are one of the most important aspects of access to information laws, since they define limits to the right to information. Since refusals of access are limitations on a human right, as guaranteed in the Constitution of various countries and under international law, it is important that they be based on objective and legitimate grounds set out in the law, and that they be assessed and applied properly. As a result, it is important to understand the philosophy that underlies exceptions to the right to information.

The law on right to information provides that public information shall be in nature open and accessible to public information user. Exceptions to this rule should be interpreted narrowly and be based on the specific facts of each case. The combination of broad access with narrowly interpreted exceptions is known as ‘maximum access limited exemption’.

The need for exemptions is not disputed, and in some instances there is wide agreement about the appropriate definition of exemptions. However, there is no consensus about the definition of exemptions when information relates to important state interests. In general, complete exclusion of organisations from the applicability of access laws i.e. blanket exemptions are unattractive in terms of usability from a requester’s point of view, citizen’s perspective, because they focus on the owner/holder of the information rather than the information itself. The better course is to have clearly drafted exemption sections for the type of record or information, rather than broad blanket exemptions for the holding department or entity.

Another common exemption found in many laws is the ‘deliberative process’, which exempts from disclosure an official document that contains opinions, advice or recommendations and/or a record of consultations or deliberations. However, this exemption should clearly link the type of document to any form of mischief. Where such clauses appear,

¹ Exemption. A privilege which dispenses with the general rule; Exemptions are generally allowed, not for the benefit of the individual, but for some public advantage. Source: http://legal-dictionary.thefreedictionary.com/exemption.
they are linked to the notion of candour; the idea is that policy-makers should not feel restricted in terms of their candour with each other during the decision-making phase. If release of the document would not have alarming effect on deliberation, the document should not be exempt from disclosure.

The principle that information held by public authorities belongs to the public is essential to understanding exceptions to the right to information. It means that exceptions must be applied only in order to protect overriding public and private interests. The laws on access to information use two principles to ensure that exceptions are interpreted in an appropriate manner: the consequential harm test and the public interest test.

The primary determinant of whether or not information should be disclosed to the public is the interest of the public itself. This assessment should take into account both the general public interest in openness and the specific public interest in disclosure of the information under request. For example, if the information deals with issues of corruption or human rights abuses, there will be a particularly high public interest in its disclosure. In other words, even if information would harm a protected interests, it can still be withheld only if that harm is greater than the public interest in disclosure.

There should be a general public interest override covering the exemptions. Most laws around the world link a harm test to the notion of public interest, so as to trump the exemption when appropriate. This is critical to freedom of information laws because it accords their conformity with good international practice.

2.2 Scope of exemptions in right to information context – International standards

International standards relating to exceptions to the right to information are by now well established. At a very general level, it is clear that exemptions should be cast and interpreted as narrowly as possible. Assessing the legitimate scope of exemptions to the right to access information is complicated. On the one hand, an overbroad system of exemptions can seriously undermine the right to access information. In some cases, otherwise very effective right to information laws is largely undermined by an excessively broad or open regime of exemptions. On the other hand, it is obviously important that all legitimate secrecy
interests are adequately catered to otherwise public bodies will legally be required to disclose information even though this may cause disproportionate harm.\textsuperscript{2}

The complexity and yet importance of this issue is reflected in international standards. At a very general level, Commonwealth Principle\textsuperscript{3} states that exemptions to the right of access should be ‘limited’ and ‘narrowly drawn’. Similarly, the Inter-American Principles\textsuperscript{4} provides that limits to the right of access should be ‘exceptional’, previously established by law, and respond to ‘a real and imminent danger that threatens national security in democratic societies’ (Principle 4).\textsuperscript{5} This seems to have ignored many other interests that are widely recognised to warrant limitations on the right of access, such as, personal privacy and law enforcement. The UN Standards\textsuperscript{6} also call for exemptions to be established by law and narrowly drawn, providing:

“A refusal to disclose information may not be based on the aim to protect governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exemptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.”\textsuperscript{7}

Exemptions must conform to the standards under international law for restricting freedom of expression. This is clear from general principles and was also the subject of extensive elaboration in the September 2006 decision of the Inter-American Court of Human Rights which recognised right to information as part of the more general right to freedom of expression.\textsuperscript{8} This means that exemptions must be provided for by law and protect an interest

\begin{itemize}
\item \textsuperscript{2} Freedom of Information: A Comparative Legal Survey by Toby Mandel, Published by UNESCO, pages 34-35.
\item \textsuperscript{3} These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. The Ministers formulated the following principles on freedom of information: 1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right. 2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness. 3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn. 4. Governments should maintain and preserve records. 5. In principle, decisions to refuse access to records and information should be subject to independent review. (Communique, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
\item \textsuperscript{4} Adopted by the Inter-American Commission on Human Rights at its 108\textsuperscript{th} Regular Session, 19 October 2000. Source: http://www.oas.org/declaration.htm.
\item \textsuperscript{5} In October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression. Principle 4 - Access to information held by the state is a fundamental right of every individual. States have obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
\item \textsuperscript{6} Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para 44.
\item \textsuperscript{7} UN Principles on Freedom of Information- In 2004, the free expression rapporteurs of the UN, Organization of American States and Organization for Security and Cooperation in Europe issued another Joint Declaration on International Mechanisms for Promoting Freedom of Expression, affirming the right to access information as ‘fundamental human right’ for all citizens, one which governments should respect by enacting laws based on the principle of ‘maximum disclosure’. The Special Rapporteurs emphasized the fundamental importance of access to information to ensure democratic participation, accountability in government and to prevent corruption.
\item \textsuperscript{8} Claude Reyes and Others v. Chile, 19 September 2006, Series C No. 151, paras 88-92.
\end{itemize}
recognised as legitimate under international law, both of which are specifically recognised in several of the international statements. Different right to information laws recognises different legitimate aims which may be the subject of an exemption to the right of access, and this is a subject of some controversy.

The right to information is derived from the wider right to freedom of expression under international law.9 This means that exemptions must conform to the three-part test under international law for restrictions on freedom of expression.10 First, the restriction must be provided for by law. This requirement will be fulfilled only where the law is accessible and ‘formulated with sufficient precision to enable the citizen to regulate his conduct.’11 Second, the restriction must aim to protect a legitimate interest. The list of interests in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)12 - namely the rights and reputations of others, national security, public order (ordre public), and public health and morals - is exclusive in the sense that no other interests may legitimately be claimed as the basis for restriction on this right. Third, the restriction must be necessary to secure one of those interests. The word ‘necessary’ means that there must be a ‘pressing social need’ for the restriction. The reasons given by the State to justify the restriction must be ‘relevant and sufficient’ and the restriction must be proportionate.13

Commentators have suggested that this test translates into another, closely related, three-part test for exemptions to the right to information. The Public’s Right to Know: Principles on Freedom of Information Legislation14 published by the international human rights NGO ARTICLE 19, sets out best practice standards on right to information legislation. These Principles postulate the following three-part test for exemptions:

“The three-part test

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and

---

9 Claude Reyes and Others v. Chile, 19 September 2006, Series C No. 151, in particular paras 88-92 (Inter-American Court of Human Rights), Teraszt A Szabadságigazsákt v. Hungary, 14 April 2009, Application No. 37374/05 (European Court of Human Rights) and General comment No. 34, 12 September 2011, CCPR/C/62/34, para 18.
11 The Sunday Times v. United Kingdom, 26 April 1979, Application No. 6538/74, para 49 (European Court of Human Rights).
12 UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
14 ARTICLE 19 (London-based human rights organisation).
• the harm to the aim must be greater than the public interest in having the information.”\textsuperscript{15}

This three-part test finds support in a number of other international standard-setting documents. The first part of the test is reflected in Principle IV (1) of the 2002 Recommendation of the Committee of Ministers of the Council of Europe (COE Recommendation),\textsuperscript{16} which provides a detailed and exclusive list of the possible grounds for restricting the right to information, as follows:

“Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

i) national security, defence and international relations;
ii) public safety;
iii) the prevention, investigation and prosecution of criminal activities;
iv) privacy and other legitimate private interests;
v) commercial and other economic interests, be they private or public;
vi) the equality of parties concerning court proceedings;
vii) nature;
viii) inspection, control and supervision by public authorities;
ix) the economic, monetary and exchange rate policies of the state and
x) the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.”

Several international statements specifically mention the need for a risk of harm, the second part of the test, often linked to the idea of a public interest override, the third part. Thus, harm is implicit in the quotation from the UN Standards above. Principle IV(2) of the COE Recommendation recognises the need for both harm and a public interest override, stating:

“Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.”

\textsuperscript{13} Published by the international human rights NGO ARTICLE 19, Principle 4.
\textsuperscript{16} Recommendation R(2002)2 the Committee of Ministers to Member States on access to official documents, 21 February 2002
The dual ‘harm’ and ‘public interest override’ approach finds clear support in a Joint Declaration adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in 2004 (Joint Declaration), which states:

“The right of access should be subject to a narrow, carefully tailored system of exemptions to protect overriding public and private interests, including privacy. Exemptions should apply only where there is a risk of substantial harm to the protected interests and where that harm is greater than the overall public interest in having access to the information.”

2.3 Exemptions under the right to information legislations in overseas jurisdictions: An overview

Most freedom of information laws include a comprehensive list of exemptions, or grounds for refusing to disclose information. Some of the freedom of information legislations although a few, such as the Bulgarian and Kyrgyz laws, do not have provision of exemptions, instead in these jurisdictions existing secrecy laws are referred for this purpose. This is quite controversial and could potentially seriously undermine the openness regime.

For the most part, the exemptions recognized in different right to information laws do relate to protection of legitimate interests such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes. Although in many cases they are cast in

---

17 Adopted on 6 December 2004.
18 The Bulgarian RTI Law does not, unlike most right to information laws, include a comprehensive list of exceptions. Instead, information classified as secret pursuant to other laws is excluded from the definition of public information and the Law also specifically states that such information shall not be disclosed (Articles 2(1) and 7(1) & Article 9(2)). This is unfortunate and contrary to international standards, as well as the practice of most other countries. Although a number of laws from other countries do leave secrecy laws in place, most at least include their own set of exceptions. One problem with leaving secrecy laws in place is that they rarely conform to international or best practice standards on exceptions. In particular, few require a risk of harm before information may be withheld. There is no public interest override in the Law or historical time limits on secrecy. The Law on Protection of Classified Information, however, prescribes time limits, depending on the level of classification, of 2, 5, 15 or 30 years (Article 34(2)). The RTI Law does, however, provide for severability of exempt information, stating that access may either be full or partial (Articles 7(2) and 37(1)).
19 Unlike most right to information laws, the Kyrgyz RTI Law does not include a comprehensive list of exceptions but, instead, refers simply to secrecy legislation. Article 2(3) provides that the RTI Law does not apply to information contained in citizens’ suggestions, complaints and petitions to public bodies, or to access by public bodies to information held by other public bodies. These would appear to be blanket exclusions from the Law and the rationale for both is unclear. Article 15 provides for the rejection of requests for information on the basis of secrecy laws, where the request is not in conformity with the rules regarding oral requests (as provided for in Article 8), where the same public body is already considering a request by the same person on the same subject, or where the body does not hold and is not obliged to hold the information. Apart from the rule regarding secrecy laws, there are legitimate grounds to refuse requests.
unduly broad terms and this, is a serious problem in many laws which go against the principles of maximum disclosure.\textsuperscript{20}

A few laws do contain rare or peculiar exemptions. The laws of the United Kingdom and Thailand,\textsuperscript{21} for example, contain exemptions relating to the royal family, while South Africa has an exemption relating to the internal revenue service and third party research. The United States\textsuperscript{22} law contains an exemption relating to information about oil wells. India\textsuperscript{23} contains an exemption for information which would incite to an offence. While inciting to an offence is a crime in most places, it is hard to see how releasing information held by public bodies could lead to this result. In general, the need for such ‘special’ exemptions may be questioned, since modern states have very similar (legitimate) confidentiality needs.

As exemptions are ground for refusal to access to information to protect legitimate interest and to avoid harm to these protected interests requiring confidentiality but protected interests need to be respected to a reasonable extent, so as to maintain an appropriate balance between the protected interests and the need for openness. A number of means of addressing this are found in different laws. Many laws seek to narrow the scope of exemptions in various ways. Several contain exceptions to exemptions. This approach is widely used in the South African\textsuperscript{24} and Ugandan laws\textsuperscript{25} which, along with the Japanese law, for example, do not apply the privacy exemption to matters relating to the official role of public officials. The South


\textsuperscript{21} Section 14 provides: ’Official information which may jeopardise the Royal Institution shall not be disclosed.’ This involves a form of harm test, but it is not clear what precisely would be covered. In practice, secrecy regarding the Royal Family is very stringent indeed.

\textsuperscript{22} Section 15 provides for the following categories of exception: information the disclosure of which would endanger the life or security of any person, information which would reasonably encourage on privacy, information already protected by law or provided in confidence, and any other information protected by Royal Decree. These are, for the most part, categories of exceptions which are recognised in the right to information laws of other countries. The two counter-examples are the exceptions in favour of the Royal Institution and the power of the King to protect information by Royal Decree.

\textsuperscript{23} The South African RTI Law contains a very detailed, comprehensive and narrow regime of exceptions. Significantly, pursuant to section 5, the Law applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is materially inconsistent with the objects or a specific provision of the Law. However, records requested for use in civil or criminal cases after they have been commenced and for which access is provided in other legislation are excluded from the ambit of the Law (section 7). This is presumably to preserve the system for accessing this information under the relevant civil or criminal procedure rules.

\textsuperscript{24} Ugandan information legislation includes the list includes information relating to the quality, characteristics or vulnerabilities of weapons, whereas much public debate about this is perfectly legitimate. Thus, although the list is no doubt an attempt to narrow the scope of the defence exception, it fails to achieve this objective.
African and Ugandan laws also limit exemptions in favour of third parties by providing that where the third party is made aware in advance that the information might be disclosed, the information shall not fall within the scope of an exemption.

A number of countries, including Thailand and Jamaica, provide for release of background factual or technical documents otherwise covered by cabinet or internal deliberations exemptions. In many cases, laws provide for the release of previously exempt information after a decision has been made, a matter resolved by the courts, an investigation completed or some other “final” stage reached. The Azeri laws contain a long list of types of information that cannot be treated as confidential, such as economic and financial information, information on benefits provided to members of the public and so on.

A difficult issue is the relationship of right to information laws with secrecy laws. In principle, it does not matter which law provides for an exemption, as long as that exemption is appropriate in scope, taking into account the need for openness. In practice, however, many secrecy laws do not provide for an appropriate balance, in part because they were drafted before the need for openness was recognised. Put differently, leaving in place the pre-existing regime of secrecy at the time a right to information law is adopted is likely to lead to undue secrecy.

In most countries, notwithstanding the above, right to information laws do leave in place secrecy laws, although in a few, including South Africa and India, the right to information law has overriding force. The Indian law specifically mentions that it takes precedence over the Official Secrets Act, 1923, presumably because it was recognised as being particularly problematical from a secrecy point of view. In some countries, such as, Azerbaijan and Jamaica, the relationship between the right to information and secrecy laws remains unclear. A compromise solution has been adopted in Sweden, where only one

---

26 For the most part exceptions provisions in Jamaican information legislation are in line with good international practice, although they could in some cases be further narrowed either by more careful language or through the use of exceptions to exceptions. It is, however, significant that there is no general exception to protect internal deliberative processes (apart from protection for Cabinet documents).

27 Azerbaijan information law provides a list of information under Article 38, which may be kept confidential on the basis that it is private or concerns family life, including the following categories: information on political or religious views, ethnic or racial origin, health, individual features and abilities, or mental or physical disability; information collected as part of the investigation of a crime or other offence, until judgment is rendered, to protect children, morality, privacy, victims or witnesses, or as required to execute judgment; applications for social protection or services, registration of civil status, or adoption; tax information, except for outstanding debts; and information on sexual or family life. The listed categories are somewhat peculiar. It may well be, for example, that an individual has made his or her religious or political views public, in which case they would not fall within the scope of private information.

28 There are seven specific interests protected by the Swedish RTI Law, which correspond to separate chapters of the Secrecy Act, as follows: security or relations with foreign States or international organisations; central finance policy, monetary policy or foreign exchange policy; inspection, control or other supervisory functions; the interest in preventing or prosecuting crime; the public economic interests; protection of personal integrity and economic privacy; and preservation of animal or plant species. These are, by-and-large, restrictions commonly found in other right to information laws, apart from the last one, which is somewhat unique. These are the only
secrecy law, the Secrecy Act, is recognised as legitimate. This has the virtue of being transparent and also of ruling out the many secrecy provisions that lurk in older laws in most countries. A variant on this in Japan allows only laws provided for in a special list to override the right to information law. The United States law provides some redressal for the problem of ‘lurking’ secrecy laws, stipulating that secrecy laws remain in place, but only where they leave no discretion as to the non-disclosure of the information in question.

Another issue is the role of classification in determining the release of information under a right to information law. In most cases, classification is irrelevant and the exemptions in the right to information law, or possibly in a secrecy law, serve as the basis for decisions about disclosure. This has obvious merit, since mere administrative classification should not be able, in effect, to override legal provisions requiring disclosure. On the other hand, and formal legal rules aside, classifications often have a very important bearing on disclosure in practice and a number of laws put in place measure to limit it. The Azeri law, for example, requires classified information to include a date upon which classification will expire. Under the Mexican\textsuperscript{29} law, classification is subject to different levels of review, including by the independent oversight body.

A number of laws completely exclude certain bodies from the ambit of the law which is a radical way of avoiding not only the harm test but also any public interest override and even any consideration of whether the information should be disclosed at all. Security and/or intelligence bodies, for example, are excluded in the United Kingdom, India and Peru\textsuperscript{30}, while the cabinet and courts are excluded in Uganda. Significantly, in India the exclusion does not apply to information relating to corruption or human rights abuse.

A number of countries also exclude certain types of requests. In Mexico, for example, offensive requests or requests which have already been dealt with are excluded, in the United Kingdom vexatious or repeated requests, requests for information which is already accessible

\textsuperscript{29} There is a strict system of time limits to classification under Articles 13 and 14, of 12 years in Mexican Information Legislation. Information shall be declassified when the grounds for its classification no longer exist or when the period of classification is over, albeit without prejudice to other laws. The time limit may, exceptionally, be extended by IFAI or the relevant oversight body where the grounds for the original classification still pertain (Article 15). In practice, this happens relatively rarely.

\textsuperscript{30} Many of the exceptions in the Peruvian RTI Law do include a specific harm requirement. However, the intelligence and counter-intelligence activities of the National Intelligence Council (Consejo Nacional de Inteligencia, CNI) appear to be excluded entirely from the ambit of the law, without regard to specific harm (Article 15). Furthermore, most of the exceptions relating to national defence, described as military classification in the Law, do not include a harm test, although some do. This category, for example, includes defence plans for military bases, technical developments relating to national security, and so on, regardless of whether or not the disclosure of this information would cause any harm. In comparison, exceptions relating to intelligence (with the exception of the CNI, as noted above), as well as the categories of reserved and confidential information, mostly refer to some sort of harm, although in some cases the standard is low, as in ‘could endanger’ or ‘could put at risk’.
and requests for information intended to be published are excluded. Information about to be published and frivolous or vexatious requests are also excluded in South Africa. Both exclusions are in principle legitimate. There is nothing wrong with leaving in place existing publication systems as an alternative to request-driven access, as long as the standards that apply, for example, in terms of timeliness or cost of access, are similar. Where this is not the case, however, public bodies could use publication of information to avoid the procedures in place for requests. Similarly, vexatious, offensive or repetitive requests can impose costly burdens on public bodies and yet not advance the right to information. Again, however, where these are applied to broadly or within unduly wide discretionary limits they can be problematical.

Most of the laws provide for historical disclosure, often with different periods of time applying based on the type of exemption. The Azeri law, for example, provides for release of information protected on public grounds after five years, in Uganda documents protected under the internal deliberations exemption are released after ten years and the defence and international relations exemptions come to an end after twenty years. Most other laws have longer historical disclosure rules, for example of twenty to thirty years.

A few exemptions, while common, are also problematical. For example, most laws have an exemption relating to internal decision-making, or deliberative processes. This is legitimate as government needs to be able to run its internal operations effectively. In particular, the following harms may need to be prevented: prejudice to the effective formulation or development of public policy; frustration of the success of a policy by premature disclosure of that policy; undermining of the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; and undermining of the effectiveness of testing or auditing procedures. At the same time, if the exemption is phrased in excessively broad terms, it can seriously undermine the principle of maximum disclosure and lead to a wide range of internal documents being withheld. It is, as a result, particularly important that the exemption be clearly and narrowly drawn, that it be limited to protecting the specific interests noted above and that it be subject to a public interest override.

Another problematical exemption is protection of good relations with other states and intergovernmental organizations. In principle, this is legitimate. At the same time, it can be problematical, particularly when used by intergovernmental organisations, since it embraces much of the information they hold. A problem is that both parties may easily claim they need
to deny access to the information on the basis that disclosure would harm relations with the other party, a clearly unacceptable situation. It can also lead to a lowest common denominator situation, whereby the least open country within the information sharing ‘circle’ sets the standards. It can also be difficult for those not involved in the specific relationship, such as judges or information commissioners who are supposed to exercise oversight over secrecy claims, to assess whether or not the disclosure would harm a relationship.

National security is another problematical exemption, which led Article 19 to produce a set of principles on this subject, The Johannesburg Principles: National Security, Freedom of Expression and Access to Information.¹ States have historically demonstrated a serious tendency to over-classify information on grounds of national security. Furthermore, as with inter-governmental relations, it is difficult for outside actors to assess the extent to which the disclosure of information might really affect national security. This leads to a situation where security claims may be accepted, even though they are completely unwarranted. As Smolla has pointed out that history is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.² Unfortunately, the reaction of many states to the problem of terrorism has been to increase secrecy rather than to bolster democracy through openness.

2.4 Exemptions in right to information legislations in common law jurisdictions

This section summarises exemptions in right to information legislations in various common law jurisdictions. A summary of specific exemptions in these jurisdictions and its effects is also given in a separate table.

Table 2.1- Comparative table of exemptions in various common law jurisdictions

<table>
<thead>
<tr>
<th>Country</th>
<th>Exemptions and exclusions to disclosure. (mandatory or discretionary, and their time limits if any). What if any whole categories of records are ‘class exemptions’ i.e., without a ‘harm test’</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Australia (Commonwealth)</td>
<td>The Act contains a considerable number of exemptions, namely, for Cabinet documents, Executive Council documents, internal working documents, electoral rolls and related documents and</td>
</tr>
</tbody>
</table>

² Smolla, Rodney, Free Speech in an Open Society (New York: Knopf, 1992), page 319
provides for access to documents held by Commonwealth (national government) agencies created after 1 December 1977 documents affecting national security, defence or international relations, affecting relations with States, affecting enforcement of law and protection of public safety, to which secrecy provisions of enactments apply, affecting financial or property interests of the Commonwealth, concerning certain operations of agencies, affecting personal privacy, subject to legal professional privilege, relating to business affairs, relating to research, affecting the national economy, containing material obtained in confidence, disclosure of which would be contempt of Parliament or contempt of court.  

There are certain documents arising out of companies and securities legislation, which are excluded.

Ministers can issue ‘conclusive certificates’ stating that information is exempt under the provisions protecting deliberative process documents, national security and defence, Cabinet documents, and Commonwealth/State relations. These conclusive certificates cannot be reviewed during any appeal; an appeal body is only allowed to consider whether it was reasonable for the Minister to claim that the provisions of the exemption were satisfied.

Under the Archives Act, most documents are available after 30 years. Cabinet notebooks are closed for 50 years.

2. Canada (Commonwealth) Access to Information

The Act provides both mandatory exemptions and discretionary exemptions.

33. Documents affecting national security, defence or international relations; 33A. Documents affecting relations with States; 34. Cabinet documents; 35. Executive Council documents; 36. Internal working documents; 36A. Periods for which certain certificates remain in force; 37. Documents affecting enforcement of law and protection of public safety; 38. Documents to which secrecy provisions of enactments apply; 39. Documents affecting financial or property interests of the Commonwealth; 40. Documents concerning certain operations of agencies; 41. Documents affecting personal privacy; 42. Documents subject to legal professional privilege; 43. Documents relating to business affairs etc.; 43A. Documents relating to research; 44. Documents affecting national economy; 45. Documents containing material obtained in confidence; 46. Documents disclosure of which would be contempt of Parliament or contempt of court; 47. Certain documents arising out of companies and securities legislation; 47A. Electoral rolls and related documents

34. The Australia (Commonwealth) Freedom of Information Act 1982 - Exemption. 33. Documents affecting national security, defence or international relations; 33A. Documents affecting relations with States; 34. Cabinet documents; 35. Executive Council documents; 36. Internal working documents; 36A. Periods for which certain certificates remain in force; 37. Documents affecting enforcement of law and protection of public safety; 38. Documents to which secrecy provisions of enactments apply; 39. Documents affecting financial or property interests of the Commonwealth; 40. Documents concerning certain operations of agencies; 41. Documents affecting personal privacy; 42. Documents subject to legal professional privilege; 43. Documents relating to business affairs etc.; 43A. Documents relating to research; 44. Documents affecting national economy; 45. Documents containing material obtained in confidence; 46. Documents disclosure of which would be contempt of Parliament or contempt of court; 47. Certain documents arising out of companies and securities legislation; 47A. Electoral rolls and related documents

35. The Australia (Commonwealth) Freedom of Information Act 1982 - In Schedule 2, some documents held by these entities are excluded - Albury-Wodonga Development Corporation, Attorney-General’s Department, Australian Communications and Media Authority, Australian Broadcasting Corporation, Australian Postal Corporation, Australian Trade Commission, Australian Transaction Reports and Analysis/Also records noted in the Australian Wine and Brandy Corporation Act 1980, Dairy Produce Act 1986, Primary Industries and Energy Research and Development Act 1989, Wheat Marketing Act 1989.
Mandatory exemptions\textsuperscript{36} include information obtained in confidence from other governments; certain RCMP information, investigative records of independent officers of Parliament, of the Commissioner of Lobbying, of the Chief Electoral Officer, of the Public Sector Integrity Commissioner, disclosures for an investigation under the Public Servants Disclosure Protection Act\textsuperscript{37}; Personal information; Third party information (the only section with a limited public interest override, discretionary); secrecy provisions in other laws.

Discretionary exemptions\textsuperscript{38} include federal-provincial affairs; international affairs and defense; law enforcement and investigations; safety of individuals; economic interests of Canada; operations of government; testing procedures; solicitor-client privilege; information to be published in 90 days.

Time Limits\textsuperscript{39} - There are certain exemptions that cannot be applied when the records in question are more than the prescribed period.\textsuperscript{40}

Certain information under the control of Atomic Energy of Canada Limited has also been excluded from operation of the Act.\textsuperscript{41}

\textsuperscript{35} Amendments came into force in 2007.

\textsuperscript{36} All of the foregoing except 16.3 and 16.5 have exceptions to the withholding requirement.

\textsuperscript{37} All of the foregoing except 16.3 and 16.5 have exceptions to the withholding requirement.

\textsuperscript{38} Sec. 14. Federal-provincial affairs; Sec. 15. International affairs and defense; Sec. 16 (1) and (2). Law enforcement and investigations; Sec. 17. Safety of individuals; Sec. 18. Economic interests of Canada; Sec. 21. Operations of government; Sec. 22. Testing procedures; Sec. 23. Solicitor-client privilege; Sec. 26. Information to be published in 90 days.

\textsuperscript{39} In 2006 the government amended the Act to withhold draft audits (for various periods of time) in sections 16(1) and 22.1(1), and records of ongoing investigations by independent officers of parliament.

\textsuperscript{40} 15 years old for Sec. 22.1(1); 10 years old for Sec. 22.1(2).

\textsuperscript{41} 68.2 This Act does not apply to any information that is under the control of Atomic Energy of Canada Limited other than information that relates to (a) its general administration; or (b) its operation of any nuclear facility within the meaning of section 2 of the Nuclear Safety and Control Act that is subject to regulation by the Canadian Nuclear Safety Commission established under section 8 of that Act.
| **3. Ireland**  
| Freedom of Information Act, 1997  
| There are a number of exemptions and exclusions with different harm and public-interest tests. Records can be withheld if they relate to: the deliberative process unless the public interest is better served by releasing the document; cases where the release of information would prejudice the effectiveness of investigations or audits or the performance of government functions and negotiations unless the public interest is better served by releasing the documents; or cases where disclosure would prejudice law enforcement, security, defense and international affairs.  
| Documents must be withheld where they relate to Cabinet meetings with an exception for certain records related to a decision made over ten years before the request or those that contain factual information relating to a decision of the government; contempt of court and parliamentary proceedings; legal professional privilege; information obtained in confidence; commercially sensitive information and personal information, or where (with certain exceptions) disclosure is prohibited or authorized by other legislation.  

| **4. New Zealand (Commonwealth)**  
| There are strict exemptions for releasing information that would harm national security and international relations; information provided in confidence by other governments or international organizations; information that is needed for the maintenance of the law and the protection of any person; information that would harm the economy of New Zealand; and information related to the entering into any trade agreements.  
| In a second set of exemptions, information can be withheld for good reason unless there is an overriding public interest. These exemptions include information that could intrude into personal privacy, commercial secrets, privileged communication and confidences, information that if disclosed could damage public safety and health, economic interests, constitutional conventions and the effective conduct of public affairs, including ‘the free and
<table>
<thead>
<tr>
<th><strong>5. United Kingdom (Commonwealth)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Freedom of Information Act 2000.</strong></td>
</tr>
<tr>
<td>2000 [2005 in force]</td>
</tr>
</tbody>
</table>

The United Kingdom RTI Law has a very broad regime of exemptions. Most of the exemptions are reasonably clear, but many are anything but narrow and, in some cases, they go well beyond what has been considered necessary in other countries.

The law preserves secrecy provisions in other laws, as well as disclosures prohibited by European Community obligations or the rules relating to contempt of court (section 44). However, it does at least give the Secretary of State summary powers to repeal or amend by order laws restricting disclosure (section 75), which could in theory serve to mitigate at least the most egregious problems of leaving in place secrecy laws. So far, only one regulation has been adopted pursuant to this power and, while this is positive, it failed to address the most important secrecy legislation, the Official Secrets Act, 1989. At the same time, the RTI Law provides that nothing contained within it shall be deemed to limit the powers of a public body to disclose information (section 78). Thus, like most right to information laws, it is not in any way a secrecy law, this interest already being more than adequately catered for by the Official Secrets Act and other secrecy legislation.

Some of the exceptions are subject to a harm test but the majority are not, making them class exceptions. A common formulation of the harm test, for those exceptions which include one, is ‘would, or would be likely to, prejudice’ the protected interest, a fairly strong formulation. In a few cases – such as legally privileged information – the exceptions effectively incorporate an internal harm test.

Certificates are envisaged in relation to the exceptions in favour of

---

43 This law has been widely criticised. See, for example, ARTICLE 19 and Liberty, Secrets, Spies and Whistleblowers: Freedom of Expression and National Security in the United Kingdom (2000, London, ARTICLE 19 and Liberty).
security bodies (section 23), national security (section 24) and parliamentary privilege (section 34), as well as in relation to the public interest override. Where a minister issues a certificate to the effect that information falls within the scope of one of these exceptions, it shall ‘be conclusive evidence of that fact’, subject to different levels of review by the Information Tribunal (section 60).

The specific exemptions are as follows:

- information directly or indirectly supplied by or relating to a long list of security bodies and their oversight tribunals (section 23);\(^{44}\)
- information the withholding of which is ‘required for safeguarding national security’ (section 24) or the disclosure of which would prejudice defence (section 26);
- information the disclosure of which would, or would be likely, to prejudice relations with other States or international bodies or the interests of the United Kingdom abroad, or which was supplied in confidence by another State or inter-governmental body (section 27);
- information the disclosure of which would, or would be likely, to prejudice relations between different administrations within the United Kingdom (section 28);
- information the disclosure of which would, or would be likely, to prejudice the economic interests of the United Kingdom or the financial interests of the government (section 29);
- information the disclosure of which would, or would be likely, to prejudice criminal investigations (section 30);
- information the disclosure of which would, or would be likely, to prejudice the detection, prevention or prosecution of crime or the administration of justice generally (section 31);
- court records (section 32);

\(^{44}\) This is in addition to the total exclusion from the ambit of the Law of those security bodies.
• information the disclosure of which would, or would be likely, to prejudice audit functions or the examination of the effectiveness of public bodies (section 33);
• information covered by parliamentary privilege (section 34);
• information relating to the formulation of government policy or ministerial communications; this ceases to apply to statistical information, but not other information, once the policy has been adopted (section 35);
• information the disclosure of which would, or would be likely, to prejudice the collective responsibility of ministers or the free and frank provision of advice (section 36);
• information relating to communications with Her Majesty (section 37)
• information the disclosure of which would, or would be likely, to prejudice health or safety (section 38);
• information separately required to be provided under environmental regulations (section 39);
• personal information (section 40);
• information the disclosure of which would constitute a breach of confidence (section 41);
• legally privileged information (section 42);
• trade secrets and information the disclosure of which would, or would be likely, to prejudice the commercial interests of any person (section 43); and
• information the disclosure of which is prohibited by any other law or European Community obligation (section 44).

Taken together, this is a formidable list of broad, repetitive and in many cases, simply unnecessary exemptions.

There are three general exceptions, as well as some twenty specific ones. The three general exceptions are for vexatious or repeated requests (section 14), information which is already reasonably accessible to the applicant, even though this involves
payment (section 21), and information intended to be published, as long as it is reasonable not to disclose it pursuant to the request, even though no date of publication has been set (section 22). This latter is problematical inasmuch as it could be abused to delay disclosure beyond the normal timelines for responding to requests.

There are three categories of exemptions. Under the absolute exemptions [Sec. 2(3)], court records, most personal information, information relating to or from the security services, information whose disclosure would be an actionable breach of confidence, or information whose disclosure is prohibited under another law is exempt from the obligation to disclose.

Under the "qualified class exemptions," information can be withheld if it is determined to be within a broad class of exempted information, but only if the authority can show that the public interest in withholding it outweighs the public interest in disclosure. This includes information relating to government policy formulation, safeguarding national security, investigations, royal communications, legal privilege, or was received from a foreign government in confidence.

The 3rd category is not a class exemption; these are exemptions which are based on a harm test - usually whether disclosure would or would be likely to "prejudice" the interest concerned. Here too authorities must show that the public interest in withholding the information is greater than the public interest in its release.

---

43 Maurice Frankel, 2008: 'All the UK exemptions are discretionary. There are a number of exemptions to which the Public Interest test does not apply, and these are known as 'absolute' exemptions. 'Absolute' does not correspond to 'mandatory' it simply means that if the exemption applies no additional test (of PI) then follows.'

44 T Mendel, 2008: 'The United Kingdom RTI Law has a very broad regime of exceptions, referred to in the Law as exemptions, reflecting an ongoing preoccupation with secrecy in government. Indeed, this is the real Achilles heel of the Law, which is otherwise progressive. Most of the exceptions are reasonably clear, but many are anything but narrow and, in some cases, they go well beyond what has been considered necessary in other countries.'

The also provides for disclosure of record which becomes "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.48

<table>
<thead>
<tr>
<th>Exemptions</th>
<th>Australia</th>
<th>Canada</th>
<th>Ireland</th>
<th>New Zealand</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Information accessible to the public by other means.</td>
<td>Yes.</td>
<td>Yes, if published or available for purchase</td>
<td>Yes. Class exemption</td>
<td>Not specified</td>
<td>Class exemption</td>
</tr>
<tr>
<td>2. Information intended future publication</td>
<td>Yes. Defer until publication due</td>
<td>Yes, if publication is due within 3 months</td>
<td>Yes. Class exemption, if publication due within 3 months</td>
<td>Not specified</td>
<td>Class exemption.</td>
</tr>
<tr>
<td>3. Information supplied by, or relating to work of bodies dealing with security matters</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Yes. ‘Adversely affect’</td>
<td>Not specified</td>
<td>Class exemption.</td>
</tr>
<tr>
<td>4. National security</td>
<td>Yes. Class exemption</td>
<td>Yes. ‘Reasonably be expected to be injurious.’</td>
<td>Yes. ‘Adverse affect.’</td>
<td>Yes. ‘Would be likely to prejudice.’</td>
<td>If necessary to safeguard national security.</td>
</tr>
<tr>
<td>5. Defence</td>
<td>Yes. ‘Reasonably expected to cause damage’</td>
<td>Yes. ‘Reasonably be expected to be injurious’</td>
<td>Yes. ‘Adversely affect’</td>
<td>Yes. ‘Would be likely to prejudice’</td>
<td>would, or would be likely to prejudice</td>
</tr>
<tr>
<td>6. International relations</td>
<td>Yes. ‘Reasonably expected to’</td>
<td>Yes. ‘Reasonably be expected to be’</td>
<td>Yes. ‘Adversely’</td>
<td>Yes. ‘Would be likely to’</td>
<td>would, or would be likely to</td>
</tr>
</tbody>
</table>

41. Information provided in confidence; 42. Legal professional privilege; 43. Commercial interests; 44. Prohibitions on disclosure.
45. Saving for existing powers 78
46. Historical records 62. (1) For the purposes of this Part, a record becomes a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.
47. Removal of exemptions: historical records generally. 63. (1) Information contained in a historical record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, 36, 37(1)(a), 42 or 43.
| 8. Investigation and proceedings conducted by public authorities. | Yes.  
‘Prejudice conduct of investigation or fair trial’ | Yes.  
‘Reasonably expected to be injurious’ | Yes.  
‘Significant adverse affect’ | Yes.  
‘Would be likely to prejudice’ | Class exemption |
‘Prejudice fair trial’ | Yes. Class exemption | Yes.  
‘Reasonably be expected to prejudice’ | Yes.  
‘Would be likely to prejudice’ | Would or would be likely to prejudice |
| 11. Decision making and policy formulation. | Yes. Class exemption  
‘Factual Information available’ | Yes. Class exemption | Yes. Class exemption | Yes.  
‘Maintains constitutional conventions’ | Class exemption |
‘Would be likely to prejudice interests’ | Class exemption |
| 13. Information provided in confidence. | Yes. Class exemption | Yes. Class exemption | Yes. Class exemption | Yes.  
‘Would be likely to prejudice’ | Class exemption |
| 14. Legal professional privilege. | Yes. Class exemption | Yes. Class exemption | Yes. Class exemption | Class exemption |
| 15. Commercial interests. | Yes.  
‘Reasonably be expected to affect adversely’ | Yes. Class exemption | Yes.  
‘Cause undue disturbance’ | Yes.  
‘Would be likely unreasonably to prejudice’ | Would or would be likely to prejudice |
| 16. Communications with Her Majesty etc. | Not specified | Not specified | Yes. Excludes all records | Yes. ‘maintains constitutional’ | Class exemption |
2.5 Exemptions and public interest override in right to information legislations in various common law jurisdictions

The section particularly examines various provisions regarding public interest override of exemptions in the access to information legislation in the Australia, Canada, Ireland, New Zealand and United Kingdom. The experience of these jurisdictions and concrete examples from their case law are essential reference points for decision-makers in countries sharing a Westminster-style heritage, such as India.

Table 2.3 – Comparative table of Public interest override provisions in various common law jurisdictions

<table>
<thead>
<tr>
<th>Country</th>
<th>Public interest override (if any) to other sections. Is it an override to all other sections, or just some/which ones? Mandatory, discretionary?</th>
</tr>
</thead>
</table>
| **1. Australia (Commonwealth)** | • The Act contains a variety of “public interest” provisions depending on the type of information to which the exemption relates. For example, the exemptions relating to disclosures which would affect relations with States, the financial or property interests of the Commonwealth or the national economy, documents concerning certain operations of agencies and internal working documents are all subject to public interest tests.\(^{49}\)  
• The Commonwealth Act requires a decision-maker to consider public interest factors for and against disclosure. The test operates in three different ways.  
• The first is the “classic” public interest test which requires the |

---

\(^{49}\) The federal Freedom of Information Act 1982: Section 21. Deferment of access. (1) An agency which, or a Minister who, receives a request may defer the provision of access to the document concerned... (c) if the premature release of the document concerned would be contrary to the public interest - until the occurrence of any event after which or the expiration of any period of time beyond which the release of the document would not be contrary to the public interest; or (d) if a Minister considers that the document concerned is of such general public interest that the parliament should be informed of the contents of the document before the document is otherwise made public–until the expiration of 5 sitting days of either House of the Parliament.
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).

- Each of these sections contains a ‘harm’ test and it therefore follows that the harm suffered will itself be a public interest in favour of withholding information.

- The second formulation of the test relates to deliberative internal working documents. Section 36 provides that documents can only be withheld which meet the description in section 36 of internal working documents and, in addition, where disclosure would be contrary to the public interest. Since the requirement is to demonstrate that disclosure is contrary to the public interest, this gives a slight tilt in favour of disclosure.

- The third is effectively a deeming provision that it would be contrary to the public interest to release information that would have a substantial adverse effect on the management of the economy or undue disturbance on the ordinary course of business. Section 44 requires a decision-maker to consider whether a substantial adverse effect exists. If it does, then the provision states that it would be contrary to the public interest to release the information.50

- There is provision in section 36(3) for a Minister to issue a certificate to the effect that disclosure of any document which meets the statutory description of an internal working document would be contrary to the public interest. The issue of such a certificate may be reviewed by the AAT (and

50 Re Arnold Mann and the Australian Taxation Office (1985) 7 ALD 648 at 710. This decision has been criticized by at least one commentator, who takes the view that section 44 does not operate as a deeming provision, but requires both that the documents meet the description and that the public interest test be applied. Christopher Enright, Federal Administrative Law (2001) at page 178. However, the AAT has repeated this view in Re Edelsten and the Australian Federal Police (1985) 4 AAR 220, Source: http://www.austlii.edu.au/dau/eases/cthiaat/unrep2080.html, and the cases there referred to.
subsequently, by the Federal Courts), but under section 58(5) of the Act, the AAT (and the Courts) may only decide whether or not there exist reasonable grounds for the claim that disclosure would be contrary to the public interest, and in that type of review, the AAT (and the Courts) do not carry out the exercise of balancing the public interests involved\(^5\).

The following sections confer absolute exemption:

- **Section 33** national security, defence and international relations;
- **Section 34** Cabinet documents;
- **Section 35** Executive Council documents;
- **Section 37** law enforcement and administration;
- **Section 38** secrecy enactments;
- **Section 41** unreasonable disclosure of personal information, though the term ‘unreasonable’ permits a consideration of public interest factors;
- **Section 42** legal professional privilege;
- **Section 43** commercial affairs, though again the "harm" tests will permit consideration of the public interest;
- **Section 43A** unreasonable disclosure of research;
- **Section 45** action for breach of confidence;
- **Section 46** contempt of a Court or Parliament;
- **Section 47** certain companies documents;
- **Section 47A** the electoral roll.

- There is onus under the Act on the agency to establish that its decision was justified or that a decision adverse to the applicant should be made.

### 2. Canada (Commonwealth)


- **Section 20. Third party information.** 20(6) The head of a government institution may disclose any record requested

---

\(^5\) *McKinnon v. Secretary, Department of Treasury* [2005] FCAFC 142 (2 August 2005),

Amendments came into force in 2007 under this Act, or any part thereof, that contains information described in paragraph (1) (b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

- Second, subsection 20(6) provides for the disclosure of third party information, other than a trade secret, if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

- The ATI Act does not contain a general public interest override that applies to all the exemptions. A select committee report (1987) reviewing the access to information regime recommended that there should be a more thoughtful balancing of the public interest under the Act. The McIsaac report to the Task Force also recommended that the legislation be amended to provide for a much broader obligation to release information in the public interest. However, the Task Force recommended that a general public interest override is not necessary because discretionary exemptions already imply a balancing of public interest considerations.

---

52 Canada (Commonwealth) Access to Information Act, 1982: 2006 Amendments to ATIA : 18.1 (1) The head of a government institution may refuse to disclose a record requested under this Act that contains trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by, (a) the Canada Post Corporation; (b) Export Development Canada; (c) the Public Sector Pension Investment Board; or (d) VIA Rail Canada Inc.

Exceptions (2) However, the head of a government institution shall not refuse under subsection (1) to disclose a part of a record that contains information that relates to: (a) the general administration of an institution referred to in any of paragraphs (1) (a) to (d); or (b) any activity of the Canada Post Corporation that is fully funded out of monies appropriated by Parliament.

3. Ireland

Freedom of Information Act, 1997


- There are 12 sections in the Irish Freedom of Information Act which contain exemptions to release, and a total of 26 separate exemption provisions contained within those 12 sections. The public interest test applies to the eight exemptions set out below and requires a decision-maker to release information.

  “…Where in the opinion of the head of the public body concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request.’

Exemption under Freedom of Information Act, 1997 subject to public interest test as follows:

  Section 20- deliberative processes of public bodies;
  Section 21- functions and negotiations of public bodies;
  Section 23- law enforcement and public safety;
  Section 26(1) (a)- information given in confidence where disclosure would prejudice future supply;
  Section 27- commercially sensitive information;
  Section 28- personal information;
  Section 30- research and natural resources; and
  Section 31- financial and economic interests of the State and public bodies.

- Certain Sections of the Irish Act contain ‘class’ based exemptions. These are contained in Sections 19, 22, 24, 26(1) (b), and 32, and are satisfied if the record in question meets the description set out in the exemption, including in some of these provisions (but not all) a ‘harm test’, but with no application of a public interest test.

4. New Zealand

- The public interest test is set out in Section 9 of the OIA. It
provides that where a Section 9 exemption applies, there is ‘good reason’ to withhold official information unless in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable in the public interest to make that information available.

- This test effectively tilts the balance slightly in favour of withholding information, since the reasons in favour of disclosure must outweigh those supporting non-disclosure.
- The public interest test applies only to the exemptions set out in Section 9. These relate to personal privacy, commercial interests and trade secrets, confidentiality, the protection of health and safety, national economic interests, material loss to the public, communications with the Sovereign, collective and individual Ministerial responsibility, internal advice, ministerial internal working documents, the free and frank expression by or between or to Ministers, legal professional privilege, commercial activities and negotiations of public bodies, and the prevention of improper gains or advantages.
- The public interest test does not apply to the exemptions in the OIA which are categorized in Section 6 as ‘conclusive reasons for withholding information’. These exemptions cover the maintenance of security, information given in confidence at government level between nations, maintenance of law, personal safety, and serious damage to the economy.

5. United Kingdom (Commonwealth)

- Section 2(2) (b) of the Freedom of Information Act provides that information to which an exemption applies can be

54 The UK Freedom of Information Act 2000: ‘Effect of the exemptions in Part II. 2. (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either - (a) the provision confers absolute exemption, or (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1) (a) does not apply. 19. (1) It shall be the duty of every public authority- [...]. (3) In adopting or reviewing a publication scheme, a public authority shall have regard to the public interest (a) in allowing public access to information held by the authority, and (b) in the publication of reasons for decisions made by the authority.

Formulation of government policy, etc. 35. (4) In making any determination required by section 2(1) (b) or (2) (b) in relation to information which is exempt information by virtue of subsection (1) (a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking [...].

90
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. 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- defense; 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)- personal information where the data subject has a right to prevent processing; Section 42- legal professional privilege; and Section 43- commercial interests.

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

Section 21- information accessible by other means;
Section 23- information supplied by security bodies; Section 32- court records; Section 34-...

---

information that would prejudice the effective conduct of public affairs or inhibit the free and frank provision of advice. A "public-interest test" applies to the last two categories and provides that information can be withheld only when the public interest in maintaining the class or prejudice exemption outweighs the public interest in disclosure. Decisions on the public-interest test can be made beyond the Act's 20-day limit as long as it is within a time period that is deemed "reasonable in the circumstances."
parliamentary privilege; Section 36 in relation to conduct of public affairs in the House of Lords or House of Commons; Section 40 - personal information; Section 41 - information provided in confidence; and Section 44 - prohibited by another enactment community obligation, contempt of court.

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

• The application of Section 40(2) is complex. In regard to the absolute exemption, Section 40(2) (a), read together with Section 40(3) (a) (i) there will be absolute exemption where the information is personal data and disclosure would contravene any of the data protection principles in the Data Protection Act, 1998.

• The exemption constituted by Section 40(2) and Section 40(3) (a) (ii) when read together is not absolute and the public interest test will need to be applied where the information is personal data and disclosure would ‘contravene’ the right of an individual to prevent processing of personal data likely to cause damage or distress. Section 40(3) (a) (ii) is curiously drafted, since it refers to disclosure contravening Section 10 of the Data Protection Act, 1998. Section 10 gives an individual a right to object to certain processing, but under Section 10(3), the data controller may either comply or disregard the objection notice. An application may be made to the court

55 Except 40(3) (a) (i) of UK Freedom of Information Act.
under Section 10(4) if an individual wishes to contest a decision to disregard the notice.

- 'The UK Freedom of Information Act, 2000 does provide for a public interest override, albeit in negative terms, providing that the obligation to disclose does not apply where, ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’ (section 2(2) (b)). This is a good test, requiring the grounds for exception to outweigh those in favour of disclosure. It is, however, undermined in two key ways. First, section 2(3) provides a long list of exceptions which are ‘absolute’, in the sense that the public interest override does not apply to them. […] The exceptions to the public interest override are wide but even more significant are the power to defeat the public interest override provided for in section 53. [Exception from duty to comply with decision notice or enforcement notice.]’

2.5.1 Legislative framework, administration and enforcement of right to information legislations in various common law jurisdictions

This section also provides comparison of legislative framework, the department with policy responsibility for the legislation, enforcement mechanism and official guidance of right to information in Australia, Canada, Ireland, New Zealand and United Kingdom. Where available, government guidance on the application of the test is also included. Web addresses for government departments, information commissioners, ombudsmen, courts, and tribunals in each country are also included.

Table 2.4 - Legislative framework, administration, enforcement and official guidance of right to information legislations in various common law jurisdictions

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislative framework, administration, enforcement and official guidance</th>
</tr>
</thead>
</table>

93
1. Australia (Commonwealth)  
- The Australian Commonwealth Freedom of Information Act, 1982 (the Commonwealth Act) gives a right of access to personal information and official information. The Act was assented to on March 9, 1982, commenced on December 1, 1982, and applies to Commonwealth government departments and prescribed authorities. Prescribed authorities include bodies established for public purposes under laws of the Commonwealth. The Freedom of Information Acts of all of the Australian states and territories are modelled on the Commonwealth legislation, though there are differences. It should be noted that there are some differences in the application of the public interest test within the exemptions.
- Policy in respect of the Commonwealth Act is administered by the Attorney General’s Department in Canberra.
- The Commonwealth Act provides for two avenues of enforcement. Requesters have a right of appeal, under Section 55, directly to the Administrative Appeals Tribunal (AAT) which has the power to order disclosure. Alternatively, they can complain to the Commonwealth Ombudsman, under Section 57, who has the power to recommend disclosure, and investigate complaints about delays or excessive fees. Applicants can appeal against a decision of the AAT on a point of law to the Federal Court of Australia. On a significant point of law applicants could seek special leave to appeal to the High Court of Australia.
- The Attorney-General’s Department published in December, 2004 a detailed and useful memorandum on the exemption Sections of the Commonwealth Act. This includes a lengthy discussion of the public interest test. The Attorney General’s Department website also hosts a number of other memoranda and Freedom of Information research papers.

2. Canada (Commonwealth)  
- Access to government information in Canada is regulated at both federal and provincial/territorial levels. The federal Access to Information Act, 1982 (the AI Act) came into force on July 1, 1983. It applies to all government departments and most government...
agencies with the exception of the commercial crown corporations, parliament and the courts. 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. Access to personal information is governed by the Privacy Act, 1982.

- 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 publication containing information about government institutions and their information holdings to assist individuals exercising rights under the legislation.

An interdepartmental task force (the Access to Information Review Task Force) has written a report on access to information legislation, 'Access to Information: Making it Work for Canadians'. 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. This report also contains a brief discussion of public interest provisions in non-Canadian jurisdictions, though only at a very general level.

- The federal Access to Information Act, 1982 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.
It is important to note that the Commissioner operates as an Ombudsman under the AI Act and not as a second level decision-maker. The Commissioner investigates complaints made by persons who are dissatisfied with access decisions made by agencies. As part of the investigation, the Commissioner makes findings and recommendations, but has no power to make a new decision in place of the original decision. If the Commissioner is not satisfied with an agency's response to his recommendations, he has the right, with the requester's consent, to ask the Federal Court to review the matter. If the requester is dissatisfied with the results of the Commissioner's investigation, the requester has the right to ask the Federal Court to review the agency's response. Third parties whose information or documents may be part of a request also have the right to seek review from the Federal Court if they are dissatisfied with the results of the Commissioner's investigation. Such third parties, except in most unusual circumstances, will be opposing disclosure.

- The term 'public interest' is not defined in the AI Act. Canada's Access to Information Review Task Force is of the view that the public interest override has been rarely-if ever-used to disclose information that would otherwise have been withheld under a mandatory exemption. 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. Other materials including policy documents, guidelines, and annual reports are also collected on the website. 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.

3. Ireland

- The Irish Freedom of Information Act, 1997 (the Irish Freedom of Information Act) came into force on April 21, 1998 for most government bodies and on October 21, 1998 for local authorities
and health boards. Since that time, additional public bodies have been prescribed under regulations to be covered by the Act. The purpose of the Act is to give members of the public a right of access to official information to the greatest extent possible consistent with the public interest and right to privacy. The Act also gives rights to members of the public to seek amendment to records relating to personal information. The Irish Freedom of Information Act was subject to substantial amendment in 2003 which related to fees, deliberations of public bodies, security, defence, and international relations, amongst other topics.

- The Central Policy Unit of the Irish Department of Finance administers the Irish Freedom of Information Act. The Central Policies Unit maintains a website which contains a great deal of useful material, including a Manual for Freedom of Information Decision Makers, a list of public bodies covered by the Irish Act, short guides to the 1997 and 2003 legislations, and Central Policy Unit notices dealing with a range of Freedom of Information issues arising under the Act.

- The Freedom of Information Central Policy Unit of the Irish Department of Finance publishes a ‘Manual for Freedom of Information Decision Makers’ on its website. The Freedom of Information CPU notices are contained in Part C of the manual, and the notices that deal with exemption provisions include specific discussions of the type of public interest factors which may apply in each case.

4. New Zealand (Commonwealth)

- Access to government information in New Zealand is governed by the Official Information Act, 1982 (the OIA). The OIA was enacted on December 17, 1982 and came into force on July 1, 1983. An almost identical regime applies to access to local government information which is governed by the Local Government Official Information and Meetings Act, 1987. This Act was enacted on July 17, 1987 and commenced operation on March 1, 1988. The OIA applies to all ministers of the Crown, central government
departments and organisations listed in Parts I & II of the First Schedule to the Ombudsmen Act, 1975 and to those organisations listed in the First Schedule to the OIA. The OIA operates alongside the Privacy Act, 1993 which governs access to personal information and is enforced by the Privacy Commissioner.\(^5\)

- The OIA is administered by the Ministry of Justice. The Ministry of Justice does not play a day-to-day role in the operation of the OIA. However, the Ministry of Justice has issued a number of publications for the information of the public. Every two years since 1997 the Ministry of Justice has published a directory of official information. The directories contain a listing of government departments and other entities subject to the OIA and provide information to the public about the manner of seeking access under the OIA. The directories are published in compliance with Section 20 of the OIA.

- 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 is not public servant. The types of decision an Ombudsman can investigate under the OIA include refusals of requests, delays, charges, and other access decisions.

Upon an investigation, the Ombudsmen are empowered to review access decisions made by agencies. The Ombudsman has the power to report his opinion and the reasons for his opinion to an agency and make such recommendations as he thinks fit. Thereafter, the agency comes under a public duty to comply with the Ombudsman’s recommendations (e.g., to release information) on

---

\(^5\) Section 29B of the OIA obliges the Ombudsmen to consult the Privacy Commissioner when investigating decisions involving personal information.
the twenty-first working day after the recommendations were made to the agency, unless before that day the Governor-General, by order in Council, otherwise directs. An applicant may seek a review of the making of an order in Council in the High Court of New Zealand. A further appeal is available from the High Court to the Court of Appeal. The office of the Ombudsmen has published a number of guidelines explaining how the OIA works, considering the exemption provisions of the legislation, explaining how an Ombudsman carries out an investigation, and referring to other important provisions of the legislation.

Guideline B5 deals with the public interest test set out in Section 9 of the OIA. The office also publishes the Ombudsmen’s Quarterly Review, which may be accessed online. The website contains a consolidated index of topics, including the topic of official information. The March 1998 issue (volume 4, issue 1) was devoted entirely to the topic of official information. It included a checklist for requesters and holders of official information.

- The New Zealand Cabinet Manual is the authoritative source of advice for the executive of the New Zealand government. Chapter 6 of New Zealand Cabinet Manual deals with official information, protection, availability and disclosure. It does not give specific guidance on the considerations to be taken into account but describes generally the operation of the OIA. Eagles et al. in their book ‘Freedom of Information in New Zealand’, wrote some time ago that public authorities in New Zealand usually only consider the public interest in a cursory way.

| 5. United Kingdom (Commonwealth) | The Freedom of Information Act, 2000 (UK Freedom of Information Act) received Royal Assent on November 30, 2000. It came into force in stages over the following years and was fully in force in January, 2005. The processing and use of personal information is regulated by the Data Protection Act, 1981. Principles contained in that Act are also relevant to requests by third parties under the Freedom of Information Act for personal information. |
information and such requests are subject to the exemptions contained in the Freedom of Information Act.

- The department for Constitutional Affairs is responsible for the overall policy. 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.

- The Freedom of Information 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. 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. 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. The decision to issue a certificate under Section 53 must be supported by ‘reasonable grounds’ and is therefore open to judicial review.

- The Department of Constitutional Affairs provides, on the official website, information concerning the operation of the UK Freedom of Information Act. The website also contains a number of publications, including the codes of practice under Section 45 and Section 46, implementation and annual reports, guides and authorities in implementing the Act and research and policy papers. There is also a Section dealing with the history of the background to the Act. The website of Information Commissioner contains the Commissioner’s decision notes as well as awareness guidance, information for authorities concerning publication schemes, research on operation of the Act and general information for the
2.6 Critical appraisal of exemptions and public interest override in various common law jurisdictions

2.6.1 Australian Commonwealth

The Freedom of Information Act 1982 (FOI Act) contains twenty exemption provisions that preclude access to documents. In addition, the Act allows ministers to evade external merits review by issuing conclusive certificates under five of the exemption provisions. It has been described as a structure that is designed to achieve a balance between open government and public access to government documents, with the need to protect government information that may create an adverse effect if released. The main function of exemption provisions is to recognise the need for protection against the duty of disclosure. However such exemption provisions promoted the secrecy that existed before the FOI Act was enacted. It has also been said that the structure, provides a legalistic minefield for applicants where the struggle is rarely over the value or public interest in the release of documents, but descends into an intense Talmudic debate over twists in meaning.

Subsection 36(1) of the FOI Act provides for the internal working documents exemption. It states that a document is exempt if access to it would disclose a matter occurring as part of the ‘deliberative processes’ involved in the functions of an agency, a minister or government and disclosure would be contrary to the public interest. The subsection also allows the minister responsible for a government agency, to issue a conclusive certificate. Generally, Section 36 can be viewed:

“...as an attempt by the legislature to protect the integrity and viability of the decision making process. If the release of documents would impair this process to a significant or substantial degree and there is no countervailing

---

57 Sections 33, 33A, 34, 35, and 36.
60 Freedom of Information Act 1982, Section 36(1) (a).
61 Freedom of Information Act 1982, Section 36(1) (b).
benefit to the public which outweighs that impairment then it would be contrary to the public interest to grant access.'

Subsection 36(3) enables a minister to issue a certificate which establishes conclusively that the documents, if disclosed, would have an impact that ‘would be contrary to the public interest’.

Public interest is a nebulous concept which remains undefined in the FOI Act. In a general context, its determination depends on the application of a subjective consideration rather than any identifiable criteria. As a consequence, it can create difficulties in interpretation for both agencies and upon review. The requirement in subsection 36(1) that disclosure is contrary to the public interest is part of the primary test to determine whether internal working documents are exempt from disclosure. It is not necessary to show that disclosure would be in the public interest but whether it would be against the public interest and concerned with protection against prejudice to ‘the ordinary business of government’. Underlying all the relevant public interest factors that could be invoked against disclosure, is a requirement to determine ‘the extent to which disclosure’ would adversely affect or be likely to obstruct ‘the official administration of the agency concerned’. Additionally, subsection 36(3) enables a minister to issue a conclusive certificate which establishes that the documents, if disclosed, would have an impact that ‘would be contrary to the public interest’. This formulation involves a balancing of the interests with the burden on the applicant to establish that the public interest in favour of disclosure outweighs the public interest for refusal of access to the document for which the exemption is claimed. The balancing must be neutral in section 36 as it is not necessary to establish harm. The process involves the decision-maker exercising a discretionary judgment.

The FOI Act also constrains the powers of the AAT by limiting its ability to construe and determine what ‘public interest’ is in relation to circumstances where a conclusive certificate has been issued. Where a reasonable ground exists for a decision that disclosure is against the public interest, the AAT is prevented from weighing public interest factors in

---

63 Freedom of Information Act 1982, Section 36(1) (b).
66 Ibid.
68 Re Lianos and Department of Social Security (1985) 7 ALD 475.
69 Freedom of Information Act 1982, Section 36(1) (b).
70 Harris v. Australian Broadcasting Corporation (1983) 5 ALD 545, 554
favour of disclosure against public interest factors favouring nondisclosure. When a section 36 claim is made without the support of a conclusive certificate, the AAT can undertake full merit review of the claim that disclosure of a document would be contrary to the public interest.  

A common baseline for the determination of public interest is the list of factors identified by the AAT in Re Howard (Howard). In that case the AAT accepted five public interest factors that militate against disclosure of deliberative process documents. The first factor is that as communications are more sensitive at a higher level, there is a greater likelihood that the documents should not be disclosed. Consequently requests for documents relating to politically sensitive communications between ministers and their department heads are likely to be exempt. The second factor is that disclosure of communications made during policy development and its ultimate promulgation is not in the public interest. The third and most controversial factor is that disclosure that will inhibit frankness and candour in future pre-decision communications is likely to be contrary to the public interest. The fourth factor is that disclosure which will lead to confusion and unnecessary debate is contrary to the public interest. This is based on the argument that disclosure may be harmful where the documents disclosed will not be well understood. The final factor provides that disclosure of documents which do not properly indicate the reasons for a decision may prejudice the integrity of the decision making process so their disclosure would not be in the public interest.

For some time these considerations were regarded as almost statutory requirements to be considered when determining when disclosure would not be in the public interest. Such grounds have been queried and it has been held that the Howard criteria are ‘not intended to be used as determinative guidelines for the classification of information’.  

Despite this, Commonwealth government agencies have continued to cite the ‘Howard factors’, or variations of them, when refusing to release documents on the grounds that disclosure would be contrary to the public interest. In a case refusal by the Treasury to

---

71 Re Lianos para 113
72 Re Howard and the Treasurer of the Commonwealth of Australia (1985) 7 ALD 645.
73 Paterson, paras 55, 295
74 Paterson, paras 55, 297
75 Re Reith and Minister of State for Aboriginal Affairs (1988) 16 ALD 709; Re Aldred and Dept of Foreign Affairs and Trade (1990) 20 ALD 294; Dwyer and Department of Finance (1985) 8 ALD 474; Re Aldred and Department of the Treasurer (1994) 35 ALD 685.
76 Re Rae and Dept of Prime Minister and Cabinet (1986) 12 ALD 589.
release documents to the ABC, the fourth ‘Howard factor’ was utilised on the basis that the release of the documents would ‘cause unnecessary debate and confusion’.77

The ‘frankness and candour’ factor was affirmed in relation to public interest and internal working documents by Callinan and Heydon JJ in McKinnon.78

On the few occasions that the Commonwealth Ombudsman has had to deal with the release of internal working documents, and a consequential consideration of public interest, a cautious approach has been taken.79 The consideration has rarely extended beyond a determination of whether the relevant agency has sensibly explained its position and ensured that applicable public interest factors have been considered. As with any other exemption, or basis for exemption, the Commonwealth Ombudsman’s office considers whether the claim is made formulaically or whether it has some apparent relationship to the description of the document or, less commonly, the document itself.

Howard-like factors are given considerable weight in the Ombudsman’s own freedom of information decision making. What is worthy of consideration is the New South Wales Court of Appeal decision relating to the New South Wales FOI Act which overruled the ‘Howard factors’ in approving a test of ‘tangible harm’. This requires a government agency to show – on a factual basis – that harm would result if information was disclosed.80

The Australian courts recognize that the availability of information relevant to the performance of government is essential to the effective maintenance of the democratic system and that the Freedom of Information Act is a necessary supplement to the operation of responsible government.81

Because freedom of information legislation has been in place in Australia since 1982, there is a well-developed body of law in which a variety of elements of the public interest have been identified in Freedom of Information context. These elements pertain to the interest of the public as a community and more specific elements of the public interest which

---

77 Sid Marris para 106.
78 McKinnon para 83.
79 Paul Black para 72.
80 General Manager, WorkCover Authority of NSW v. Law Society of NSW [2006] NSWCA 84.
are recognized as rights held by individuals. A list of a number of those elements, drawn from the decided cases, is set out below:

- the public interest in maintaining effective decision-making processes in governments;
- the relationship between the federal government and state governments in a federal system and amongst the state governments;
- the effectiveness of internal procedures of agencies and the deliberations of officials;
- the need to protect the internal procedures of police forces and law enforcement agencies;
- the need to protect the public from unsafe consumer products, drugs, or prohibited substances;
- the public interest in the detection of crime;
- the public interest in the detection of regulatory offences, such as breaches of taxation legislation, trade practices legislation and other similar regulatory laws;
- the public interest in maintaining an open and democratic system of government;
- the public interest in protecting national security and defense arrangements from unlawful or unwarranted attack;
- the public interest in protecting important social institutions such as the judiciary, family and so forth;
- the public interest in having information concerning all arms of government, including information concerning public wrongdoing or, criminal conduct; and
- the need to protect key interests such as those of consumers or the environment.

There are further aspects of the ‘public interest’ which might be thought to deal more specifically with the rights and privileges of individuals and corporations, such as:

- the rights of persons to freedom of speech and freedom of movement;
- the rights of persons to be protected from unlawful acts or harassment;
• the rights of persons to carry on legitimate business activities, subject to all proper regulation;
• the rights of persons to choose their own employment and not to be forced into employment;
• the right of persons to keep certain matters confidential and to use such confidential material in their private lives or business affairs;
• the rights of persons to be protected from arbitrary arrest, incarceration or detention;
• the right of free association with other persons and groups;
• the right of individuals and organizations to report on news and current affairs and
• the rights of persons and organizations to comment upon government and governmental activities and to be provided with necessary information concerning such activities.

It must be borne in mind that, as it is recognized in Australia, the concept of ‘public interest’ embodies also public concern for the rights of an individual.82 It has also been said that the public interest is not synonymous with the interest of the government.83

The Australian courts have recognized the process under which a decision maker must weigh (amongst other elements of the public interest) the public interest in citizens being informed of the processes of government and its agencies on the one hand against the public interest in the proper working of government and its agencies on the other.84

The Administrative Appeals Tribunal has considered the application of the public interest test in a number of cases excluding cases which involved a request for personal information. 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-

83 Re Bartlett and the Department of Prime Minister and Cabinet (1987) 7 AAR 355.
General’s guidance states that this approach may have important consequences for the application of the public interest test.

In one decision, the AAT identified a number of matters relevant to a consideration of where the public interest lies when considering a request for internal working documents. The AAT said:

“Relevant considerations include matters such as the age of the documents; the importance of the issues discussed; the continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be ‘misunderstood or misapplied by an ill-informed public’; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned.”

The AAT has consistently rejected, as a ground of exemption, the claimed public interest in officers within agencies supplying information and advice with **candour and frankness** and the associated argument that such public interest weighs significantly against release of information. As early as 1984, the AAT said:

“It was submitted, though not strongly, that candour and frankness in making recommendations and in writing opinions with respect to assessments, objections and requests for reference would be affected if disclosure to the public or to the particular taxpayer of such recommendations and opinions took place.”

The **candour and frankness** argument is not new. It achieved pre-eminence at one time but has now been largely limited to high level decision-making and to policy-making.

---


In an early AAT decision under the Commonwealth Act, a Full Panel of the Tribunal presided over by the President expressed great skepticism concerning the candour and frankness argument in the following terms:

“It was submitted that, if officers of the Department of Taxation knew of the possibility that their written comments would be disclosed to the particular taxpayer, they would be more reluctant to commit their views to paper. Tomkins gave evidence that officers of the department were actively encouraged to put their personal beliefs in no uncertain terms. Often, Tomkins said, they would ‘argue strongly’ in favour of taxpayers. It was suggested that such a process might be hampered if an officer knew that at some later point in time in the appeal stage he or she would have to argue in favour of the Commissioner and contrary to the officer’s earlier observations. It was suggested that this would put the officer in an untenable position.”

We cannot accept this view. It is one of the duties of an officer of the department to argue in favour of proper recovery of taxation. It is also a duty to weigh up arguments in favour of and against the taxpayer. The fact that an officer may express views which favour a taxpayer cannot be held against him or her in any way. The expression of such views cannot be used against him or her at the review stage. If officers are made aware of this fact then they should not temper the nature of their comments nor be reluctant to commit them to paper.

No cogent evidence has been given to this Tribunal either in this review or, so far as we are aware, in any other, that the enactment of the Freedom of Information Act 1982 has led to an inappropriate lack of candour between officers of a department or to a deterioration in the quality of the work performed by officers. Indeed, the presently perceived view is that the new administrative law, of which the Freedom of Information Act 1982 forms a part, has led to an improvement in primary decision-making.87

---


Re Robyn Frances Murtagh and Commissioner of Taxation [1984] 6 ALD 112.

Source: http://www.austlii.edu.au/cases/cth/aat/unrep/536.html

---

108
The AAT has recognized that in some cases it may well be necessary to give a special protection to communications between ministers, between servants of the Crown and ministers, and even very high level communications within the public service.88

However, even with respect to such ministerial and high level communications, the ‘frankness and candour’ argument has been rejected in Australia, including in the AAT. In *Re Waterford and Treasurer of the Commonwealth of Australia*, [1985]. AATA 114 the AAT referred to and adopted the reasoning of the Australian and English courts, as follows:

“I do not accept the respondent’s argument on this point. The document has been prepared by highly skilled and senior members of the Treasury. Indeed, it is the advanced nature of the document and the fact that it assumes considerable expertise in economic analysis which provides part of the justification for its non-publication to the general public. I find it difficult to believe that these persons would shrink from the preparation of such a document if they knew that it was to be published. Mr Evans’ evidence revealed that... it is hard then to see why these departmental officers would be inhibited in expressing their views to other persons, the vast majority of whom could be considered far less knowledgeable in the area than those to whom it has already been revealed. In this regard I respectfully adopt the statements of Mason J in *Sankey v. Whitlam* (1978) 142 CLR 1 at 97...

The possibility that premature disclosure will result in want of candour in cabinet discussions or in advice given by public servants is so slight that it may be ignored, despite the evidence to the contrary which was apparently given and accepted in *Attorney-General v. Jonathan Cape Ltd* (1976) QB 752. I should have thought that the possibility of future publicity would act as a deterrent against advice which is spacious or expedient.”89

And *Upjohn U in Conway v. Rimmer* (1968) AC 910 at 994:

“I cannot believe that any minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duties on some subject, such as even the personal qualifications

---

88 *Re Murtagh* (op. cit.) a case in which internal records relating to the assessment of a taxpayer were ordered to be released.
89 Para 29 of *Re Waterford and Treasurer of the Commonwealth of Australia*. 

109
and delinquencies of some colleague, by the thought that his observations might one day see the light of day.\footnote{Re Waterford and Treasurer of the Commonwealth of Australia AAT (16 May 1985). Source: http://www.austlii.edu.au/au/cases/cth/aat/unrepid94.html}

While there is a presumption in favour of disclosure in the legislation, application of the public interest test has led (as one might expect) to a range of decisions, either in favour of, or against, disclosure. One important question in the decisions, both at Commonwealth and State level in Australia, has been whether a document should be exempted in the public interest because disclosure would lead to confusion of the public, for example, because the document merely discusses possible policy options and/or on the ground that the contents or options discussed were not ultimately adopted in the decision-making process.

It is fair to say that earlier decisions of the Commonwealth AAT did place great weight on the ‘confusion’ argument and upheld exemptions on this ground, but that later decisions have moved away from application of this principle as the Freedom of Information jurisdiction has become more developed. Examples of decided cases are summarized in the sections which follow dealing with the Commonwealth, Queensland, and New South Wales jurisdictions.

\subsection*{2.6.2 Canada: Federal}

It has been said by the Supreme Court of Canada that the expression ‘public interest’ includes both the concern of society generally and the particular interests of identifiable groups. 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.

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. 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’.

The requirement that the public interest in disclosure clearly outweigh the reasons for non-disclosure makes the Canadian test different from those in the other Commonwealth jurisdictions and in the UK where it is a question of merely balancing the competing public interests. If the balance is even slightly in one direction, that public interest will prevail. In Canada the decision-maker would probably have to be comfortably satisfied that the balance fell in favour of disclosure, given the different test. Judicial interpretation at federal level supports the presumption in favour of access inherent in the AI Act. According to a former Associate Chief Justice of the Federal Court, James Jerome, ‘public access ought not to be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure’. However, the courts have shown judicial deference for decision-makers and in particular for provincial Information Commissioners on the application of the public interest test and refrained from identifying criteria or guidelines. However, it appears that now the Canadian federal courts will review the reports and recommendations of the Commissioners for their correctness, and not just as to whether they are unreasonable.

The Supreme Court of Canada considered the nature of the decision-makers’ 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. In one case, the Federal Court of Appeal had to balance competing public interests where certain information was the ‘personal information’ of more than one person - an individual on the one hand and a group of persons on the other. The court considered that relevant ‘public interests’ were the following:

(a) for the group:

- the private interest of the group in hiding the fact that they participated in an inquiry and in keeping confidential certain conversations they had with an investigator;
- the ‘chilling’ effect of disclosure on future investigations;

These interests were not regarded by the court as significant.

---

91 Maislin Industries Limited v. Canada (Minister for Industry, Trade and Commerce) [1984] 1 FC 939 (TD).
93 Canada Inc. v. Canada (Minister of Industry) (CA) [2002] 1 FC 421; Source: http://www.canlii.org/calcas/fcal200112001fca254.html
AND ALSO Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police) [2003] 1 SCR 66; Source: http://www.canlii.org/calcas/scc/2003/2003scc8.html
94 Dagg v. Canada (Minister of Finance) [1997] 2 SCR 403, per La Forest at pages 432-433 quoted by Mcisaac supra note 32.
95 Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration) [2003] 1 FC 210 (CA).
(b) for the individual:

- his private interest in being able to respond to certain allegations made against him;
- the public interest in ensuring procedural fairness in administrative inquiries;

The court considered these interests as much stronger than the interests of the group in this case and the information was disclosed.

There is a difference, however, between there being a private and public interest in a person having access to allegations made or statements of witnesses and an interest in having access to notes taken by members of the judiciary or persons conducting an administrative inquiry. There is a strong public interest in such persons being able to take notes freely recording their impressions as a matter proceeds before them, and underlying that interest is the concept of judicial independence. 96 There is no public interest in access to such notes.

In a recent case, the Federal Court (Trial Division, Snider J.) had to consider whether certain tapes and transcripts of conversations between air traffic controllers and aircraft personnel in respect of four separate collisions had been properly exempted from disclosure. 97 In considering the public interest, the court said that it could not find that the discretion not to disclose had not been exercised in good faith, that the discretion had not been exercised in accordance with principles of natural justice or that irrelevant considerations were taken into account by the decision-maker. The decision-maker took into account the privacy concerns of the persons speaking on the tapes and in the transcript, the practice in other places as to release or non-release and the fact that the public interest was being served by the official investigations. In those circumstances and applying a 'judicial review' standard rather than assessing for itself the competing public interests, the court could not find that the discretion not to disclose the information was wrong, as a matter of a decision rationally available to the decision-maker on a discretionary basis. The public interests pointed to by the Commissioner were the fact that the communications took place on public airwaves and the fact that other jurisdictions did release such information.

This did not influence the court to find that the exercise of the discretion under Section 19(2) of the AI Act had miscarried. The Information Commissioner appealed to the Federal Court against the refusal to release the information. It is possible to envisage a

96 Canada (Privacy Commissioner) v. Canada (Labour Relations Board) [1996] 3 FC 609 (TD).
97 Canada (Information Commissioner) v. Canadian Transportation Accident Investigation and Safety Board [2005] FC 384.
different result if the court could, as a matter of law, have weighed for itself the competing public interests.

2.6.3 Ireland

In the *Sheedy v. Information Commissioner*, the Supreme Court of Ireland held that the decision of the High Court below and that of the Information Commissioner were correct on a consideration of the ‘harm test’ under Section 21. The Court went on to state that the weighing up of the various public interests by the Commissioner was a task ‘uniquely within his remit’. Once there was some evidence before the Commissioner as to the circumstances in which the relevant records had been compiled, the general principles applicable to review of decision-makers for error of law meant that his decision in such a case was not to be interfered with. (However, the Supreme Court overturned the decision of the High Court and the Information Commissioner, not on a Freedom of Information basis, but on the basis that Section 53 of the Education Act, 1998 applied to exempt the material.)

Earlier this case was before the High Court of Ireland before the case went in appeal to the Supreme Court of Ireland. In the decision by Gilligan J., the Court pointed to the detailed consideration of the public interest question which the Commissioner had carried out, and could find no legal error in his approach to the subject.

2.6.4 New Zealand

The New Zealand Official Information Act 1982 (OI Act) looks at the consequences that release of particular information will have and aims to guide the government to ‘increase progressively the availability of official information’. New Zealand officials can withhold information if it can be shown that release would be likely to cause certain harm as provided for in the Act, such as to national security and defence, public safety and economic protection. The New Zealand Court of Appeal has held that this requires ‘a serious or real and substantial risk to a protected interests, a risk that might well eventuate.’

The OI Act does not allow the release of all government information upon request, as evidenced by the third purpose of the Act, ‘to protect official information to the extent

---

99 Keams J. with whom Denham J. concurred.
100 *Barney Sheedy v. The Information Commissioner and the Minister for Education and Science and the Irish Times Limited (First and Second Notice Parties) [2003] No. 20 M.C.A.
102 Official Information Act 1982, Section 6 and 7
consistent with the public interest and the preservation of personal privacy.104 In line with this aim the OI Act, contains an exemption designed to protect the integrity of government decision-making processes. The exemption protects ‘thinking processes’, particularly advice and deliberation, where disclosure would constitute likely harm to the public.105

Section 9 of the OI Act, provides for other harm against which disclosure of information must be weighed. Subparagraphs 9(2) (f) (iv) and 9(2) (g) (i) of the OI Act operate as exemption provisions in that they prohibit information from being released if withholding that information will ‘maintain the conduct of public affairs through the free and frank expression of opinions’ or ‘maintain constitutional conventions’ protecting ‘the confidentiality of advice’ given by ministers and officials. However, agencies must release information if the reasons set out in the OI Act are ‘outweighed by other considerations which render it desirable, in the public interest, to make that information available’.106

The OI Act uses ‘spare, open-textured drafting’ in respect of public interest test.107 The effect of this has been to allocate more power to the New Zealand Ombudsmen. This is consistent with the evolving nature of freedom of information and ensures that the concept of public interest is viewed in the light of the objective of greater government accountability and transparency. Relevantly, paragraph 9(2) (a) of the OI Act provides that there is good reason to withhold information if such an interest is not ‘outweighed by other considerations which render it desirable, in the public interest, to make that information available’. Paragraph 9(2) (a) of the OI Act reflects one of the purposes set out in section 4 of the OI Act, which is to ‘protect official information to the extent consistent with the public interest and the preservation of personal privacy’.

However, paragraph 9(2) (a) is subject to subsection 9(1). This means that even if there is a privacy interest in the information that requires protection, the agency must still consider whether, in the circumstances of the case, the public interest requires disclosure of the information in any event. The test to be applied under subsection 9(1) is whether the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information to protect privacy. The exercise is not so much one of balancing competing

104 Official Information Act 1982, Section 4(c).
105 Nicola White, para 16, 174
106 Official Information Act 1982, Section 9(1)
107 Re Buchanan, para 56.
interests, but rather assessing the weight of competing interests in the circumstances of a particular case.

In making that assessment, matters such as accountability for a decision being made, transparency of a process, and ensuring that natural justice is accorded may be relevant to a consideration of whether the public interest requires release of information. The New Zealand Ombudsmen have used this public interest test to ensure that the public interest would be continually used to reach the desired aims of the OI Act in achieving greater government accountability and transparency. As a result, public interest in New Zealand applies to all issues of information disclosure. There is little case law on public interest and its operation under the OI Act. However, it is clear that the courts approach public interest and its effect on deliberative process documents by balancing the extent to which harm would be caused to the public interest in releasing certain information, against the effect that disclosure would have on the administration of justice by withholding documents from a party to the proceedings.\(^{108}\)

The New Zealand Ombudsmen continue this balancing process when considering the public interest aspect of deliberative process documents. When dealing with subsection 9(1) a distinction is drawn between things which may be of interest to the public, and matters which are of sufficient relevance and weight to outweigh the apparent importance which parliament attaches to subsection 9(2). The obligation to disclose the information against the need to protect the deliberative processes of government is carefully balanced.

The New Zealand approach to public interest allows the New Zealand Ombudsmen to use the concept as a test for withholding any information, whether or not the decision by the agency was reasonable or not. In addition, the OI Act uses ‘spare, open-textured drafting’\(^{109}\) which allocates more power to the New Zealand Ombudsmen and matches more effectively the evolving nature of freedom of information. Such wording also ensures that public interest is a concept that can be often used to achieve the objective of greater government accountability and transparency.

### 2.6.5 United Kingdom

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

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

Most consideration of the public interest test in overseas countries and in the ‘UK Open Government Code’ cases has focused on a few exemptions. The precise drafting of the exemption is different in each country but the analogous UK Freedom of Information Act exemptions are in: Section 35 (formulation of government policy); Section 36 (effective conduct of public affairs); Section 40 (personal information); Section 41 (breach of confidence) and Section 43 (prejudice to commercial interests)

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

a) **Formulation of government Policy: Section 35**

Subject to the public interest balancing test, Section 35 allows a public authority to withhold information if it relates to the formulation or development of government policy; ministerial communications (primarily communications between ministers, and Cabinet proceedings); the provision of advice by Law Officers or the operation of any ministerial private office.

Section 35 provides that once a decision on government policy has been taken, the background statistical information cannot be withheld. Even for the non-statistical information, it is more likely that public interest considerations will outweigh the exemption if the decision has already been taken.\(^{110}\)

b) **Effective Conduct of Public Affairs: Section 36**

Subject to the public interest test, Section 36 allows a public authority to withhold information if its disclosure would: prejudice the maintenance of the convention of ministerial collective responsibility; inhibit the free and frank provision of advice; inhibit the free and frank exchange of views for deliberation; otherwise prejudice the effective conduct of public affairs. There may be a public interest in maintaining the frankness and candour of official communications but it will be a high test. In Eccleston, 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, colorful 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 Freedom of Information Act.”

c) Privacy and Data Protection: Section 40

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

d) Actionable Breach of Confidence: Section 41
In the UK, the ‘breach of confidence’ exemption\textsuperscript{112} is not subject to a statutory public interest test. However, the public interest test is incorporated into the test for breach of confidence in equity\textsuperscript{9,113}.

e) The Law of Breach of Confidence in Equity: Section 41

In the United Kingdom, the courts analyze the question of whether a person may bring an action successfully for breach of confidence by weighing up, on the one hand, the public interest factors in favour of protecting the confidence, with, on the other hand, the public interest factors in favour of making available to the defendant or to the public the information in question.

This principle does not depend on any statute (including the UK Freedom of Information Act) but is an equitable principle of the law as developed in cases decided by the courts over the last century and a half. These cases deal with protection of confidential information in equity. The existence of this principle means, in effect, that even though Section 41 is not subject to a statutory public interest test, the question of public interest still forms part of the analysis as to whether disclosure of the information to the public would constitute an actionable breach of confidence under Section 41(1) (b). While the marginal note to Section 41 refers to ‘information provided in confidence’, it is important to understand that the requirements of Section 41 are not satisfied simply by the fact that information is provided in confidence. The Section requires that disclosure of the information be actionable, either at the suit of the person from whom the information was obtained or some other person. In this way, the Freedom of Information Act preserves the effect of past cases decided by the courts.

\textsuperscript{112} Under Section 41 of UK Freedom of Information Act.

\textsuperscript{113} The term Equity refers to a body of legal principles, originally developed in England in medieval times, and incorporated over centuries into the legal systems of all jurisdictions based on the English common law. Equity developed alongside the principles of the common law, and was a creation of the English Lord Chancellors which qualified and sometimes ameliorated the stricter principles of the common law. At first, the Lord Chancellor received petitions but subsequently comprised a court separate from the King’s Courts. The court became independent of the personality of the Chancellor over time and reached its apogee in the nineteenth century as the Court of Chancery, of which the Lord Chancellor was the pre-eminent member. Today all superior courts in the common law jurisdictions, including the ones discussed in this book, apply both the rules of the common law and the principles of Equity within the same court structure; for example, the Chancery division of the UK High Court of Justice. Principles of law and of Equity together constitute “the law” as a generic description. Equity qualifies and supplements that part of “the law” which derives from the common law of England. The principles of Equity are made by judges handing down decisions and are not derived from statutes. In some areas the principles of Equity dominate, in particular in the law of trusts, wills and probate, and in providing some forms of remedies which the common law did not recognise, e.g. injunctions. Equity has no role in tort or criminal law. For the purposes of the present analysis, it should be noted that if an obligation of confidence is imposed by a contract, the obligation is said to arise at law. If the obligation of confidence is not contractual, but the circumstances are such as to bind the conscience of a recipient of confidential information, this obligation is recognised as one in equity. This illustrates the point often made that Equity is a court of conscience and while that statement is misleading if read so as to suggest that Equity does not operate by reference to established principle, there is no doubt that relief against unconscionable conduct is a touchstone of Equity.
In Attorney-General v. Guardian Newspapers (No. 2), Lord Goff said that the important general question of principle was whether in the view of a reasonable person, public disclosure would be ‘just in all the circumstances’. This view was accepted by Dame Elizabeth Butler-Sloss P. in Venables & Thompson v. News Group Newspapers Limited & Others. In Webster v. James Chapman & Co, Scott J. said:

“The court must, in each case where protection of confidential information is sought, balance on the one hand the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information. There is never any question of an absolute right to have confidential information protected. The protection is the consequence of the balance to which I have referred coming down in favour of the plaintiff. It is reasonable to say that in the case law the courts have usually required strong reasons for finding that the public interest in preserving confidences is outweighed by the public interest in disclosing the information.”

One important factor is whether the information has been provided to the public authority under a valid and enforceable contract which contains confidentiality or non-disclosure provision which applies to the information a requester may seek. Since contracts are in the normal event upheld at law as a matter of public interest, it is probable that the public interest test will not apply to contractual obligations of confidence, but only to those arising apart from contract in equity. For example, in Australia the binding nature of contractual obligations of confidence has been recognized as preventing disclosure under Freedom of Information legislation.

Where there is a contract between a public authority and the third party providing information, one should look to the contract to determine the rights between the parties including the right to sue for breach of confidence and principles derived from the cases in equity should be resisted. The cases in contract will therefore be subject to different principles from the cases in equity, and this difference will therefore be required to be

---

recognized when considering the exemption in Section 41, depending on whether the obligation arises under a contract or not.

This may be one reason why public authorities have been advised not to agree to broad confidentiality clauses in agreements with suppliers. The cases in equity dealing with non-contractual obligations of confidence have considered various aspects of the public interest and applied a balancing test in a variety of non-FoI contexts. Principles which emerge from the decisions include the following:

- Where disclosure would provide information concerning actual or potential harm to the public, the public interest will usually require disclosure.
- Where an official inquiry is considering questions involving possible fraudulent financial practices, an obligation of confidence will not prevent an auditor providing information to the inquiry.
- An employee may, without breaching confidence, disclose information to an official regulatory authority which involves possible breaches of the regulatory framework.
- A doctor may ‘breach’, lawfully, a patient’s confidence where the doctor acts in the reasonably held belief that disclosure is necessary for the prevention of serious harm to others.
- A person will not breach confidence in disclosing dangers to public health contained in ‘quackery’ semi-religious doctrines.
- However, it will not be lawful and will be a breach of confidence to disclose which Ministers of the Crown support particular aspirants to the Prime Ministership.

---

119 The Statutory Code of Practice entitled Secretary of State for Constitutional Affairs’ Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000 and the comments of the Information Commissioner in Guidance No. 2 (at page 5) and in the Annex to ‘Guidance No. 5.’ Source: http://www.dca.gov.uk/foilcodefunct.htm#partV
120 In Beloff v. Pressdram Ltd [1973] 1 All ER 241 at 260, Ungoud-Thomas J. said “The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which... must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country’s security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.”
125 Beloff v. Pressdram Ltd.
This approach of balancing the public interests involved has now been overlaid by legislation such as the Human Rights Act, 1998, in particular by the requirement contained in Section 12(4) of the ibid Act which requires courts to take into account the public interest prior to granting any relief which impacts upon freedom of expression.

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


Broadly speaking, the Human Rights Act, 1998 has incorporated into UK law the protections found in the European Convention for the Protection of Human Rights and Fundamental Freedoms. For Freedom of Information purposes, the points which follow are important. All UK public authorities, which includes a court must recognize and give effect to the Convention principles.126

Most relevant to Freedom of Information are Articles 8 and 10.

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

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

Section 12(4) of the Human Rights Act, 1998 provides: ‘The court must have particular regard to the importance of the Convention right to freedom of expression’. Clearly, these human rights principles will have a significant impact on the availability of the exemption under Section 41 (1). Their impact will not be limited to individual rights or personal information. They are also likely to impact on confidential commercial information where there is a strong interest in freedom of expression with respect to such information.

However, it is important to note that breach of confidence is an exception within Article 10(2), and it has been said that, ‘the qualifications set out in Article 10(2) are as relevant as the right set out in Article 10(1)’.[127] It follows that there must be a balancing process or ‘juggling act’[128] between rights available in an action for breach of confidence and the right to freedom of expression where both sets of entitlements are raised. In addition, there may be rights of privacy involved, often with a right to bring an action for breach of confidence.

The principles derived from European law and included in the Human Rights Act, 1998 will apply, more obviously and more often, to personal information as distinct from commercial information of third parties which may be held by public authorities.

Venables[129] is an important decision in which the court found that the right to freedom of expression under the Human Rights Act, 1998 was outweighed by the rights of the plaintiffs to protect their privacy by recourse to the law concerning breach of confidence. The process involved balancing, on the one hand, the Article 8 right to privacy which the plaintiffs sought to enforce by the action for breach of confidence and on the other hand, the Article 10 right of freedom of expression in that case, the claim being advanced by the press. The potential threat to the plaintiffs in that case was very serious, involving a potential threat to their lives which made relevant the Article 2 right to life and this outweighed the right of the press to freedom of expression.

Even within the Article 10 right, the law of breach of confidence qualifies that right, requiring a further process of balancing of respective rights. It has been said that:

“Although the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect[130] … and if freedom of expression is to be impeded, it must be on cogent grounds recognized by law[131] …The Court of Appeal made important statements in A v. B plc.[132] concerning the interrelationship between

---

[130] Michael Douglas, Catherine Zeta-Jones and Northern & Shell Limited at para [49], per Brooke LJ.
[131] Michael Douglas at para [137], per Sedley LJ.
the relevant Convention Articles and between the Convention and the action for breach of confidence.”

As to the relationship between the Articles, the court said:

“The manner in which the two articles operate is entirely different. Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous approach to the situations in which privacy is to be protected. Article 10 operates in the opposite direction. This is because it protects freedom of expression and to achieve this it is necessary to restrict the area in which remedies are available for breaches of confidence. There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles were designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account.”¹³³

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

“These articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court’s approach to the issues which the applications raise has been modified because under Section 6 of the 1998 Act, the court, as a public authority, is required not to act ‘in a way which is incompatible with a Convention right’. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.”¹³⁴

While the judgment deals with Article 8 issues, as does Venables, the balancing process will also apply to commercial confidences, though it is fair to say that the rights to freedom of expression will be less capable of successfully trumping rights of confidence in a commercial context. One effect, however, might be that in a commercial confidence case, the final approach, which will overlay the public interest test within the UK doctrine of confidence with Article 10 right in the ‘stronger and broader action’ to which the court of Appeal referred, will probably make it easier to withhold protection under Section 41 (1) to a commercial confidence. It was also said by the court of Appeal that:

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

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

The House of Lords approached the Campbell case as also requiring a balance to be struck between Articles 8 and 10 and full regard being had to Section 12(4) of the Human Rights Act 1998. The approach of the court of Appeal was generally endorsed.

**g) Summary of Approach to the Confidentiality Exemption: Section 41**

It follows that public authorities, when considering the exemption requirements of Section 41(1), will have to consider two things: first, whether the requirements have been made out to classify the information as confidential in the first place. The three classic elements of breach of confidence are those identified by Megarry J. in Coco v. AN Clark (Engineers) Ltd. [1969] RPC 41 at 47. The whole of what Megarry J. said was:

“Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances imposing an obligation of confidence. 

135 A v. B plc at para 11(vi).
137 Per Lord Nicholls Lord Hope, Baroness Hale Lord Carswell of Campbell v. MGN Limited [2004] 2 AC 457.
Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.”

These principles are accepted in Ireland also.

Secondly, whether the confidential information was provided under contract, in which case the principles relevant in equity will not apply, but the law looks to the terms of the contract to govern the relationship between the parties. This approach may be subject to the principle that the contract be bona fide (and not an attempt to circumvent the Freedom of Information laws) and that the information not be trivial or have entered the public domain. If any of those factors were to be present, it is difficult to see how an action for breach of confidence would succeed.

- if the confidential relationship arises only in equity (and either the Coco elements are satisfied or the information is plainly confidential where not received in the course of a consensual relationship; e.g., if the information is appropriated or stolen), then the respective public interests in disclosure as against non-disclosure must be weighed up.
- as part of that process, the new principles under the European Convention and the Human Rights Act, 1998 must also be weighed in the balance. The principles of freedom of expression (Article 10) will favour disclosure, though confidentiality will be given weight under Article 10(2). The protection of personal privacy will weigh against disclosure in almost all cases and where strong enough (as in Venables) will overcome the right to freedom of expression, which is itself recognized as a very strong right.

h) Commercial interests: Section 43

Subject to the public interest test, Section 43 of the UK Freedom of Information Act allows a public authority to withhold information if, it constitutes a trade secret and if disclosure would be likely to prejudice the commercial interests of any person including the authority.

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

---

139 House of Spring Gardens Limited v. Point Blank Limited; Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office for Public Works.
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. Where the commercial interests of a public agency are concerned, the public interest is more likely to favour release because there is a clear public interest in accountability for public funds.

In 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. The Code of Practice under Section 45 of the UK Freedom of Information 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 Freedom of Information Act.

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

***