CHAPTER 4

EXEMPTIONS AND PUBLIC INTEREST OVERRIDE IN OVERSEAS JURISDICTIONS: JUDICIAL APPROACH

The aim of this chapter is twofold: first, to analyze various aspects of the public interest as understood in a freedom of information context in numerous common law jurisdictions and secondly, to assist freedom of information decision-makers to apply the public interest test in considering exemption provisions in legislation which incorporates that test in one form or another. Furthermore, this chapter is to provide analysis and concrete examples of public interest test considerations.

The Freedom of Information Acts discussed in this chapter require decision-makers to weigh the public interest in maintaining exemptions and the public interest in disclosing the information where the exemptions are not expressed in absolute terms. It is the decision-makers’ responsibility to assess these competing public interests and weigh them against each other while making determination.

None of the Acts defines the concept of the ‘public interest’ - intentionally, so that determinations must be made with regard to the specifics of each request. Cases have been analysed and summary has been given for each case with a view to distill relevant principles because it is inherent in the public interest test that the application of the relevant principles will vary from case to case. However, the cases are essential references for decision-makers because they are examples of how the balancing of public interest considerations and the interests protected by an exemption can be weighed.

Decision-makers should give significant consideration to the public interest test when applying exemptions for which it is required, and identify in every case the specific public interest in releasing the particular information. Good practice focuses on the ‘micro level’ of the document or information requested and whether that matter ought or ought not to be released in accordance with the legislation. Questions of public interest (including whether release will or will not benefit that interest) are determined by a consideration of the specific subject matter and not by reference to the class or category to which the document or information may belong, nor by purely theoretical or asserted detriments.
4.1 Eccleston: Overriding exemptions in public interest - A landmark case

Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs is an important decision encompassing the public interest.¹ This decision of the Queensland Information Commissioner has been described as ‘a comprehensive examination of the meaning of public interest in relation to internal working documents.’² Eccleston is the most important for its discussion of the concepts and principles relevant to the question of ‘public interest’ and should be considered by reference to the principles discussed in the decision.

The finding of the Information Commissioner was that the respondent department had failed to satisfy him that disclosure of the deliberative processes matter contained in documents would be contrary to the public interest.³ The documents in issue related to assessment or advice of the consequences for the Queensland Government of the then recent decision of the High Court in Mabo,⁴ which is the leading Australian decision on Indigenous Australians’ land rights. Section 81 of the Queensland Act meant that the onus to prove that the department’s decision to exempt the matter was justified, was on the department, and, as Section 41 requires, the department had to establish that disclosure would be contrary to the public interest.

4.1.1 The concept of the public interest

The Information Commissioner referred to judicial recognition of the principle that government exists for the benefit of the community it serves. In Attorney-General (UK) v. Heinemann Publishers Pty. Limited (the Spy catcher case), McHugh JA said⁵:

“But governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.”

The Information Commissioner referred to the 1991 report⁶ by Professor Paul Finn⁷ and quoted from it:

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¹ Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs (1993) 1 QAR 60
² Simpson v. Director-General, Department of Education & Training [2000] NSWADT 134.
³ Paragraph [185] of the Re Eccleston.
⁴ Mabo and Others v. Queensland (No.2) (1992) 175 CLR 1; Source: http://www.austlii.edu.au/au/cases/ch/ch/175chl.html
⁷ Subsequently a judge of the Federal Court of Australia; paragraph [35] of the Re Eccleston.

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“The manner in which government manages and is lawfully allowed to manage information in its hands has a marked bearing both on the quality of the citizen-State relationship and on the vitality of the democracy in which it governs. In the 200 years of our legal and governmental history, the latitude given to government in this has been variable. To the extent that it is possible to make broad generalizations and disregarding the very early colonial period, one can discern three overlapping phases in our law’s governing of information management generally and of official secrecy in particular. Each, as will be seen, reflects rather different assumptions about the nature and proper working of our constitutional system. Each, for a period, has been the predominant influence in our law... While the impact of these phases has been variable in our governmental systems, and while the pace of legal development in them is by no means uniform, the following discussion will proceed on a broad national basis, emphasizing the change in constitutional and democratic principles which are embodied in our law, and particularly in the emerging law of the last decade.”

Assigning labels to the three phases, the first can be described as one of ‘public interest paternalism.’ While using the ‘public interest’ to set the legal limits to the protection of official information, deference to the Crown and its advisers left it very much to the Crown to determine both what constituted the public interest and what and when official information should be made publicly available. The second phase, and much the most influential in Australia, has been that of a ‘governmental authoritarianism.’ In it neither official secrecy nor the public availability of information was made to depend upon the ‘public interest.’ It allowed government to elevate its interests over all others; to regulate at its discretion the public dissemination of information; and, formally at least, to coerce subservience from its officials through stringent official secrecy regimes. The third and much the most recent phase, can be designated the ‘liberal-democratic’ one. Its manifestations are various: in freedom of information and in privacy legislation; in the common law’s ‘public interest’ test for protecting governmental information; and in the now less deferential attitude taken to government in privilege cases. While accepting that official secrecy has a proper and necessary province, the guiding ideas here are that: ‘the interests of government... do
not exhaust the public interest\textsuperscript{8} endorsed by Stephen J in \textit{Sankey v. Whitlam},\textsuperscript{9} that the public availability of information is an important value to be promoted in a democratic society especially where this enables ‘the public to discuss, review and criticize government action’\textsuperscript{10} and that persons and bodies who supply confidential information to government about their own affairs have a legitimate interest in having the integrity and confidentiality of that information respected (the liberal theme).

“For the most part contemporary Australian law is in a period of transition from the second to the third of these phases. The power of government to act in the manner of its own choosing in the management of official information is being subordinated progressively to wider considerations of public interest. This trend in this particular sphere is not an isolated one. It reflects a wider and more general commitment to liberal-democratic ideals now evident in Australian public law generally.’’

The Information Commissioner quoted from the important judgment of Mason J. in \textit{Commonwealth of Australia v. John Fairfax & Sons Limited and Ors},\textsuperscript{11} concerning the manner in which claims for confidentiality by government must be assessed and what detriment government must show in order to establish such a claim.

“The question then, when the executive government seeks the protection given by Equity, is: What detriment does it need to show?

The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the government, but it is to say that when Equity protects government information it will look at the matter though different spectacles.

It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism.

\textsuperscript{9} (1978) 142 CLR 1 at 59
\textsuperscript{10} \textit{Commonwealth of Australia v. John Fairfax and Sons Limited and Others} (1981) 55 ALJR 45 at 49; (1980) 32 ALR 485 at 493 per Mason J) (the democratic theme)
But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

Accordingly, the Court will determine the government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

The Court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, as long as it does not prejudice the community in other respects.

Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public’s interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.”

Support for this approach can be found in Attorney-General v. Jonathan Cape Ltd., where the Court refused to grant an injunction to restrain publication of the diaries of Richard Crossman Widgery LCJ said:

“The Attorney-general must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.”

The Information Commissioner pointed to the comments of Mason J, and regarded it as implicit in those comments that embarrassment to the government or exposing the government to criticism will not be a ground for refusing disclosure of information, just as it would not be in a case of government impropriety. The Information Commissioner took the view that since the John Fairfax case dealt directly with public interest considerations bearing on the publication of government information, the principles enunciated by Mason J. were particularly apposite to the Freedom of Information context. The Information Commissioner pointed out that the concept of ‘public interest’ is not one defined in statutes including Freedom of Information legislation and that it is really a legal term of art. He also quoted the well-known passage from Director of Public Prosecutions v. Smith. Having done so, he made the observation referred to in a number of subsequent cases, that:

“...a matter which is of interest to the public does not necessarily equate to a matter of public interest.”

4.1.2 Public interest and the rights of the individual

The decision in Eccleston accepts the principle that while in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. The Information Commissioner cited in this regard the statement by Mason CJ., in the High Court that ‘the public interest necessarily comprehends an element of justice to the individual.’ Similarly, another public interest consideration regarded as worthy of protection, depending on the circumstances of any particular case, is the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests.

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13 At paragraph [46] of the Re Eccleston.
14 At paragraph [44] of the Re Eccleston.
15 At paragraph [45] of the Re Eccleston.
16 At paragraph [50] of the Re Eccleston.
17 At paragraph [55] of the Re Eccleston.
19 Eccleston, paragraph [55].
4.1.3 Public interest in accountability of government and public participation in government

The Information Commissioner regarded the Freedom of Information Act as intended to enable interested members of the public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be, bring the government to account through the democratic process; and enable interested members of the public to discover what the government proposes to do, and obtain relevant information which will assist the more effective exercise of the democratic right of any citizen to seek, to participation and influence the decision-making or policy forming processes of government.  

He pointed to the intentions of the Queensland government in passing the Freedom of Information Act by quoting from the second reading speech of the Queensland Attorney-General when introducing the Freedom of Information Bill:

“Freedom of information legislation throughout Australia enshrines and protects three basic principles of a free and democratic government, namely, openness, accountability and responsibility...[after repeating the terms of S.5(1) of the Freedom of Information Act]... The Bill enables people to have access to documents used by decision-makers and will, in practical terms, produce a higher level of accountability and provide a greater opportunity for the public to participate in policy making and government itself.”

Moreover, the Explanatory Notes to the Bill said in respect of clause 5 of the Bill (now Section 4 of the Act):

“The clause states two basic reasons for the enactment of Freedom of Information legislation. First, the public interest is served by public participation in, and the accountability of, government. Second, the public interest is served by enabling persons to have access to documents held by government which contain information which relates to their personal affairs. The clause acknowledges that the public interest is also served by the non-disclosure of certain information, where disclosure would harm the essential

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public interests or the private or business affairs of members of the community.”

The Information Commissioner also referred to the democratic reinforcements of the public interest in having access to information when he quoted from an article by an English legal academic, as follows:

“The reason for desiring public political institutions to be organised democratically is that democracy allows individuals a say in the terms and conditions on which social rules which bind them are developed. Intrinsically undemocratic social organizations may make the trains run on time but are bad because regardless of the benefits which they produce, they deny the autonomy of individual citizens by denying them a voice in the determination of policies, rules and procedures.

...there are (higher order) democratic rights. These should be respected and protected by a system which claims to be democratic; failure in this will represent a lapse from the democratic ideal...

These higher order rights secure each citizen’s access to the machinery of political decision-making... This provides a reason for individuals to subject some of their interests and freedom of choice to the public political process for some purposes. If it is ever rational for citizens to accept that their rights and obligations will be fixed by social institutions, it will be so only if the institutions operate under rules which guarantee to all citizens an equal right to influence decisions about the form and behaviour of those institutions... Some rights, at least are necessary to democratic institutions.

For instance, it would be undemocratic to deny the vote to blacks, Jews or women because that would contravene the principle of political equality. On the other hand, it would not be illegitimate to fix a minimum voting age, so long as it is reasonably related to the age at which people are regarded as capable of discharging civic responsibilities and applies to all groups in a non-discriminatory way. These limitations on the majority’s power to disenfranchise a minority are not limitations on democracy. They are an

22 At paragraph [67] of the Re Eccleston.
essential part of democracy. The same applies to a wide range of rights, which take up a special status as higher order democratic rights which need special protection under a democratic constitution. These include freedom of speech and association, the right to receive information which is relevant to public political decisions which one is entitled to make or influence and perhaps the right to be provided with forums for speech and association."

The Information Commissioner was mindful that the policy of the Freedom of Information Act\(^\text{24}\) is intended to strike a balance between competing interests in secrecy and openness for the sake of preventing prejudicial effects to essential public interests, or to the private or business affairs of members of the community, in respect of whom information is collected and held by government.\(^\text{25}\)

The ability of citizens to scrutinize the activities of government and empower them as electors in a democratic society was addressed, the Information Commissioner pointed out, in a High court decision in which McHugh J. said:

"If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation... Only by the spread of information, opinions and arguments can electors make an effective and responsible choice in determining whether or not they should vote for a particular candidate or the party which that person represents. Few voters have the time or the capacity to make their own examination of the raw material concerning the business of government, the policies of candidates or the issues in elections even if they have access to that


\(^{23}\) Reflected in subsections 5(2) and (3) as enacted, now in subsections 4(3) and (4) of the Queensland Freedom of Information Act.

\(^{24}\) At paragraph [40] of the Re Eccleston.

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material. As Lord Simon of Glaisdale pointed out in *Attorney-General v. Times Newspapers*:

People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.

In the same High Court decision, Mason, CJ described the process of public participation in government and the accountability of government in the following terms:

“The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. The point is that the representatives who are members of parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.”

### 4.1.4 Balancing of public interests

The Information Commissioner drew attention to the exemption provisions where a public interest balancing test was required to be applied. He was mindful that where apparently legitimate interests conflict, as will frequently arise when competing interests of individuals, of government in the conduct of its affairs, and of the public generally (or a substantial segment thereof) are sought to be protected or furthered in disputes over access to information, it is the balance of public interest which determines the particular interest(s) which it will be appropriate to protect, and whether by openness or secrecy. It is inherent in the process of balancing competing interests that one or more interests, whether public,
individual or government interests, will in fact suffer some prejudice, but that prejudice will be justified in the overall public interest.\textsuperscript{28}

The Information Commissioner went on to describe the manner in which as a general principle the balance in the public interest is properly arrived at. The appropriate balance in the public interest will be struck according to the relative weight of the competing interests at play in any particular set of circumstances. Sometimes the public interest in accountability and public participation will outweigh the public interest in the effective and efficient use of limited government resources to obtain the government’s desired outcomes. A certain amount of inefficiency in getting things done should be a burden that democratic governments are prepared to accept as the price of honouring the higher values of the democratic process.\textsuperscript{29}

Freedom of Information decision-makers are required, in the view of the Commissioner, to give full weight to the important principles of public interest in weighing up the appropriate balance unless the exemption provisions, and Section 41 in particular, are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the Freedom of Information Act, the traditions of government secrecy are likely to continue unchanged.\textsuperscript{30}

4.1.5 The Information Commissioner’s analysis of the Howard principles

The Information Commissioner gave a detailed exposition and analysis of the principles identified by the Commonwealth AAT in the early decision in \textit{Re Howard and Treasurer of the Commonwealth of Australia}.\textsuperscript{31} The Information Commissioner set out the five \textit{Howard} criteria in his decision:

“From such authorities and from decisions of Tribunals... it is possible to postulate that in each case the whole of the circumstances must be examined including any public benefit perceived in the disclosure of the documents sought but that:
a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
c) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;
d) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

The Freedom of Information Act has been in operation since 1st December, 1982... the Tribunal has not yet received evidence that disclosure under the Freedom of Information Act has in fact led to a diminishment in appropriate candour and frankness between officers. As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. Weight must be given to the object of the Freedom of Information Act.”

The Commissioner pointed out that the opening words of the passage from Re Howard emphasised the need for the whole of the circumstances to be considered and the closing words suggested that the five criteria were not set in concrete but were indicators which might need to be revised in the light of greater experience in the Freedom of Information Act and with the concept of the public interest, but that in practice these qualifications to the five criteria were rarely acknowledged.

32 Quoted at paragraph [105] of the Howard decision.
33 At paragraph [106] of the Howard decision.
The Commissioner then proceeded to analyse in great detail why the formulation of the five Howard criteria was ill-advised in part of the decision which merits being set out in full:

“(i) First, it placed an unwarranted emphasis on factors justifying non-disclosure, and provided an easy checklist of factors that could be called in aid to justify non-disclosure. No similar set of criteria specifying considerations which favoured disclosure was enunciated.

(ii) Second, the terms in which the criteria were framed, using words like ‘tends not to be’, ‘is likely to be’, ‘may be unfair to’, ‘may prejudice’, and referring only to general and mostly intangible kinds of harm (e.g. prejudice to the ‘integrity of the decision-making process’), has given government agencies the impression that it is sufficient to point in a general and speculative way to largely intangible kinds of harm to the public interest, instead of requiring them to state with precision the kinds of tangible harm to effective government decision-making processes (or other aspects of the public interest) that can be expected to flow from disclosure.

(iii) Third, in respect of at least the first two of the criteria, aspects of the class claim (against which the Tribunal specifically warned in the passage from Murtagh quoted earlier in the Howard decision itself) were permitted to re-enter by the specification of categories of documents disclosure of which tends not to be in the public interest (high-level documents, policy documents) without any qualifying reference to the overriding need to consider whether disclosure of the actual contents of such documents would be injurious to the public interest.

(iv) Fourth, the Tribunal seems to have drawn on principles from United States case law interpreting the fifth exemption, (b) (5), of the US Freedom of Information Act which are not necessarily appropriate to the materially different wording and structure of S.36 of the Commonwealth Freedom of Information Act. Exemption 5 in the US Freedom of Information Act excludes from the obligation of disclosure ‘inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with

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34 At paragraphs [107]-[119] of the Howard decision.
the agency.’ The US legislature was prepared to express its exemption in terms which incorporated by reference the US law with respect to a government agency’s privilege from production in legal proceedings which would roughly equate to the English and Australian law of Crown privilege/public interest immunity plus legal professional privilege and thereby accepted the limitations inherent in that law, with its very narrow focus on public interest considerations favouring disclosure. The Commonwealth Parliament, on the other hand, and all State legislatures that have followed it, chose to adopt a quite different statutory formula which left wide open the range of competing interests that might bear on the question of whether disclosure of particular deliberative process documents would on balance be contrary to the public interest. There is no requirement to import notions from the law of discovery in legal proceedings into the interpretation of S.36 of the Commonwealth Freedom of Information Act or S.41 of the Freedom of Information Act, and attempts to do so should be tempered by an appreciation of the quite different objects that the law is seeking to achieve in these two different contexts.

(v) The efficiency of government would be seriously compromised if cabinet decisions and papers were disclosed whilst they or the topics to which they relate are still current or controversial. But I base this view, not so much on the probability of ill-formed criticism with its inconvenient consequences, as upon the inherent difficulty of decision-making if the decision-making processes of cabinet and the materials on which they are based are at risk of premature publication.’

(vi) It is important to remember that both Conway v. Rimmer and Sankey v. Whitlam15 were decided in an era when the prevailing law was that, apart from the curial processes of discovery, interrogatories and subpoena, the executive government could not be compelled to disclose any information which it possessed. The authority of the courts was limited to compelling disclosure of government-held information for the purpose of its use as relevant evidence in

15 These two cases were in fact among the first in their respective jurisdictions to mark the end of a longstanding trend of judicial deference to the judgment of the executive government as to whether the public interest would be injured by disclosure in court proceedings of government-held information.
court proceedings, and the courts were generally conscious that they were exercising an exceptional power.”

The Commissioner then went on to consider each of the five Howard criteria in turn:

a) **The documents involved high level communications**

In respect of this principle, the Commissioner endorsed the approach taken by Deputy President Todd in two Commonwealth AAT cases. These cases held that simply because documents consisted of high level communications, it did not follow that disclosure was contrary to the public interest. If high level communications had certain characteristics which made disclosure contrary to the public interest, then it is those characteristics which are relevant and not the fact that the communications are high level.

b) **Disclosure of policy documents tends not to be in the public interest**

The Information Commissioner regarded this criterion as ‘plainly wrong’ and not supported by authority. Indeed, he regarded it as quite contrary to the Act itself and said:

“To uphold the second Howard criterion in the very broad terms in which it is stated would defeat one of the main purposes of the Freedom of Information Act which is to allow citizens access to documents that will permit informed participation in the development of government policy proposals which are of concern to them.”

(c) **Inhibition of frankness and candour**

The Commissioner pointed out that this principle has been viewed by the Commonwealth AAT with a healthy degree of skepticism. He also went on to cite the comments of Lord Upjohn in Conway v. Rimmer:

“.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

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36 At paragraphs [120]-[122] of the Howard decision.
37 Re Dillon (op. cit.). Re Rae and Department of Prime Minister and Cabinet (1986) 12 ALD 589.
38 Re Rae and Department of Prime Minister and Cabinet (1986) 12 ALD 589 at p.604, quoted at paragraph [121] of the Re Eccleston. It is worth noting the terms of the uncommon provision in Section 27(4) (a) of the Tasmanian Freedom of Information Act 1991 which states that disclosure of information is not contrary to the public interest merely because of the seniority of the person who created, annotated, or considered the information.
39 At paragraphs [122]-[123] of the Howard decision.
40 At paragraph [123] of the Howard decision.
41 At paragraph 124 of the Howard decision.
course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worst fear might be libel and there he has the defence of qualified privilege like everyone else in every walk of professional, industrial and commercial life who everyday has to express views on topics indistinguishable in substance from those of the servants of the Crown.”

The Commissioner also cited the views of Mason J. in Sankey v. Whitlam (the leading Australian authority on public interest immunity):

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

The Commissioner was of the view that the approach which should prevail in Queensland on the third Howard criterion was that taken by Deputy President Todd in Re Fewster and Department of Prime Minister and Cabinet (No.2), which is that a ‘frankness and candour’ argument:

“...should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.”

He based this holding on the approach of Deputy President Todd in Re Fewster (No.2), where parliament has deemed it necessary to give paramountcy to the undoubted public interest in confidentiality and candour and frankness by protecting a class of documents containing high level communication from disclosure under the Act, it has done

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46 Re Fewster and Department of Prime Minister and Cabinet (No.2) (1987) 13 ALD 139.
47 At paragraph [132] of the Re Eccleston.
48 Re Fewster and Department of Prime Minister and Cabinet (No.2) (1987) 13 ALD 139.

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so by express prohibition. Thus, by force of S. 34 (1) (a) of the Act, a document is an exempt
document if it is a document that has been submitted to cabinet for its consideration, being a
document that was brought into existence for that purpose. Similar provision has been made
with respect to executive council documents.\textsuperscript{49} The document is exempt upon proof of the
facts which bring it within the prescribed class, regardless of the actual contents or subject
matter: \textit{Re Anderson and Department of Special Minister of State}\textsuperscript{50} (No. 2); \textit{; Re Lianos and
Secretary, Department of Social Security}\textsuperscript{51}. Parliament has not gone on to provide, as it might
well have done, had it been so minded, that documents containing confidential
communications between Ministers or between senior public servants and Ministers are also
exempt, as a class, from disclosure under the Act. Rather, the question whether such
communications should be exempt has been left to be determined having regard to the
contents of each document, in the light of the public interest test posed by S. 36 (1) (b):
\textit{Lianos} at 494-5. The need to ensure candour and frankness in the expression of advice etc.
and to maintain confidentiality, where appropriate, are left, in my view, as facets of the public
interest to be weighed and evaluated in each case with other competing considerations. They
are relevant but not determinative considerations: \textit{Re Brennan and Law Society of Australian
Capital Territory}\textsuperscript{52} (No.2) at 21; cf \textit{Re Lianos} at 496.\textsuperscript{53}

The Information Commissioner stated that in the absence of clear, specific and
credible evidence, he would not be prepared to accept that the substance or quality of advice
prepared by professional public servants could be materially altered for the worse by threat of
disclosure under Freedom of Information legislation.\textsuperscript{54}

d) Disclosure producing confusion and unnecessary debate

The Information Commissioner pointed out that this criterion does not refer to injury
to government processes at all, but simply asserts a judgment that disclosure will lead to
confusion and unnecessary public debate.\textsuperscript{55} He regarded this approach as inconsistent with
the remarks of the High Court in \textit{Australian Capital Television} concerning the

\textsuperscript{49} Section 35(1) (a) of Queensland Freedom of Information Act 1992.
\textsuperscript{50} 11 ALN N239
\textsuperscript{51} (1985) 7 ALD 475 at 493
\textsuperscript{52} (1985) 8 ALD 10
\textsuperscript{53} Re Fewster and Department of Prime Minister and Cabinet (No.1) Nos. A86/8 and A86/23 Freedom of Information (1986) 11 ALN N
266 at N276-1, AAT No. 3131, Source: http://www.austlii.edu.au/au/cases/cth/aat/unrep2716.html
\textsuperscript{54} At paragraph [133] of the Re Eccleston.
\textsuperscript{55} At paragraph [136] of the Re Eccleston.
indispensability of freedom of communication in relation to public affairs and political discussion in a representative democracy.

The Information Commissioner regarded the fourth Howard criterion as based on rather elitist and paternalistic assumptions and considered that it was better left to the judgment of individuals and the public generally as to whether information is too confusing to be of benefit or whether debate is necessary.

“The committee regards the Australian community as more sophisticated and robust than the guideline assumes. The committee acknowledges that documents relating to policy proposals considered but not adopted can be used to attempt to confuse and mislead the public. But the committee considers that such attempts, if made, will be exposed. The process of doing so will lead to a better public understanding of the policy formation process.

Consistent with its attitude to the basis on which deletions should be able to be made, the committee records its conclusion that possible confusion and unnecessary debate not be factors to be considered in calculating where the public interest lies.”

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e) Disclosure of documents which do not fairly disclose the reasons for a decision may be unfair to a decision-maker and prejudice the integrity of the decision-making process

Reference has already been made to the Information Commissioner’s criticism of the concept of the ‘integrity of the decision-making processes.’ Otherwise, the Commissioner said that this criterion could be justified in some circumstances; for example, where a draft report had been prepared and a person criticised in the draft had not yet had a chance to comment. In those circumstances, it would be contrary to the public interest to release the draft at that time.

The Commissioner went on to endorse the approach of Deputy President Todd in the Commonwealth AAT who had held that just because a policy document does not reflect subsequent policy does not mean it would not be disclosed; if that were the applicable

56 Quoted at paragraph [137] of the Re Eccleston.

principle then no interim policy document would ever be released because some person might assume it represented current government thinking. Deputy President Todd said:

“I agree with Mr Bayne that a distinction may be drawn between the disclosure of a ‘preliminary’ document which contains criticism of a specific individual and a ‘preliminary’ document which reflects a stage of thinking in the policy making process... It is true that the documents to which access is currently sought are different from the documents in Harris and Kavvadias and the rationale for the public interest findings in those cases is not directly applicable here. Moreover, the documents here relate to a continuing administrative process. It will rarely be possible to say of any policy document that it reflects the ultimate view of government from which there will be no departure. If the fact of a document not accurately reflecting current government policy were a determinative public interest consideration, no policy document would ever be released, for it is always possible that some person someday might read such a document in the mistaken belief that it represents current thinking. There will no doubt be instances where an interim document by its very nature, or because of circumstances surrounding it, ought not to be released. Harris and Kavvadias afford two such examples. But it will not be enough for a respondent to rely on the mere fact of the contents of a document being subject to change to support a claim that disclosure would be contrary to the public interest.”

4.1.6 Reception of Eccleston in other Australian jurisdictions

The principles and analysis of the public interest in Eccleston have been approved, followed, or applied in or by:

- The New South Wales Court of Appeal
- Commonwealth Administrative Appeals Tribunal

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60 Re Rae and Department of Prime Minister and Cabinet (1996) 12 ALD 589, quoted at paragraph [138] of the Re Eccleston.
• The NSW Administrative Decisions Tribunal
• The Western Australian Information Commissioner

a) New South Wales Court of Appeal

General Manager, Work Cover Authority of New South Wales v. Law Society of New South Wales was an important decision of the New South Wales Court of Appeal. While the court did not review the decision in Eccleston in a detailed manner, it approved the view of the Queensland Information Commissioner that Freedom of Information applications should not be determined by a mechanistic application of the Howard factors but rather by a consideration of what tangible harm would flow from release of the requested material. Consideration of the Howard factors should be tempered by the understanding that they emerged in a context heavily influenced by doctrines of Crown privilege, and they should be looked at as empiric conclusions, not as determinative guidelines.

b) Commonwealth Administrative Appeals Tribunal

In Martin Saxon v. Australian Maritime and Safety Authority case, the AAT referred to the 'exhaustive' examination of the Howard criteria in Eccleston. While stating that it did not agree with all of the Eccleston criticisms of the Howard criteria, the Tribunal did agree that deliberative process or internal working documents were exempt only to the extent that the particular disclosure is contrary to the public interest. The Tribunal also accepted that the preservation of frankness and candour in communications between public servants is not often a circumstance of significant weight. In Purcell and Veteran’s Review Board,


66 At paragraph [41] of the Re Eccleston.

67 At paragraph [56] of the Re Eccleston.
decision, the AAT member who also decided Dunn as described above expressed the same views she later expressed in Dunn.69 In Patricia Hudson and Child Support Registrar,70 the Tribunal agreed with the description of the public interest in Eccleston that although amorphous, it meant something of serious concern to the public, not merely of individual interest.71

In Sutherland Shire Council and Department of Industry, Science & Resources and Department of Finance & Administration,72 decision, another Deputy President of the AAT approved the analysis in Chapman, agreeing that the Howard criteria were not fixed or immutable;73 agreed with the principle that a matter which is of interest to the public does not necessarily equate to a matter of public interest, but that there were public interests involved in the interest of a significant Section of the public and also in the rights of an individual;74 referred to the ‘useful’ discussion in Eccleston of the ‘resolution of conflict between two competing aspects of the public interest such as the effective and efficient conduct of government business on the one hand, and accountability of government and public participation in government processes on the other.’75

c) New South Wales Administrative Decisions Tribunal

In Simpson v. Director-General, Department of Education & Training76 decision, the NSW Tribunal expressed serious reservations about the third Howard criterion, the ‘candour and frankness’ argument. The tribunal referred77 to Commonwealth AAT authorities78 which had indicated that this criterion is unlikely ever to suffice as a ground of injury to the public interest that would justify non-disclosure. In doing so, it was quoting from the Eccleston decision. In National Parks Association of New South Wales Inc. v. Department of Lands &

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70 Deputy President Forgie did the same in Toomer and Department of Agriculture, Fisheries & Forestry and Ors, Source: http://www.austlii.edu.au/au/cases/chf/aat/2003/1301.html
72 At paragraph [27] of the Re Eccleston.
75 At paragraph [29] of Sutherland Shire Council.
76 Also at paragraph [29] of Sutherland Shire Council.
78 At paragraph [86] of the Re Eccleston.
Another\textsuperscript{79} case, the same Tribunal member effectively adopted the whole of the analysis of the public interest in Eccleston and applied it to the case before him.\textsuperscript{80}

In Gales Holdings Pty. Limited v. Tweed Shire Council\textsuperscript{81} decision, a single member ADT followed the reasoning of the panel in the Law Society decision which had followed Eccleston.\textsuperscript{82} The Tribunal also pointed out that even where there is evidence that disclosure may lead to confusion and unnecessary public debate or criticism, there must also be evidence to show that this debate or criticism may have an adverse effect on an agency in the performance of its functions.\textsuperscript{83} In expressing this view, the Tribunal may have implicitly been responding to the point made in analysis in Eccleston.\textsuperscript{84}

In Waite v. General Manager, Hornsby Shire Council\textsuperscript{85}, the Tribunal accepted that the deliberative processes exemption should be applied, as held in Eccleston, in a manner which ‘accords appropriate weight to the public interest objects sought to be achieved in the Freedom of Information Act, which includes the right to obtain access to information held by government.’\textsuperscript{86}

d) Western Australian Information Commissioner

In the early decision of Veale and Town of Bassendean\textsuperscript{87}, the Western Australian Information Commissioner referred to the Eccleston critique of the five Howard factors.\textsuperscript{88} In respect of factor three, ‘candour and frankness’, the Commissioner pointed out that it was rejected in Eccleston and has been rejected consistently in the Commonwealth AAT.\textsuperscript{89} The Commissioner went on to say that in the absence of cogent evidence of a lack of candour having emerged; she also rejected the claim in the case before her.\textsuperscript{90} The Commissioner went on to approve the views in Eccleston as to the fourth Howard criterion. She also went on to agree with the views in Eccleston that simply because the contents of a document change is not a sufficient reason, without more, to support a claim that disclosure would be contrary to

\textsuperscript{79} National Parks Association of New South Wales Inc. v. Department of Lands & Another[2005] NSW ADT 134.
\textsuperscript{80} At paragraph [15] of the Re Eccleston.
\textsuperscript{82} Law Society of New South Wales v. General Manager, WorkCover Authority of New South Wales (No.2) [2005] NSWADTAP 33.
\textsuperscript{83} At paragraph [37] of the Re Eccleston.
\textsuperscript{84} As set out at paragraph [136] of Eccleston; the analysis of Howard criterion 4 in Eccleston.
\textsuperscript{86} At paragraph [51] of the Re Eccleston.
\textsuperscript{88} At paragraph [20] of the Re Eccleston.
\textsuperscript{89} At paragraph [21] of the Re Eccleston.
\textsuperscript{90} At paragraph [22] of the Re Eccleston.
the public interest. She also approved generally of the views in Eccleston concerning the fifth Howard criterion.

Once again, in Jeanes and Kalgoorlie Regional Hospital, the Information Commissioner rejected the ‘candour and frankness’ argument in the circumstances of this case. She did not accept that professional medical people, including medical practitioners, nurses and other clinical staff would not be as candid and frank as they would have been in the absence of any threat of disclosure, in the context of a peer review process concerning the actions of a colleague. In Ravlich and State Supply Commission decision, the Information Commissioner followed the Eccleston principles and applied them in the manner she had done in Veale. The Commissioner rejected a claim made essentially without any supporting evidence that disclosure would inhibit candour and frankness in the context of public service officers providing comments to the relevant Ministers on the effectiveness of a piece of State supply legislation.

In Australian Medical Association Limited and Health Department of Western Australia case, the Information Commissioner agreed with the views in Eccleston that the purpose of Freedom of Information legislation is to give effect to the public interest in the openness and accountability of a democratically elected government; The Freedom of Information Act does that by providing a general right of access to government documents (and the information contained in them) except where some harm to the public interest is sufficiently demonstrated; While the Howard criteria, or at least some of them, may be helpful guidelines to consider in some cases, they do not comprise a prescriptive list. In the result in this case, all but one document was ordered to be disclosed. That was exempt in the public interest because disclosure would reveal certain integral facts of the agency’s negotiating position, which would, in turn, adversely affect the capacity of the agency to achieve a settled result concerning the terms upon which medical practitioners would be engaged to provide services to public patients in public hospitals in the State.

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91 At paragraph [23] of the Re Eccleston.
92 At paragraph [22] of the Re Eccleston.
94 At paragraph [29] of the Re Eccleston.
96 At paragraphs [31] and [32] of the Re Eccleston.
97 Australian Medical Association Limited and Health Department of Western Australia [1999] WAIcmr 7.
98 At paragraph [36] of the Re Eccleston.
99 At paragraph [55] of the Re Eccleston.
4.2 Disclosure of information: Overriding exemptions in public interest – judicial approach in various common law jurisdictions

4.2.1 Australia Commonwealth - Decisions where the balance lay in favour of disclosure

i) Documents relating to housing policy\textsuperscript{100}

A journalist sought access to certain documents relating to certain government housing policies in the Australian Capital Territory and reasons for transfer of the Head of Department. The AAT held that the public interest under Section 36 (1) (b) favoured release of the documents. Details given included:

- The documents would not produce confusion in the public mind. Although in one case, public concern and speculation as to the subject matter of one document could have arisen, the AAT said that disclosure would add to public knowledge already derived from other documents which had been released.
- Release would not inhibit frankness and candour, even in the case where one document was a communication from a senior public servant to the Minister.
- Nor would release misrepresent the reasons for a decision made by the Departmental Secretary.
- In one case, a document recording handwritten notes of the Minister was released, since conclusions which might be drawn from the notes could already be drawn from documents previously released.

Various public interest arguments were put by the respondent and considered by the Tribunal:

- That documents passing at a very high level between a statutory authorities reporting directly to the Treasury are exempt. The Tribunal read this principle (from \textit{Re Howard}) as being empiric; that is, it needed to be demonstrated with respect to the particular document that the public interest would be adversely affected.
- That there was a public interest in protecting information supplied voluntarily and confidentially by commercial organizations. The Tribunal pointed out that disclosure of a confidential document was not contrary to the public interest solely because its disclosure

\textsuperscript{100} \textit{Re Graham Downie and Department of Territories No. A 85/3 Freedom of Information [1985].}

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would constitute a breach of confidence (authors' note: though the public interest in preserving confidences is normally a strong one).

- Disclosure would prejudice the flow of information between agencies. While the Tribunal accepted that such a factor would be relevant, it had to be demonstrated with respect to the specific documents in question (which had not been produced).

- There was a ‘frankness and candour’ argument also. The Tribunal pointed out that it had repeatedly demonstrated its unwillingness to entertain this claim unless evidence in support could be adduced. The Tribunal pointed out that even if what was committed to paper by public servants were to reduce, this would not necessarily show a detrimental effect on government administration; it might reflect greater care in what was being written and this would be in the public interest. The Tribunal therefore ordered that the documents be produced to it so that the case could continue.

ii) Information on economic forecasts

An applicant requested information from the Department of the Treasury on economic forecasts. The Tribunal held the documents were deliberative process documents under Section 36 of the Act, and prima facie excluded. The Tribunal rejected the Department’s claim that disclosure would inhibit the provision of frank, unqualified written advice. There was no evidence to suggest that candour and frankness of future advice would suffer as a result of the disclosure. Nor was there evidence to suggest that the economic information to be disclosed would put certain investors at an unfair advantage.

iii) Release of reasons for decision

The applicant company sought access to certain documents relating to an assistance payments scheme for manufacturers of recycled paper administered by the Treasury. The issue was whether release of five documents which could damage Commonwealth-State relations (Section 33A) was or was not, on balance, in the public interest.

The Tribunal stressed the public interest in a person gaining access to the reasons for a decision that affects him or her and so to the findings of fact upon which that decision is based. The Tribunal also regarded the public’s ‘right to know’ under the Freedom of Information Act and the interest in ensuring that information gathered by government is

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101 Re Graham Downie and Department of Territories No. A85/3 Freedom of Information [1985].
103 Cosco Holdings Pty. Ltd and Department of Treasury [1998] AATA 124.
accurate, relevant and soundly based, as public interests of ‘grave import’. These factors overwhelmed any other public interests involved.

The AAT also rejected an argument that release of the information would diminish the frankness and candour of officers required to report on aspects of administration of the scheme.

iv) Narrowing of the exemption on public interest grounds104

In one decision, the AAT specifically stated that the concepts of public interest (which would justify exemption) have been narrowed in recent years.

The Tribunal referred to the so-called ‘Howard factors’189 and said these (following) were no longer accepted without question:

- The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed.
- Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest.
- Disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest.
- Disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered tends not to be in the public interest.
- Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

The AAT pointed out that Davies J. in Re Howard had gone on to state that time and experience would impinge on consideration of the public interest for Freedom of Information purposes. The Tribunal considered that Davies J. envisaged a flexible approach, not a fixed or immutable one.

v) Possible misconduct in statutory office105

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105 Smith and Aboriginal & Torres Strait Islander Commission [2000] AATA 512.

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The applicant sought access to a range of documents relating to investigations into certain alleged financial misconduct of some regional Aboriginal councilors of the Aboriginal and Torres Strait Islander Commission.

In respect of a consultant’s report which considered certain questions, the AAT found that disclosure was not contrary to the public interest because:

- There had been serious allegations against statutory office holders and there was a strong public interest in ensuring that public moneys were expended impartially and for the purposes for which they were allocated.
- Sufficient time (four years) had passed since the report was delivered during which ATSIC could have made its decision without the intrusion of public debate.
- There was a strong public interest in knowing the identities of those whom the consultants considered had been in breach.
- If the request had come soon after delivery of the report then there might have been a strong argument that disclosure would create misleading impressions, encourage ill-informed speculation, and lead to unnecessary debate.
- The understanding which elected office holders have of their responsibilities, both legal and ethical, was also a matter of public interest.
- There was a public interest in the proper and appropriate consideration of complaints about the manner in which the holders of elected offices carry out their duties and their fitness for office.
- Where public funds were used to acquire assets, there was a public interest in knowing whether those assets are maintained and, should they be disposed of, that this occurs at an appropriate value.

The AAT made the important point that simply because debate and speculation might follow from disclosure; it would not necessarily be the case that disclosure itself would create misleading impressions, speculation and debate. This might or might not occur, depending on context; for example if there were simply no other information released. The Tribunal pointed to the absence of any evidence as to the other information that might be available.
A similar point (and analysis) has been made in decisions of the Queensland Information Commissioner.105

vi) Community consultation document107

The applicant sought access to a consultant’s report which had investigated community views on the existing tax system and proposals to simplify that system.

The AAT weighed up competing aspects of the public interest. In that process, the following were very important considerations:

• the document was not prepared by the Australian Taxation office and did not reflect its input;
• rather, it dealt with a sample survey of public opinion, including public reaction to proposals for change;
• there would be enhancement of public debate by disclosure;
• there would be no adverse effect on the deliberative processes of government from disclosure.

The Tribunal held that the report was ‘a document of overwhelming public interest’ and decided that it should be released.

vii) Internal taxation working documents108

The applicant taxpayer sought access to certain internal working documents of the Australian Taxation Office which would disclose:

• Whether an amended assessment issued by the Office was based on fraud or evasion or both;
• The basis upon which the applicant was being proceeded against after expiry of the normal six year limitation period.

The AAT applied the reasoning in Re Murtagh. It held that disclosure would not prejudice the case of the taxation authorities upon any case upon the assessment. Further,

105 The Queensland Information Commissioner has expressed a skeptical view when dealing with claims that disclosure of information would confuse or mislead the public, pointing out that this claim might be discounted when it was in the power of the agency to release other clarifying information: Re Coulthart and Princess Alexandra Hospital (2001) 7 QAR 94 at 119-120. Source: http://www.austlii.edu.au/cases/qld/QICmr/2001/6.html
there was nothing secret about the law, and the applicant was entitled to know (and there was a public interest in his knowing) the legal bases of the action being taken by the authorities.

viii) **Non-sensitive documents of an investigation**

The applicant had made certain complaints, concerning companies with which he had been associated, to the corporate regulatory authorities, and subsequently sought access to certain documents relevant to his complaints.

The Tribunal rejected a ‘frankness and candour’ argument. It went on to hold that the documents in question were not sensitive and that it was in the public interest to disclose the making of representations by a Minister of Parliament (as the documents did), as well as the careful way in which those representations were examined by the authorities and a reply to them prepared for recommendation to the relevant Minister. In particular, it was in the public interest to disclose that after a suggestion had been made about purported inaction on the part of public servants, an investigation led to information which rebutted that suggestion.

ix) **Information on economic forecasts**

An applicant requested information from the department of the Treasury on economic forecasts. The Tribunal held the documents were deliberative process documents under Section 36 of the Act, and prima facie excluded. The Tribunal rejected the department’s claim that disclosure would inhibit the provision of frank, unqualified written advice. There was no evidence to suggest that candour and frankness of future advice would suffer as a result of the disclosure. Nor was there evidence to suggest that the economic information to be disclosed would put certain investors at an unfair advantage.

x) **Notes of a promotion appeals inquiry**

The applicant sought access to notes of an inquiry which reviewed the decision to promote another officer to the position for which the applicant had also applied.

The Tribunal accepted that there was a public interest in the individual right of the applicant to seek to ensure the fair and proper operation of the promotion and review system.

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The AAT thought that the ‘frankness and candour argument’ was weak and observed that ‘the trend of the cases is in favour of giving weight to the objects of the Freedom of Information Act over submissions arguing a lack of candor would result if disclosure were ordered.’

The argument that confusion would arise was rejected, since the applicant had seen the final report and the notes could not have that effect. Similarly rejected was the argument that the integrity of the process would be compromised; even if the notes showed that the decision-maker had changed his mind as he prepared the report, that would not amount to such a compromise in some undefined manner.

xi) Community consultation document

The applicant sought access to a consultant’s report which had investigated community views on the existing tax system and proposals to simplify that system. The AAT weighed up competing aspects of the public interest. In that process, the following were very important considerations:

- the document was not prepared by the Australian Taxation office and did not reflect its input;
- rather, it dealt with a sample survey of public opinion, including public reaction to proposals for change;
- there would be enhancement of public debate by disclosure;
- there would be no adverse effect on the deliberative processes of government from disclosure.

The Tribunal held that the report was ‘a document of overwhelming public interest’ and decided that it should be released.

4.2.2 Canada-Federal - Canadian Federal Information Commissioner - Decisions where the public interest test operated in favour of disclosure

i) A whistleblower

An employee of Public Works and Government Services Canada blew the whistle on contracting irregularities and misappropriation of government funds. There was an internal

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113 A whistleblower, Case 16, 1995, AR 1994-35
investigation and the employee subsequently asked for all of the papers. The department refused because it wanted to protect the privacy of the wrongdoers, who could be identified even if their names were omitted. The Commissioner considered that there was a public interest in exposing instances of misappropriation of public funds and that this clearly outweighed any invasion of privacy. He was guided by comments made by Justice Muldoon of the Federal Court in the case of *Bland v. Canada (National Capital Commission)*:

> It is always in the public interest to dispel rumors of corruption or just plain mismanagement of the taxpayers’ money and property. Naturally if there has been negligence, somnolence or wrongdoing in the conduct of a government institution’s operations it is by virtual definition, in the public interest to disclose it and not to cover it up in wraps of secrecy.

The Commissioner also noted that as a general rule before a department suppresses information about employee wrongdoing, even to protect privacy, the relative balance between the public interest in disclosure and privacy should be considered by the department’s most senior officials.

**ii) Reneging on a promise**

A journalist complained to the Commissioner because the Transportation Safety Board had refused to release air traffic control tapes and transcripts relating to a plane crash. The Commissioner considered that TSB did not properly consider the public interest override and that the public interest in air safety outweighed any privacy considerations.

**iii) Weighing public interest**

A journalist requested the audit reports on 21 meatpacking companies from Agriculture Canada. Agriculture Canada consulted the companies and weighed the potential financial loss to competitive interests or interference with contract negotiations with the public interest in safeguarding public health. The journalist complained to the Commissioner of delays and argued that consultations with third party companies were unnecessary. However, the Commissioner noted that the ‘only fair and reasonable way to balance public interest and corporate loss is to do some measure of fact finding including facts from corporations.’

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114 Reneging on a promise, Cases 001 and 002, 2001, AR 2000–01
115 Weighing public interest, Case 08, 1994, AR 1993-94
4.2.3 Ireland - Decisions of Irish Information Commissioner held that the public interest was better served by granting the request

i) Notes of an interview board

The applicant sought access to all personal information held about him. The agency declined the request, relying on Section 21(1) (b) (adverse effect on management functions) to do so.

The Information Commissioner annulled the decision of the agency and, with minor exceptions, the applicant was provided with access to the records requested. The Information Commissioner dealt with a number of arguments raised by the agency in support of the exemption under Section 21(1) (b).

The department argued that disclosure of the matter could lead to more challenges to the recruitment process, resulting in a diversion of resources from the recruitment process and adversely affect the ability of the agency to manage the process. In addition, it would be difficult to find persons willing to serve on interview boards. The Information Commissioner took the view that while it was possible that some prospective interviewers would be deterred, no evidence was offered to indicate that this could be expected to happen to such a degree as to have a significant adverse effect on the ability of the agency to find suitable interviewers. Particularly was this so in a case of an interview for a position such as a clerical assistant (as was the case here) where it was reasonable to assume that the pool of prospective interviewers was fairly wide. In respect of future challenges, the Information Commissioner was not convinced that either the likelihood or the scale of such challenges in the present case was such as to significantly affect the ability of the agency to recruit effectively.

The Information Commissioner expressed the opinion that to affirm the decision of the agency in this case he would need to have been satisfied that release could reasonably be expected to have a significant adverse effect on the performance of at least one of the agency’s functions relating to management. The onus of course rested on the public body to show to the satisfaction of the Information Commissioner that the decision to refuse access was justified: Section 34(12) of the Act applied.

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16 AAF and the Office of the Civil Service and Local Appointments Commissioners, case 98020.
Although not strictly necessary to be considered, the Information Commissioner did deal with the public interest question under Section 21(2). First, the Information Commissioner rejected an argument that records created at interview were the personal records of the interviewers. He was of the opinion that persons who served on interview boards did so either as agents of the agency in question or in the performance of their functions and the records created could not be considered to contain personal information about the board member but rather, personal information about the person being interviewed.

In relation to further arguments about the ‘integrity and viability’ or ‘confidentiality’ of the decision-making process and the ‘broader Civil Service recruitment and selection interests’, these arguments were not developed in any detail and the public interest in non-disclosure had not been demonstrated. If information of the kind sought was already available to the applicant in synopsis form (as the agency had stated), then it was difficult to see, and the agency had not demonstrated, how release of the records upon which the synopsis was based would be detrimental to the public interest.

ii) Information about successful tenders

The requester sought access to all of the documentation relating to a tender for army vehicles. The Office of Public Works decided to release details of the successful tenderer’s name, the tender price, and the number and type of vehicle involved. Three of the four successful tenderers sought review by the Commissioner of this decision, relying on Section 26(1) (a) (information provided in confidence) and Section 27(1) (commercially sensitive information). The Information Commissioner handed down a lengthy and seminal judgment in the context of the Irish Freedom of Information Act. The Commissioner’s findings are summarised, by section, in the following paragraphs. According to the Commissioner, four elements are required before Section 26(1) (a) can apply:

- the information was given in confidence;
- the information was given on the understanding that it would be treated by the agency as confidential;
- disclosure of the information would be likely to prejudice the giving to the agency of further similar information from the same person or other persons in the future; and

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that it is of importance to the agency that such further similar information should continue to be given.

Here, each tenderer originally disclosed the tender price in confidence, so the first element was made out.

There was an understanding that the price would be treated as confidential until the end of the tender process. While the tenderers might have assumed, based on past experience, that the price information would be kept confidential even after the end of the tender process, such an assumption or understanding on the part of the provider of the information was not sufficient. The second element requires a mutual understanding of confidence, and this was not met. The principles in the decision of the Queensland Information Commissioner in Re B v Brisbane North Regional Health Authority\(^{18}\) were relevant to the third requirement:

- where a person was under an obligation to continue to supply confidential information to government or where there was a statutory power to compel disclosure of information or where a person was required to disclose information in order to obtain a benefit from government or avoid a disadvantage, then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information;
- the test was not considered by reference to whether the particular confider whose confidential information was being considered for disclosure could reasonably be expected to refuse to supply such information in the future but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.
- In considering governmental practices in Queensland, Western Australia, and Canada, it appears that a tender system involving price disclosure has been found practicable in those jurisdictions and in the circumstances the Information Commissioner did not accept that it was likely that a similar system in Ireland would result in commercial enterprises refusing to tender. Accordingly, the third element was not made out.

According to the Commissioner, for Section 26(1) (b) to apply it is necessary to show that disclosure would constitute a breach of a duty of confidence provided for by a provision of:

- an agreement; or
- an enactment; or

otherwise by law.

The expression ‘otherwise by law’ comprehends the duty of confidence known in equity. The elements of a breach of an equitable duty of confidence were set out in *Coco v. A.N. Clark (Engineers) Limited*¹⁹, which has been accepted in Ireland. Those three elements are:

- the information itself must have the necessary quality of confidence about it;
- the information must have been imparted in circumstances imposing an obligation of confidence;
- there must be an unauthorized use of that information to the detriment of the party communicating it.

There is an overlap between the first two requirements of Section 26(1) (a) and the first two elements of the test in the case of the equitable duty of confidence.

No principle or authority supported the proposition that price information was in all cases inherently confidential, but in a case such as the present, the price information was not known at the outset and therefore did have the necessary quality of confidence. There was no evidence of circumstances giving rise to an obligation of confidence and no inference could be drawn from the relationship of vendor and purchaser that pricing information would be kept confidential; indeed, in such a relationship there is no general expectation that a purchaser will keep secret the price paid for goods or services. As to the third requirement, a release of information under the Act could not amount to ‘unauthorised use’ of the information. [Note: The authors consider that this statement of the Commissioner should not be applied in other cases. If release under Freedom of Information could not amount to an unauthorised use of information, no record could be exempt under Section 26(1) (b).]

Accordingly, Section 26(1) (b) did not apply.

In regard to Section 27(1) (a), the Commissioner noted that the factors identified by Gowans J in *Ansell Rubber Co Pty Limited v. Allied Rubber Industries pty. Limited*,²⁰ a Victorian decision, were a useful guide to the meaning of the term ‘trade secret’. Those factors are:

- the extent to which the information is known outside a business;

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¹⁹ *Coco v. A.N. Clark (Engineers) Limited* [1969] RPC 41.
• the extent to which it is known by employees and others involved in the business;
• the extent of measures taken by the proprietor to guard the secrecy of the information;
• the value of the information to the proprietor and to his contemporaries;
• the amount of effort or money expended by the proprietor in developing the information; and
• the ease or difficulty with which the information could be properly acquired or duplicated by others.

The information must be information used in the trade or business and the owner must limit dissemination of the information or at least not encourage or permit widespread publication. Historical pricing information was not information in respect of which it could be said that it was presently being used in the trade or business. Historical pricing information would not normally have a substantial value to tenderers when tenderers came to quote or tender for future work, given that a competitor could not readily predict the behaviour of competitors on future occasions in a competitive market setting. In these circumstances, the pricing information could not be considered a trade secret after the end of the tender process.

In regard to Section 27(1) (b), the Commissioner considered that while the information was certainly ‘financial or commercial’ information, the following points were relevant:

• once again, knowledge by future tenderers of historical prices did not automatically provide any advantage, given the inability to predict the behavior of competitors;
• it was unlikely that disclosure of such prices would drive tenderers from the market, but even if it did, loss of business would result from that decision rather than from release of the information;
• given that the price in this case was a special or unique price, there seemed to be little scope for the argument that the disclosure of the information could affect other business; there was no evidence or possible inference available that any business relationship with other customers would be disrupted.

However, the test that disclosure ‘could prejudice the competitive position’ of the parties concerned was met in this case, given that this was a lesser standard than ‘might reasonably be expected to’, inasmuch as what could occur is that other customers who might
be paying a different price from that quoted in the tender might well be concerned enough to
take their custom elsewhere.

In regard to Section 27(1) (c), the Commissioner held that in these circumstances
negotiations with other customers could be prejudiced if knowledge of the tender price
became known inasmuch as it would provide a lever to the other party in the negotiations and
lead to the objector being able to command only a lower price.

Although Sections 27(1) (b) and 27(1) (c) applied, the documents would not be
exempt if by applying Section 27(3), the public interest would, on balance, be better served
by granting than by refusing access. It was so held in this case for the reasons that the
significant public interests in ensuring openness in relation to the use of public funds and the
public interest in requesters availing themselves of rights under the Act outweighed the
possible prejudices to the objectors with respect to their competitive position and the conduct
or outcome of the negotiations with other customers. These latter considerations were not
such as to be given significant weight in this case since the information was historic, it
related to a single transaction, and by itself, the price disclosed nothing about the policy
adopted by tenderers or how they arrived at the quoted prices. Moreover, no evidence was
provided that these harms would in fact occur although the Information Commissioner
accepted that they could occur; however a mere possibility of such occurrence must
necessarily carry a great deal less weight than a prejudice which was likely to occur.
Similarly, the suggestion that the tender process itself would be affected by reason of persons
not tendering in future was, although a possibility, not of particularly significant weight and
it was unlikely that release of the pricing information would have these effects.

iii) Information about the legislative process

The requester asked the department of Justice for papers relating to the drafting of the
Solicitors Amendment Bill 1998. The records at issue consisted of correspondence between
the department and the Law Society, records created by the Office of the Attorney General, a
memorandum to the government and earlier drafts, the government decision about the Bill
and copies of two published articles.

In relation to the information for which the department could legitimately claim an
exemption under Section 26(1) (a) for information given in confidence, the Commissioner

\[121\] Phelim McAleer of the Sunday Times and the Department of Justice, Equality and Law Reform, case 98058.
considered that on balance the information should be released in the public interest under Section 26(3). He expressed the clear view that ‘it is in the public interest that views and representations which influence the legislative process should be open to public scrutiny’ and noted:

Before the enactment of the Freedom of Information Act, significant weight might not have been attached to this aspect of the public interest. Indeed, it might have been assumed generally that the public interest was better served by conducting deliberations which preceded legislation on a confidential basis. However, the very enactment of the Freedom of Information Act suggests that significant weight should be attached to the public interest in an open and transparent process of government.

With respect to one letter exempted under Section 20(1) (a) (deliberative processes), the department had failed to discharge its burden under Section 34(12) (b) of showing that the exemption decision was justified.

iv) Invoices paid by government departments to telecommunications companies

The requester sought access to copies of all invoices paid to 18 telecommunication companies by three agencies. Various parts of Section 27(1) (b) and 27(1) (c) were argued. The decision of the department of Finance to release the records was affirmed, while the decisions of the other two public bodies to grant access to summary information were annulled. In the latter two cases, access was granted subject to certain deletions of names, telephone numbers and account numbers to avoid potential breaches of security systems of the bodies concerned. In the decision, the Information Commissioner set out the following principles:

- For the purposes of the exemption in Section 27(1) (b), the expression ‘could reasonably be expected’ is a more generous expression than the word ‘would’. The Section would apply even where the relevant harm is not certain to materialise but might do so.
- However, in this case the resultant harm from release was not a harm that could reasonably be expected; however, it was found that the information contained in the invoices if disclosed, could ‘prejudice’ (in the sense of injure or potentially injure) the competitive advantage held by Eircom in dealing with public bodies.

\[122\] Eircom PLC and the Department of Agriculture and Food; Mark Henry and the Department of Agriculture and Food; Eircom PLC and the Department of Finance; Eircom PLC and the Office of the Revenue Commissioners; cases 98114, 98132, 98164, and 98183, Source: http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name.1472.en.htm
• It was sufficient for Section 27(1) (c) to apply if the release could prejudice the outcome of negotiations for the provision of services to the public bodies concerned; it was held that the better informed competitors are, the more likely they are to succeed at the expense of the objector, in this case Eircom.

• For the purposes of the public interest test in Section 27(3), relevant public interests include the interests in ensuring the maximum openness in relation to the use of public funds and the public interest in requesters availing themselves of rights under the Act.

• However, the public interest in public bodies obtaining value for money and in openness about expenditure of public funds is not absolute and cases could be envisaged where the effect of disclosure would be to totally undermine the business of the company, though this was not such a case.

• A general proposition that disclosure would result in unfairness with respect to future competition for the provision of services was not accepted; rather, the Information Commissioner held that such disadvantage as Eircom might suffer was an inevitable consequence of the regulatory regime which required it to publish its prices and/or required Eircom to ensure that its charges in at least some areas were cost-oriented and transparent; these were matters themselves which furthered the public interest and therefore on balance, the public interest was better served by release of the records in this case.

v) Records relating to the expenditure of health boards and voluntary hospitals

The requester sought access from the Department of Health and Children to reports concerning expenditure trends and outcomes of health boards and hospital services and certain correspondence from the Department to health boards and voluntary hospitals. The department based its exemption decision on Section 20 (deliberative processes) and Section 21 (prejudice to management functions).

In regard to Section 20, the Information Commissioner found the decision of the department should be varied, and that non-factual information submitted by hospitals and health boards to the department was exempt under Section 20(1), but that matter would not be exempt to the extent that it had already been released through the health boards. The Commissioner expounded the following principles:

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123 Martin Wall, The Sunday Tribune newspaper and the Department of Health and Children, case 98078.
• The Information Commissioner observed that the general approach of the department was to seek an exemption in relation to all of its correspondence with the health boards and the voluntary hospitals, regardless of content and the department failed to accept that at least some of the material must have lost its sensitivity since the request was made. The Information Commissioner considered this to be an extreme position and apparently amounting to an assertion that the department must be allowed to administer the Health Service with whatever degree of secrecy it sees fit. Such a proposition was not sustainable under the terms of the Act.

• The Information Commissioner pointed out that the bulk of the records in the case contained factual information and analyses within the meaning of Section 20(2) (b) and therefore could not be exempted under Section 20. Examples of such material included reports of actual expenditure, amount of budget variance, steps taken to keep within budget, changes which have occurred to cause the increased expenditure, and other similar information. The Information Commissioner took the view that the only parts of the records which were no factual information were those parts which reflected proposed courses of action being considered by agencies or the department.

• In examining the general reports received each month (the IMRs), the Information Commissioner held that the department was not engaged in a deliberative process but was acting in a monitoring or supervisory role to ensure that agencies were operating and delivering services within budget. There was no evidence in the records of any weighing up or evaluation of competing options by the department\textsuperscript{124}.

• The department sought to argue that the public interest in maintaining effective and efficient delivery of health services outweighed the public interest in disclosure. The Information Commissioner pointed out that this was a mistaken approach because Section 20 requires the public body to show that release would be contrary to the public interest (authors’ emphasis). This was at the time a stronger public interest test than the test in other sections of the Act (but was amended in 2003 to impose the same public interest test as the other exemption provisions which are not absolute exemptions) which require that on balance the public interest would be better served by granting than by refusing the release. In the present case, the department had not shown that release would be against the public interest.

\textsuperscript{124} In my views, the significant distinction between monitoring or supervising on the one hand and weighing up or evaluating on the other, is one which must be carefully considered in decision-making and one which may easily be overlooked.
Certain proposal material furnished to the department which the department might have been considering with a view to further action was identified by the Commissioner and exempted. Other records however where action had been taken or which referred to past practices, problems and events, was, with the passage of time, no longer exempt pursuant to Section 20. In regard to Section 21, the Information Commissioner found the decision of the department should be varied, and that certain information disclosing negotiating positions or plans of the health boards and which had not been previously released by them was exempt under Section 21(1) (c). In respect of that exemption, the Commissioner expressed the following views:

- The department had not shown any adverse effect on the performance of its own functions relating to management for the purposes of Section 21(1) (b); rather, if anything, it had suggested possible difficulties for individual health agencies. While such difficulties might in turn make the department’s job more difficult, the Information Commissioner did not accept that this alone was sufficient to support the exemption in Section 21(1) (b).

- In any event, enquiries indicated that a great deal of this information was already in the public domain having been released by the health boards and significant adverse effects predicted had not occurred by reason of such disclosure.

- The Information Commissioner made the point that as a matter of weight, he could not be satisfied by a general prediction without any supporting evidence; such a prediction was not sufficient to satisfy the requirement that disclosure could reasonably be expected to have a significant adverse effect on the performance by the department of any of its functions relating to management.

- Certain other records relating to failure by a particular health board to spend all of its allocation were generally available to persons attending meetings of the board, including journalists, and in some cases were published by the board in any event. Such records could not be exempt under Section 21(1) (b).

- The department had mistakenly applied the exemption in Section 21(1) (c); for example, it sought to argue that the disclosure of the existence of unfunded positions could cause industrial relations problems and public confusion. The Information Commissioner pointed out that such a disclosure would not be a disclosure of a position taken or a plan, procedure or other matter within Section 21(1) (c).
• The Information Commissioner expressed the view that the only information contained in the records that would be exempt under Section 21(1) (c) would be information relating to the negotiation positions or plans of the department and the health boards (which were all public bodies), but not that of the voluntary hospitals. Exemption could be claimed for such records to the extent that they had not already entered the public domain.

• While it was not necessary to consider the issue with respect to factual information, the Information Commissioner nevertheless expressed the view that he was not satisfied that negative outcomes suggested by the department from release of records could reasonably be expected to occur. The claims of the department in this regard were undermined, he thought, by the department maintaining claims that release of information already in the public domain would have such adverse effects. The Information Commissioner pointed out that there was a public interest in the community knowing how health spending decisions (or decisions not to spend) are made and a public interest in seeing how official management and decision-making is conducted. Public scrutiny would be greatly reduced if the only disclosure occurred in the publication of annual reports well after the end of the relevant period. On balance, if he was required to decide it, the Information Commissioner would have found that the public interest would be better served by release of the information than by withholding it.

• The position was different with respect to information concerning proposals. The Information Commissioner considered that there was a great likelihood of negative consequences argued for by the department where there was release of information at a time when options or various measures were still being considered. Given that management of the health services was a complex task requiring constant monitoring and consideration of various courses of action, it would interfere to such an extent with the process of management to have ongoing disclosure to the world of such proposals, that it would not be in the public interest to do so. While there was public interest in members of the public exercising their rights under the Act and in being informed as to how the health services were being managed, there was a greater public interest in managers in the health service being allowed the opportunity to formulate plans without undue interference as well as the public interest in avoiding the disclosure of negotiation plans and positions. Accordingly, disclosure of proposal information in this case would not be in the public interest under Section 21(2).
vi) Records relating to employment policy

The requester sought access to minutes and a policy paper prepared for the Interdepartmental Strategy Group on Employment and Unemployment. The department of the Taoiseach exempted the material under Section 20 (deliberative processes). The Information Commissioner made the following findings:

- decision of the department annulled;
- access in full granted to the background paper and to the minutes of 3 meetings;
- partial access granted to the minutes of a fourth meeting.
- The Commissioner stated the following principles.

As to the background paper, the Information Commissioner found that the bulk of it was factual, but identified some specific parts of the paper which contained comment, interpretation and suggestions as to future actions. The Commissioner rejected the submission of the department that the interpretation of the term ‘public body’ should be read as wider than the department itself. He did however accept that the background paper did contain matter relating to the department’s deliberative processes inasmuch as the department considered the paper for the purpose of deciding on its input into policy and strategy in relation to unemployment.

Deliberative processes involve the consideration of various matters with a view to making a decision on a particular matter.

There were two requirements for the exemption in Section 20(1) to apply:

- the record must contain matter relating to the deliberative process; and
- disclosure must be contrary to the public interest.

These two were independent requirements and the fact that the first one may be met carries no presumption that the second is also met.

As to the public interest, this was an issue to be considered having regard to the contents of the record or records at issue in each particular case and the Information Commissioner cited Australian case law in support of that proposition. In other words, the
Information Commissioner pointed out Section 20 was not a ‘class’ exemption designed to protect all records relating to a deliberative process regardless of their contents.

The Information Commissioner rejected a submission from the department that as a matter of principle the deliberative process should be given ‘full protection’ until completed and that this was the purpose of Section 20. The Information Commissioner stated that he could find no such principle within Section 20 and had that been the intention of the legislature, then it would have been a simple matter to have enacted a specific provision along those lines.

The department raised three specific arguments as to why granting of the request would be contrary to the public interest:

- Disclosure of the material would inhibit the development of a coordinated position on these matters across government departments and agencies. In support of this argument the department argued that the frankness and candour of participants would be prejudiced by premature disclosure of the deliberations and this would in turn inhibit the development of a coordinated position. The Information Commissioner, having regard to the contents of the paper, rejected this argument. He also pointed out that the Act has introduced a new regime in respect of records held by public bodies and, while accepting that open and frank discussion is often required in order to evaluate and assess policy options he did not accept as a general proposition that disclosure under the Act would have the effect of preventing public servants from properly carrying out their functions.

In some exceptional cases, an argument regarding frankness and candour might be sustainable in the context of the public interest test. The Information Commissioner cited two examples from the Eccleston case in Queensland as follows:

- the furnishing of a report on the suitability of an officer for appointment to a position;
- a need to preserve the confidentiality of an official’s views where that official may be responsible for advising the Minister but whose views may need to be kept confidential as the only means of ensuring that the official is acceptable to a number of parties who have competing interests.

The department sought to argue that disclosure of the material could prejudice the government’s position concerning discussions and negotiations with the social partners and release of the papers would put into the public domain information on strategies
which the government might adopt. While the Information Commissioner accepted in a general sense that in certain circumstances disclosure of future government strategies might not be in the public interest, no evidence and no detailed arguments were put in this case as to why disclosure of future strategy would be against the public interest. The argument was accordingly rejected.

- The department also argued that the paper contained proposals for strategies and policies which had not yet been agreed and that premature release of such information would be contrary to the public interest. This was an argument virtually identical with the submission that matter should not be released until the deliberative process has been completed. The Information Commissioner was not willing to accept the concept of ‘premature’ release for the purposes of Section 20, but in any event the department did not provide any explanation of how such release could be against the public interest. The Information Commissioner pointed out that release prior to the conclusion of a deliberative process might be inconvenient to public bodies and that such disclosure might spark further public debate, challenges to the views or facts contained in the material or criticisms of the public body or its officials. The Information Commissioner pointed out that such consequences might also arise if the material is released after the deliberations have been completed and mentioned in passing that such a delay might well work in the interests of the public body in sense that matters will have moved on and the public will concern itself more with the decision which has emerged and less, if at all, with the detail of the process which resulted in the decision. The Information Commissioner said that as with the frankness and candour argument, specific facts in relation to the case must be presented and a specific harm to the public interest flowing from release must be identified. This had not been done in the case and the arguments were rejected.

With regard to minutes of meetings, the Information Commissioner made the point that minutes are a brief summary of proceedings at meetings and, by their very nature, were bound to contain some factual information. He discussed but rejected the proposition that minutes might be regarded as entirely factual because they record matters or events which occurred at a meeting, including advice, opinions and recommendations. The Information Commissioner took the view that this was not the proper way of approaching the term ‘factual information’, and that the proper way of considering that issue was to look beyond the fact that the contribution was made and examine the content of each contribution.
Approaching the matter in this way, and having examined the minutes, the Information Commissioner decided that they consisted almost entirely of non-factual information other than attendance lists. Those lists were factual information and Section 20(1) could not be relied upon to refuse access to those lists.

The department raised the same three general arguments with respect to the minutes as it did with the background paper. The Information Commissioner considered each of these arguments in relation to each of the sets of minutes and rejected them for the same reasons as he rejected the claims for exemption in relation to the background paper. Essentially, where the Information Commissioner found there was non-factual information within the minutes, he decided that release would not be contrary to the public interest for the reasons he outlined in relation to the background paper.

vii) Report relating to a charitable organisation

The requester sought access to a report commissioned by the department of Foreign Affairs into the charitable organisation GOAL. The department refused access, relying on Sections 26 and 27.

The Information Commissioner found that none of the provisions of Section 26 or 27 applied. Having regarded to its accountability to Dail Eireann any understanding of confidentiality was inappropriate. Nor could the Commissioner see how disclosure of the report could result in a material financial loss to GOAL.

Therefore the Commissioner strictly did not have to consider the public interest. Nevertheless he observed that while there was a public interest in the efforts of charitable organisations not being disrupted, the public interests in disclosure outweighed that interest. These were the interests in ensuring that the objectives in respect of which public funds are allocated were met, and the interest in accountability as to how such funds were applied.

The Information Commissioner offered a helpful general summary of his views to date regarding records relating to a tender competition. In his view, the following principles are relevant:

- Public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.

• Tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances would historic prices remain trade secrets. However, documents which would reveal detailed information about a company's current pricing strategy or about otherwise unavailable product information could fall within the exemption in Section 27(1) (a) even after the conclusion of a tender competition.

• Tender prices generally qualify as commercially sensitive information for the purposes of Section 27(1) (b) and (c) of the Act. Depending on the circumstances, product information can also be considered commercially sensitive under Section 27(1) (b).

• When a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied, and the public interest also favours the release of such information but exceptions may arise.

• Other successful tender information which is commercially sensitive or detailed explanations as to how the tenderer proposed to meet the requirements of a public body may remain confidential. The public interest would not normally require disclosure of these matters unless it was necessary to explain the nature of the goods or services purchased by the public body.

• Unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract and the public interest lies in protecting that information from disclosure.

• The Information Commissioner stressed that no tender-related records are released or exempted as a class; each record must be examined on its own merits in light of the relevant circumstances.

The Commissioner considered that there were stronger public interests in protecting privacy, and these interests were:

• The public interest in protecting the general right to privacy of members of the public.

• The public interest in members of the public and the business community being able to communicate in confidence with public bodies without fear of disclosure in relation to sensitive matters. The public interest in ensuring the flow of information to public bodies and The public interest in public bodies being able to perform their functions effectively and efficiently, particularly in relation to issues relating to the investigation of alleged breaches of the law.

viii) Information about the identity of a requester under the Freedom of Information
Act\textsuperscript{127}

The requester sought access from the Midland Health Board to full information about the identity and details of a requester who had previously made a request under the Act in relation to the prescription of the drug class ‘Statins’ by general practitioners in a particular region. Information already disclosed indicated that the first requester was a pharmaceutical company. The request for the identity and details of that previous requester was refused by the Board relying on Section 27(1) (b) (commercial interests).

The Commissioner pointed to a public interest in the public having as much information as possible about the public health service and about how the various interests within the service interacted. She was of the view that it was in the public interest that information was freely available regarding the contacts between medical practitioners and pharmaceutical companies and whether, and if so how, such contacts influenced prescribing patterns. This was part of the very strong public interest in ensuring the greatest level of transparency possible in regard to the operation of the health service.

The Commissioner pointed out that not to identify the first requester meant that one or other pharmaceutical company would be wrongly associated with that Freedom of Information request and might suffer some damage on that account, a result which would not be in the public interest. On the other hand, by releasing the information, transparency would make it less likely that anything improper would occur (although she did not impute any bad motives to the first requester). The Commissioner also recognised that there were public interests in the first requester not suffering any prejudice in the view of doctors (because it might be suggested that the request was an invasive investigation into the doctors’ prescribing practices). There was also a public interest argued by the first requester in it being able to pursue initiatives to improve economic efficiency.

Notwithstanding these public interest arguments, the Commissioner found that the balance of the public interest favoured release of the identity of the first requester. The Commissioner found it difficult to envisage that a commercial entity would expect to have a right of access under Freedom of Information to detailed information regarding prescribing patterns of named medical practitioners while also holding the view that the practitioners concerned, or the public generally, would be precluded from knowing the identity of the requester. Part of the information held by public bodies was details of use of the Freedom of


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Information Act and such details were potentially releasable under the Act unless they were protected by a specific exemption such as Section 28 or Section 27. In this case, however, the public interest test applicable to Section 27 required disclosure.

ix) **Details of an out of court settlement**[^128]

The requester sought records relating to an out of court settlement of an employment dispute involving the North Eastern Health Board and a senior hospital consultant. The Board exempted the records under various provisions, including Section 21(1) (b) (adverse effect on management functions) and Section 26 (confidentiality).

The Commissioner annulled the decision and required the records to be provided. She rejected an argument that disclosure would make it impossible for the Board to enter into similar settlements in the future, since a confidentiality clause in the settlement agreement would thereby be negated and this would have a significant adverse effect for the purposes of Section 21(1) (b). While the existence of the confidentiality clause in the agreement was of importance, it did not follow that release in this case would mean that records relating to future settlements would also have to be released. The finding of the Commissioner in this case depended on specific facts which she went on to set out in her decision. She rejected arguments that the Board would be put at risk of substantially higher claims in the future if settlement negotiations were made impossible.

The Commissioner was surprised that the Board had expressed the view that the settlement could not be explained adequately and she went on to state that much of the background to the dispute was already in the public domain including details set out in a High Court judgment. The Board would be in a position, or be capable of, presenting information in a manner which would allow any objective observer to draw accurate and balanced conclusions. The Commissioner did not accept that the size of any settlement would impact upon the conduct of other settlement negotiations since it was reasonable to expect that future claims would depend on the facts and on terms that might reasonably be expected to be achieved based on those facts. In addition, the records at issue related to matters which occurred about four years in the past, they related to a very specific dispute and much information was already in the public domain. While accepting that release would have certain consequences, the Commissioner was not satisfied that it would have a significant adverse effect on management functions.


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In respect of Section 21(1) (c), the Commissioner pointed out that the Board was seeking to exempt information in relation to the outcome of negotiations and not positions taken for the purpose of negotiations. The Section was intended to protect undisclosed strategies, positions or alternatives not the results of a settlement. Accordingly, she found that Section 21(1) (c) also did not apply.

While not having to do so strictly, the Commissioner went on to consider the public interest under Section 21(2). The Commissioner pointed to the fact that in correspondence with the doctor in question, he had shown no interest at all in expressing a view as to whether release of the records would be to his detriment. Accordingly, the argument put by the Board that release would affect the reputation of the doctor was not one acceptable to the Commissioner in the circumstances. In addition, the fact that the circumstances in the present case were unique and the settlement was over four years old, minimized any potential harm to current or future proceedings if the records were to be released. Public interest required the Board to act fairly and to be subject to public scrutiny. There was a public interest in the openness and transparency in the expenditure of public money which favored release in the case. The fact that the Financial Statements of the Board were audited by government authorities and had been published did not lead to a conclusion that the additional further safeguard of public disclosure under the Freedom of Information Act should be put to one side. While there was no grounds for thinking that there had been any abuse of position, if the details of the settlement were to remain secret, the scope for abuse would remain as a possibility in the public mind. This was an additional reason why public scrutiny was desirable. There was also a strong public interest in disclosing how public bodies carried out their functions in cases such as this including functions in relation to management and employment of staff and the resolution of disputes with staff. Overall, this was a matter of real public concern and the public interests referred to by the Commissioner favored disclosure had she found that the Section 21(1) exemptions applied.

In considering the breach of confidence exemption, the Commissioner recognized that there was a contractual obligation expressly set out providing for confidentiality. Disclosure would break one of the terms of the agreement between the Board and the doctor and would therefore amount to a breach of a contractual duty of confidence. However, where a contractual right to confidentiality had been waived, this would not be the case. The Commissioner pointed to a number of communications between her Office and the doctor and his solicitors in the course of the review. There had been no substantive response at all.
made to the Office and no response in particular as to whether the doctor would regard release by the Board as detrimental to his own interests. In the absence of any reply whatsoever, the Commissioner was entitled to take the view, and did so, that the doctor had no objection to disclosure and did not insist upon confidentiality. Since he did not do so, he would not have a cause of action for breach of confidence under Section 26(1) (b) and that exemption did not apply. The exemption under Section 26(1) (a) did not apply by reason of Section 26(2); if any duty of confidence was owed, it was owed by the Board to a member of staff of a public body.

In the circumstances, the public interest was better served by granting the request.

In the course of the decision, the Commissioner also made the finding that Section 26(1) (b) was not intended to protect solely the interests of a government authority; rather, it was intended to protect persons and entities dealing with government authorities. It was possible in some cases that the public authority would also be protected where its interests coincided with the third party to whom the duty of confidence under Section 26(1) (b) was owed.

x) Records of correspondence between a hospital and the post mortem inquiry

The requester sought access to records of correspondence between Our Lady’s Hospital for Sick Children and the Post Mortem (Dunne) Inquiry and between the Hospital and others relating to the Inquiry. The Hospital exempted a large number of records on the basis of various exemptions, including Section 26(1) (confidentiality) and Section 21(1) (a) (prejudice to investigations).

The Commissioner did not regard the exemption provisions of Section 26(1) as applicable. Nor did she regard Section 20(1) as applicable. Nevertheless, she went on to make certain comments concerning the public interest. The Commissioner stated that there was a very strong public interest in ensuring the maximum transparency possible in regard to the manner in which public bodies conducted their business on behalf of the public. This was certainly true in the sensitive area of the post mortem practices of hospitals. On the other hand, there was a public interest in enabling the Hospital to conduct its business effectively and allowing it a space to think out its response to the Inquiry. However, once a decision had been made to proceed with a response by the Hospital to the Inquiry’s requests, the need to

withhold information weakened considerably. In addition, the argument raised by the Hospital that the ultimate public interest was in the success of the Inquiry had lost its force since the government announced the conclusion of the Inquiry. The Commissioner was required to make her decision upon the facts as applying at the time of that decision, including the fact that at that time (though not earlier) the Inquiry had concluded.

The Commissioner found that having regard to the content of the records (many of which were administrative), the passage of time since their creation, the fact that the Inquiry had concluded, and a very substantial public interest served by transparency in relation to all of the issues arising, she was of the view that were it necessary to apply the public interest test under Section 20(3) she would have found that the public interest would be better served by granting than by refusing the request.

4.2.4 New Zealand- Decisions of the Ombudsman where the public interest in disclosure outweighed the harm likely to arise from disclosure

i) Information about salary and nature of job:130

A journalist suspected a university staff member was being paid by a university without having to perform any duties. The journalist asked the university whether the staff member was receiving a salary and for details of her duties. The university refused and argued that her personal information could be withheld to protect privacy. On appeal to the Ombudsman, it was held that the public interest in the accountability of a public body overrode the staff member’s privacy interests.

ii) Health authority investigations:131

Two newspapers and a member of a victim’s family requested an internal report produced by a health authority after a public tragedy involving the death of several people at the hands of a person who had been a patient under the care of the health authority at the time the tragedy occurred. Although the Ombudsman accepted that there were strong arguments in favour of withholding medical information about the patient given in confidence, and that potentially the supply of similar information in the future would be prejudiced, he concluded that on balance, there was a stronger public interest in the public being assured that a comprehensive inquiry into the tragedy had been held by the health authority. The

130 Case No A6737, 12th Compendium, page 99.
conclusions in the report provided such an assurance. The health authority released the information to the requesters.

iii) Request for letter of resignation of senior manager:

A senior manager in the department of Corrections resigned in circumstances where the fact of his resignation received wide publicity. A journalist asked for his letter in the belief that it might reveal reasons for his resignation. The letter was in fact no more than formal notice of resignation. The department nevertheless argued to withhold it. The Ombudsman considered that there was a valid privacy interest when an employee writes a letter of resignation to an employer but that in the case of a senior manager there may be a countervailing public interest in making available some details of resignation. In this case, the letter in fact did not contain any reasons and following a statement to this effect from the department, the journalist withdrew the complaint to the Ombudsman.

iv) Request for detailed information about Prime Minister’s Office staff salaries:

A reporter requested details of staff salaries in the PM’s office from the Minister responsible for Ministerial services. The Minister refused on the grounds that it was necessary to protect privacy of the individuals concerned. The Ombudsman agreed that releasing the detailed information would prejudice privacy, but considered that there was a public interest in the office expenditure given that the office was critical to the effectiveness of the PM in the discharge of her role. Following consultations with the Privacy Commissioner it was agreed that the Minister should release the total personnel expenditure and the number of staff involved and withhold details of each individual employee’s salary.

v) Risk management plans upon transfer of health responsibilities:

The applicant sought the risk management plans prepared by the District Health Board Establishment Support Unit which was managing the risks of transition from the Health Funding Authority to 21 District Health Boards. In response, the Ministry of Health released a description of the risk management process but withheld the actual plans in reliance upon Section 9(2) (f) (iv) of the OIA (confidentiality of advice tendered by Ministers and officials). The Ministry was concerned that release of the actual plans would present a misleading picture as the actual risks and the steps taken to mitigate those risks could change.

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132 Case No. W 40876.
133 Case No. W4151712th Compendium, page 103.
134 Case No. W44924, 13th Compendium, page 86.
on a daily basis. The Ministry considered it important to provide advice without undermining
the effectiveness of the process by releasing potentially misleading reports.

In the view of the Ombudsman, the exemption provision did apply in order to protect
the flow of information between officials and Ministers. The question was where the balance
of the public interest lay. There was an identified public interest in the public being aware of
the major risks during the risk management process, the potential consequences for the
delivery of public health services and the Ministry’s strategy for managing those risks. The
Ombudsman took the view that an appropriate balance could be struck between the relevant
interests by providing a short summary of the risks together with a statement explaining the
actions being taken to mitigate the risks and pointing out that those risks would change from
time to time. The Ministry agreed to provide this summary and the applicant was satisfied
with that decision.

vi) Draft Cabinet paper: The applicant sought certain information from the Minister for Biosecurity. One draft
Cabinet paper was withheld. However, an earlier draft paper had been released in error to the
applicant. When considering the released draft paper and the draft paper now withheld, the
Ombudsman found few differences, and those were mainly linguistic. The underlying advice
was the same. The view was therefore taken that no prejudice would result from making
available the draft paper in that any prejudice would have already occurred by virtue of the
release of the earlier draft. Therefore, good reason did not exist for withholding the
information.

vii) Information about potentially contaminated sites: The applicant sought access to a list of all potentially contaminated sites located in a
District Council’s area. Some information was released but the Council withheld the location
of sites which could have been contaminated. This was done on the basis of privacy
protection under Section 7(2) (a) of the Local Government Official Information & Meetings
Act. In the view of the Ombudsman there were significant public interests involved. These
related to the potential contamination and the effect on current and prospective owners of
the property who would not be aware that their property might include a contaminated site. Work
had not been done to establish whether or not the sites posed a safety risk. However, there

1 Case No. W45017, 13th Compendium, page 87.
2 Case No. CS637, 13th Compendium, page 132.
were also privacy interests to be protected in relation to owners and occupiers of the property concerned. The view formed by the Ombudsman was that the complaint could be resolved by the Regional Council informing the owners of the information it held and releasing the information to the District Council (which had not been advised of the sites). This would protect the privacy of the owners. The applicant was satisfied that release to the District Council would serve the public interest because in the future the relevant information would be available to potential owners of the properties through a Land Information Memorandum provided by the District Council.

4.2.5 United Kingdom-Decisions where the public interest in disclosure outweighed the harm likely to arise from disclosure

a) Decisions UK Parliamentary Ombudsman

The Open Government Code of Practice on Access to Government Information has been in operation since 1994 and was revised in 1997. It is a non-statutory code enforced by the Parliamentary Ombudsman. The Code is based on the presumption that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. The test is set out in Part II of the Code provided:

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

The Ombudsman has taken the application of the public interest test seriously. He commented in one decision:

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

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

‘The balance of the public interest in disclosure cannot always be decided solely on the basis of the effect of a specific disclosure. The exemption covering the proceedings of Cabinet and Cabinet Committees, for example, is based on the need for confidence in the confidentiality of such discussions, and not primarily on whether the disclosure of particular information would cause harm.’ 138

The Freedom of Information Act requires a decision-maker to balance the public interest in disclosure with the public interest in maintaining the exemption. The Code balances the public interest in disclosure with the ‘harm caused by disclosure.’

The Ombudsman’s decisions are not legally binding on the Information Commissioner or the courts. In the due course, with the passage of time and the accumulation of experience of the decisions of the Information Commissioner, they will become less significant. However, the Ombudsman’s decisions on the public interest test in the Code are a good indication of the sorts of issues that a decision-maker should consider when applying his or her mind to the public interest test in the UK Freedom of Information Act.

It is clear from the Ombudsman’s decisions that where the information requested relates to a high profile issue that has been in the media and involves accountability for public funds, there will be a strong public interest in releasing that information. For example, the public interest in having up-to-date information about cost estimates on a publicly-funded project outweighed any harm caused by disclosure. 139 In a small number of cases, although public interest considerations weighed in favour of disclosure, there as a potential actionable breach of confidence which prevented disclosure.

i) Failure to give full information about an exceptional granting of legal aid 140

The requester asked the Lord Chancellor’s Department a series of questions about the granting of legal aid to families of victims of the ‘Marchioness disaster.’ The department initially withheld details of fees paid to senior and junior counsel. During the investigation, the department changed its view and advised the Ombudsman that the exemptions which

138 Guidance on interpretation 1996, para 0.5.
139 Decision of UK Parliamentary Ombudsman Case No A.5/97.
140 Decision of UK Parliamentary Ombudsman Case No A.5/97.
may have applied did not outweigh the public’s right to know how their money had been expended under the Legal Aid Scheme. The Ombudsman agreed.

ii) Refusal to disclose information about the funding for a project to create a wetland habitat for birds

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

iii) Failure by the companies house to release information about their choice of personal identifiers as authentication for the electronic filing of documents by companies

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

‘There was bound to be a public interest in this development. Paragraph 3 of Part 1 of the Code commits departments and public bodies within the Ombudsman’s jurisdiction to publish the facts and analysis of the facts, which lie behind major policy decisions. In not answering the applicant’s question the Companies House have failed to act in accordance with that principle….

The matter of the electronic authentication of documents is clearly, in my view, an area of public interest affecting a wide range of companies and individuals. It is therefore incumbent on the Companies House to explain to those with an interest in the matter why, as in this case, particular choices have been made and others not.’

141 Decision of UK Parliamentary Ombudsman Case No A.1/97.
142 Decision of UK Parliamentary Ombudsman Case No A.21/99.
The Ombudsman recommended that information be released, subject to withholding the legally privileged information.

iv) Refusal to release a copy of an engineer’s report

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

v) Refusal to provide copies of correspondence between the Foreign and Commonwealth Office (FCO) and the Department of Trade and Industry (DTI) relating to human rights issues and the Ilisu Dam

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

vi) Refusal to release a list of countries designated as priority markets for UK defence sales

The requester asked the Ministry of Defence for the list of countries designated as priority markets in the Defence Export Sales Organisation’s 2000 strategic plan. The department declined to release this information, citing exemption 1(b) (conduct of

143 Decision of UK Parliamentary Ombudsman Case No A. 29/00.
144 Decision of UK Parliamentary Ombudsman Case No A. 26/01.
145 Decision of UK Parliamentary Ombudsman Case No. A.05/03.
international relations). The Ombudsman found that Exemption 1 (b) was, in principle, applicable. However, given the government’s stated commitment to greater transparency and responsible controls on UK arms exports, he found that the public interest would be best served by the information being disclosed. He pointed out that the government already published an annual report putting into the public domain details (including the overall value) of the export licenses granted to the UK defence industry for each individual country. He recalled the view previously expressed by the Ombudsman that the public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue currently the subject of public debate.\footnote{Decision of UK Parliamentary Ombudsman Case No. A.11/02.} He said that the whole question of UK arms sales was, in his opinion, such a subject. He pointed to the government’s commitment to greater transparency and responsible controls on British arms exports, and suggested that the information published by the government made the UK one of the most transparent of arms exporting states. Against that background, and having regard to the fact that the information in question was, effectively, two years out of date and that the actual figures of the total value of arms exports for 2000, on a country by country basis, were already in the public domain, he found it difficult to envisage that any harm might now arise from the disclosure of the protected information.

vii) \textbf{Refusal to release information about accidents involving nuclear weapons}\footnote{Decision of UK Parliamentary Ombudsman Case No. A.12/03.}

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

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

viii) Failure to provide information relating to potential Ministerial conflicts of interest under the Ministerial Code of Conduct\textsuperscript{148}

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

ix) Refusal to provide details of driving test routes\textsuperscript{149}

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

x) Refusal to release a ministerial direction\textsuperscript{150}

\textsuperscript{148} Decision of UK Parliamentary Ombudsman Case No. A.16/03.
\textsuperscript{149} Decision of UK Parliamentary Ombudsman Case No. A.22/03.
\textsuperscript{150}
The requester sought access to information concerning a Ministerial Direction made in relation to the Millennium Dome in 1997. Exemption 2 (internal discussion & advice) was cited in the refusal to supply the information, which consisted of a submission to the Minister for expenditure on the Millennium Exhibition, as well as the resulting Direction. The Ombudsman accepted that there was a public interest in officials being able to provide candid advice to Ministers, but in this case, given that the information was eight years old (and therefore of less sensitivity), the public interest in disclosure outweighed any such potential harm. The Ombudsman also noted the departmental submission that disclosure would breach the convention under which current administrations are not permitted to see documents prepared by a previous administration of a different political complexion. She regarded this as potentially relevant, but not overriding in any case, and not decisive on the facts of this case.

xi) Refusal to provide the date on which the government first sought legal advice about the legality of military intervention in Iraq

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

The Ombudsman considered that exemption 2 could not apply to the date sought, because it was factual information. In coming to this view, she was reiterating previous Ombudsman decisions. The Office argued that if they were to release the date then they would have to release additional information, which would put the date into context, and that this further information would fall within exemption 2. This further information, consisting of an internal minute, would have been regarded by the Ombudsman as exempt in the public interest, but it had not been asked for. She did not accept that release of the date in this case would inhibit the seeking of legal advice in a future case; such a response, she thought, would be ‘wholly disproportionate’. She recommended that the information be released and expressed disappointment that the Office did not accept this recommendation.

b) Decisions of the UK Information Commissioner where the public interest in

151 Decision of UK Parliamentary Ombudsman Case No. A.9/05.
152 Decision of UK Parliamentary Ombudsman Case No. A.16/05.
disclosure outweighed the harm likely to arise from disclosure\textsuperscript{152}

i) **Refusal to provide minutes relating to the setting of school budgets**\textsuperscript{153}

The requester sought all minutes of senior management meetings at the Department of Education and Skills in the period June 2002 to June 2003 relating to the setting of school budgets in England. The department exempted most information from disclosure under Section 35 (1) (a) (formulation and development of policy) and one minute under Section 35(1) (b) (information relating to Ministerial communications), applying the public interest test in each case. The Commissioner found that Section 35(1) (a) applied to most of the material and that Section 35(1) (b) applied to the single minute (it revealed one policy option which had been taken to a Cabinet Committee). However he took a different view of where the balance of the public interest lay in the case of the bulk of the documents. The Commissioner accepted that there was a public interest, in appropriate situations, of allowing policy development to take place away from public scrutiny, but this was not an absolute, just as the exemption was not an absolute one. In this case, release of the information would show how the department was responding properly to serious funding issues and would not have a detrimental effect on the frankness and candour of future debates, whether within the department or across the whole civil service, as the department had submitted.

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

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

\textsuperscript{153} Decisions of the UK Information Commissioner Case Ref: FS50074589, 04/01/06, Public Authority: Department for Education and Skills.
ii) Refusal to provide a copy of the defence export services organisation directory

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

- there should be as much transparency as possible between defence companies and the Ministry, and disclosure of the Directory would guard against inappropriate closeness between such companies and Ministry staff, as well as making more visible movement between such companies and the Ministry;
- it would allow a better understanding of the Ministry, its involvement in overseas projects, and its relationship with the arms industry;
- it would further the accountability and transparency of public officials by allowing the public to understand their professional responsibilities;
- public confidence in the integrity of DESO officials could be improved;
- staff would be made more accessible to the public.

The Ministry put the following public interest factors against disclosure:

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

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

iii) Refusal to provide information to a third party on payments made to an artist

154 155 Decisions of the UK Information Commissioner Case Ref: FS50073980, 19/04/06, Public Authority: Ministry of Defence.

156 157 Decisions of the UK Information Commissioner Case Ref: FS50063478, 20/6/05, Public Authority: National Maritime Museum.
The complainant requested documents and correspondence relating to any payments made to an artist for an exhibition staged at Queen’s House at the National Maritime Museum (NMM). The Commissioner noted that NMM was involved in active negotiations with another artist for a project of a similar nature at the time the Freedom of Information request was made. He therefore decided that the premature disclosure of financial information about the project in question would prejudice NMM’s bargaining position relating to its negotiation for that subsequent project. The public interest in maintaining exemption under Section 43(2) therefore outweighed the public interest in disclosing the information for the time being. It was noted that while the potential prejudice to the artist’s commercial interest would also be avoided as a result of the Commissioner’s ruling, the artist’s commercial interest was not, in itself, sufficient reason to maintain the exemption. The Commissioner highlighted that potential prejudice would diminish with time; in particular after NMM had completed the negotiations for the subsequent project and thus the risk of prejudice would at such a time no longer outweigh the public interest in releasing the information requested by the complainant.

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

iv) Refusal to release document containing legal advice

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

v) Refusal to provide details of legal advice on a complaint made against a franchise company

136 Decisions of the UK Information Commissioner Case Ref: F850098767, 23/09/05, Public Authority: University of Cambridge.
137 Decisions of the UK Information Commissioner Case Ref: F850066313, 24/10/05, Public Authority: Department of Trade and Industry.
In the view of the Commissioner, the submission and further material provided to Counsel as well as Counsel’s advice were covered by legal professional privilege and that there was a public interest in permitting advice to be received on what remained a sensitive issue in confidence without the fear of disclosure affecting the frank and disinterested nature of that advice.

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

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

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

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

vi) Refusal to provide information on the recruitment of social workers in Australia and New Zealand

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

The advice was subject to Section 42 of the Freedom of Information Act (legal professional privilege). The Commissioner accepted that there was a clear public interest in the public knowing that proper legal advice has been sought, obtained and acted upon. Further, there was a strong public interest in the public being aware of how decisions are made and whether all matters have been addressed in the course of the decision-making process.

However, the Commissioner considered that the public interests in maintaining the confidentiality of legal advice were stronger and that the information was properly exempted. He accepted that disclosure could make it more difficult for Council to receive external legal

158 Decisions of the UK Information Commissioner Case Ref: FS50068973, 24/11/05, Public Authority: Calderdale Council.
advice in future and Council officers could be more reluctant to seek such advice, and these results would affect adversely the quality of decision-making. The Commissioner also took into account the existence of Council’s Monitoring Officer, whose role in ensuring the fairness and lawfulness of decision-making should help assure the public that the proper processes had been followed.

vii) Refusal to provide information on customer service at a Post Office

The complainant requested details of service standards, waiting times and persons who gave up waiting at a specified post office at Clapham. The Post Office Limited held only information concerning service standards and exempted that information under Section 43(2) (prejudice to commercial interests). The information held was in the form of a number of ‘mystery shopper surveys’ collected over the whole postal network, in which a post office employee, acting as a customer, collected information concerning service at the branches surveyed. That information gave a snapshot of standards at a given time and was necessarily transient in nature.

The Commissioner accepted that there was a significant public interest in the openness and accountability of the Post Office in the use of public funds. In this case the benefit was lessened since the information was not robust or meaningful in assisting public understanding. On the other hand, there were a number of elements of the public interest tending against disclosure, including:

(a) the information would disclose marketing strategies used at post office service counters;

(b) the information was potentially misleading and could be used in such a way by competitors;

(c) the information could be used detrimentally to the Post Office’s interests in negotiations with potential franchisees of a local post office (this was not a strong factor, given the limited value of the information);

(d) disclosure could prejudice the marketing strategies of post offices in selling a range of private sector goods and services.

These factors all pointed to real prejudice and would detrimentally affect the ability of the Post Office to compete on a level playing field. Reduction of branch services or even

159 Decisions of the UK Information Commissioner Case Ref: FS50066054, 30/11/05, Public Authority: The Post Office Limited.
The requester sought information from the Foreign and Commonwealth Office about countries whose diplomatic staff in London had allegedly committed serious offences. The Office relied on Section 27(1) (prejudice to international relations) in refusing to provide the information. The requester had originally requested names of the diplomatic staff involved, but withdrew that request. The Commissioner was satisfied that release of the information would prejudice relations between the UK and the countries involved and went on to consider the question of the public interest. The Commissioner thought that there was a considerable public interest in the public having information about criminal acts committed by persons who have diplomatic immunity and that publishing details of the countries involved could act as a deterrent against future offences being committed.

On the other hand, disclosure could lead to an adverse effect on relations with the countries involved, with the risk that they would not co-operate with authorities in the future, for instance, concerning waiver of diplomatic immunity and the withdrawal of diplomats accused of serious offences. This risk of prejudice was considered by the Commissioner to outweigh the public interest in disclosure. The Commissioner noted the policy of the Office and the expectations of foreign missions that such information would not be disclosed. While he took these factors into account in the present decision, he suggested that the Office might wish to review its policy and communicate with foreign missions concerning the changes brought about by the Freedom of Information Act.

ix) Refusal to provide a police report in an old investigation

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

For Disclosure

(a) Release would or might demonstrate the vigilance and transparency of the police investigation. The Commissioner did not regard this as a strong factor, given that there

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161 Decisions of the UK Information Commissioner Case Ref: FS50078588, 22/02/06, Public Authority: Avon & Somerset Constabulary.
had been a trial some years before and the investigation had already been exposed to public scrutiny.

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

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

Against Disclosure

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

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

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

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

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

The Commissioner found that the public interest factors in favour of maintaining the exemption were stronger than those in favour of disclosure.
x) **Refusal to provide a report on management of a sports arena**

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

- there was a mutual understanding of confidence between the supplier of the report and the Council;
- the information had the necessary quality of confidence in that it was sensitive commercial, legal and financial information;
- the information had been supplied on the basis that it would not pass beyond the immediate recipients nor be used for purposes other than those for which the report was supplied;
- disclosure would undermine and damage the commercial interests of the company, particularly with respect to reclaiming costs of construction, forecasted returns, third party funding, and ongoing pre-contractual negotiations and discussions.

The Commissioner then considered whether the public interest nevertheless override confidentiality for the purposes of Section 41. There was a public interest in accountability and transparency of the authority, including as to the application of public moneys. There was also a public interest in informing issues of public debate, particularly since there was considerable local interest in the construction and management of the project. Costs incurred by Council on the project would deplete Council reserves and might have a detrimental effect on the local community as a whole.

On the other hand, disclosure would reveal private information of bodies which were not public authorities. It could also affect the viability of the arena, potentially depriving the community of a valuable resource.

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162 Decisions of the UK Information Commissioner Case Ref: FS50064581, 06/04/06, Public Authority: Boston Borough Council.

163 For a consideration of the principles involved in this context where Section 41 contains no express public interest test but one is required at general law.
4.3 Non-disclosure of information: Overriding exemptions in public interest – judicial approach in various common law jurisdictions

4.3.1 Australia Commonwealth-Decisions of Administrative Appeals Tribunal- Decisions where the balance lay against disclosure

i) Investigative documents regarding a share acquisition hearing

The applicants sought access to investigative documents prepared by the National Companies and Securities Commission, relating to a hearing into a share acquisition.

One of the grounds for refusal was that the information requested consisted of internal working documents (Section 36), and therefore disclosure would not be in the public interest, since it would inhibit frank discussions between officials. The Tribunal agreed that the functions of the Commission were an essential public interest, and so withholding disclosure of the documents was in this instance necessary for the protection of that public interest.

ii) Withholding access to state’s negotiating strategy

The Public Service Board and a Union were in an ongoing dispute over wages. The Union sought access to background correspondence. The Board refused, citing two exemptions. First that the documents were internal working documents and second that disclosure would have a substantial adverse effect on national industrial relations. On appeal, the Tribunal held that the public interest in non-disclosure outweighed the public interest in disclosure. The PSB was entitled to maintain a confidential negotiating strategy.

iii) Documents dealing with school performance

The applicant sought access to a range of documents dealing with performance of students in government and non-government schools. One document was a computer tape containing raw data on student performance from selected students attending schools in the Australian Capital Territory.

The Tribunal accepted that there was a public interest in a debate concerning educational standards. However, on the evidence presented, the material on the tape was

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166 Re Warwick Bracken and Minister for State for Education and Youth Affairs No. A84/25 Freedom of Information [1984].

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statistically unreliable and, in the opinion of the Tribunal, it was purely speculative to suggest that such data would make any useful contribution to the public debate. Indeed, the Tribunal thought that the data could lead not only to statistically unreliable conclusions, but to ones which were potentially mischievous.

Against such a dubious possibility of benefit, was set the real potential damage to Commonwealth State relations, since confidentiality had been promised to State schools and fundamental to the arrangement was that the data was not to be used to make comparisons between educational systems. Accordingly, reasonable grounds existed for the claim that disclosure would not be in the public interest. Certain other documents were ordered to be released where to do so would not breach the confidentiality arrangements between the Commonwealth and States.

iv) International communications

The applicant sought access to parts of a letter written by the Attorney-General of the United States to the Attorney-General of Australia. The AAT held that the letter was obviously a communication at the highest level and confidentiality was assumed in the giving and receipt of it as an inter-governmental understanding (though this did not amount to an express or implied obligation of confidentiality). The letter dealt with sensitive anti-trust issues and there was no expectation that it would be made public. This high level understanding of confidentiality was itself a public interest factor against disclosure.

In addition, the government of the United States opposed disclosure. No particular public interest factor in favour of disclosure was identified in the case. The Tribunal therefore held that there were reasonable grounds for the claim that disclosure would be contrary to the public interest, a certificate to that effect having been issued by the Australian Attorney-General.

v) Documents dealing with leaks

The documents involved in this request from a journalist related to proposals for action to be taken to deal with the problem of leaks from the Prime Minister’s Department. The Tribunal (Morling J.) held that there were reasonable grounds for the certificate that disclosure would be contrary to the public interest, finding that confidentiality ought to be

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preserved for recommendations dealing with such a sensitive matter and disclosure would inhibit the making of recommendations.

Another document suggested advice as to how the Prime Minister might choose to reply to parliamentary questions, also with respect to leaks. The Tribunal found that it was ‘very much in the public interest that Ministers should be able to receive advice in confidence from their senior advisers’ as to how to answer in parliament questions on sensitive matters.

vi) Information regarding government control of public hospital services

An applicant sought access to documents relating to a dispute about government control of public hospital services and the doctors’ remuneration and conditions of service. Disclosure was refused under Section 33A (damage to Commonwealth/State relations), Section 34 (documents disclosing Cabinet deliberations), and Section 36 (internal working documents).

The Tribunal upheld the Section 33A claim, on the basis that there were sufficient indications that the correspondence between the New South Wales and Commonwealth governments were intended to be confidential. The correspondence was high-level and discussed problems of strategy and methods of dealing with the doctors’ dispute. The Tribunal also upheld the Section 36 claim, on the basis that there was an ongoing disagreement about the hospital system and medical funding. Although the public might have some idea about the strategies developed by the government, this was not justification to disclose the precise details. It could adversely affect public opinion if there was disclosure of proposals which were considered and not implemented. It found that there was a public interest in medical and health matters. But it did not find that this justified disclosing confidential communications between the Commonwealth and NSW governments.

vii) Position paper on defence procurement

A journalist sought access to a Position Paper of the Royal Australian Air Force on selection of a basic trainer aircraft which had been submitted to a committee required to make that selection. The AAT considered that disclosure of this single document could lead to public confusion in as much as the Position Paper was only one ingredient in the debate, and disclosure could have distorted the validity of the decision that was made. In addition, disclosure of the document could have been unfair to the decision-maker because it did not
fairly set out the reasons for the decision, and could thus prejudice the integrity of the decision-making process.

viii) Documents useful in litigation

The applicant sought access to certain documents prepared by or on behalf of the Aboriginal Development Commission. The issue of public interest concerned certain documents expressing opinions, legal advice or deliberations on tactics with regard to existing or anticipated legal action between the applicant and the Commission. The Tribunal pointed out that although there was a public interest in the applicant having access to documents which related to his personal interests and affairs, the requested documents had not been generated in a relatively neutral context. Rather, they had been brought into existence because of litigation between the parties. The Tribunal held that it would be against the public interest to disclose these documents, because the functions of the agency and its statutory duty (in which the service of the Legal Branch of the agency formed an essential part) would be severely hampered in conducting the litigation if the strategies which it employed prior to taking of a decision were to be disclosed to the applicant, its adversary in the litigation.

ix) Access to documents relating to a draft bill

The applicant sought access to documents relating to a draft Bill on reorganizing the administration of Aboriginal affairs. The Minister and Department argued that five documents were internal working documents. It was held that an internal briefing note was exempt under Section 36, and that disclosure would breach the need for confidentiality in such communications and would mislead the public.

x) Documents relating to high level appointments

Access to documents in two main categories was sought by the applicant, a politician:

- Documents disclosing the names of possible or prospective appointees to the Constitutional Reform Commission or its Advisory Committees.


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• Documents relating to the formulation of Cabinet submissions and draft submissions (but not the submissions themselves).

The Tribunal considered that there were public interests in ensuring the efficacy and integrity of the processes of selection for appointment to positions of importance in the community and in constitutional reform itself. However, the Tribunal held that in this case, these interests were outweighed by the potentially damaging effects upon the capacity of government to make appointments to important public positions. To disclose the names of those considered but not appointed would be likely to provoke ‘mischievous speculation’ as to the reasons for non-appointment, with potentially damaging or at least embarrassing effects upon the reputations of those concerned.

With respect to the second category, the AAT held that these documents (minutes, draft minutes and correspondence) played an integral part in formulation of the submissions that went to Cabinet and were inextricably interwoven with those submissions. Accordingly, disclosure would effectively undermine the principle of Cabinet secrecy and on this significant public interest ground, these documents were exempt.

xi) Documents regarding uranium stockpiles

An opposition MP sought access to Department of Finance documents about proposed sale of uranium stockpiles. The department refused. It argued that releasing the documents would have a substantial adverse effect on financial or property interests of the Commonwealth because the uranium market was volatile and information about its sale would impact on the price obtained at market. The Tribunal considered the public interest for and against disclosure and held the public interest in this case was in the stability of the market price for uranium.

xii) Documents regarding advice concerning foreign shareholders

An MP asked the Department of the Treasury for advice by the Foreign Investment Review Board on foreign investment thresholds. The department refused and claimed the advice was exempt under Section 36(1) (deliberative process documents). The Minister issued a certificate stating that it was in the public interest to withhold. The Tribunal then had

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only to consider whether he had reasonable grounds for his belief. It held that he did and that there was a public interest in maintaining Cabinet confidences.

xiii) Complaints about a civil servant

The applicant had previously complained about the conduct of an officer of the Australian Taxation Office, which was investigated by the Ombudsman. Subsequently, the applicant sought access to certain letters and a draft report prepared during the course of the Ombudsman’s investigation.

The AAT was of the view that the documents, all of which stated tentative or preliminary conclusions (including, in particular, the draft report), were exempt in the public interest under Section 36(1) (b) of the Freedom of Information Act. The final report had not been prepared and before this could be done, submissions were awaited from the officer who was the subject of the complaint.

In respect of the draft report, the Tribunal applied the decision of the Federal Court in an earlier case. In that decision, Sheppard J. said:

‘And, depending on their submissions will depend the form of [the Ombudsman’s] final report. It follows that if, as the applicant would have it, the draft report is disclosed; the problems mentioned by Beaumont J [in Harris] are likely to arise. It may well be that criticism the Ombudsman has made will not be maintained or will be changed. If that were to occur it may be unfair to the department or to the persons [criticized in the draft report] that his tentative criticisms, be disclosed. On balance it would be contrary to the proper working of government for there to have been published an earlier report in which criticism, no longer maintained, was included.’

xiv) Documents concerning sites for nuclear reactors

The applicant Council sought access to documents concerning possible alternative sites for a nuclear reactor which was located within its boundaries. In its decision, the Tribunal reiterated a number of public interest principles:

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178 Kavvadias at pages 79-80, cited at Brown, para [27].
• A matter which is of interest to the public does not equate to a matter of public interest.\(^{180}\)
• The relevant interest is the interest of the public as distinct from the interest of an individual or small group of individuals.\(^{181}\)
• But the interest of a significant section of the public is a public interest.\(^{182}\)
• There is a public interest in the rights of an individual.\(^{183}\)

The Tribunal also said that the ‘clear trend and preponderance of modern thought is away from those Howard principles which act as a shield against disclosure based upon the status and supposed discomfiture of public servants’.\(^{184}\) On the facts, some documents were exempt in the public interest because their disclosure could have led to public confusion and unnecessary and ill-informed debate or because their disclosure would breach the confidentiality applying to deliberations and processes of Cabinet even though they were not themselves Cabinet documents. Other documents where these effects were not proved were ordered to be released.

**xv) Report prepared by a third party**\(^{185}\)

The applicant had made certain grievances against two fellow members of the Royal Australian Navy. She met with a Queen’s Counsel who subsequently prepared a report for the RAN. Subsequently, the applicant sought access to those parts of the report which related to her. The Tribunal found that the applicant was involved in a process of alternative dispute resolution which the Queen’s Counsel was facilitating. The Tribunal considered that there was a significant public interest in parties being able to resolve difference by a process of alternative dispute resolution and in the confidentiality attaching to such process. Accordingly, the Tribunal was of the view that disclosure would inhibit the type of effective communication that was necessary to alternative dispute resolution and future disputants might be reluctant to engage in that process if information arising out of that process were to be disclosed. In addition, in the present case, disclosure might lead to a reopening of the dispute.

\(^{180}\) Citings Re Eccleston (1993) 1 QAR 60 at 79.
\(^{182}\) Sinclair’s case at 480.
\(^{183}\) Re James [1984] 6 ALD 687 at 701.
\(^{184}\) Para [38] of the decision.
The Tribunal pointed out that a different result might arise in a different factual context where there might be a stronger public interest in disclosure than was apparent in this case.

xvi) **Document identifying blind spots**\(^{186}\)

The applicant, a member of a firm of solicitors, sought access to an internal memorandum of the Australian Taxation Office which identified the applicant’s firm as a potential high risk to the revenue due to participation in certain tax planning arrangements. The Tribunal refused a request for access to those parts of the memorandum which referred to shortcomings in the systems of the Commissioner of Taxation which could be used by an unscrupulous taxpayer to defraud the revenue. The Tribunal said that in this case, it was contrary to the public interest to identify the Commissioner’s ‘blind spots’. This case may be contrasted with the earlier AAT decision in *Re Murtagh*. In that case, the information disclosed was useful to taxpayers in seeking to comply lawfully with the requirements of the Australian Taxation Office and it was in the public interest that such requirements be disclosed so as to facilitate the operation of the tax system.

4.3.2 Canada: Federal-Decisions of Canadian Information Commissioner—

**Decisions where the public interest test operated in favour of nondisclosure**

i) **The grey area of ‘public interest’**\(^{187}\)

A journalist requested records from Transport Canada relating to violations by commercial pilots of the Aeronautics Act and Regulations. Transport Canada refused the request under Section 19(1) to protect the privacy of the pilots. The Commissioner held that the public interest in the protection of health and safety did not in this instance clearly outweigh invasion of privacy because Transport Canada’s regulatory role adequately served the public interest in airline safety.

ii) **Refugees and access to legal services**\(^{188}\)

The Legal Services Board asked the Citizenship and Immigration department to routinely make available details of refugees held in detention so that it could more effectively

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\(^{188}\) Refugees and access to legal services, Case 01, 2000, AR 2000—01.
arrange legal representation for those refugees. The Board argued that any privacy interest of the refugee was outweighed by the public interest in effective legal representation. The Commissioner carefully considered all the circumstances and concluded that a slight invasion of privacy was not warranted because there were other ways of dealing with the Board’s concerns. The fact that the Board wanted a routine release of information signaled that the parties should work together outside the Act to find solutions.

iii) **Whose videotapes are they?**189

A persistent requester had been using the AI Act for many years to obtain information from Environment Canada. He asked for videotapes which were part of trap research carried out by Environment Canada into the effectiveness of traps for fur bearing animals. He argued there was a public interest in the protection of the environment and that this outweighed any potential damage caused to the fur industry by the release of images of dying animals. The Commissioner was not persuaded the public interest required release of the tapes, primarily because the department was still developing standards for humane trapping. He noted that once those standards were developed there might be a public interest in allowing the public to see how trapped animals fared in approved devices.

iv) **Confidentiality versus Public Interest**190

A University of British Columbia health researcher sought access to certain toxicological data on a disinfectant manufactured by Johnson & Johnson. The data was held by Health Canada and the requester argued that the disinfectant might have an adverse effect on the health of healthcare workers. The Commissioner took the view that Health Canada had carefully weighed the factors for and against disclosure under Section 20(6) of the AI Act. He also agreed that no basis had been shown for the suggestion that the disinfectant posed any threat to public health or safety and that the prejudice to commercial and competitive interests of Johnson & Johnson outweighed any issue concerning public health.

v) **Census records - Facilitating research while protecting privacy**191

In one case summary, the Commissioner discussed the proper balance between the public interest in having statistical material available for research and the public interest in maintaining the secrecy of census records so as to encourage participation by citizens in

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190 Confidentiality Versus Public Interest, Case 06, 2003-04, AR 2003-04.
191 Census Records - Facilitating Research While Protecting Privacy, Case 03, 2002-03, AR 2002-3.
censuses. He regarded the need for secrecy as diminishing progressively over time and thought that the Privacy Regulations properly set the time at which secrecy disappeared altogether at 92 years. While this time will differ according to the statute law of different jurisdictions, the Commissioner’s reasoning may be applicable where members of the public take part in voluntary surveys where some assurance of confidentiality is given.

vi) Litigation disbursements - Should they be protected?

In this case, the Commissioner applied, in a novel way, the public interest test of accountability for the use of public funds. He said that this test should be applied so as to narrow as far as possible the scope of legal professional privilege in a case where the issue was the extent to which disbursements charged by lawyers to the Crown were privileged. While the common law protected communications between client and lawyer for the purpose of legal advice, it did not protect mere facts such as the amount of disbursements charged, except where the statements of charges might reveal legal tactics.

vii) Private hurt and public good

A requester sought access from Transport Canada of inspection records on the condition of two aircraft. The request was refused. Upon investigation, the Commissioner observed that:

- air carrier general audit reports should be made public since they permit the public to assess the compliance of both the carrier and the department with their lawful obligations;
- in some cases, individual occurrence reports should also be released regardless of the harm to the carrier.

In this case, however, the Commissioner thought that release of the inspection/occurrence reports would be detrimental to the carrier because, in isolation, they were open to misinterpretation which could result in unwarranted public alarm. The Commissioner considered that he could not conclude that the public interest in disclosure clearly outweighed the potential harm to the carrier. This case, it should be said, could well be decided differently today because ‘misinterpretation’ is not generally regarded as a sound basis for exempting information, particularly government information. The approach of the Commissioner may reflect that it was a private business which would suffer due to

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192 Litigation Disbursements - Should They Be Protected, Case 07, 2002-03, AR 2002-03.
‘misinterpretation’. The case may also have a different outcome where the test is simply the balance of the public interests concerned rather than whether the public interest in disclosure clearly outweighs the other relevant interests.

In the following situations the public interest clearly outweighed harm to third parties:

- damage or danger to public health and safety or to the environment;
- political and bureaucratic accountability to the public;
- to enable citizens to participate in the political process; and
- specific and identifiable threat to the public interest posed by non-disclosure.

The following public interest considerations weigh against disclosure:

- unnecessary breaches of personal privacy;
- if request is framed in the form of a ‘fishing expedition’ and does not relate to specific information;
- financial or contractual prejudice resulting from disclosure;
- commercial prejudice where no basis is demonstrated for an adverse effect on public health;
- where information is already publicly available in another form or is to be reported upon by government.

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

i) Allegations made by an informant

The requester sought access to ‘my file and any other information you may have on me’. The Department of Agriculture and Food exempted certain records under Section 26(1) (a) (information given in confidence).

The Information Commissioner varied the decision of the department, permitting disclosure of certain records referring to allegations made against the requester. The Commissioner reiterated the four elements required for Section 26(1) (a) to apply.

Where Information comes from an anonymous source, it is reasonable to assume that information given about the informant and which might identify him is given in confidence.

194 AAK and the Department of Agriculture and Food. Case 98032.

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and on the basis that it will be kept confidential; this situation differs little from that of an allegation from a named informant who explicitly requests confidentiality.

The Information Commissioner accepted that it was important to the department to know the identity of informants or (as in this case) to have some details about them as distinct from the details of their allegations. Information from identifiable sources was more useful than entirely anonymous information, because it was usually easier to determine the quality and accuracy of the information if the source is known.

For the purposes of Section 26(3) there is a significant public interest in the department being able to effectively detect and eliminate offences of the kind which were the subject of the allegations against the requester; on the other hand there can be a public interest in an individual against whom allegations are made knowing about these allegations and being given an opportunity to refute them. However, in this case there was no public interest in the requester being given information to identify the parties who made allegations about him, given that following the allegations, an investigation was carried out, a prosecution commenced and the requester pleaded guilty to one of the alleged offences. Since the matter had concluded, there was no public interest in the requester knowing the identity of the informants.

In some cases, disclosure of the full details of an allegation would be likely to reveal the identity of an informant, and in such a case, there could be an implicit understanding that those details would be kept confidential. There was no such general understanding in this case concerning the contents of the allegations. Records containing the contents of the allegations therefore could be disclosed, with however any matter which might identify the source having first been deleted.

The Information Commissioner also applied Section 46(1)(f) to exclude from release matter which could disclose the identity of the source of the information.

ii) Departmental draft reports into a schools pilot project

The requester sought access to a number of Whole School Evaluation (‘WSE’) reports created during a pilot project. The Department of Education and Science relied on Sections

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195 John Burns and the Department of Education and Science, case 98099.

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The Information Commissioner affirmed the decision of the department in refusing access under Section 20.

The Information Commissioner accepted the department’s evidence and argument that schools had participated voluntarily in the project and had not expected the reports to be published and that it was critical to the department to be able to secure cooperation in relation to future pilot projects. The Information Commissioner considered the arguments of the applicant that there was a public interest in the public having access to the reports and being in a position to engage in constructive debate concerning their contents. However, the Information Commissioner found that in the circumstances of this case the public interest in disclosure was insufficient to outweigh the public interest in ensuring the department continued to receive cooperation in future. An important factor was the fact that the final report of the project, which contained an analysis and critique of the individual reports, provided a solid basis for an informed public debate, although the Information Commissioner did not seek to suggest that the public’s rights under the Act to obtain information about a pilot project could always be satisfied by the publication of a final report.

The Information Commissioner considered and rejected an argument that the inspectors who wrote the reports were scientific or technical experts within the meaning of Section 20(2) (e) of the Act. In so doing, the Information Commissioner followed the approach of the Federal Court of Australia in *Harris v. The Australian Broadcasting Corporation*.

In this case, Beaumont J. held that the reference in Section 36(6) (a) of the Commonwealth of Australia legislation to ‘technical experts’ was intended to describe experts in the mechanical arts and applied sciences generally; such a meaning was suggested by the mention of scientific experts in the same connection. The Information Commissioner considered that such an interpretation was appropriate to the Irish Act.

The Information Commissioner stated the following principles: Section 21(1) (a) envisages two potential types of 'prejudice':

- Prejudice to the 'effectiveness' of the tests and other subjects referred to;
- Prejudice to the 'procedures or methods employed for the conduct thereof.'

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The Information Commissioner considered that the term ‘effectiveness’ referred to the ability of the test, examination or audit to produce or lead to a result of some kind, or the ability of the procedures or methods employed to achieve their purpose.

In considering Section 21(1) (b), the Information Commissioner pointed out that the standard of ‘significant, adverse effect’ required stronger evidence of damage than the ‘prejudice’ standard of Section 21(1) (a); that is, that the harm would be of a more significant nature than that required under the earlier subsection.

For the same reasons as those he set out in respect of the part of his decision dealing with Section 20, the Information Commissioner upheld the exemption under Section 21(1) (b) finding that release in this case could reasonably be expected to have a significant adverse effect on the performance of the department’s functions of pilot testing new initiatives in the education system.

iii) Commercially sensitive information regarding staff redundancies

A journalist asked the department of Enterprise, Trade and Employment for records listing high-risk companies or companies which might be forced to make staff redundant. She subsequently amended her request and sought access only to lists prepared by Forbear, IDA and Shannon Development detailing ‘companies in which jobs are at risk.’ The department refused access to these records on the basis that they contained commercially sensitive information (Section 27) and information given in confidence (Section 26(1) (a)).

The Commissioner accepted that release would disclose a wide variety of commercially sensitive information (including details of losses, financing arrangements, and future plans), which could prejudice the companies’ competitive position.

The Commissioner agreed that the balance of the public interest did not favor disclosure. He analyzed the public interest for the purpose of both exemptions in the following terms:

The premature release of this information could significantly damage the operation of the early warning system and limit the opportunities available to the State to take action and prevent job losses. I also consider that the harm that could result to vulnerable companies by

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197 Fiona McHugh, the Sunday Times newspaper and the Department of Enterprise, Trade and Employment, case 98100, Source: http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,1466,en.htm

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the premature release of commercially sensitive information of this kind is a significant factor to be taken into account in considering the balance of the public interest.

On the other hand, I consider that there is a strong public interest in the public being aware of how public bodies are carrying out their functions, particularly in circumstances that could involve the expenditure of public monies. There is also a public interest in requesters exercising their rights of access under the Freedom of Information Act.

iv) Letter from anonymous informant

The requester sought access to an anonymous letter sent to the Department of Social, Community and Family Affairs which stated that the requester had been working while claiming benefit. The department exempted the record under Section 26(1) (a).

In upholding the decision of the department, the Information Commissioner applied the principles concerning anonymous informants which he had set out in AAK.

The following public interest factors were in favour of release:

- The interests of the requester as individual exercising rights under the Act.
- The need to ensure proper and fair treatment of social welfare claimants against whom allegations of fraudulent claims are made.
- The public interest in discouraging the making of allegations which are false, malicious and designed only to cause distress to the party involved without providing any assistance to the public body. It may be that Section 26 could not apply to such allegations at all in that it would not be of importance to the body that further similar information should continue to be provided.

v) Access to records about a teacher’s disciplinary action

The requester applied for access to the department of Education and science’s file concerning a complaint she had made about a national school teacher. The department applied Section 21(1) (b) (adverse effect on management functions) and Section 26(1) (confidentiality), and refused access to certain records given to it by the Board of Management of the school concerned, including the teacher’s response to the complaint. It

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198 AAY and the Department of Social, Community and Family Affairs, case 98103.

199 ABY and the Department of Education and Science, case 98169.

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

The Information Commissioner accepted that there was a public interest in preserving confidences. There was also a public interest in complaints against teachers being properly investigated, with outcomes which were both fair and impartial, but in this case, he could not see how release of the response would further this interest. Release was no substitute for the proper discharge of their functions by the department and the Board of Management.

Even though there were public interests in persons exercising their rights of access under the Freedom of Information Act, in the accountability of officials, and in scrutiny of the decision-making process, the balance in this case weighed against disclosure.

This decision is also significant because in considering Section 26(1) (b) of the Act (disclosure would found an action for breach of confidence), the Information Commissioner applied the public interest test, even though that subsection is not expressly subject to such a test under the Act. He did so on the basis that the action for breach of confidence at general law itself imposes a public interest test.

vi) Letters alleging child sexual abuse

The requester sought access to two letters that referred to the requester in relation to an inquiry into matters relating to child sexual abuse in swimming. The Department of Tourism, Sport and Recreation refused the request on the basis of Section 26(1) (a) (information given in confidence). The Information Commissioner upheld the decision of the department and stated the following principles:

The first two requirements of Section 26(1) (a) are to be interpreted in light of a definition of the term ‘confidence’ based on a definition in textual authority as follows:

A confidence is formed whenever one party (‘the confider’) imparts to another (‘the confidant’) private or secret matters on the express or implied understanding that the communication is for a restricted purpose.

The information must therefore be concerned with private or secret matters and cannot be information which is trite or already in the public domain. There was no express

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200 ACE and the Department of Tourism, Sport and Recreation, case 99097.
assurance of confidentiality in this case and therefore all the circumstances needed to be examined to determine whether there was an implied understanding of confidentiality.

It appeared clear that the authors of the letters expected confidentiality in the context of an inquiry that had only recently been concluded, which inquiry had treated not only the complaints of the victims as confidential, but also the evidence of all other parties who had provided information to the inquiry. Similarly, the department understood and accepted the desire and need of the authors for confidential treatment of the letters. It was also clear that persons providing information on such a basis who did not stand to benefit in any tangible manner would be deterred from making similar submissions in the future.

The purpose of Section 26(1) (a) is to protect the flow of information which relates to the exercise by a public body of its statutory powers and functions and in the case of a department this extends to the Minister’s statutory powers and functions, including those arising as a member of government. In this case, given the responsibility of the Minister for sport and his role in relation to funding, it was necessary that the Minister should be as fully informed as possible about matters that are relevant to the safety and well-being of those involved in sport, especially children. It was of importance to the department that information of this type be continued to be supplied.

Factors weighing against disclosure were:

- The public interest in the proper preservation of confidences; and
- The public interest in protecting the right to privacy of third parties (a particularly strong one where, as here, the record concerns a victim of child sexual abuse and her family).

This case was similar to AAY. Here, the requester was already aware of the substance of the allegations and the Minister had no authority to take any action against the requester even if he so desired. The Minister’s role in relation to funding could not be influenced by the letters, which had been overtaken by events in this regard. It followed that public interest in disclosure on the basis of procedural fairness did not carry substantial weight. As in AAY, there was no public interest in discouraging false allegations here because it did not appear that the authors had knowingly made any false allegations.

Also in favor of release was the public interest in an open and transparent process of government. However, in this case the influence of the private individuals on the Minister’s decision-making process was minimal compared, for example, to the influence of a statutory
vii) Records relating to an investigation at the request of US Customs

The requester sought access to four records relating to an investigation carried out by the Revenue Commissioners at the request of US Customs. The Revenue refused access under the confidentiality provisions of Section 26(1) (a) and (b) of the Act.

The Commissioner found that the exemption provisions applied inasmuch as there was a Mutual Assistance Agreement which provided for mutual assistance in matters of this kind. The US Customs had provided information pursuant to that Agreement for the specific purpose of having the Revenue visit the office of the requester company and carry out an investigation. That investigation related to suspected fraud by a company other than the requester. Concern had been expressed both by the Revenue and US Customs that disclosure would have an adverse effect on an ongoing investigation. In those circumstances, having regard to the importance of the exchange of information and assistance under the Agreement, the Commissioner found that the relevant materials had been provided in confidence by US Customs (although not all information which might be provided would necessarily be of a confidential character).

In considering the public interest, the Commissioner rejected an argument from the requester that there was a public interest in it being accorded natural justice. The Commissioner pointed out that no public accusations had been made against the requester company and there was a separate company under investigation. There were no proposals for action to be taken against the requester since the visit and therefore the alleged public interest did not arise. Accordingly, the public interest in maintaining the confidence in the Mutual Assistance Agreement prevailed and with one minor exception, the records were held exempt in the public interest.

viii) Records concerning a father and child

The requester sought access to all records held in relation to him and his child, for whom he had been, assessed an unsuitable custodian. The Southern Health Board exempted a

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substantial quantity of records, relying on, among other provisions, Section 21 (1) (a) (prejudice to investigations). The Information Commissioner annulled the decision of the Board and access was provided to certain specified records, with access to the balance of the records being refused. The Commissioner set out the following principles.

He referred to the statutory duty of health boards to promote the welfare of children and their functions including the co-ordination of information relating to children. Here, the board was Directed by the District Court to undertake an investigation of the child’s circumstances. The Commissioner held that this was an inquiry or investigation within the meaning of Section 21(1) (a) of the Act.

While the Commissioner did not accept that all information furnished to health boards is always given on a confidential basis, he was satisfied that in certain circumstances release of information received by health boards in the course of inquiries or investigations could reasonably be expected to inhibit the co-operation which health boards receive in such matters and could reasonably be expected to prejudice the effectiveness of the boards’ inquiries or investigations.

Certain public interest factors favouring release of the records were:

- Public interest in members of the public knowing how a public body performs its functions;
- The public interest in members of the public knowing that information held by public bodies about them is accurate;
- Public interest in individuals against whom allegations are made being made aware of those allegations and being given an opportunity to refute them;
- The public interest in parents being able to exercise guardianship rights in relation to their children.

Public interest factors favoring refusal of the request were:

- The public interest in protecting the right to privacy;
- the public interest in members of the public being able to communicate in confidence with public bodies, and without fear of disclosure, in relation to personal or sensitive matters;
• The public interest in safeguarding the flow of information to public bodies;

• The public interest in public bodies being able to perform their functions effectively, particularly in relation to issues involving the welfare of children;

• In this context, the public interest in the public body adopting fair procedures in the conduct of an investigation or inquiry where the outcome might affect the interests of an individual.

It was a question of weighing up the public interest considerations in favor of disclosure against those favoring non-disclosure. As part of this process, an attempt must also be made to measure the actual benefit to the requester which would result from release of the records, and as part of that process, the Information Commissioner considered the extent to which records had already been released to the requester and whether release of further records would add significantly to his understanding of the Board’s acts or decisions.

In this case, the social work report produced by the Board and presented in court had already been provided to the requester, and it was this report that appeared to be the basis upon which the court had acted in deciding that the requester should not have custody of his child.

In the result, the Information Commissioner considered that release of the records would not add significantly to the requester’s understanding of the issues in his case and on balance the public interest was not better served by granting than by refusing to grant access to those records.

4.3.4 New Zealand-Decisions of the Ombudsman where the public interest in disclosure did not outweigh the harm caused by disclosure

i) Access to psychiatric records:203

The applicant asked a hospital for access to her late sister’s psychiatric records, including notes from medical professionals and family members. The hospital withheld this information under Section 9(2) (a) of the OIA to protect the privacy of the deceased, of family members and of the medical professionals involved.

203 Case No. W42031; 12th Compendium, page 97.
On appeal, the Ombudsman held that the public interest in a family member’s ability to access information about the treatment and diagnosis of a close relative outweighed privacy issues. Relevant factors in the decision included: that the medical staff made notes purely in their professional capacity and had no valid privacy interest to protect, the deceased died intestate, that the applicant was her sister, and that the deceased and the applicant had had a close relationship. The Ombudsman agreed that notes made by the deceased’s friends and other family members were rightly withheld by the hospital because it did not have their consent. The Ombudsman agreed that there was no clear public interest in releasing the comments made by the friends and family. The applicant was provided with a summary of the comments.

ii) Request for still photo used in court case: 204

A newspaper requested the Police make available a still photo of an individual committing a crime. The individual had been prosecuted. The Police refused on the grounds that it was necessary to protect her privacy. The Ombudsman agreed that releasing the images would prejudice her privacy and went on to consider public interest considerations. He considered that criminal proceedings occasion much media attention but matters which may be interesting to the public are not necessarily matters which it may be in the public interest to disclose. In this case any public interest surrounding conviction of the individual had been sufficiently met by the criminal proceedings which had been in open court.

iii) Request for details of course attended by a prisoner: 205

A journalist asked the Department of Corrections for details of a tertiary course in which a prisoner convicted of murder had been released temporarily to enroll. The department refused on the grounds that it was necessary to protect the privacy of the prisoner. The Ombudsman accepted that the prisoner had a right to privacy and that there were no public interest considerations that outweighed this. While details of the course might be interesting to the public, this was not enough to satisfy the test.

iv) Disclosure of the name of a restaurant: 206

A District Health Board had carried out an investigation of a restaurant where a food poisoning outbreak had occurred. The restaurant co-operated with the investigation and an

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204 Case No. W42789.
205 Case No. W42556.
206 Case No. A8727; 13th Compendium, page 62.
employee infection was considered to be the likely cause of the outbreak. The restaurant took appropriate measures and the Board took the view that there was no continuing risk to public health. In a subsequent publication, the Board described the events and identified the type of restaurant concerned, without naming it.

A trade association considered that the article would be likely to damage the business of all restaurants of that class because the restaurant in question had not been identified, and the association sought the name of the restaurant. The request was refused on the basis of prejudice to commercial affairs under Section 9(2) (b) (ii) of the OIA.

The Ombudsman considered that while there was a strong public interest in knowing of real and current risks to public health that might arise from attending a particular restaurant, in this case measures had been taken to remedy the situation to the satisfaction of the public health authorities. On the other hand naming the restaurant would almost inevitably lead to considerable and unreasonable prejudice to its commercial position. In those circumstances, the Ombudsman took the view that the public interest had been satisfied by the release of the information already made available by the Board. The Ombudsman also pointed out that the publicity specifying the class of restaurant concerned had been published outside the control of the restaurant involved and it would be quite unfair for that restaurant to suffer by reason of that publication. This was therefore, in the view of the Ombudsman, not a factor to affect the balance of the public interest one way or the other.

The trade association accepted this reasoning as resolving the matter.

v) Report of an investigation into a company:

A shareholder in a company listed on the Stock Exchange sought access to a copy of a Securities Commission report of an investigation carried out into the company. The investigation had concluded that no action should be taken concerning a share rights issue by the company. The Commission withheld the information, relying, amongst other provisions, on Section 9(2) (b) (i). The Commission argued that its ability to obtain frank, accurate and complete information from a company or from persons associated with a company would be significantly prejudiced if such persons had reason to believe that information which they provided might be released. This would prejudice the Commission’s ability to discharge its statutory functions. The Commission argued that it ought have an unfettered ability to

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207 Case No. W41711; 13th Compendium, page 66.
investigate and inquire into suspected market irregularities and that the continued flow of good quality information for this purpose was clearly in the public interest.

Upon investigation, the Ombudsman concluded that some of the information in the report was already publicly available from the Companies Office. It was therefore not confidential and Section 9(2) (b) could not apply with respect to that information. However, with respect to other information, the Ombudsman accepted the arguments of the Commission and found that there would be prejudice to the future supply of information should disclosure take place. The Ombudsman could not identify public interest considerations in disclosure of the information which could outweigh the reasons for withholding information which properly met the harm test in the exemption provisions.

vi) Answers prepared to parliamentary questions:208

The applicant sought access to copies of all alternative answers to a parliamentary question which had been provided to the Minister of Housing. Two alternative answers had been prepared and the Minister had decided which one to present. The request was refused by the agency under Section 9(2) (g) (i), but during the course of the investigation, this ground was regarded as inapplicable. However, Section 9(2) (b) (ii) was regarded as applicable. The answers had been prepared and were subject to an obligation of confidence between the Department and the Minister. The question of damage to the public interest was therefore considered.

The Ombudsman took the view that the answer to be presented to parliament was a decision to be made by the Minister. If alternative answers were to be released, Ministers would be less likely to seek assistance in the future in preparing their answers and this would undermine answers to parliamentary questions and the quality of accountability to parliament. This would damage the public interest. It was also considered that release of the alternative answer would place the department in the political arena and the Minister might lose confidence in the impartiality of the organisation. This result would also damage the public interest.

The content of the alternative answer did not raise any public interest considerations; it did not contradict the answer given in parliament and was not exceptional in comparison. Accordingly, the only public interest consideration was to ensure that the Minister was

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208 Case No. A9003; 13th Compendium, page 71
accountable for his response to parliament and this was sufficiently provided for under the parliamentary process. There was, therefore, no countervailing consideration to overcome the considerations supporting withholding of the information.209

4.3.5 United Kingdom- Decisions of the UK Parliamentary Ombudsman where the public interest in disclosure outweighed the harm likely to arise from disclosure

i) Fail to supply, third party information about department’s discussions with industry representatives.210

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

ii) Unwilling to release information relating to the repeal of the Northern Ireland broadcasting restrictions.211

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

iii) Refusal to provide information about the economic viability of the Thermal

209 This decision is consistent with the approach taken in the Australian Commonwealth Administrative Appeals Tribunal: Re F.E.Peters and Public Service Board and Department of Prime Minister & Cabinet (No.4) No.A83/53 & A83e7 Freedom of Information [1986] AAT No. 2751, Source: http://www.austlii.edu.au.au/cases/cthlaat/unrep2420.html
210 Decision of UK Parliamentary Ombudsman Case No A.5/94.
211 Decision of UK Parliamentary Ombudsman Case No A.12/95.
Oxide Reprocessing Plant (THORP) at Sellafield.  

The requester asked the Department of the Environment for a complex technical report by an external consultant about the economic viability of THORP. The department refused citing exemption 13 (commercial confidentiality). The Ombudsman found that the public interest in making information about THORP available did not outweigh the interest in maintaining the exemption. It was significant that the technical report was consistent with the published public consultation paper and other than the fact it was more detailed, it did not make any further information available.

iv) Failure to disclose to a complainant an internal report into his complaint

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

v) Refusal to disclose an internal report about matters raised in a complaint

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

vi) Refusal to disclose information including telephone notes and internal legal advice from an individual’s file

A family firm was in dispute with the court Service about a default judgment entered in error against it. It asked to see all documents held by the court Service about the case. The

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212 Decision of UK Parliamentary Ombudsman Case No A.29/95.
213 Decision of UK Parliamentary Ombudsman Case No A.15/96.
214 Decision of UK Parliamentary Ombudsman Case No A.26/97.
215 Decision of UK Parliamentary Ombudsman Case No A.13/97.
court Service cited the legal privilege exemption. The Ombudsman held that exemption 2 (harm to frankness and candour of internal discussion) applied. He held that the public interest in making the information available did not outweigh the interest in maintaining the exemption.

vii) Refusal to disclose a report by a Board of Visitors

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

viii) Refusal to release copies of four internal performance reports

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

ix) Refusal to release information about a London Transport project

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

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216 Decision of UK Parliamentary Ombudsman Case No A.27/97.
217 Decision of UK Parliamentary Ombudsman Case No A.2/00.
218 Decision of UK Parliamentary Ombudsman Case No A. 2/01.
x) **Refusal to release information about direct to consumer advertising**\(^{219}\)

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

xi) **Refusal to provide information about the constitutional implications of joining the European Economic and Monetary Union**\(^{220}\)

The Ombudsman in considering the public interest said that:

‘The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate. The whole question of whether Britain should join the EMU is a sensitive and contentious subject which is already a matter of considerable public debate. I am of the view therefore that there is a strong public interest in disclosing any information that would assist the public understanding of this issue.’

xii) **Failure to provide copies of progress reports on records released into the public domain under the Open Government initiative**\(^{221}\)

Considering the harm test, the Ombudsman said:

‘It may be argued that because, after the completion of the present exercise, the Cabinet Office have no immediate plans to prepare further reports on the release of records, no harm can be caused by making available information about the deliberative processes applied when reaching the conclusions expressed in the reports. I do recognise, however, that while this particular reporting exercise is close to completion, future exercises of this kind may be hampered if those involved are unable to comment freely without worrying that their views could be made widely available. With this in mind, I do not

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\(^{219}\) Decision of UK Parliamentary Ombudsman Case No A.16/01.
\(^{220}\) Decision of UK Parliamentary Ombudsman Case No A.11/02.
\(^{221}\) Case No. A.02/03.
consider that the public interest in having access to all of the additional, nonfactual, information in the reports is strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure.'

xiii) Refusal to provide information relating to a decision to amend legislation relating to the Public Interest Disclosure Act 1998\(^2\)\(^2\)\(^2\)

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

xiv) Refusal to provide information contained in background briefing for Parliamentary Questions\(^2\)\(^3\)

The requester asked the Cabinet Office for information about briefing prepared by officials in response to certain parliamentary Questions asked since September 1999. The Cabinet Office withheld the information citing exemption 2 (internal discussion and advice). The Ombudsman found that the advice and recommendations contained in briefing for Ministers relating to parliamentary Questions were covered, in principle, by exemption 2. However, her report suggested that the department should apply the harm test in relation to each individual item of briefing, rather than refusing to provide any of the information sought

\(^{222}\) Case No. A.24/03.
\(^{223}\) Case No. A.25/03.
on the principle that it was information of a type which should not be released (authors’ note: an example of rejection of a class claim). She accepted that the provision of candid advice by officials to Ministers might be hampered if their views were in all circumstances to be made widely available. With that in mind, she did not consider that the public interest in having access to all of the non-factual information in the briefing notes was strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. She accepted that some of the information should be withheld, but found that there remained comments which, if released, were unlikely to harm the quality of any future advice, and that they should be made available.

xv) Refusal to release a Ministerial Direction

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

xvi) Refusal to provide information relating to vehicles suspected of involvement in the production of weapons of mass destruction

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

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224 Case No. A.40/03.
225 Case No. A.9/04.
companies produced them. The department relied on exemptions 1 (b) and (c) in refusing to supply the information (information received in confidence from foreign governments and harm to international relations). The Ombudsman thought that exemption 1 (c) applied, which contained no harm test, but also went on to consider the harm test applicable to exemption 1 (b). In her view, there was no doubt at all that there was a substantial public interest in the public knowing whether these vehicles were or were not involved in the production of weapons of mass destruction. However, in this case the following public interest factors outweighed the public interest in disclosure:

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

xvii) Refusal to provide information relating to the inspection of a school

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

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

xviii) Refusal to supply information relating to allegations of corruption

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226 Case No. A.12/04.
227 Case No. A.33/04.
The requester sought from the Ministry of Defence information relating to a meeting between the department and the US State department containing details of a discussion about alleged corrupt practices in the Czech Republic by the company BAE Systems. The Ombudsman accepted that the information fell within exemption 1 (b) (prejudice to international relations). She accepted that there was a clear public interest in allegations of corruption concerning a major UK company. She also accepted that the sensitivity of information of this kind would diminish over time. However, on balance she thought that the public interest in avoiding the harm that would be caused to the conduct of international relations outweighed the public interest in disclosure for the reasons that:

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

xix) Refusal to supply information relating to allegations of corruption

The requester sought information from the Export Credit Guarantee Department concerning allegations of corruption against the UK company BAE Systems in South Africa. The public interest questions arose under exemptions 7(b) (effective operation of the public service) and 2 (internal discussion and advice) that were relied upon by the department in refusing to provide some of the information requested. The Ombudsman was critical of the department for making claims for blanket exemption rather than applying specific exemptions to specific information. She accepted that there was a public interest in disclosure of information relating to the procedures put in place by the department to minimise fraud in business supported by the department, and went on to say that these procedures were precisely the kind of internal guidance that the Code envisaged as being made available to enhance public understanding. In addition, there was a public interest in ensuring that a department backed by taxpayers’ money was carrying out its functions in a proper manner.228

Against these factors, the Ombudsman considered that there was a public interest in the department being able to carry out discussions in a frank manner, without public exposure, in circumstances where the matter remained sensitive and the issues live. As to exemption 7(b), the Ombudsman considered that disclosure of the department’s internal procedures would provide helpful information to those who would seek to circumvent the

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228 Case No. A.36/04.
requirements. The case was finely balanced but she held the information ought not, in the public interest, be released.

xx) Refusal to provide copies of internal correspondence relating to allegations of corruption

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

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

xxi) Refusal to provide information about allegations of corruption with regard to the Lesotho Highlands Water Project

The requester asked the Department for International Development for information about allegations of corruption concerning this project as well as any information about the possibility of providing financial support to the Lesotho Government to assist the prosecution of those allegedly involved in the corrupt practices. Some of the information was withheld under exemptions 1(c) (information received in confidence from foreign governments), 2

229 Case No. A.39/04.
230 Case No. 45/04.
384
internal discussion and advice), and 4(d) (legal professional privilege). The Ombudsman accepted that there were strong public interest arguments in favour of disclosure, namely:

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

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

xxii) Refusal to supply information about the provision of military training assistance to Colombia

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

- information detailing the precise nature of the assistance, because it would harm national security by putting UK personnel based in Colombia at an increased risk of terrorist action from anti-government forces

231 Case No. A.3/05.
• the details of the assistance and background information as to why it was thought to be required, because it had a direct bearing on the relationship between the UK and Colombia and disclosure could damage the relationship and compromise any further assistance.

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

xxiii) Refusal to provide information relating to a complaint made against the trustees of a charity

The applicant requested the Charity Commission to provide him with copies of information on which the Commission had based its conclusion that his complaint against the trustees of a charity was not justified. The Commission relied on exemption 4(b) (prejudice to law enforcement) in declining to provide any of the information.

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

xxiv) Refusal to provide details of meetings with members of the Czech Republic in relation to the sale of supersonic jets

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

The Ombudsman regarded the arguments in this case as finely balanced. There was a legitimate public interest in the public knowing whether there was any substance to the suggestion of corruption in relation to arms sales. The Ministry argued that the details of the

\[232\] Case No. A.10/05.
\[233\] Case No. A.20/05.
conversation in question between the Secretary of State and the Czech Defence Minister had been frank and open and the views expressed by the Czech Minister had been provided in confidence, and also pointed out that the allegations were unsubstantiated, and the Ombudsman accepted these contentions.

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

xxv) Refusal to provide information about the failure of the government to proscribe an organisation

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

The Ombudsman found that exemption 1(b) (harm to international relations) relevantly applied. She accepted that whether or not a particular organisation should or should not be proscribed was a subject of great public interest and that a strong argument existed that disclosure of the particular information would help to inform public debate in this area. Against that, however, she accepted the department’s arguments that disclosure would harm international relations by:

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

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

xxvi) Refusal to provide information about meetings between representatives of BAE

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234 Case No. A.26/05.
The public interest in accountability concerning the expenditure of public moneys would be potentially damaged by disclosure of the information. Damage could occur both to the frankness and candour of internal discussions between Ministers and officials, but also to the ongoing commercial activities of the Ministry and its business partners. She regarded the public interest therefore as supporting exemption under exemptions 2 and 7(a). She also stated, briefly, that certain other information was properly withheld in the public interest under exemptions 1 and 13, but did not therefore need to consider exemption 14.

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235 Case No. A.31/05.