

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

by Meredith Cook

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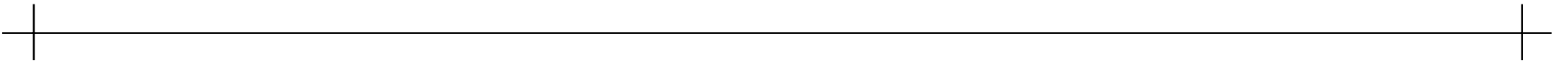
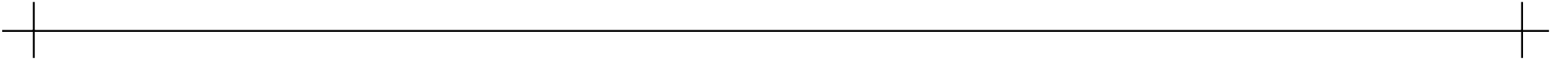
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1 Executive summary

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

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

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

1.4 In weighing up the public interest decision makers need to set out the factors telling in favour of disclosure, and those against, before deciding where the balance lies. The report provides check lists of factors from each jurisdiction to help ensure that no relevant factors are missed. Each jurisdiction has a similar but not identical set of factors.

2 *Structure and scope of this paper*

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

Why study overseas jurisdictions?

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

Weighing privacy and the public interest

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

Confidential information

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

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

3 *The public interest test*

What is a public interest test?

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

What does “in the public interest” mean?

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

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

- 3.5 It is more difficult to identify the public interest in disclosure of the particular information that has been requested.
- 3.6 The “public interest” is an amorphous concept which is typically not defined in access to information legislation. This flexibility is intentional. Legislators and policy makers recognise that the public interest will change over time and according to the circumstances of each situation. In the same way, the law does not try to categorically define what is “reasonable.” In a 1995 review of Australian legislation, the Australian Law Reform Commission recognised the difficulties in applying the public interest override but concluded that no attempt should be made to define the public interest in the FoI Act.² The Commission did however recommend that guidelines be issued by the Information Commissioner on what factors should or should not be taken into account in weighing the public interest. In 2000, the Attorney General’s Department issued a memorandum on the exemption sections in the FoI Act. This contains lengthy guidance on the application of the public interest test.³ The Task Force that recently reviewed Canadian legislation also concluded that the public interest should not be defined in legislation.

Who is the public?

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

Who has the burden of proof?

- 3.8 An informed applicant for information will ar4in 1 Tfw57 Tmo(used in2.57S0 -1

decision-maker has a responsibility under the Act to make his or her own assessment of the public interest considerations in the particular case and weigh them against the public interest in maintaining the exemption.

What is the role of the Information Commissioner?

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

4 United Kingdom

Legislative framework

4.1 The Freedom of Information Act 2000 received Royal Assent on 30

The public interest test

4.8 Section 2(2)(b) of the FoI Act provides that information to which an exemption applies can be withheld only if:

“In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

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

Section 22 information intended for future publication;
 Section 24 national security;
 Section 26 defence;
 Section 27 international relations;
 Section 28 relations within the UK;
 Section 29 the economy;
 Section 30 investigations and proceedings by public authorities;
 Section 31 law enforcement;
 Section 33 audit functions;
 Section 35 formulation of government policy;
 Section 36 effective conduct of public affairs;
 Section 37 communication with Her Majesty, and honours;
 Section 38 health and safety;
 Section 39 environmental information;
 Section 40(3)(a)(i) to personal information where the data subject has a right to prevent processing;
 Section 42 legal professional privilege;
 Section 43 commercial interests.4.10

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

Section 21 information accessible by other means;
 Section 23 information supplied by security bodies;
 Section 32 court records;
 Section 34 parliamentary privilege;
 Section 36 in relation to conduct of public affairs in the House of Lords or House of Commons;
 Section 40 personal information; (except 40(3)(a)(i))
 Section 41 information provided in confidence;
 Section 44 prohibited by another enactment.

Matters of public debate

The public interest in disclosure is particularly strong where the information in question would be of public interest.

Accountability for public funds

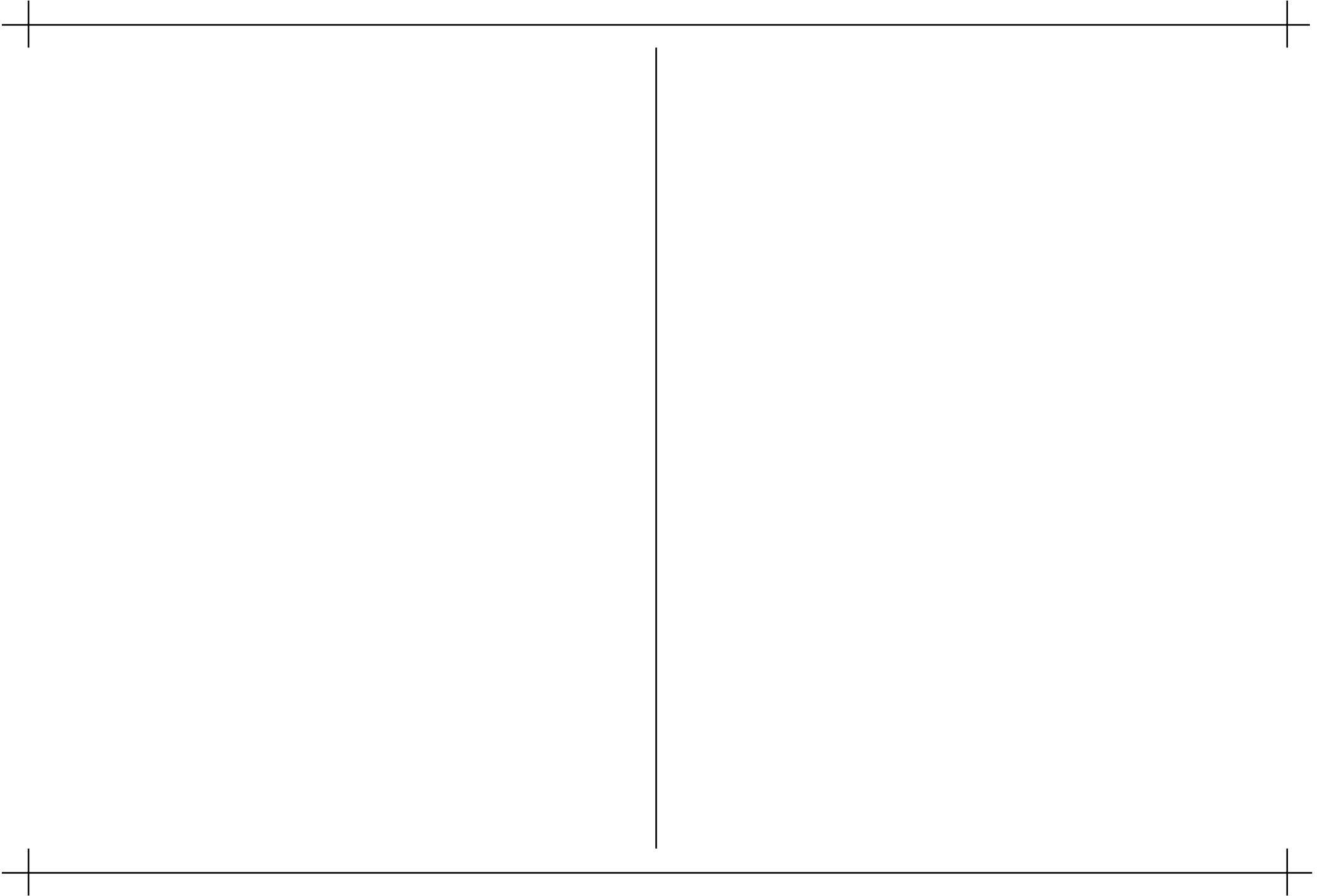
Accountability for proceeds of sale of assets in public ownership (see page 17, Decision A5/96 UK Ombudsman)

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

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

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

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issue overrode the necessity to maintain candour of internal advice.

5.8 The UK Ombudsman has said that:

“The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate.”¹¹

Section 43: Commercial interests

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

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

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

5.11 Where the commercial interests of a public agency are concerned, the public interest is more likely to favour release because there is a clear public interest in accountability for public funds.

5.12 In one Canadian case, the Commissioner noted that the only fair and reasonable way to balance public interest and corporate loss is to undertake some measure of fact finding with the company concerned.¹² The Code of Practice under section 45 of the UK FoI Act includes guidance for public authorities on entering into contracts. The LCD’s advice is that public authorities should not include contractual provisions relating to confidence or

commercially sensitive information that are inconsistent with the FoI Act.

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

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

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

5.15 The “public interest” does not mean “that which gratifies curiosity or merely provides entertainment or amusement.” The “public interest” is not the same as that which may be of interest to the public. This is well established in all jurisdictions and is often quoted by Ombudsmen and Commissioners. There is an argument that this distinction is blurring in the United Kingdom in light of recent court decisions relating to the disclosure of personal information of high profile public figures.¹³ This is a developing area and a detailed discussion of this case law is beyond the scope of this paper.

5.16 The fact that an applicant or the public may misinterpret or misunderstand the information is not a factor weighing against disclosure. In one Australian case¹⁴ the Commissioner said the view that possible misinterpretation is relevant is:

“Based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it, and can judge what is necessary or unnecessary in democratic society. I consider that it is best left to the judgement of individuals and the public generally as to whether information is too confusing to be of benefit or whether debate is necessary.”

5.17 Equally, the fact that the information is overly technical is irrelevant in the weighing exercise. In a Queensland decision where a journalist requested access to information showing adverse outcomes from carotid artery surgery performed by the hospital, the Commissioner held that the fact that a layperson may not fully comprehend a technical report was not a valid reason for denying public access to it.¹⁵

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

5.19 There will not automatically be a public interest in maintaining an exemption in relation to particular classes of information. For example, there is no presumption in favour of withholding “high level communications.” It may be that high level correspondence is more likely than lower level material to have characteristics which make its disclosure contrary to the public interest but that will not always be the case.

6 *Decisions of the UK Parliamentary Ombudsman*

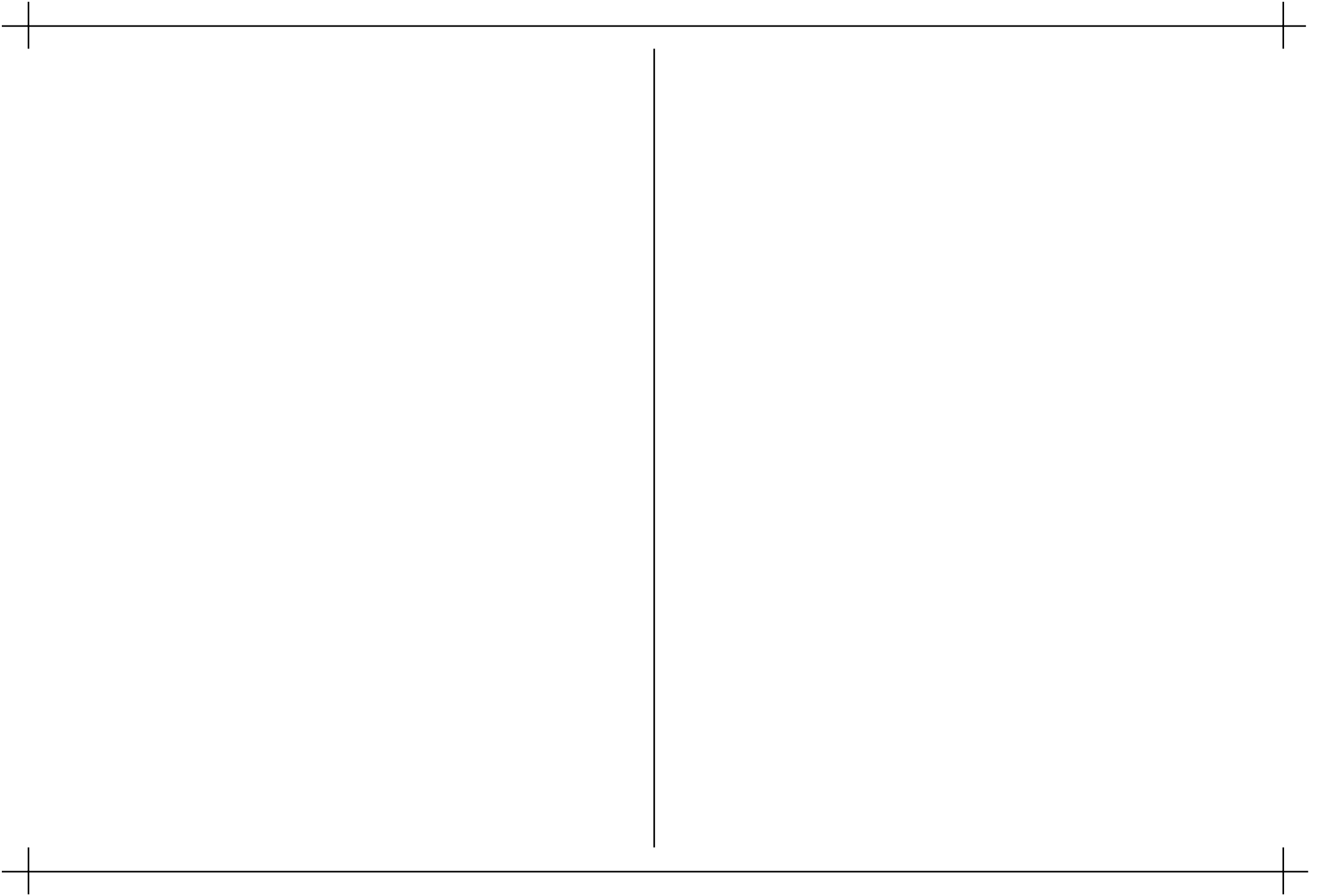
6.1 The Open Government Code of Practice on Access to Government Information has been in operation since 1994 and was revised in 1997. It is a non-statutory code enforced by the Parliamentary Ombudsman. The Code is based on the presumption that information should be disclosed unless the harm likely to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

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

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

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

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



caused to TranSys's present and future competitive position if the information were disclosed.

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

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

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

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

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

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

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

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

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

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

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

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

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

A vehicle testing station asked the Vehicle Inspectorate for the

Public interest in disclosure did not outweigh harm caused by release

- Protecting names of third parties (not officials) where information on the substance of the issue had already been released
- Sensitive issues discussed internally still on the agenda and which may still arise in future
- Premature release of commercial information could prejudice the sale of public assets
- Information is commercially sensitive and offers no more insight than the information already available on the issue
- Information relates to investigations carried out in a very rancorous manner
- Northern Ireland Prison service security at risk if information released
- Information relates to nuclear capability and security
- Government policy is still evolving on an issue

Public interest in disclosure outweighed harm caused

- Public interest in knowing how legal aid money spent
- Public interest in up to date cost estimates on spending of public funds on a proposed wetland habitat
- Public interest in knowing about the authentication of electronically filed documents at the Companies House

7 Ireland

Legislative framework

7.1 The Irish Freedom of Information Act 1997 (the Irish FoI Act) came into force in April 1998. The purpose of the Act is to give members of the public a right of access to official information to the greatest extent possible consistent with the public interest and right to privacy. The Act gives rights to members of the public to seek amendment to records relating to personal information.

Administration and enforcement of the Irish FoI Act

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

The public interest test

7.3 There are 12 exemptions in the Irish FoI Act. The public interest test applies to the 7 exemptions set out below and requires a decision-maker to release information:

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

Section 21 functions and negotiations of public bodies;
Section 23 law enforcement and public safety;
Section 26 confidential information;
Section 27 commercially sensitive information;
Section 28 personal information;
Section 30 research and natural resources;
Section 31 financial and economic interests of the State and public bodies.^{7.4}

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

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

Government guidance

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

- the public interest is not necessarily the same as that in which the public is interested.
- usually the public interest pertains to a fairly large group of people, but there is nothing to stop it applying to a single individual.
- factors which operate against disclosure include potential damage to community interests, and the need to avoid serious damage to the proper working of government at the highest level.
- factors which operate for disclosure include the need for accountability of public bodies, and for individuals to know the reasons for decisions made which concern them.

Decisions of the Information Commissioner

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

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

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

Case 98049—Information about successful tenders²³

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

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

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

Case 98058—Information about the legislative process²⁴

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

In relation to the information for which the Department could legitimately claim an exemption under section 26(1)(a) for information given in confidence, the Commissioner considered that on balance the information should be released in the public interest. He expressed the clear view that *"it is in the public interest that views and representations which influence the legislative process should be open to public scrutiny"* and noted:

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

Case 98114—Invoices paid by government departments to telecommunications companies²⁵

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

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

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

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

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

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

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

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

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

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

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

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

Case 98100—Commercially sensitive information regarding staff redundancies²⁹

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

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

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

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

On the other hand, I consider that there is a strong public interest in the public being aware of how public bodies are carrying out their functions, particularly in circumstances that could involve the expenditure of public monies. There is also a public interest in requesters exercising their rights of access under the Freedom of Information Act. Important though these latter two factors are, they do not, in my opinion, tilt the balance of the public interest in favour of disclosure."

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

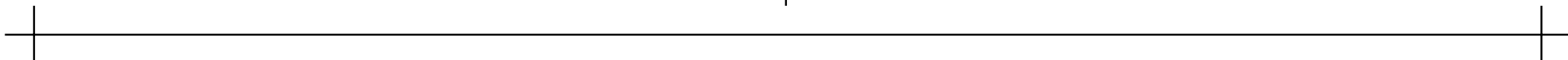
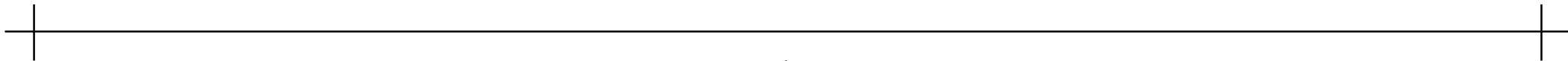
Case 99273—Access to confidential advice given by health professionals³⁰

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

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

The Commissioner held that:

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



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

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

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

- It is necessary to avoid serious damage to the proper working of government at the highest level
- A final report on the relevant issue is imminent
- Premature release of sensitive information would damage commercial interests
- Regulatory function of the agency is at issue and the information relates to its financial business rather than regulatory functions

8 Canada

Legislative Framework

- 8.1 Access to government information in Canada is regulated at both federal and provincial levels. The Federal Access to Information Act 1982 (the AI Act) came into force 1 July 1983. It applies to all government departments and most government agencies with the exception of the commercial crown corporations, Parliament and the Courts.
- 8.2 The purpose of the AI Act is to provide a right of access to information in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.
- 8.3 Access to Personal Information is governed by the Privacy Act 1982.

Administration and enforcement

- 8.4 Two ministers share responsibility for access to information. The Minister of Justice is responsible for the legislation. The President of the Treasury Board is the Minister responsible for overseeing administration of the Act, the issuance of guidelines and directives to government institutions and for producing a publication (Info Source) containing information about government institutions and their information holdings to assist individuals exercising rights under the legislation.
- 8.5 An interdepartmental task force (the Access to Information Review Task Force) has recently released its report on access to information legislation.³³ The Task Force's terms of reference were to conduct an administrative and general legislative review, identify possible adjustments for immediate implementation and report on

further recommendations. The Task Force commissioned a report by Barbara McIsaac which considered the public interest override in the AI Act.³⁴

- 8.6 The AI Act is enforced by the Information Commissioner who is an independent Ombudsman appointed by Parliament. If the government institution does not disclose information as recommended by the Information Commissioner, the complainant or the Commissioner can seek judicial review in a federal court.

The public interest test

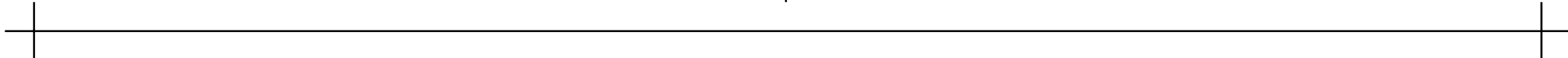
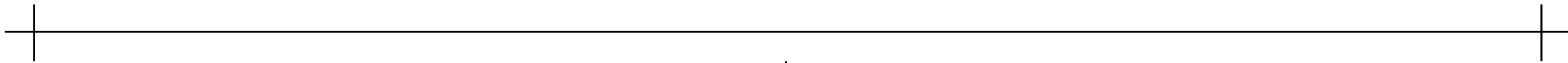
- 8.7 Two mandatory exemptions include specific public interest overrides which allow the head of a government institution to disclose information where this would be in the public interest as defined in the provision.
- 8.8 Section 20(6) permits the disclosure of commercial information from a third party if this would be in the public interest as it relates to health, safety or protection of the environment, and the public interest in disclosure **clearly** outweighs any injury to the third party. The test does not apply to third party trade secrets because the trade secret exemption is absolute.
- 8.9 Section 19 is a mandatory exemption for personal information. It says that personal information may be disclosed if the disclosure is in accordance with section 8 of the Privacy Act. One of the circumstances in section 8 is where "the public interest clearly outweighs any invasion of privacy that could result from disclosure."
- 8.10 The AI Act does not contain a general public interest override that applies to all the exemptions. A 1987 select committee report reviewing the access to information regime recommended that there should be a more thoughtful balancing of the public interest under the Act.³⁵ The McIsaac report to the Task Force also

broader obligation to release information in the public interest. However, the Task Force recommended that a general public interest override is not necessary because discretionary exemptions already imply a balancing of public interest considerations.

Government guidance

- 8.11 The term public interest is not defined in the AI Act. Canada's Access to Information Review Task Force are of the view³⁶ that the public interest override has been rarely—if ever—used to disclose information that would otherwise have been withheld under a mandatory exemption.
- 8.12 The Treasury Board of Canada Secretariat publishes a manual for government departments on the application of the AI Act. This is formal guidance from the Minister made under the Act and is available on the Treasury Board website.³⁷
- 8.13 The manual has a limited discussion of the public interest test. It does not offer guidance on how to carry out the balancing act required by the test or on what criteria should be taken into account.
- 8.14 The manual does offer procedural guidance for departments dealing with requests under the AI Act. Some of this guidance is relevant to the public interest override. The manual suggests departments ensure that third parties are asked to give:

“Reasons why their information should be exempted under section 20(1) (third parties’ financial, commercial, scientific and technical



wanted a routine release of information signalled that the parties should work together outside the Act to find solutions.

Whose videotapes are they?⁴⁵

A persistent requester had been using the AI Act for many years to obtain information from Environment Canada. He asked for videotapes which were part of trap research carried out by Environment Canada into the effectiveness of traps for fur bearing animals. He argued there was a

public interest in the protection of the environment and that this outweighed any potential damage caused to the fur industry by the release of images of dying animals. The Commissioner was not persuaded the public interest required release of the tapes, primarily because the Department was still developing standards for humane trapping. He noted that once those standards were developed there might be a public interest in allowing the public to see how trapped animals fared in approved devices.

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

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

The following public interest considerations weigh against disclosure:

- unnecessary breaches of personal privacy;
- if request is framed in the form of a “fishing expedition” and does not relate to specific information;
- financial or contractual prejudice resulting from disclosure.

9 Ontario

Legislative Framework

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

Enforcement and administration

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

Public interest override

9.3 The public interest override in section 23 of the Provincial Act and section 16 of the Municipal Act provides:

“An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third party information], 18 [economic and other interests of Ontario], 20 [danger to health or safety], 21 and 21.1 [personal privacy] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.”

9.4 The override does not apply to exemptions covering Cabinet records, law enforcement records, records qualifying for solicitor client privilege and records relating to the defence of Canada.

9.5 The test is in three parts and all three must be satisfied: a public interest in disclosure, this public interest must be **compelling**, and this compelling public interest must **clearly outweigh** the purpose of the exemption claim.

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

Decisions of the Information Commissioner

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

9.8 The Commissioner’s view is that although the issue is frequently raised by requesters and appellants, the threshold for its application is very high and carefully applied on appeal.⁴⁷ A very small proportion of public interest override claims are upheld.

9.9 The Assistant Commissioner of the Ontario Information and Privacy Commission said that⁴⁸ the Commissioner has taken a liberal interpretation of what constitutes a “public interest” and has focused on what makes a public interest “compelling” and whether the public interest “clearly outweighs” the exemption. The Federal Courts have approved the Commissioner’s approach and held that the interpretation of the public interest test is within the Commissioner’s area of expertise.

What is a compelling situation?

Some examples of situations found to be not “compelling”:

- another public process or forum to address public interest considerations has been established (Orders P-123/124, P-391, M-539);
- a significant amount of information has already been disclosed and this is adequate to addressing public interest considerations (Orders P-532, P-568);
- a court process provides an alternative disclosure mechanism and the reason to obtain records is for civil or criminal proceedings (Orders M-249, M-317);
- there has already been wide public coverage or debate, and the remaining information would not shed further light on the matter (Order P-613).

Some examples of situations where the public interest was determined to be compelling

- the integrity of the criminal justice system has been called into question (Order PO-1779);
- disclosure would give the public significant information into the safe operation of petrochemical plants (Order P-1175) or into Ontario’s nuclear emergency contingency abilities (Order P-901).

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

“Section 23 recognises that each of the exemptions listed in this section, while serving to protect vital interests, must yield on occasion to the

public interest in access to information held by government. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.”¹⁰
British Columbia

Some examples of situations where the public interest has overridden the exemption

- Where the actions of an elected official were called into question and irrespective of any actual wrongdoing, the public interest in disclosure clearly outweighed the purpose of the personal information exemption claim. (Order M-710)
- Where the public interest in safety of nuclear facilities and public accountability for operation of nuclear facilities clearly outweighed the exemption protecting economic and competitive interests of the company concerned. (Order P1190-1805)
- Where the public interest in informed public discussion about Quebec independence, which was a political issue of virtually unprecedented importance, clearly outweighed the exemption protecting advice and recommendations of the Ministry of Finance and the exemption protecting intergovernmental relations. (Order P1398)

Legislative Framework

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

Administration of the BC Act

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

Enforcement of the BC Act

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

The public interest test

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

Which reveals a risk of significant harm to the environment or to the health and safety of the public or a group of people; or the disclosure of which is, for any other reason, clearly in the public interest.

Public interest factors in favour of disclosure:

- public access to operations of government;
- maintenance of the integrity of criminal justice system;
- access to information relating to industries such as petrochemical plants and the nuclear industry;
- accountability for nuclear plant emergency contingency plans;
- scrutiny of the operations of public bodies;
- improper actions of elected officials;
- publicly-funded bodies receiving money from a private source.

Public interest factors against disclosure:

- existence of another process or forum to address public interest considerations;
- significant amounts of relevant information have already been disclosed;

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

Decisions where the balance lay in favour of disclosure

Information on economic forecasts⁵²

It found that there was a public interest in medical and health matters. But it did not find that this justified disclosing confidential communications between the Commonwealth and NSW governments.

An unsuccessful candidate requesting information about a successful candidate⁵⁶

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

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

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

Access to documents relating to a draft bill⁵⁷

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

The Minister and Department argued that 5 documents were internal working documents. It was held that an internal briefing note was exempt under section 36, and that disclosure would breach the need for confidentiality in such communications and would mislead the public.

Documents regarding uranium stockpiles⁵⁸

An opposition MP sought access to Department of Finance documents about proposed sale of uranium stockpiles.

The Department refused. It argued that releasing the documents would have a substantial adverse effect on financial or property interests of the Commonwealth because the uranium market was volatile and information about its sale would impact on the price obtained at market.

The Tribunal considered the public interest for and against disclosure and held the public interest in this case was in the stability of the market price for uranium.

Information regarding an environmental assessment⁵⁹

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

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

On appeal the Tribunal considered the public interest test in relation to damage to Commonwealth/State relations and held that the public interest in disclosure was outweighed by the damage which disclosure would cause to relations between the Commonwealth and the Northern Territory.

Documents regarding advice concerning foreign shareholders⁶⁰

An MP asked the Department of the Treasury for advice by the Foreign Investment Review Board on foreign investment thresholds.

The department refused and claimed the advice was exempt under section 36(1) (deliberative process documents). The Minister issued a certificate stating that it was in the public interest to withhold. The Tribunal then had only to consider whether he had reasonable grounds for his belief. It held that he did and that there was a public interest in maintaining Cabinet confidences.

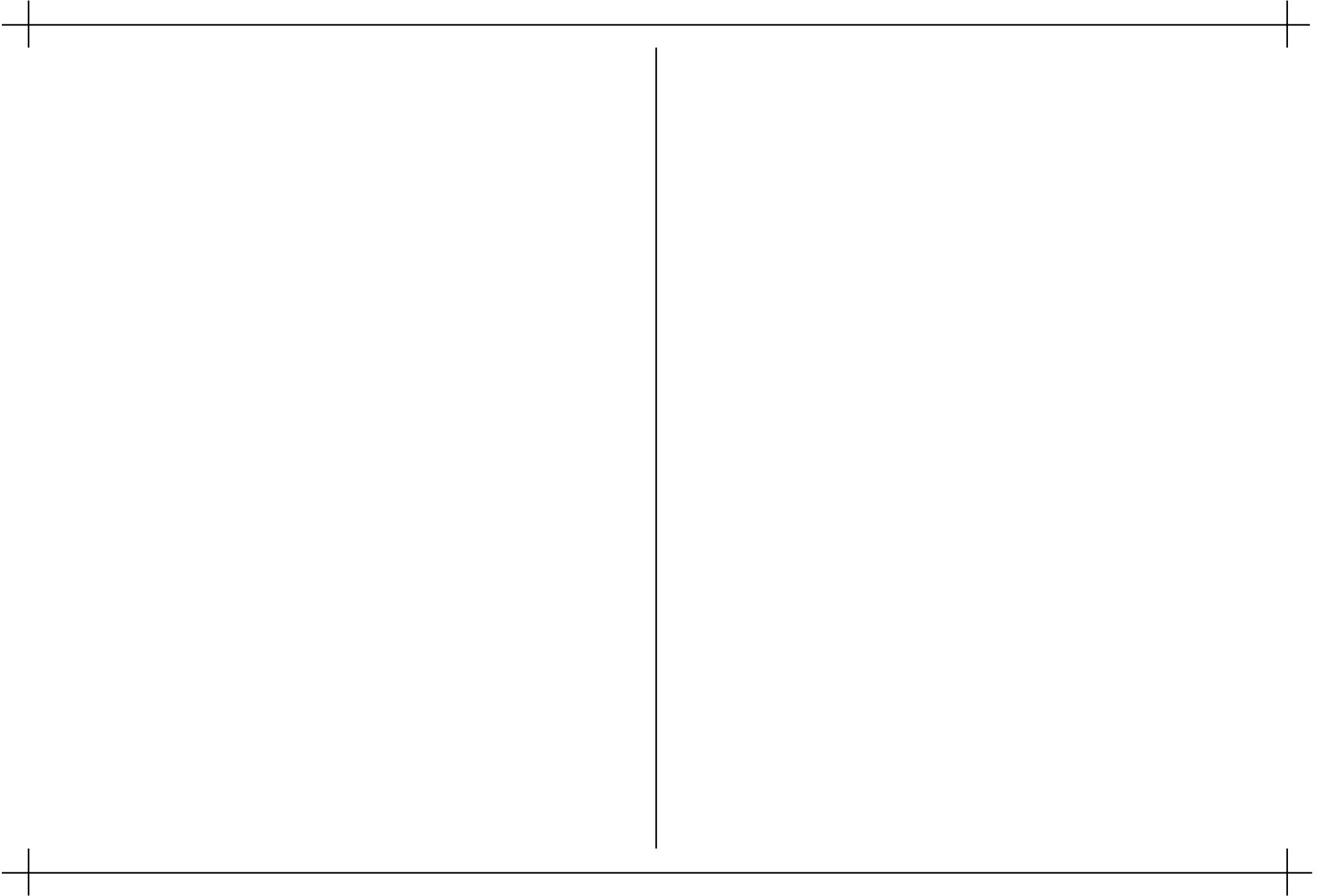
Public interest has outweighed the exemption in situations where there was a public interest in:

- Full information to assist in defence in criminal cases (especially involving the death penalty);
- curing distortion of facts caused by earlier disclosure;
- official accountability to the public;
- promotion of public participation in the processes of government;
- making a valuable contribution to public debate on an issue;
- the proper administration of justice and in the availability of evidence (*Sankey v Whitlam* (1978) 142 CLR 1 at 49)
- environmental, and health and safety concerns;

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

- Likelihood of damage to security or international relations of the Commonwealth; (Re Throssell and Departments of Foreign Affairs (1987) 4 ALD 296)
- If the release of documents would impair the integrity and viability of the decision making process to a significant or substantial degree; (Re Murtagh and Commissioner of Taxation (1983) 6 ALD 112 at 121)
- Disclosure would undermine stability of the market; (Re David Miles Connolly and Dept. Finance)
- Disclosure would undermine a confidential negotiating strategy;
- Disclosure would impact on international relations;
- Need to preserve public agency resources, and therefore it may be contrary to the public interest to release information which could lead to great expense, unless this were outweighed by competing public interests;

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12 New Zealand

Legislative Framework

- 12.1 Access to government information in New Zealand is governed by the Official Information Act 1982 (the OIA). An almost identical regime applies to access to local government information which is governed by the Local Government and Meetings Act 1987.
- 12.2 The OIA applies to all Ministers of the Crown, central government departments and organisations listed in Parts I & II of the First Schedule to the Ombudsmen Act 1975 and to those organisations listed in the First Schedule to the Official Information Act 1982.
- 12.3 The OIA operates alongside the Privacy Act 1993 which governs access to personal information and is enforced by the Privacy Commissioner.⁶¹

Administration and enforcement of the Official Information Act 1982

- 12.4 The OIA is administered by the Ministry of Justice. The Ministry does not play a day to day role in the operation of the OIA.
- 12.5 The OIA is enforced by the Ombudsmen. The New Zealand Ombudsmen have jurisdiction to enquire into both complaints about maladministration and about the availability of information under the OIA. The Ombudsmen are independent Officers of Parliament appointed by the Governor-General on the recommendation of the House of Representatives. They report annually and are accountable to Parliament rather than to the Government of the day. Their staff are not public servants.
- 12.6 The types of decision an Ombudsman can investigate under the OIA are:
- a) a refusal to provide information requested;

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

The public interest test

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

“In the circumstances of the particular case, the withholding of that information, is outweighed by other considerations which render it desirable in the public interest to make that information available.”

- 12.2 The public interest test applies only to the exemptions set out in section 9. These relate to personal privacy, commercial interests and trade secrets, confidentiality, the protection of health and safety, national economic interests, material loss to the public, communications with the Sovereign, ministerial internal working documents, the free and frank expression to Ministers, legal professional privilege, commercial negotiations, and the prevention of improper gains or advantages.
- 12.3 The public interest test does not apply to the exemptions in the OIA which are categorised as “conclusive reasons for withholding information.” These exemptions cover the maintenance of security, information given in confidence at government level between nations, maintenance of law, personal safety, and damage to the economy.

A purpose clause

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

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

12.5 Sir Brian Elwood, the Chief Ombudsman has commented that⁶² “Where making available the information requested would assist participation in the making and administration of laws or policies” or “promote the accountability of Ministers...or officials, the public interest becomes more readily identified.”

Government guidance

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

12.7 Chapter 6 deals with official information, protection, availability and disclosure.⁶³ It does not give specific guidance on the considerations to be taken into account but it does emphasise the presumption in favour of disclosure inherent in the OIA. It also highlights the often-cited catch phrase that there is a difference between information in the public interest and information which may be h oays3.8(rK Folic in Eaglit dIA. ation i9.5book FreedomIt is)TjT*8.0012 Tc-0.0023y bleen informatio the New Zesure.

university whether the staff member was receiving a salary and for details of her duties.

The university refused and argued that her personal information could be withheld to protect privacy.

On appeal to the Ombudsman, it was held that the public interest in the accountability of a public body overrode the staff member's privacy interests.

Health Authority investigations Cases Nos W38403, W39515 and W39584⁶⁸

Two newspapers and a member of a victim's family requested an internal report produced by a health authority after a public tragedy involving the death of several people at the hands of a person who had been a patient under the care of the health authority at the time the tragedy occurred.

Although the Ombudsman accepted that there were strong arguments in favour of withholding medical information about the patient given in confidence, and that potentially the supply of similar information in the future would be prejudiced, he concluded that on balance, there was a stronger public interest in the public being assured that a comprehensive inquiry into the tragedy had been held by the health authority. The conclusions in the report provided such an assurance. The health authority released the information to the requesters.

Request for letter of resignation of senior manager Case No W40876

A senior manager in the Department of Corrections resigned in circumstances where the fact of his resignation received wide publicity. A journalist asked for his letter in the belief that it might reveal reasons for his resignation. The letter was in fact no more than formal notice of resignation. The Department nevertheless argued to withhold it.

The Ombudsman considered that there was a valid privacy interest when an employee writes a letter of resignation to an employer but that in the

case of a senior manager there may be a countervailing public interest in making available some details of resignation.

In this case, the letter in fact did not contain any reasons and following a statement to this effect from the Department, the journalist withdrew the complaint to the Ombudsman.

Request for detailed information about Prime Minister's Office staff salaries Case No W41517⁶⁹

A reporter requested details of staff salaries in the PM's office from the Minister responsible for Ministerial services. The Minister refused on the grounds that it was necessary to protect privacy of the individuals concerned.

The Ombudsman agreed that releasing the detailed information would prejudice privacy, but considered that there was a public interest in the.35 Tcam0.

13 Selected sources of further information

United Kingdom

Legislation and Code

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

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

Freedom of Information Act 2000

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

Data Protection Act 1998

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

Administration and enforcement

Office of the Parliamentary and Health Service Ombudsman

www.ombudsman.org.uk

The Information Commissioner

www.informationcommissioner.gov.uk

The Department for Constitutional Affairs

www.lcd.gov.uk

Case law and orders

Decisions of the Parliamentary and Health Service Ombudsman

www.ombudsman.org.uk

Other sources

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

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

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

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

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

Ireland

Legislation

Freedom of Information Act 1997

www.irlgov.ie/oic/foi.htm

Administration and enforcement

Irish Department of Finance

www.irlgov.ie/finance

Irish Information Commissioner

www.oic.gov.ie

Case law and orders

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

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

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

Ontario

Legislation

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

Administration and enforcement

Ontario Information and Privacy Commissioner

www.ipc.on.ca

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

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

Case law and orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

British Columbia

Legislation

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

Administration and enforcement

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

British Columbia Information and Privacy Commissioner
www.oipcbc.org

Case law and orders

Release of a contract between University and sponsor

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

Australia

Commonwealth

Legislation

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

Administration and enforcement

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

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

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

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

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

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

Case law and orders

Administrative Appeals Tribunal decisions

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

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

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

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

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

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

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

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

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

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

Other sources

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

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

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Notes

- ¹ *Re Eccleston and Department of Family Services and Islanders* (1993) 1 QAR 60, Decision of the QLD Information Commissioner No 93002 30 June 1993, page 25
- ² "Open Government: A review of the Federal Freedom of Information Act 1982", ALRC 77, 1995, para 8.13. www.alrc.gov.au/publications/finalreps.htm
- ³ Attorney General's FOI Memoranda: Memorandum No 98 Exemption Sections in the FOI Act www.law.gov.au/foi/memos/memo98.htm
- ⁴ www.lcd.gov.uk
- ⁵ Birkinshaw P, *Government and information: the law relating to access disclosure and their regulation*, Butterworths, London, 2001 page 21
- ⁶ Decision 98078 of the Irish Information Commissioner
- ⁷ *Eircom Plc and the Department of Agriculture and Food; Mr Mark Henry and the Department of Agriculture and Food; Eircom Plc and the Department of Finance and Eircom Plc and the Office of the Revenue Commissioners* (Cases 98114/98132/98164/98183)
- ⁸ Above note 1
- ⁹ UK Ombudsman decision 15/94
- ¹⁰ Order P1398 Ontario Information Commissioner. See chapter 9.
- ¹¹ Case No A.26/01. See Chapter 6 for further discussion.
- ¹² *Weighing public interest* Case 08 1994 of the Canadian Federal Information Commissioner. See chapter 8.
- ¹³ *Campbell v MGN Limited* [2002] EWHC 449 (QB) discussed in a conference paper by Simon Chalton, Bird and Bird "Defining the boundaries of Privacy in the UK", July 2002
- ¹⁴ See above, note 1
- ¹⁵ *Coulthart and Princess Alexandra Hospital and Health Service District*, Queensland Information Commissioner, Decision No 06/2001 10 August 2001
- ¹⁶ Case A 7/98
- ¹⁷ Guidance on interpretation 1996, para 0.5
- ¹⁸ Case A.2/98
- ¹⁹ Case A 16/01
- ²⁰ Case A/97
- ²¹ www.irlgov.ie/finance/publications/foi/foiman0.htm
- ²² www.oic.gov.ie
- ²³ *Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office for Public Works* (Cases 98049/98056/98057)
- ²⁴ *Mr Phelim McAleer of the Sunday Times Newspaper and the Department of Justice, Equality and Law Reform* Case 98058
- ²⁵ Above note 7
- ²⁶ *Mr Martin Wall, The Sunday Tribune newspaper and the Department of Health and Children* (Case 98078)
- ²⁷ *Mr Richard Oakley, The Sunday Tribune newspaper and the Dept of Enterprise, Trade and Employment* (Case 99168)
- ²⁸ *Mr John Burns and the Department of Education and Science* (Case 98099)
- ²⁹ *Ms Fiona McHugh, the Sunday Times Newspaper and the Department of Enterprise, Trade and Employment* (Cases 98100, 1999)
- ³⁰ *Mr ABLI and the North Western Health Board* (Case 99273)
- ³¹ *Mrs ABY and the Department of Education and Science* (Case 98169)
- ³² *Ms ABT, Mr ABU and the North Eastern Health Board* (Cases 99347,99357)
- ³³ www.atirtf-geai.gc.ca/report2002-e.html
- ³⁴ Barbara McIsaac "The nature and structure of exempting provisions and the use of the concept of a public interest override" Research paper 17 to the Task Force.
- ³⁵ Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act. *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 1987 Recommendation 3.1

³⁶ In correspondence with the Constitution Unit.

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

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

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

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

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

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

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

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

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

⁴⁶ Section 11 Provincial Act, section 5 Municipal Act

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

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

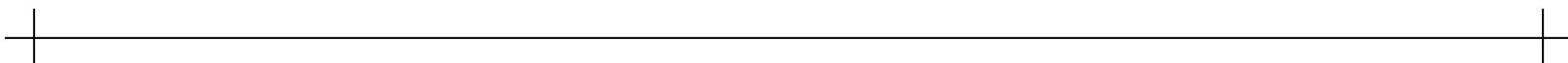
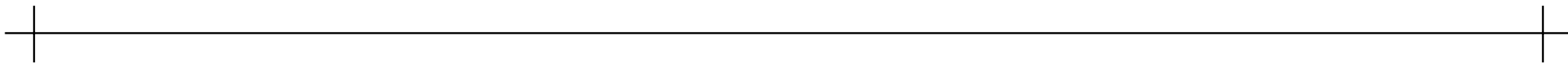
⁴⁹ In correspondence with the Constitution Unit, British Columbia’s Information Commissioner, David Loukidelis, noted that the public interest issue “has hardly come up.”

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

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

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

⁵³ *Re News Corporation Ltd, Mirror Newspapers Ltd, Nationwide News Pty Ltd and Control Investments Pty Ltd and National Companies and Securities Commission*, Case No: N83/0.0066 Td TDur(ACLR88 tR6ments P066 Td TDur(ACLR88 tR9wvDg062 Tw[(Re News Corporati2892 496.49 Tm0 Tc()Tj/TT5 1 Tf0.288 0 TD0.0005 Tc0.0119 :Re Paul G



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