OFFICE OF THE INFORMATION COMMISSIONER (QLD)

Decision No. 96012
Application S 74/95

Participants:

CRIMINAL JUSTICE COMMISSION
Applicant

DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

GORDON LYLE HARRIS
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - 'reverse FOI' application - document in issue comprising a covering note and attached document forwarded for the purposes of an investigation - whether the document in issue contains any matter falling within the terms of s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether the document in issue comprises information of a confidential nature communicated in confidence - whether s.132 of the *Criminal Justice Act 1989* Qld is relevant to this issue - whether any continuing claim to confidentiality has been negated by subsequent events (a public hearing in respect of the investigation) - whether disclosure of the document in issue could reasonably be expected to prejudice the future supply of such information - application of s.46(1)(b) of the *Freedom of Information Act 1992* Qld.

FREEDOM OF INFORMATION - 'reverse FOI' application - document in issue comprising a draft public statement for consideration by the Chairman of the applicant - a public statement with minor variations from the draft subsequently released by the Chairman of the applicant - draft public statement comprises matter of a kind mentioned in s.41(1)(a) of the *Freedom of Information Act 1992* Qld - whether disclosure of the draft public statement would be contrary to the public interest - application of s.41(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.5(1)(a), s.5(1)(b), s.16, s.41(1), s.41(1)(a), s.46(1)(b), s.48, s.78
Criminal Justice Act 1989 Qld s.132

"B" and Brisbane North Regional Health Authority, Re (1994) 1 QAR 279
Eccleston and Department of Family Services and Aboriginal and Islander Affairs, Re (1993) 1 QAR 60
Trustees of the De La Salle Brothers and Queensland Corrective Services Commission, Re (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported)

DECISION

I affirm the decision under review (being the internal review decision made on behalf of the respondent by Mr L Parker on 10 March 1995).

Date of decision: 28 June 1996

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F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

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REASONS FOR DECISION

Background

1. This is a 'reverse FOI' application by the Criminal Justice Commission (the CJC) which objects to the respondent's decision to grant Gordon Lyle Harris access under the *Freedom of Information Act 1992* Qld (the FOI Act) to two documents held by the respondent. The documents have been numbered for identification purposes, in the decision under review, as document 5 and document 21. Document 5 was forwarded by a person (referred to in these reasons for decision as Person A, since the person's identity is part of the information claimed by the CJC to be exempt matter) to the Queensland Police Service (the QPS), in connection with a complaint made to the CJC against Mr Harris. Document 21 is a draft public statement, dated 15 March 1991, which was prepared by an unnamed officer of the CJC for the consideration of the then Chairman of the CJC. The CJC contends that document 5 is exempt matter under s.41(1) and s.46(1)(b) of the FOI Act, and that document 21 is exempt matter under s.41(1) of the FOI Act.

2. In a letter dated 15 September 1994 to the Director of Public Prosecutions (the DPP), Mr Harris described 21 categories of documents to which he sought access under the FOI Act. Mr Harris is a former police officer who, in 1990, was involved in the laying of charges against another former officer. Those charges were subsequently withdrawn by the DPP.
Mr Harris has, however, continued to pursue the matter, both before and after he ceased to be an officer of the QPS. A number of investigations relating to Mr Harris and the matters raised by him have since taken place, conducted by the QPS, the DPP, the CJC, the Parliamentary Criminal Justice Committee, the Senate Select Committee on Unresolved Whistleblower Cases and some segments of the media.

3. Following consultation with the CJC concerning Mr Harris' FOI access application, the DPP informed the CJC of its decision that, *inter alia*, documents 5 and 21 were not exempt matter and would be disclosed to Mr Harris under the FOI Act. The CJC, by letter dated 23 February 1995, sought internal review of the DPP's decision in respect of documents 5 and 21. That review was conducted by Mr L Parker who, by letter dated 10 March 1995, affirmed the decision that Mr Harris was entitled to have access to the two documents.

4. By letter dated 4 April 1995, the CJC applied to me for external review, under Part 5 of the FOI Act, of Mr Parker's decision. That letter was accompanied by a three page submission supporting the CJC's claims for exemption.

5. I contacted both Mr Harris and Person A, advising them of the external review and of the provisions of s.78 of the FOI Act, which allow persons affected by a decision to apply to become participants in the proceedings. Mr Harris applied for, and was granted, the right to participate in this external review. Person A wrote to me objecting to the release of document 5, but otherwise declining the opportunity to participate in the external review.

6. I obtained and examined copies of documents 5 and 21. By letter dated 13 September 1995, I wrote to the CJC expressing my preliminary view that neither document was exempt matter under the provisions contended for by the CJC. I invited the CJC, should it not accept my preliminary view, to lodge a written submission and/or evidence in support of its contentions. The CJC replied, indicating that it did not accept my preliminary view, but stating that it did not propose to provide any further submissions or evidence.

Relevant provisions of the FOI Act

7. Section 41(1) of the FOI Act provides:

> ***41.(1)*** *Matter is exempt matter if its disclosure—*
>
> *(a) would disclose—*
>
> *(i) an opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) a consultation or deliberation that has taken place;*
>
> *in the course of, or for the purposes of, the deliberative processes involved in the functions of government; and*
>
> *(b) would, on balance, be contrary to the public interest.*

8. Section 46(1)(b) of the FOI Act provides:

> ***46.(1)*** *Matter is exempt if—*
>
> …
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to*

prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.

Document 5

9. Document 5 consists of a single covering page dated 16 July 1990, from Person A to an officer of the QPS, and a one page attachment. The covering page is headed "Confidential". It has a number of handwritten notes on it made by officers of the QPS and the CJC. It is clear that Person A intended that document 5 be passed from the QPS to the CJC, for the purposes of investigation of a complaint made to the CJC. The attachment which forms part of document 5 is a photocopy of a document which was created by Mr Harris.

Application of s.41(1) to document 5

10. A detailed analysis of s.41 of the FOI Act can be found in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at pp.66-72, where, at p.68 (paragraphs 21-22) I said:

> *21. Thus, for matter in a document to fall within s.41(1), there must be a positive answer to two questions:*
>
> *(a) would disclosure of the matter disclose any opinion, advice, or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, (in either case) in the course of, or for the purposes of, the deliberative processes involved in the functions of government? and*
>
> *(b) would disclosure, on balance, be contrary to the public interest?*
>
> *22. The fact that a document falls within s.41(1)(a) (ie. that it is a deliberative process document) carries no presumption that its disclosure would be contrary to the public interest. ...*

11. An applicant for access is not required to demonstrate that disclosure of deliberative process matter would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of the relevant deliberative process matter would be contrary to the public interest. In *Re Trustees of the De La Salle Brothers and Queensland Corrective Services Commission* (Information Commissioner Qld, Decision No. 96004, 4 April 1996, unreported), I said (at paragraph 34):

> *34. The correct approach to the application of s.41(1)(b) of the FOI Act was analysed at length in my reasons for decision in* Re Eccleston, *where I indicated (see p.110; paragraph 140) that an agency or Minister seeking to rely on s.41(1) needs to establish that specific and tangible harm to an identifiable public interest (or interests) would result from disclosure of the particular deliberative process matter in issue. It must further be established that the harm is of sufficient gravity that, when weighed against competing public interest considerations which favour disclosure of the matter in issue, it would nevertheless be proper to find that disclosure of the matter in issue would, on balance, be contrary to the public interest.*

12. The first question I must consider is whether document 5 falls within the terms of s.41(1)(a) of the FOI Act. In his internal review decision, Mr Parker said:

> … *exemption cannot be established under Section 41(1)(a) of the* Freedom of Information Act 1992 *as these documents do not disclose any opinion, advice or recommendation that is being obtained, prepared or recorded by the Criminal Justice Commission; nor does it disclose any consultation or deliberation that has taken place; nor does it disclose the deliberative processes involved in the functions of Government. This memorandum dated 16 July 1990 merely transmits a copy of a document … to the Commander of the Queensland Police Service for referral to the Criminal Justice Commission for consideration by the Commission's investigative officers in relation to a complaint … .*
>
> *To answer the question as to whether the memorandum and its accompanying document (Document 5) discloses deliberative processes involved in the functions of Government, one looks at the document and one asks what does the document disclose of the deliberative processes involved in the functions of Government? Document No. 5 does not disclose anything about the deliberative processes involved in the functions of Government relating to the Criminal Justice Commission. The highest category that one could place upon the memorandum dated 16 July 1990 and its accompanying document is that it may have been a document which formed part of an ongoing investigation by the Criminal Justice Commission … In my view, Document 5 tells us nothing of the deliberative processes of the Criminal Justice Commission.*

13. The CJC did not address this point in the submission attached to its application for external review, choosing rather to respond to Mr Parker's comments on the application of s.46(1)(b).

14. Based on my examination of it, I am not satisfied that any part of document 5 falls within the terms of s.41(1)(a) of the FOI Act. As noted above, the covering page does no more than pass on the attachment to it. Its contents cannot be properly characterised as opinion, advice or recommendation. Its release would not disclose a consultation or deliberation which has taken place. Person A has merely volunteered information which Person A considered may prove useful in the course of a CJC investigation. Brief handwritten notes made on the covering page by officers of the QPS and the CJC merely relate to administrative processes, and could not be properly characterised as falling within the terms of s.41(1)(a). The attachment comprises matter of a factual nature: it contains no matter which can properly be characterised as falling within the terms of s.41(1)(a) of the FOI Act.

15. As I do not consider that any part of document 5 falls within the terms of s.41(1)(a) of the FOI Act, it is unnecessary for me to consider the question of whether disclosure would be contrary to the public interest. I am prepared to observe, however, that nothing the CJC has put forward in its letters to the DPP, or in the submission attached to its application for external review, has convinced me that it would be contrary to the public interest to give Mr Harris access to document 5, given the nature of the document, the extent to which the controversy to which it relates has already been made public, and the lapse of time since it was created.

Application of s.46(1)(b) to document 5

16. In *Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at p.337 (paragraph 146), I indicated that, in order to establish the *prima facie* ground of exemption under s.46(1)(b) of the FOI Act, three cumulative requirements must be satisfied:

    (a) the matter in issue must consist of information of a confidential nature;

    (b) that was communicated in confidence;

    (c) the disclosure of which could reasonably be expected to prejudice the future supply of such information.

    If the *prima facie* ground of exemption is established, it must then be determined whether the *prima facie* ground is displaced by the weight of identifiable public interest considerations which favour the disclosure of the particular information in issue.

17. In the submission attached to its application for external review, the CJC made the following submissions in relation to the application of s.46(1)(b):

> *The information contained in the document was given to Commander M N Comrie of the Queensland Police Service for the purpose of forwarding on to the Criminal Justice Commission for its consideration in relation to the complaint …*
>
> *The Commissioners and the Commission's officers have a statutory duty under section 132 of the* Criminal Justice Act 1989 *(the CJ Act) to maintain confidentiality in respect of information that comes to their knowledge as a result of their being a Commissioner, an officer of the Commission, or a person engaged by the Commission under section 66 to provide services, information or advice.*
>
> *Pursuant to this provision, the Commission and its officers are required to maintain confidentiality in respect of information provided by complainants and information which may identify complainants.*
>
> *The Commission submits that disclosure of the information and the fact that* [Person A] *provided the information would reasonably be expected to prejudice the future supply of information from complainants.*
>
> *The Commission also submits that it is in the public interest that the document not be disclosed as it is in the public interest that members of the public, police officers and public officers know that they can complain in confidence to the Complaints Section of the Commission.*

18. As to requirement (a) referred to in paragraph 16 above, I find that the attachment which forms part of document 5, having been created by Mr Harris, does not have the necessary quality of confidence to be regarded as information of a confidential nature *vis-à-vis* the applicant for access in this instance. As to the covering page, there is nothing of substance in it which could now be said to be confidential information. The fact that Person A has supplied information to the CJC in relation to a complaint made against Mr Harris is information which is in the public domain, as well as being known to Mr Harris. The handwritten notes by QPS and CJC officers

merely deal with administrative matters and their substance would not, in my view, qualify as information of a confidential nature.

19. The covering page is headed “Confidential", and it may be that, at the time this information was provided, Person A did not wish it to be known that information had been provided to the CJC in relation to a complaint made against Mr Harris. While an understanding as to the maintenance of confidentiality of Person A’s identity may have existed at the time document 5 was forwarded, it is now clear that Mr Harris is aware that Person A has supplied information to the CJC. This is therefore not a case where the identity of an informant is in issue - the fact of the informant having supplied information to the CJC being already well known to the applicant for access under the FOI Act. In addition, the information which the informant supplied to the CJC was, in fact, created by the applicant for access under the FOI Act. I therefore find that, while there may have been a mutual understanding as to the confidentiality of the information at the time it was supplied, that has been overridden by subsequent events, and document 5 cannot satisfy the initial requirement for exemption from disclosure to Mr Harris under s.46(1)(b) of the FOI Act.

20. The CJC has argued that the statutory secrecy obligations imposed on Commissioners and officers of the CJC by s.132 of the *Criminal Justice Act 1989* Qld are relevant, but I do not think the CJC can obtain any assistance from that provision in this case. Section 132 of the *Criminal Justice Act* provides:

> ***132(1)*** *Subsection (2) applies to—*
>
> *(a) a commissioner; or*
>
> *(b) an officer of the commission; or*
>
> *(c) a person engaged by the commission under section 66 (Engagement of services).*
>
> ***(2)*** *A person must not wilfully disclose information that has come to the person's knowledge because the person is or was a person to whom this subsection applies unless the information is disclosed for the purposes of the commission or of this Act.*
>
> *Maximum penalty—85 penalty units or 1 year's imprisonment.*
>
> ***(3)*** *A person must not wilfully disclose information that has come to the person's knowledge from the commission because the person is or was a member of the parliamentary committee unless—*
>
> *(a) the disclosure is in the discharge of a function of the committee under this Act; or*
>
> *(b) the information is contained in a report of the commission that has been ordered by the Legislative Assembly to be printed.*
>
> *Maximum penalty—85 penalty units or 1 year's inprisonment.*

21. Although it has the somewhat misleading heading "Confidentiality to be maintained", s.132 of the *Criminal Justice Act* does not, in its terms, purport to regulate the formation or maintenance of obligations or understandings of confidentiality that are binding on the CJC in respect of information conveyed to the CJC. In its terms, s.132 of the *Criminal Justice Act* binds past and present commissioners and officers of the CJC, not the CJC itself, and binds them not to disclose information (any information at all, rather than merely confidential information) acquired through holding office with the CJC, otherwise than for the purposes of the CJC or the *Criminal Justice Act.* It is a secrecy provision of a type quite common in Queensland legislation (see *The Freedom of Information Act 1992: Review of Secrecy Provision Exemption*, Queensland Law Reform Commission, Report No. 46, March 1994) designed to prohibit officers of a specified government agency from disclosing (otherwise than in the course of, or for the purposes of, discharging their duties of office) or taking personal advantage of, information obtained in the performance of their duties of office.
Such provisions are not designed to restrict dissemination of information where that is necessary or appropriate in carrying out the functions of, or discharging legal duties and obligations imposed on, the relevant government agency or its officers. Section 16 of the FOI Act provides that the FOI Act is intended to operate to the exclusion of the provisions of other enactments relating to non-disclosure of information (but subject to the application of s.48 of the FOI Act which makes special provision in respect of a select group of statutory secrecy provisions, of which s.132 of the *Criminal Justice Act* is not one).
Whether particular information communicated to the CJC is exempt under s.46(1) of the FOI Act will depend on whether, having regard to all the relevant circumstances, the requirements for exemption under that provision are satisfied. In this case, the first requirement for exemption under s.46(1)(b) is not satisfied.

22. Moreover, as to requirement (c) identified in paragraph 16 above, I do not consider that disclosure of document 5 could reasonably be expected to prejudice the future supply of similar information, given the particular circumstances of this case. Members of the public are or should be aware (from the terms of the *Criminal Justice Act* itself and a general understanding of criminal investigation and legal processes) that information provided to the CJC may need to be selectively disclosed to enable the effective conduct of an investigation into alleged wrongdoing, and may at some stage be made public, whether in the course of public hearings or by other means (see, for example, s.132(3)(b) of the *Criminal Justice Act*, set out above). The identity of Person A as a source of information has been made public in this case. I do not consider that the release of document 5 to Mr Harris would have any significant effect on public confidence in the ability of the CJC to keep confidential, information or the identity of sources of information which have been given on a confidential basis, and which have not been disclosed to other persons, or become public knowledge, in accordance with the due processes of the law.

23. I find that document 5 is not exempt from disclosure to Mr Harris under s.46(1)(b) of the FOI Act.

Document 21

24. Document 21 is a draft public statement dated 15 March 1991, created by an unnamed officer of the CJC for consideration by the then Chairman of the CJC. It appears that it was intended that the statement be read at a public hearing relating to allegations that Mr Harris had improperly removed diaries and notebooks, created by another police officer in the course of his duties, from QPS headquarters. The draft statement refers particularly to allegations which were made on Brisbane television station, Channel 7, on 11 and 12 March 1991, and which

were based, at least in part, on information obtained from the aforementioned diaries. A statement in a form slightly altered from the document in issue was eventually made public by the Chairman of the CJC. The DPP has indicated (and the CJC has not disputed) that the only difference of substance between the draft which is document 21 and the public statement was the deletion of the final two paragraphs of
the draft.

25. I find that document 21 falls within the terms of s.41(1)(a) of the FOI Act. It is a document which has been prepared by an officer of the CJC for consideration by the Chairman, and by its nature constitutes opinion, advice or recommendation as to the appropriate form of public response which the Chairman of the CJC should make to allegations raised by the media, bearing on the conduct by the CJC of its functions.

26. Whether document 21 is exempt under s.41(1) of the FOI Act will therefore turn on whether its disclosure would, on balance, be contrary to the public interest. The matters referred to in paragraph 11 above are relevant in this regard.

27. As I noted above, nearly all of the matter contained in document 21 (the exception being the final two paragraphs) has already been made public. In the circumstances, I do not consider that there is any public interest factor which weighs against release of the material already made public. I am satisfied that that material is not exempt matter under s.41(1) of the FOI Act. In light of the arguments made in the CJC's submission, it is necessary to deal in more detail with the final two paragraphs of document 21.

28. In his internal review decision, Mr Parker drew the attention of the CJC to what he regarded as material similarities between the two paragraphs omitted from the draft statement before its public release, and other parts which were present in both the draft statement and the statement which has been made public. His view was that the omitted paragraphs could not be regarded as materially different from the document which was published by the Chairman at the hearing. He considered that they did not add significantly to the position the Chairman took at the hearing. He concluded that the public interest in Mr Harris obtaining access to the complete document was not outweighed by the public interest in protecting the deliberative processes of the CJC.

29. I must agree with Mr Parker that the tenor of the two omitted paragraphs does not differ greatly from other comments made in the statement as publicly released. It may be that the final two paragraphs of the draft statement were omitted because they were merely repetitious, or, at least, added nothing of substance to points made earlier in the document.
This is not entirely irrelevant to the judgment of whether disclosure of the matter in the final two paragraphs of document 21 would be contrary to the public interest.

30. In the submission which accompanied its external review application, the CJC raised the following arguments (I have numbered the sub-paragraphs for ease of reference):

> *It is the Commission's submission that the following considerations weigh heavily against disclosure of that part of the document which has not yet been disclosed, namely, the final two paragraphs on page five:*

[(a)] *The need to protect the integrity and viability of the decision-making processes of government in general, and of law enforcement agencies such as the Commission in particular.*

[(b)] *The possibility that disclosure will significantly affect the efficient and economical performance of an agency.*

[(c)] *The potential for causing detriment to the workings of government in general, and law enforcement agencies in particular, by the public disclosure of decision-making processes.*

[(d)] *The important functions and responsibilities of the Commission as described by the* [Criminal Justice] *Act, in particular sections 21 and 23, and the commensurate public interest in it meeting those responsibilities.*

[(e)] *The fact that the contents of the entire document but for the two paragraphs objected to is already in the public arena.*

[(f)] *It is not correct to assert (as the Director of Public Prosecutions asserted) that the information already in the public domain, as a result of Sir Max Bingham's public statement, is in similar terms to the terms of the two paragraphs to which the Commission's objection relates. Words appearing in those paragraphs do not appear elsewhere in the statement made public. When the decision was made by the Commission to make public the contents of the statement, it was decided not to publish some of the words contained in those paragraphs. The document was prepared by an officer of the Commission for the consideration of the Chairman. Therefore, it was part of the pre-decisional thinking process involved in the Commission exercising its statutory powers. (See* Waterford v Department of Treasury No. 2 *[1984] 1 AAR 1).*

[(g)] *The rationale for this exemption is that it does not assist the public to know what opinions, advice or recommendations were considered and rejected. Document 5 falls into the same category as a draft reply to a question asked of a Minister which was held to have been exempt material under the deliberative process category in* Re Doohan v Australian Telecommunications Commission *(unreported, 2 May 1986).*

[(h)] *The release of the document and in particular the final two paragraphs will be of no advantage or assistance to the applicant or to the public in the sense of assisting their understanding of the processes of government.*

In further support of its submission, the Commission refers to the following passage from the decision of the Information Commissioner in the matter of Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs*:*

> The common law has long recognised … that important public interests are secured by the proper and effective conduct of government itself, so that there are likely to be many situations in which the interests of government can for practical purposes be equated with the public interest.

The Commission submits that it is in the public interest that the public has confidence in the administration of criminal justice which is secured, in part, by the public being confident that the Commission is properly and effectively discharging its functions and responsibilities. The interests of the Commission in this regard, therefore, can be equated with the public interest.

31. The points made in sub-paragraphs (a) to (d), and in the penultimate sentence, of the above submission merely invoke vague and general concepts of potentially relevant facets of the public interest, while in no way explaining how disclosure of the final two paragraphs of document 21 would cause specific and tangible harm to public interests of the general kind to which the CJC refers.

32. The contention made in sub-paragraph (h), even if correct, is irrelevant unless it can be demonstrated that disclosure of the final two paragraphs of document 21 would be contrary to the public interest.

33. As to sub-paragraph (g), there is simply no foundation to be gathered from a consideration of the terms of s.41(1) itself (as to which see my observations in *Re Eccleston* at pp.68-69, paragraphs 20-26) or the legislative history of s.41 (or of corresponding exemption provisions in the freedom of information legislation of other Australian jurisdictions) for the remark that the rationale for this exemption is that it does not assist the public to know what opinions, advice or recommendations were considered and rejected. Section 41(1) of the FOI Act is not a vehicle for the introduction of *de facto* "class claims" for exemption (see *Re Eccleston* at p.97, paragraph 102, and at p.111, paragraph 149) such as for a class comprising matter considered and rejected in the course of a deliberative process of an agency. The judgment must always be made as to whether disclosure of the particular matter in issue would be contrary to the public interest.

34. This contention by the CJC appears to have been influenced by the now largely discredited notion (which can be traced to the 'fourth *Howard* criterion': see *Re Eccleston* at p.98, paragraph 105) that disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest. In *Re Eccleston* at pp.108-109 (paragraph 137), I quoted the views expressed by the Senate Standing Committee on Legal and Constitutional Affairs, in its "Report on the Operation and Administration of the Freedom of Information Legislation" (1987), in response to the 'fourth *Howard* criterion', of which the following segment bears repeating in the present context:

> *... The implication is that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. Debate after the event on an option that was not adopted is presumably 'unnecessary debate'.*

> *11.12 The Committee 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.*
>
> *11.13 Consistent with its attitude to the basis on which deletions should be able to be made, the Committee records its conclusion that possible confusion and unnecessary debate not be factors to be considered in calculating where the public interest lies.*

35. My own views on the 'fourth *Howard* criterion' were stated in *Re Eccleston* at p.107, paragraphs 136-137. I also note that in the recent joint report of the Australian Law Reform Commission and the Administrative Review Council, "Open government: a review of the federal Freedom of Information Act 1982", it is urged (at pp.96-97 of the report) that guidelines be issued on the application of public interest tests in the *Freedom of Information Act 1982* Cth, including as a factor irrelevant to the public interest: "that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information".

36. I am confident that members of the public are sufficiently aware of the procedures adopted by government organisations to be able to distinguish the significance of draft documents from final expressions of the approach of an organisation. Documents prepared to express the position of an organisation on matters of public importance may go through many stages of development before being finally adopted by an agency. Often there will be input from numerous officers of an agency. Divergent ideas will be expressed. Some will be followed up; some will be rejected at an early stage. I do not consider that disclosure of draft documents to the public must be assumed in every case to represent a danger to this process.

37. On the contrary, I consider that there may be significant benefits to the public in obtaining access to draft material, so as to further the accountability, and public understanding of, the operations of government organisations (*cf.* s.5(1)(a) and (b) of the FOI Act). In my view, disclosure of this type of material allows members of the public to examine the processes by which an agency has come to its final conclusion. It shows the alternatives that were considered, the differing views that were taken account of, and the reaction of those within the organisation to those views. In addition, disclosure of drafts and working documents can educate members of the public about the many inputs that can go into the process of government decision-making, thereby promoting a better understanding that working documents do not represent a final agency decision. (And, provided access can be obtained at a timely stage in the process, access by interested members of the public to draft and interim documents relating to policy proposals in development, is essential if the FOI Act is to achieve one of its major objects, namely, fostering informed public participation in the processes of government.)

38. It is evident from what I have said above that I do not accept the CJC's contention that the rationale for s.41 is that it does not assist the public to know what opinions were considered and rejected by an agency. Rather, I consider that public access to pre-decisional processes of agencies, even well after the event, may, in appropriate cases, be valuable in furthering accountability, and public understanding, of the operations of government agencies.

39. The CJC suggests that there is a public interest in members of the public having confidence that it is properly and effectively discharging its functions and responsibilities. However, it seems to me that such confidence is more likely to be engendered by complying with applications under the FOI Act for disclosure of operational documents, where no specific and tangible harm to recognised public interests is likely to result, rather than by blanket claims for non-disclosure. In saying this, I recognise that there are many areas where the CJC must maintain secrecy of documents, either in the short or long term, for the effective conduct of its operations. However, I do not consider that such restrictions must or should be placed on every document it creates, and I do not consider that the release of the matter in issue in this external review will have any significant effect on the confidence which the public has in the CJC.

40. I should also comment on the assertion by the CJC that its interests can be equated with the public interest. In making this claim, the CJC has relied on an extract from *Re Eccleston*. I set out below a more extensive quotation from that decision (at pp.74-76) in order to place that comment in its full context:

> *41. ... where apparently legitimate interests conflict, as will frequently arise when competing interests of individuals, of government in the conduct of its affairs, and of the public generally (or a substantial segment thereof) are sought to be protected or furthered in disputes over access to information, it is the balance of public interest which determines the particular interest(s) which it will be appropriate to protect, and whether by openness or secrecy. It is inherent in the process of balancing competing interests that one or more interests, whether public, individual or government interests, will in fact suffer some prejudice, but that that prejudice will be justified in the overall public interest.*
>
> *42. Because government is constitutionally obliged to act in the public interest, the protection which government can claim for its own interests cannot exceed that which is necessary to prevent possible injury to the public interest. The common law has long recognised, however, that important public interests are secured by the proper and effective conduct of government itself, so that there are likely to be many situations in which the interests of government can for practical purposes be equated with the public interest: for instance, the High Court of Australia has recently re-affirmed in* Commonwealth of Australia v Northern Land Council and Another *(1993) 67 ALJR 405, that the interest of government in the maintenance of the secrecy of deliberations within Cabinet constitutes a public interest that will be accorded protection by the courts in all but exceptional cases.*
>
> *43. By way of contrast, however, an important principle was enunciated by Mason J in* Commonwealth of Australia v John Fairfax & Sons Ltd and Ors *(1981) 55 ALJR 45; (1980) 32 ALR 485, which illustrates that the interests of government are not always synonymous with the public interest. The Commonwealth government sought an injunction to restrain the disclosure of confidential information about to be published in a book, with extracts from the book also to be published in the* Age *and the* Sydney Morning Herald*. To establish its case for an injunction to restrain the publication of the confidential information, the Commonwealth government had to show*

that it would suffer detriment from the unauthorised publication of the confidential information.
Mason J said (at ALJR p.49, ALR p.493):

> The question then, when the executive Government seeks the protection given by Equity, is: What detriment does it need to show?
>
> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the Government, but it is to say that when Equity protects Government information it will look at the matter through different spectacles.
>
> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and 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, so 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 is to be found in *Attorney-General v Jonathan Cape Ltd* [1976] QB 752, where the Court refused to grant an injunction to restrain publication of the diaries of Richard Crossman. Widgery LCJ said (at pp. 770-771):
>
> > *The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest*

> *requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.*

41. There is no doubt that there is a significant public interest in the CJC being able to effectively perform its functions. It plays an important role in the supervision of public administration and parts of the criminal justice system in this State. However, as I noted in *Re Eccleston*, the interests of government (and certainly the interests of individual government agencies) are not always synonymous with the public interest. There may be many factors which make up the balance of the public interest in a particular case, e.g. the public interest in the accountability of government agencies, the public interest in fair treatment of the individual according to law, the public interest in the proper administration of criminal justice. In the particular circumstances of each case, the relevant public interest considerations telling for or against disclosure must be identified and attributed appropriate weight, the competing considerations must be balanced against each other, and a judgment must be made as to whether disclosure of the particular matter in issue would, on balance, be contrary to the public interest. The public interest in the CJC being able to effectively perform its functions is a significant public interest, but the first step in invoking s.41(1) of the FOI Act must be to demonstrate that specific and tangible harm to that public interest would be caused by disclosure of the particular matter in issue. The CJC has failed to satisfy me on that point in the present case. Even if it had, the public interest in the CJC effectively performing its functions could only be "equated with the public interest" in circumstances where no competing public interest considerations favouring disclosure could be identified in a particular case.

42. The CJC has not established any satisfactory basis for a belief that detriment would flow from disclosure of document 21, or its final two paragraphs in particular. I am not satisfied that disclosure of this draft document would cause any significant detriment to the CJC. The two paragraphs not yet published represent an unidentified officer's advice on appropriate closing paragraphs for a public statement by the Chairman of the CJC. That advice was clearly not adopted as the paragraphs did not appear in the version that was publicly disclosed. I do not consider that members of the public would regard the document as doing anything more than displaying part of the process that the CJC went through in determining its response to certain matters raised by the media. I do not consider that the operations of the CJC would be affected in any real way by the disclosure of this information.

43. I have referred to the general public interest in disclosure for the purposes of promoting accountability of government agencies. That is not a particularly weighty public interest consideration in this case, having regard to the nature of the particular matter in issue.
However, I am not satisfied that disclosure of the matter in issue would, on balance, be contrary to the public interest.

44. I find that no part of document 21 is exempt matter under s.41(1) of the FOI Act.

Conclusion

45. I therefore affirm the decision of Mr Parker that neither document 5 nor document 21 is exempt from disclosure under the FOI Act.

.....
F N ALBIETZ
INFORMATION COMMISSIONER