THE FREEDOM OF INFORMATION ACT 1982 (CTH) AND ITS EFFECT ON BUSINESS RELATED INFORMATION AND CONFIDENTIAL INFORMATION IN THE POSSESSION OF COMMONWEALTH AGENCIES

JAMES ELLIOTT*

A. INTRODUCTION

This article deals with two of the exemptions in the *Freedom of Information Act* 1982 (Cth.) *(F.O.I. Act)*, namely section 43 which covers information relating to business affairs and section 45 which deals with confidential information. It is necessary to analyse the *F.O.I. Act* as a whole to provide the context in which these exemptions appear. The following provides a brief discussion of its main aspects.

The presumption at common law had always been that information in the hands of the government or any of its agencies was not available for disclosure to the general public. This presumption was reversed by the *F.O.I. Act*. An applicant under the *F.O.I. Act* need not show any right to or interest in the information sought to make a valid request.[1] Of course, the presumption has only been reversed to the extent that information is covered by the *F.O.I. Act*. Furthermore, access may be denied if the relevant agency [2] can show that the information comes within any one of the exemptions.

1. Why was the *F.O.I. Act* Enacted?

The *F.O.I. Act* was conceived on the basis of a commonly accepted principle of democracy, that is, that a society which claims to be democratic ought to be properly informed about the activities of its government. The only means by which members of a society may genuinely decide what rules and policies they are to be governed by is for them to know the real facts of the government.[3] A past President of the United States, James Madison, made the following axiomatic assertion:

*B.A. LL.B. (Hons.) Monash University. This article is based on a thesis submitted in partial fulfilment of the requirements for LL.B. (Hons) Monash University. This article was awarded the Commercial Law Prize 1988 by the Centre for Commercial Law and Applied Legal Research, Monash University.

[1] There are some minor exceptions to this. Under sub-ss.43(2) and 45(1) an applicant may have to show that the information sought relates to him or her. These provisions are discussed below. An applicant may also have to provide such evidence if seeking: (i) information relating to his or her personal affairs: sub-s.41(2); or (ii) a document that came into existence prior to the commencement of the *F.O.I. Act*: para.12(2)(a).

[2] "agency" is used throughout the article to mean "agency or Minister of the agency".

[3] E. Campbell "Public Access to Government Documents" (1967) 41 A.L.J. 73.

> "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power that knowledge gives."[4]

Accordingly Senator Durack, in his Second Reading Speech,[5] stated that government authorities should publish the rules and guidelines which they operate from, thereby making available their decision-making structure and their functions. Further, he proclaimed that authorities should allow access to documents, unless special reasons exist for not making them public.[6] He also adverted to a passage from the report on the United States F.O.I. Bill by the Senate Committee on the Judiciary, which read, in part, as follows:

> "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personal records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material ... It is not an easy task to balance the opposing interests, but it is not an impossible one either ... Success lies in providing a workable formula which encompasses, balances and protects all interests, yet places emphasis on the fullest possible disclosure."[7]

The Honourable Senator stated that the Government had attempted to create the "workable formula" to enable the correct balance between openness and secrecy. Further, he stressed the Government intended "to make as much information as possible available to the public".[8]

2. The Structure of the *F.O.I. Act*

The basic structure of the *F.O.I. Act* is apparent from section 3. This section gives a general right to all government information, but subjects this right to a number of exemptions. The section reads:

> "3.(1): The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by—
> (a) making available to the public information about the operation of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and
> (b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business

[4] I. Brant *James Madison: Commander in Chief 1812-1836* (1st Printing, 1961) p.450.
[5] Cwlth. of Aust., Parl., The Senate *Parliamentary Debates* (Hansard) (1978) Vol.S.77. p.2693.
[6] Ibid.
[7] Id. 2694.
[8] Ibid. For an extensive discussion of the purpose and objects of the *F.O.I. Act* see: Bayne P.J. *Freedom of Information. An Analysis of the Freedom of Information Act 1982 (Cth.) And a Synopsis of the Freedom of Information Act 1982 (Vic.)* (1st ed., 1984).

affairs of persons in respect of whom information is collected and held by departments and public authorities.

(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

The *F.O.I. Act* is now divided into eight Parts. Part I contains the object, deals with how certain terms are to be interpreted and specifies the agencies not subject to the *F.O.I. Act*.[9] Part II provides for the publication of material that government bodies use to function and make decisions, such as guidelines or ministerial directives. Part III enunciates the legally enforceable right given to members of the Australian community to information held by the government. It also provides certain rules and restrictions surrounding this right, some of which will be dealt with later in this article. Part IV prescribes the information and documents that are exempt. It is here that sections 43 and 45 are found.[10] Part V allows a member of the community to, if it is warranted, amend information held by an agency concerning himself or herself. Part VA stipulates the role of the Ombudsman in relation to the *F.O.I. Act*. Appeal procedures against an adverse decision, either by an applicant or a person to whom the information relates, are provided in Part VI. Part VIII provides miscellaneous provisions. (Part VII dealt with the Document Review Tribunal but is now repealed.)

3. The Public Interest

The concept of the public interest, though a nebulous one, is fundamental to the *F.O.I. Act*. Essentially it exists in the form of two opposing factors: (i) the public interest in open government and allowing persons access to government information; and (ii) the public interest in the security of information in the possession of the government. The latter public interest may exist for many reasons including the protection of privacy, the desire to obtain the same or analogous information in the future, the need to ensure national security and so on. The exemptions provided are based on the latter type of public interest. Some require the balancing of the two opposing interests when an application for access is made. With other exemptions the decision-maker need only consider the language of the section and is not required to consider the broader public interest factors. This type of exemption was provided as it was considered the public interest in non-disclosure could not be outweighed by opposing public interests in certain instances.

For the above commentary to be comprehensible one must have an understanding of what is meant by "public interest" and the appropriate

[9] If an agency does not come within the definition of a "prescribed authority" then the *F.O.I. Act* will not apply to information held by that agency.

[10] The sections in Part IV deal with a range of information: see ss.33-47.

weight that it should be given on either side of the ledger.[11] A public interest is an interest that is shared by the community as a whole, as opposed to a private interest that is held only by the individual concerned. That is not to say that a person cannot represent a public interest. There may be a public interest in an individual's right to justice or in his or her "need to know".[12] The concept of public interest is derived from the common law. In the High Court decision of *Commonwealth* v. *John Fairfax & Sons Ltd*[13] Mason J. observed that there would be situations where the conflicting interests would be finely balanced and that it would be difficult to know which public interest outweighs the other.[14] The *F.O.I. Act* attempts to deal with this predicament.

In different areas the common law has provided the procedure of balancing the opposing public interests. As to the weight to be given in the balancing process, no set rule exists. In the context of the law relating to Crown privilege this procedure was analysed by Stephen J. in *Sankey* v. *Whitlam*.[15] During the course of his judgment, in which his Honour had to decide whether documents held by the Australian Government were privileged, Stephen J. stated that:

> "its (the privilege's) essence is a recognition of the existence of the competing aspects of the public interest, their respective weights and hence the resultant balance varying from case to case."[16]

The necessity for the weight to be varied was emphasised even further under the *F.O.I. Act* as the public appears in various contexts. The phrase is surrounded by differing language when expressly included in some of the exemptions. Also, where it has not been expressly included, decisions have stated the public interest is necessarily incorporated into some sections. This is because the exemptions are based on a common law doctrine that includes the public interest or words such as "unreasonable disclosure" or "would, or could reasonably be expected to, unreasonably affect" have been used. Other cases have denounced this approach.[17]

According to Deputy President Hall in *Re Lianos and Secretary to Department of Social Security*[18] some assistance may be derived from *Sankey* v. *Whitlam* in regard to how the importance or weight of a public interest should be gauged. Borrowing from the judgments of Gibbs A.C.J., Stephen and Mason JJ., Mr Hall stated the following are some of the factors that need to be considered when evaluating the public interest:

> ". . . the age of the documents; the importance of the issues discussed; the

[11] Unfortunately, this is not an homogeneous concept and it is impossible to give a complete understanding in such a brief introduction. What is provided here is simply an overview of this complex and enigmatic factor.

[12] *Re Burns and Australian National University (No. 1)* (1984) 6 A.L.D. 193.

[13] (1980) 147 C.L.R. 39.

[14] id. 52.

[15] (1978) 142 C.L.R. 1.

[16] id. 63-64.

[17] The manner by which the public interest is dealt with under ss.43 and 45 is discussed below.

[18] (1985) 7 A.L.D. 475.

continuing relevance of those issues in relation to matters still under consideration; the extent to which premature disclosure may reveal sensitive information that may be 'misunderstood or misapplied by an ill-informed public'; the extent to which the subject matter of the documents is already within the public knowledge; the status of the persons between whom and the circumstances in which the communications passed; the need to preserve confidentiality having regard to the subject matter of the communication and the circumstances in which it was made. Underlying all these factors is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the efficient administration of the agency concerned."[19]

4. The Exemptions

In the *Explanatory Memorandum*[20] it was noted that a multiplicity of exemptions had been deliberately avoided. This meant that the exemptions were generally stated in broad terms and required considerable judicial interpretation.[21] The scope of each exemption was not to be limited by the fact that a document may fall within the ambit of another exemption. Therefore it is possible for several exemptions to apply to the one document.[22]

The requirements of the exemptions are only mandatory when the Commonwealth Administrative Appeals Tribunal (A.A.T.) is hearing an appeal. There is nothing to prevent an agency from disclosing information even though it comes within the ambit of an exemption.[23] Section 14 provides that disclosure may be made where agencies "can properly do so or are required by law to do so".[24]

The *F.O.I. Act* does not exclude from disclosure information that may be attained under any other law, despite that information being within the exemptions.[25] Agencies may allow disclosure of the document, even though an exemption applies, if it is possible to delete sensitive information. Section 22 enables deletions so long as they take the document outside the operation of the exemptions, do not leave the document in a form that may be misleading and it is reasonably practicable for the deletions to be made.

5. The Right to Appeal

A decision to deny an applicant access to a document may be challenged. First, within a limited period, an applicant may apply to the principal officer

[19] id. 497 citing Gibbs A.C.J. 42-43, 46-47; Stephen J. 56-57, 62; Mason J. 99-100.

[20] Cwlth. of Aust., Parl., The Senate, Freedom of Information Bill 1981, *Explanatory Memorandum* (1981).

[21] id. 14.

[22] See s.32.

[23] When the A.A.T. is hearing an appeal it is strictly bound to the provisions of the *F.O.I. Act* and does not have a discretion to disclose the documents where an exemption applies. The A.A.T. is obliged to make its decision on the situation as a whole and cannot be bound by concessions or withdrawals by the parties: *Re Waterford and Department of Health Affairs (No.2)* 5 A.L.N. No.141.

[24] It should be noted that a Minister or public servant privy to an unauthorised disclosure of information may incur criminal liability under ss.70 and 79 of the *Crimes Act* 1914 (Cth.). Furthermore, protection under ss.91 and 92 of the *F.O.I. Act* against liability for actions resulting from disclosure will only apply where the *F.O.I. Act* required disclosure to be made.

[25] Hansard, op. cit. 2694.

of the agency for review. The review is not available if the original decision was made by the principal officer or the Minister of the agency. Once this procedure has been complied with and the original decision has been affirmed the applicant may apply to the A.A.T. for review. If an applicant does not wish to incur the time and possible costs of an appeal to the A.A.T., section 52b enables a complaint to be lodged with the Ombudsman.

Generally an appeal will be against the denial of access, however an applicant may also appeal if the request for information has not been answered within the "relevant period".[26] An applicant who has been denied access must be informed of the right to a full *de novo* appeal and provided with the reasons for the denial.[27] Obviously, an applicant may not have access to the requested document in order to prepare the appeal. It has been decided in *Re Arnold Bloch, Lieber and Co. and the Commissioner of Taxation*[28] that counsel for the applicant is also prevented from having access to the document.

In any appeal the burden of proof is on the relevant agency to show that such a decision was warranted.[29] If more than one exemption may be applicable the agency need only show that one of them applies for the information to be exempt.[30]

There is no provision for a person who is the subject of the information that has been disclosed to appeal against the decision to give the applicant access, other than when the information relates to business affairs.[31] Nevertheless, such a person may be able to obtain reasons for the decision under section 28 of the *Administrative Appeals Tribunal Act* 1975 (Cth.) and appeal against the decision under section 27 of the same Act as he or she would be a person whose interests were "affected by the decision".[32] Any decision given by the A.A.T. may be appealed against by way of judicial review on questions of law in the Federal Court.

6. The Policy behind Sections 43 and 45

The activities of the Australian Government are continually involved in regulating many aspects of our society. In performing its regulatory function in such areas as welfare, education, transport, economic activities, and so on, the government accumulates an enormous amount of information about the personal lives and business activities of many members of the community.[33] Lord Reid, in *Conway* v. *Rimmer*,[34] stated that "if the State insists

[26] Section 19 provides the time within which a reply must be forwarded to an applicant and s.56 creates this omission as a ground of appeal.

[27] See s.26.

[28] (unreported, 18 April 1984, A.A.T.).

[29] See s.61.

[30] For example, this is illustrated in both *Swiss Aluminium Australia Ltd and Department of Trade* (unreported, 30 June 1986, A.A.T.) and *Dillon and Department of Treasury (No.1)* (unreported, 7 February 1986, A.A.T.) where ss.43 and 45 were submitted to be applicable but were not included in the judgment because the information in each case was exempt under another provision.

[31] See s.59 which is discussed below.

[32] The one problem with this facility is that the person who is the subject of the information is unlikely to know of the decision to disclose the information prior to disclosure.

[33] Curtis, L.J. "Freedom of Information: The Australian Approach" (1980) 54 A.L.J. 525.

[34] [1968] A.C. 910, 946.

on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes". This attitude of protecting information disclosed to the government is expressed in section 3 and provides the foundation for these two exemptions.

The Attorney-General Department's *Guidelines to Freedom of Information ("Guidelines")*[35] and Senator Durack in his Second Reading Speech[36] gave recognition of the need to protect the interests of those who supply information to, or whose activities are recorded in, government agency files. Such recognition has also been given in earlier Commonwealth legislation. For example, the *Public Service Act* 1922 (Cth.) and the *Crimes Act* 1914 (Cth.) protect individuals from unwarranted disclosure by imposing sanctions on public servants who disclose certain types of information.[37] The protection is also consistent with resolutions made by O.E.C.D. countries which recognise several basic principles. First, where information is collected, the person supplying the information should be told, if it is not already apparent, for what purpose the information is to be used. Secondly, the supplier should be able to expect that the information will not be used for any other purpose and that such information will not be made public. Thirdly, in establishing the nature of the relationship between the supplier of the information and the record keeper, regard must be had to the perception of the supplier about how the information will be used.[38]

Sections 43 and 45 have not been based on these considerations alone. There are two additional factors involved. First, these provisions should not impair any right of a person or organisation to get access to information relating to their business affairs. Such a right is recognised in many foreign jurisdictions.[39] Secondly, the right of a person or organisation to have information relating to them withheld is to be balanced with the right of every Australian to have access to information held by the government.[40]

The relationship between the above factors has been examined in relation to personal information by the Australian Law Reform Commission (A.L.R.C.).[41] The following passage is extracted from this examination:

> "Privacy includes a number of interests; essentially however all involve the right of an individual to personal autonomy. This includes the right to control the transmission of certain personal information. In many cases truth is irrelevant. The truth of the statement may even increase the injury. The critical matter is the nature of the information and the use made of it; whether it is material which so closely pertains to a person to his innermost thoughts, actions and relationships that he may legitimately claim the prerogative of deciding whether, with whom and under what circum-

[35] (Australian Government Printing Service, 1982).

[36] Hansard op. cit. 2693.

[37] For a discussion of how private information is protected see: Australian Law Reform Commission (A.L.R.C.) *Report No. 22.* "Privacy" (Canberra, 1983) Vol. 1., pp.428-437.

[38] id. 364.

[39] Canada, *Privacy Act* 1982, s.11; France, *Act 78-17*, s.19; Israel, *Protection of Privacy Law* 1981, ss.9, 12; Sweden, *Data Act* 1973; United States, *Privacy Act* 1974, 5 U.S.C., s.522a(c)(4); West Germany, *Federal Data Protection Act* 1977, s.12.

[40] Hansard op. cit. 2694.

[41] A.L.R.C. *Report No.11.* "Unfair Publication: Defamation and Privacy" (Canberra, 1979).

stances he will share it. The privacy claim is a claim for individual personality ...
The privacy claim is not an absolute one. We are individuals, with individual personalities and needs, but we live in a community. Individuals interact; inevitably the interaction leads to the transmission of personal information. Both individuals and institutions, private and public, have a legitimate claim to receive, at least on a restricted basis, a considerable amount of very personal information ... Some matters, although highly personal, raise issues of public concern. All members of the community have an interest to receive information on topics of public significance. The claim to privacy tends to conflict with the claim to public information. The dilemma has always been to strike a proper balance between the two interests ..."[42]

There were some policy considerations that were unique to section 43. Evidence was submitted before the Senate Standing Committee[43] that the person or organisation supplying the information should have the sole and complete discretion in deciding whether information concerning them or their interests should be disclosed to a third person.[44] Such a notion was rejected on the following basis:

"Business corporations are created under federal and State laws and are properly subject to regulation by governments for the common good. A corollary of this is the public's right to know how well that regulation is being carried out on its behalf."[45]

Further, it has been suggested that regulatory agencies may be unduly influenced in their functions by the ability of businesses to lobby such agencies and that the *F.O.I. Act* may be a way of rectifying this situation.[46]

According to Beaumont J. in *Harris* v. *Australian Broadcasting Corporation*[47] the object of section 43 "is to protect, within reasonable limits, the interests of third parties dealing with [an] agency or undertaking and supplying information to it in the course of that dealing".[48] The core of the section is structured into three mutually exclusive paragraphs that have been provided to create a "mosaic to ensure that the whole area of business and commercial confidentiality is covered".[49] In the *Guidelines* F.O.I. Memorandum No.43 states the consequences of disclosure must be judged according to what would happen if the information became known to a competitor of the person or organisation.[50]

It has been recognised that a system whereby information is volunteered is favourable to one which forces members of the community to supply information. There are two reasons for this: first, it is more likely to foster

[42] id. 180.
[43] Cwlth. of Aust., Parl., Senate Standing Committee on Constitutional and Legal Affairs "Freedom of Information" *Parl. Pap.* (No.272/1979).
[44] id. 268.
[45] ibid.
[46] Bayne op. cit. 194.
[47] (1983) 5 A.L.D. 545.
[48] id. 558.
[49] Guidelines op. cit. 366.
[50] id. 365.

goodwill between the business community and the agencies;[51] and, secondly, it is likely that information may be volunteered that the government would have otherwise been totally unaware of and therefore could not have required to have been supplied. These considerations were an important part of the foundation of sections 43 and 45.

A substantial overlap exists between sections 43 and 45. This was intended when the *F.O.I. Act* was drafted.[52] Obviously there would frequently be information provided in confidence that related to business affairs. Section 45, however, is not restricted to this and may apply to any information supplied in confidence.

In summary, the enactment of sections 43 and 45 was a response by parliament to all these considerations. By including these exemptions in the *F.O.I. Act* it has made an attempt to strike a proper balance between the competing interests expounded by the A.L.R.C.

7. Conclusion

The above is an outline of the basic structure of the *F.O.I. Act* and the policies behind sections 43 and 45. The interpretation given to these exemptions has a direct effect on the operation of the *F.O.I. Act*. A broad interpretation would lead to restricting the effectiveness of the *F.O.I. Act* in relation to government information, whereas a narrow interpretation would allow a more dynamic role for the *F.O.I. Act* in public administration. The following will deal with both of the exemptions in turn to see how they have operated and the extent to which they relate to the original intentions of the parliament.

B. BUSINESS AFFAIRS

One major concern expressed to the Senate Standing Committee[53] was the interference the *F.O.I. Act* may have had with information held by agencies concerned with business related affairs. Given this unease, and the extensive number of cases that have been litigated in the United States of America under a similar provision, the paucity of cases under section 43, when compared with some other exemptions, appears somewhat surprising. The section was drafted in broad terms and perhaps this alone has deterred applicants from appealing after having access denied. The section reads:

[51] id. 364.

[52] Such a conclusion may be derived from the failure of parliament to withdraw s.45 from the *F.O.I. Act* after the Senate Standing Committee recognised this overlap and recommended the withdrawal of this provision. See: Senate Standing Committee op. cit. 272.

[53] Cwlth. of Aust., Parl., Senate Standing Committee on Constitutional and Legal Affairs "Freedom of Information" *Parl. Pap.* (No.272/1979).

*"business related affairs" is used throughout this part of the article to collectively encompass "business or professional affairs" and "business, commercial or financial affairs".

"Documents relating to business affairs, &c.

43.(1) A document is an exempt document if its disclosure under this Act would disclose—

(a) trade secrets;

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information—

(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

(ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

(2) The provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document—

(a) by reason only of the inclusion in the document of information concerning that person in respect of his business or professional affairs;

(b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or

(c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.

(3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, a State, the Northern Territory or a local government authority."

This Part will consider each key aspect of section 43 to ascertain the scope of the provision and any problems which have arisen from it.

1. Trade Secrets: Section 43(1)(a)

This provision appears to be superfluous, as a trade secret would also be protected by section 45, which protects confidential information. Section 45 includes trade secrets as they are confidential by nature. If supplied other than in confidence they would no longer be trade secrets. A possible reason why trade secrets were included in section 43 is that the suppliers of such information may utilize the reverse-freedom of information provision.[54] The law on breach of confidence will be discussed below.[55] No case has been

[54] This provision is discussed below.

[55] See especially references to: *Ansell Rubber Co. Pty Ltd* v. *Allied Rubber Industries Pty Ltd* [1967] V.R. 37., & *Mense* v. *Milenkovic* [1973] V.R. 784.

brought before the A.A.T. bringing this particular paragraph directly into issue. The only point of interest is that counsel in the *Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal (No.2)*[56] stated that there was no notion of public interest in this paragraph or in paragraph (1)(b). This submission was neither denied nor affirmed by the A.A.T.

2. Other Commercial Information of Value: Section 43(1)(b)

To date this provision has not been considered in any detail by the A.A.T. It was obvious that it is intended to cover information that falls outside the ambit of section 43(1)(a), but is still of some commercial value to the person or organisation to which it relates. Some problems arise with interpretation. First, the commercial value of the information need only be reasonably expected to be diminished for access to be denied. This gives section 43 the potential to be a very broad and encompassing exemption. The definition in the *Shorter Oxford Dictionary* of "diminish" reads as follows:

> "1. To make (or cause to appear) smaller; to lessen; to reduce in magnitude or degree. 2. To lessen in estimation, or power; to put down, degrade; to belittle."

It is not unlikely that this definition will be adopted by the A.A.T. as it has frequently used the *Shorter Oxford Dictionary*[57] to derive the meaning of terms. This could mean that the slightest variance in the value of the information would result in refusal of access. Whether the A.A.T. will place constraints on this definition, and consequently the operation of the section, remains to be seen.

The same applies to paragraph (1)(a) as to this paragraph in relation to prior disclosure of the information. If the information has become widely known then no protection would be afforded by this provision because the agency could not show that the commercial value of the information would be diminished. However, limited disclosure of the information prior to the application does not prevent the exemption from being relied upon.[58] There may be one problem with this interpretation. If the applicant already knew the information then no diminution could be shown in relation to the applicant. Generally, the A.A.T. has treated disclosure to the applicant as disclosure to the world at large, and thus the requisite diminution may be inferred. Therefore, an anomalous situation may exist where access could be denied to an applicant of information that he or she already knew. (Of course, the applicant would not know that he or she already knew the information because the contents of the document would not have been disclosed to him or her).

It is not clear whether the provision will protect 'unlawful' information. Bayne has suggested that, in contrasting the provision with section 43(1)(c),

[56] (1985) 7 A.L.D. 584, 591.

[57] For example see: *Re Corkin and Department of Immigration and Ethnic Affairs* (1984) 6 A.L.N. 225.

[58] Attorney-General's Department "Memorandum No. 43" *Guidelines to the Freedom of Information Act* (Australian Government Printing Service, 1982) p.366.

it will be protected.[59] This is a possible interpretation, however, given that the section as a whole was enacted to incorporate the public's right to ensure that business was properly regulated, there seem to be strong policy reasons against such an interpretation. Another issue is the public interest in disclosure. Given the perpetuating doubt concerning the relevance of this factor to confidential information in s.45 or business related affairs in section 43(1)(c), it is not possible to predict with any certainty whether the public interest will be considered relevant in relation to section 43(1)(b).

One case in which section 43(1)(b) has been relied upon to disallow access was *Re Timmins and National Media Liaison Service*.[60] The applicant had requested access to reports held by the respondent that listed requests made by members of the public for news releases, speeches and so on. It was submitted by the respondent that, if disclosed, the commercial value of the information "would be, or could reasonably be expected to be, destroyed or diminished".[61] The applicant did not submit any evidence to refute this proposition. Consequently, the respondent argued that the absence of evidence contrary to its submission prevented the A.A.T. from coming to a conclusion consistent with the cause of the applicant.[62] In rejecting this argument, the A.A.T. stated that this was not the case for it to be assuming knowledge of certain facts, but discussed the issue no further. The A.A.T. also rejected the submission of the respondent without giving any indication as to how the provision might operate.[63]

3. Business Related Affairs: Section 43(1)(c)

Paragraph (c) applies to information not included in paras.(a) or (b) and those two provisions must be inapplicable before para.(c) can come into operation. Some direction as to the meaning of the term "business, commercial or financial affairs" has been given in *Re Cockcroft and Attorney-General's Department*.[64] The conclusions provided in this decision as to the meaning of the above term may also be instructive as to the correct interpretation of "business or professional affairs". The applicant had been denied access to information relating to himself. The information had been supplied to the New South Wales Committee on Discrimination in Employment and Occupation by Australian Iron and Steel Pty Ltd who had refused to employ the applicant. It was stated that the phrase was "intended to embody the totality of money-making affairs of an organisation or undertaking as distinct

[59] P.J. Bayne *Freedom of Information. An Analysis of the Freedom of Information Act 1982 (Cth.) And a Synopsis of the Freedom of Information Act 1982 (Vic.)* (1st ed., 1984) p.197.

[60] (1986) 9 A.L.N. 196.

[61] s.43(1)(b) *Freedom of Information Act* 1982 (Cth.).

[62] *Collector of Customs, Tasmania* v. *Flinders Island Community Association* (1985) 60 A.L.R. 717 was submitted to support this. (This information is not contained in the notes but was obtained from the unreported decision, 30 January 1986).

[63] *Timmins'* case, above, p.197.

[64] (1985) 12 A.L.D. 462. Although the decision of the majority was overturned by the Federal Court, conclusions as to the interpretation of this phrase were not criticised by the Federal Court.

from its private or internal affairs".[65] In explaining that "business" can be given a "robust meaning" the A.A.T. quoted from a passage in *Smith* v. *Anderson*[66] where Jessel M.R. said, "Anything which occupies the time and attention and labour of a man, for the purpose of profit ... is business".[67] Clearly, both phrases are intended to have a very broad application, however, it has been held that a business name alone did not fall within this phrase.[68]

The meaning of "business and professional affairs" was looked at by Beaumont J. in *Young* v. *Wicks*[69]. In this case information was sought which included information relating to a Miss Beryl Young in her capacity as a pilot. Young flew for the Ministerial Air Unit of the Queensland Government. It was held that information concerning investigations, inquiries or charges against Young did not involve her business or professional affairs. Beaumont J. stated that the information did not relate to her business affairs because Young was performing her duties pursuant to a government contract; she was not conducting any business of her own.[70] His Honour made use of a number of references in determining the scope of professional affairs.[71] He said that the ordinary meaning was associated with theology, law and medicine, but he observed that whether a particular vocation was a profession or not was subject to changing views within the community. However, as the applicant had failed to provide any evidence in support, his Honour was not willing to expand the traditional notion of professional affairs to include pilots' affairs.[72]

4. Unreasonably Adverse Effect in Respect of Business Related Affairs: Section 43(1)(c)(i)

This sub-section protects information which may or may not have an intrinsic commercial value but if disclosed may result in the person to whom it relates suffering some form of disadvantage.[73] The provision specifically states that protection will only be afforded to "lawful" activities, but does not state whether this is restricted to criminal unlawfulness or also includes civil unlawfulness. Bayne has indicated that if the first part of sub-section 43(1)(c)(i) is compared with the second part the language used implies that the commercial and financial affairs of a person, as opposed to an organisation or undertaking, are not to be considered under this provision.[74] This is not logical and the A.A.T. may be inclined to give "business or profes-

[65] id. 19.
[66] (1880) 15 Ch.D. 247.
[67] id. 258.
[68] *Re Ralkon Agricultural Co. Pty Ltd and Aboriginal Development Commission* (unreported, 20 June 1986, A.A.T.).
[69] (1986) 13 F.C.R. 85.
[70] id. 90.
[71] His Honour referred to the *Macquarie Dictionary*, *Bradfield* v. *Commissioner of Taxation (Cth.)* (1924) 34 C.L.R. 1, *Re Social and Community Welfare Services (State) Award* (1984) 8 I.R. 364 and Boreham, Pemberton & Wilson *The Professions in Australia* (1976)
[72] *Young's* case, above, p.90.
[73] *Guidelines* op. cit. 366.
[74] Bayne op. cit. 200.

sional affairs" a broad interpretation to overcome what appears to be a drafting error. On the other hand, the use of "person" in a statute is generally understood, unless stated otherwise, to include a company and therefore a company performing professional services would presumably be protected by the section.[75]

In the *Actors' Equity* case the applicant sought access to documents containing information supplied to the Australian Broadcasting Tribunal by fourteen commercial television licensees. These documents were denied on the basis that sub-section 43(1)(c)(i) was applicable. The information clearly would have disclosed business related affairs of the commercial television licensees. What the A.A.T. had to decide was whether it could be seen as an effect that could reasonably be expected to be an unreasonable effect on the licensees' lawful business related affairs. According to the A.A.T. three questions logically flowed from sub-section 43(1)(c)(i):

(i) Would disclosure affect the licensees adversely in respect of such affairs?
(ii) Alternatively, could disclosure reasonably be expected to affect the licensees adversely in respect of such affairs?
(iii) If yes to (i) or (ii) above, would such an effect be unreasonable?[76]

The A.A.T. stated that an adverse effect that was only of a minor magnitude or that revealed unlawful or improper conduct would not be an unreasonably adverse effect. It was argued that the adverse effect could be categorised into two "impact" groups and the A.A.T. was amenable to this approach. The first group contained a list of areas in the day-to-day running of the business that would be affected by the disclosure, which included advertising revenue and rights to telecast productions and films. The second group comprised more broad considerations of overall profitability of a licensee, such as share prices and vulnerability to takeovers. It was stated that there would be an eventual connection between the factors in the first group and those in the second group. Also the second group was relevant in itself as it fell within the language of sub-section 43(1)(c)(i) which refers to "business, commercial or financial affairs" of an organisation or undertaking. As the A.A.T. held that the first group were unreasonably and adversely affected it did not consider the impact on the second group.[77]

The first conclusion the A.A.T. made is no doubt relevant to the entire section. It stated that the information had to be considered in light of all other information that was already available to the applicant. Further, the A.A.T. was not restricted to considering each document individually. The documents could be looked at as a whole to see if the section was applicable.[78] In relation to sub-section 43(1)(c)(i), it was proper to make assertions based on opinion (but not supported by evidence) when contesting whether

[75] *Acts Interpretation Act* 1901 (Cth.) sub-section 22(a): "Person" and "party" shall include a body politic or corporate as well as an individual.
[76] *Actors' Equity* case, above, p.587.
[77] id. 588.
[78] id. 589.

an adverse effect existed or whether such an effect was unreasonable. This was so as long as that opinon was not "fanciful, imaginary or contrived, but rather is reasonable".[79]

The public interest factor was closely scrutinised in relation to sub-section 43(1)(c)(i). The A.A.T. held that the word "unreasonably" necessarily connotated that a degree of public interest was to be incorporated into the section. This conclusion was qualified by the finding that this public interest factor differed from the public interest in an individual's "need to know" as applied in *Re Burns and Australian National University (No. 1)*[80] and from the public interest as it was discussed in relation to section 41 in *Re Chandra and Department of Immigration and Ethnic Affairs*.[81] Public interest under sub-section 43(1)(c)(i), when balancing it against the rights of those who supply information, could only be considered in light of the benefit that disclosure would bring to the public as a whole and not to the particular person or group applying.[82]

It was pointed out that these two public interest factors need not be the only factors involved in all cases, but no indication was given as to what the additional factors might be. The A.A.T. only treated the public interest as one relevant consideration to be analysed alongside all other relevant considerations. This is a narrower approach than in *Chandra's* case where the public interest factor was a separate specification taken into account after other considerations had been taken into account, thereby giving it more weight. The reason why this modified approach to the public interest was adopted was because of the wording of sub-section 43(1)(c)(i). According to the A.A.T., the words "unreasonable disclosure" in section 41 more readily admitted the notion of the public interest than the words "reasonably expected to unreasonably affect that person adversely". It was also implied that to adopt the approach in *Burns'* case would take the decision-maker too far away from the clear purpose of the section, which was to protect business from unwarranted disclosure of commercial information.[83]

The public interest factor was qualified even further by the A.A.T. making a distinction between "truly 'government' documents" and documents that "consist simply of business information supplied to government by direction with the authority of statute".[84] The public interest factor, as enunciated above, was more appropriate to the former type of documents than the latter. These "truly 'government' documents" are those documents created by the flow of correspondence and other documents between the public administration and the business community. The public interest factor was not completely excluded from the latter type of documents as it was only said that the considerations were "somewhat different". However, there can

[79] id. 590.

[80] (1984) 6 A.L.D. 193. This principle was first articulated in *obiter dictum* of *Re Peters and Department of Prime Minister and Cabinet* (1983) 5 A.L.N. No.306.

[81] (1984) 6 A.L.N. 257.

[82] *Actors Equity* case, above, p.591.

[83] id. 591-592.

[84] id. 592.

be little doubt that the A.A.T. intended the public interest factor to be extremely limited in its operation in relation to the latter type of documents.[85]

In deciding that the disclosure would result in an unreasonably adverse effect, the A.A.T. stated that it was improper to consider any advantages the respondents may receive from disclosure. The rationale was that it was not intended that the *F.O.I. Act* would:

> "change the character of a field of commerce by intrusion into it of principles of disclosure that the Act has laid down in relation to the supply to the community of information held by government."[86]

One interesting ramification was that the concept of public interest imputed to section 3 of the *F.O.I. Act* was treated as a malleable creature. According to this decision the public interest may be treated differently in relation to every exemption. The character it adopts depends on the purpose of the exemption in question.[87]

Sub-section 43(1)(c)(i) has also allowed information in the possession of the Australian Taxation Office to be withheld. The A.A.T. has held that information, such as banking records, records of interview, investigation papers, tax evasion schemes and analogous documents, relating to the affairs of third parties were exempt. Such documents were also held to be exempt under sub-section 43(1)(c)(ii).[88]

Several cases that were decided by the A.A.T. and the Federal Court since the decision of the *Actors' Equity* case did not challenge the approach taken in that decision. Indeed, in *Re Angel and Department of Arts, Heritage and the Environment*[89] the Full Tribunal, while not relying on sub-section 43(1)(c)(i) to decide the case, endorsed the interpretation of it in the *Actors' Equity* case.

A more recent approach by the Full Tribunal appears to have thrown what had been a consistent line of cases into uncertainty. At best, the decision of *Re Maher and Attorney-General's Department (No. 2)* and *Re Maher and Department of Resources and Energy*[90] (the parties were joined) may be viewed as an extremely narrow interpretation of the *Actors' Equity* case. Both these cases were decided by the same members of the A.A.T., none of whom had sat in the earlier decisions of the *Actors' Equity* case and *Angel's* case.

In the *Maher (No. 2)* case the request was for access to documents relating to the government's approval of a settlement in litigation by a United States' company against four Australian companies. This request was denied under several exemptions including sub-section 43(1)(c)(i). The Attorney-General submitted that, as the public interest in disclosure had not been

[85] id. 592-593.
[86] id. 594.
[87] The concept of the public interest is discussed above.
[88] *Re Kingston Thoroughbred Horse Stud and Australian Taxation Office* (1986) 10 A.L.N. 38 and *Re Briggs and Australian Taxation Office (No. 1)* (unreported, 30 June 1986, A.A.T.).
[89] (1986) 9 A.L.D. 113. Of the three members sitting, only one of them, Deputy President R.K. Todd, was also sitting in the *Actors' Equity* case.
[90] (1986) 13 A.L.D. 98.

mentioned in this provision, but was expressly included in sections 36, 39, 40 and 44 of the *F.O.I. Act*, the correct interpretation of the section did not include the weighing up of the public interests. To overcome earlier decisions stating that the object of the *F.O.I. Act* set out in section 3 required such a balancing process, counsel submitted that this process had already been performed by parliament. This was done when it enacted the exemptions and the language chosen incorporated the proper weight to be given to the public interest. The fact the public interest was not included in section 43 meant that parliament had decided it was not to be considered.[91] In upholding the refusal the A.A.T. agreed with these submissions and stated that the public interest was not a factor to be considered in this case, nor would it normally need to be considered.

The A.A.T. purported to follow three Federal Court decisions on other provisions of the *F.O.I. Act*. The first of these was *News Corporation Ltd* v. *National Companies and Securities Commission*[92] from which the following was quoted:

> "The rights of access and the exemptions are designed to give a correct balance of the competing public interests involved. Each is to be interpreted according to the words used, bearing in mind the stated object of the Act".[93]

The A.A.T. also observed that this decision rejected the notion that section 3 required that the provisions allowing access should be interpreted broadly. The second case referred to was *Waterford* v. *The Department of Treasury (No. 2)*[94] which dealt with the scope of the legal professional privilege exemption. In the course of their judgment, their Honours remarked that the plain language of section 42 should not be read down and that no other provisions in the *F.O.I. Act* operated to limit the exemption. The A.A.T. also referred to a decision of the Full Federal Court in *Department of Health and McKay* v. *Jephcott*.[95] The following passage was quoted:

> "However, there seems to me with all due respect to the Tribunal to be no warrant in the Act or elsewhere for engaging in the exercise of balancing one public interest against another and concluding that 'substantial risk' must be shown before the identity of the confidential source whether actual or hypothetical is entitled to protection. Section 37(1) makes no reference to public interest or competing public interests as do some of the other sections of the Act . . ."[96]

The A.A.T. then concluded that section 43[97] "should not be *broadened* to include an overriding public interest"[98] (emphasis added). It was also stated that the interpretation of section 3 in *Re Chandra and Department*

[91] *Maher (No. 2)* case, above, see unreported decision pp.20-21.
[92] (1984) 52 A.L.R. 277.
[93] *Maher (No. 2)* case, above, pp.103-104 citing Bowen CJ. and Fisher J. at p.279.
[94] (1984) 5 A.L.D. 588.
[95] (1985) 9 A.L.D. 35.
[96] *Maher (No. 2)* case, above, citing Forster J. at p.39.
[97] The A.A.T. also made the same conclusion in relation to s.45, which is discussed below.
[98] *Maher (No. 2)* case, above, p.104.

of Immigration and Ethnic Affairs[99] was inconsistent with the Full Court's interpretation. Finally, the A.A.T. claimed that, in purporting to follow *Chandra's* case, the decision in the *Actors' Equity* case extended the interpretation of unreasonable so as to diverge from the approach of the Federal Court.[100] However, it was acknowledged that in some circumstances the public interest may be a relevant consideration. Examples of documents containing criminal conduct or hazardous work practices were given. In these instances the word "unreasonable" would encompass such public interests but, it was stated, use of the word "unreasonable" did not require the public interest to always be considered. The A.A.T. concluded by saying:

> "This Tribunal does not consider that by the use of the words 'reasonably' or 'unreasonably' or by virtue of s.3 of the Act that a Tribunal is necessarily required to take into account public interest in the application of s.43 of the Act. However, the use of the words 'reasonably' and 'unreasonably' in s.43 may, in certain cases, include public interest as being a relevant consideration."[101]

It is submitted that this approach not only appears undesirable but is also, as a matter of logic, unsound. First, in analysing the decisions that have been relied upon to come to this conclusion, it is submitted that the Federal Court has not imposed such a restrictive interpretation from the passages quoted. The crux of the quotation from the *News Corporation* case is that a section must be interpreted according to the words used and the stated object of the Act. Sub-section 43(1)(c)(i) contains the words "reasonably" and "unreasonably" and there is no apparent reason why such language should not incorporate the public interest. Such an interpretation would be within the meaning of the "plain language" and would not artificially restrict the operation of the exemption. Indeed, to ignore the public interest would be to artificially broaden the operation of the exemption. This conclusion is made in light of the evidence put before the Senate Standing Committee, which was discussed in Part 1.[102] The passage taken from *Jephcott's* case may detract from this conclusion. The comments made about the public interest in relation to section 37 are germane as the section uses the phrase "would, or could reasonably be expected to". However, as pointed out below, if it is accepted that "reasonably" may include the notion of public interest, then the public interest must be considered in every instance.

Secondly, claiming that the *Actors' Equity* case extended the approach in *Chandra's* case is incorrect. The A.A.T. in the *Actors' Equity* case took a far narrower view of the notion of public interest, stating that such a restriction was necessitated by the wording of the provision. Finally, the proposition that the public interest would only be relevant in certain circumstances is illogical. A decision-maker cannot decide that the public interest is not

[99] This decision stated that s.3 required the exemptions to be read in favour of disclosing information.
[100] *Maher (No. 2)* case, above, p.104.
[101] id. 105.
[102] ibid.

a consideration to be taken into account without first considering it.[103] If the public interest may be considered under section 43 at all, then it must be taken into account in every case — otherwise the decision-maker would not know whether he or she was dealing with a case that warranted the public interest to be weighed against any competing interests. Furthermore, applicants to the A.A.T. would have no indication under this approach whether to include the public interest in disclosure in their submission. The decision in the *Maher (No. 2)* case stated that the public interest would only be considered where it was strong. In essence, this is really no different from saying the public interest will be considered in all cases and where it possesses considerable weight it may operate to make an adverse effect reasonable.

5. The Future Supply of Business Related Affairs: Section 43(1)(c)(ii)

Sub-paragraph (ii) allows denial of business related affairs if it could result in any cessation to the supply of information to the government for the purpose of the administration of the law in the future. It is a broad exemption and was included to ensure that the *F.O.I. Act* did not result in the drying up of information supplied to the government that is not compulsorily acquired.

F.O.I. Memorandum No. 43 explained that the prejudice of future information cannot be fanciful. It must be a real and reasonable expectation. A supplier of information merely asserting that such material would not be supplied in the future would be insufficient, unless there was a real likelihood that the supplier could cease to provide the information.[104] In *Re Angel and Department of Arts, Heritage and Environment*[105] the A.A.T. made four observations. First, information which was communicated in confidence or whose disclosure would result in a breach of confidence would prejudice the future supply of information. Secondly, there was no concept of public interest to be incorporated into this provision because of the absence of the word "reasonably". Thirdly, the source which was prejudiced need not be the same as the source of information of the documents in question and fourthly, the stage at which the information had been prejudiced was immaterial.[106]

The Full Tribunal in *Re Cockcroft and Attorney-General's Department*[107], the facts of which are set out above, attempted to decide the scope of sub-para.(ii) more fully. In relation to the meaning of the provision, it was held that, first, "information" with the exemption was not restricted to information of commercial value but could include any recitation of facts. So even though the information in question must be of a commercial nature, the threat to future information can be any type of information. Secondly, the phrase

[103] This argument is substantiated by the fact that in the *Maher (No. 2)*case, above, p.31 the A.A.T. said it did not consider that there were any public interest grounds which would suggest the adverse affect would not be unreasonable.
[104] Guidelines op. cit. 367.
[105] ibid.
[106] id. 21.
[107] ibid.

"business, commercial or financial affairs" encompassed all the money-making affairs of an organisation. Thirdly, the A.A.T. was not restricted to considerations about the particular agency in question but rather the exemption was capable of protecting the future supply of information to one particular agency, a group of agencies, or the Commonwealth as a whole. Fourthly, for the purposes of the section no distinction should be made between information volunteered and information compulsorily acquired. Finally, by a majority of two to one, it decided that the phrase "could reasonably be expected to prejudice the future supply of information" meant that the prejudice to the future supply of information had to be, from an objective viewpoint, more probable than not. The A.A.T. concluded that, as Australian Iron and Steel Pty Ltd (A.I.&S.) had continued to supply information, even though it was aware that the proceedings were imminent, it indicated that the future supply of information could not reasonably be expected to be prejudiced.

The decision was successfully challenged before the Full Court of the Federal Court.[108] In a joint judgment, Bowen CJ. and Beaumont J. decided the A.A.T. had erred in its interpretation of the provision and the weight to be attributed to the fact that A.I.&S. continued supplying information up to the hearing date. Their Honours stated that the words should be given their ordinary meaning, which required the decision-maker to decide whether it was:

> "reasonable as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act."[109]

Further, it was:

> "undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s.43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability [was] ... to place an unwarranted gloss upon the relatively plain words of the Act."[110]

They also directed that the A.A.T. was incorrect in assuming it followed that the future supply of information could not reasonably be expected to be prejudiced simply because A.I.&S. had continued to supply information. As A.I.&S. had been assured the information would be treated in confidence by the agency it was entitled to maintain its reliance on this despite other occurrences.[111]

Sheppard J. allowed the appeal on the ground that the A.A.T. was erroneous in its construction of the phrase in question. His Honour indicated that this was the only question of law open to judicial review. Although he basically came to the same conclusion, he was far more wary about giving

[108] *Attorney-General's Department* v. *Cockcroft* (1986) 64 A.L.R. 97.
[109] id. 106.
[110] ibid.
[111] id. 107.

the exemption a broad construction thereby potentially stifling the object of the *F.O.I. Act*. Sheppard J. relied upon the construction given by Lord Greene M.R. of the words "might have been expected" in *Crown Bedding Co. Ltd* v. *Inland Revenue Commissioners*[112] in arriving at his conclusion of the meaning of the word "expected". In his deliberations Lord Greene M.R. made the following observation:

> "The question of probability or possibility is a matter really which can be considered as resembling a scale. At the top of the scale is certainty. At the bottom of the scale is improbability so extreme that no sensible person would ever take it into account. But, subject to that, the precise point on the scale at which you can say that a thing is probable rather than possible and the precise point at which you can say that probability falls to the level of a mere possibility depends on the view taken by a hypothetical observer. It seems to me quite impossible to put on the word 'expected' the sense that a hypothetical observer must have had that degree of confidence in the future as to expect that the benefit would materialise."[113]

On this premise Sheppard J. rejected the approach of the A.A.T. (and the approach by Woodward J. in *News Corporation Ltd* v. *National Companies and Securities Commission*[114] of expected meaning "an even chance of it happening"). However, his Honour stated that imported in the provision were "some aspects of the concept of probability or likelihood, but short of a preponderance of probabilities".[115] That is the decision-maker must act reasonably in determining whether there are "real and substantial grounds for thinking that the production of the document could prejudice that supply".[116]

The court ordered that the matter should be remitted back to the A.A.T. for further evidence to be heard in light of these rulings. It is submitted that the approach of the Federal Court is to be preferred to that adopted by the majority of the A.A.T. In this case the body had no power to compel A.I.&S. to supply the information and had received it on the express undertaking that it would be held in confidence. It was clear from the evidence that A.I.&S. had relied on this undertaking and therefore the provision should have operated to protect the future supply of such information. The trepidation in the judgment of Sheppard J. concerning the meaning of "expected" being given an interpretation that is too wide is to be commended. If a liberal reading of the joint judgment of Bowen CJ. and Beaumont J. was taken the scope of the exemption could be too wide. This could prevent the facilitation and promotion of the disclosure of information, which is contrary to the object of the *F.O.I. Act*.

In *Re Ralkon Agricultural Co. Pty Ltd and Aboriginal Development Commission*[117] sub-section 43(1)(c)(ii) was relied upon to deny access to cat-

[112] [1946] 1 All E.R. 452.
[113] id. 456-457.
[114] (1984) 52 A.L.R. 277.
[115] *Cockcroft's* case, above, p.111.
[116] id. 112.
[117] (1986) 10 A.L.D. 380.

tle survey documents after the applicant had requested certain information contained in letters held by the Commission. The A.A.T. stated that before the issue of the future supply of information was looked at, it must be satisfied that the information in question was of a business nature. Although the name of a business organisation alone was not of such a nature, the documents also would reveal the method by which the survey was conducted and therefore they did come within the first part of the provision.[118] Nevertheless, the A.A.T. decided that the future supply of information was not prejudiced because surveyors were in the business of making surveys for profit and disclosure of the reports would not be likely to halt surveyors providing similar information. Furthermore, whether they liked it or not, professionals were expected to be "proficient and competent" and should be prepared to stand by their work.[119]

There has yet to be a case that has discussed the meaning of "for the purpose of the administration of the law". However, it is difficult to envisage such a broad term presenting many problems for agencies wishing to withhold information. The future supply of information is also discussed below in relation to information provided in confidence. As will be seen from this discussion there may be a distinct advantage, where possible, in preventing disclosure under sub-section 43(1)(c)(ii) as no factor other than the prejudice to the supply of information need be taken into account.

6. Business Related Affairs of the Applicant or an Undertaking of an Agency: Section 43(2) and 43(3)

Sub-section 43(2) allows those seeking access to information relating to themselves to be outside the ambit of the section.[120] This is an important exception because misinformation held by the government could result in a person or organisation foregoing subsidies, grants or other benefits. It may also lead to unwarranted discrimination when government contracts are being negotiated.

Sub-section (3) was provided to ensure that the meaning of undertakings in sub-section (1) included business related undertakings of agencies. For some government bodies this was unnecessary because they were already exempt from the *F.O.I. Act*.[121] The basis for their exemption was that these agencies engage in commercial activities themselves and to have made them subject to the *F.O.I. Act* would have placed them at a disadvantage in relation to their competitors.[122]

[118] id. 41.
[119] id. 42-43.
[120] Sub-section 41(2) is a similar provision relating to personal affairs.
[121] Section 7 provides that some government authorities have been exempted from the Act because they have for their purpose, or one of their purposes, the carrying on of "competitive commercial activities". Bodies included in Part I of Schedule 2 are completely exempt from the Act; bodies in Part II of Schedule 2 can only be excluded from the operation of the Act in respect of the particular type of documents listed.
[122] L.J. Curtis "F.O.I.: The Australian Approach" (1980) 54 A.L.J. 525, 529.

The exact scope of sub-section (3) has been thrown into doubt by the decision of Beaumont J. in *Harris* v.*Australian Broadcasting Corporation.*[123] In this case an officer wanted to prevent access to documents that the Chairman of the Australian Broadcasting Corporation had decided would be disclosed. One of the grounds the officer relied upon was section 43. She claimed she would be adversely affected in her professional affairs or, alternatively, that the Corporation would be adversely affected in its business or professional affairs. Having stated that the officer would not be affected unreasonably by the disclosure, Beaumont J. went on to say that section 43 was not available to a person within an agency that had engaged in what could be considered an undertaking, nor to the agency itself.[124] This is undeniably in direct conflict with the language of the section as a whole. His Honour based this conclusion on paragraph (3)(1)(b) in conjunction with what was enunciated in the *Explanatory Memorandum.* With due respect, section 15AA of the *Acts Interpretation Act* 1901 (Cth.) should not be interpreted so as to undermine the express words of a provision.[125] The interpretation given by Beaumont J. would appear to make sub-section (3) meaningless and therefore seems unlikely to be followed.

7. Reverse-Freedom of Information: Section 27

The appeal procedures for section 43 are peculiar to requests that may invoke this section. Section 27 provides this procedure and reads as follows:

"Procedure on request in respect of document relating to business affairs &c.
27.(1) Where—

(a) a request is received by an agency or Minister in respect of a document containing information concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking; and

(b) it appears to the officer or Minister dealing with the request, or to a person reviewing under section 54 a decision refusing a request, that the person or organisation, or the proprietor of the undertaking, referred to in paragraph (a) might reasonably wish to contend that the document is an exempt document under section 43,

a decision to grant access under this Act to the document, so far as it contains the information referred to in paragraph (a), shall not be made

[123] (1983) 5 A.L.D. 545.

[124] id. 557.

[125] Section 15AA of the *Acts Interpretation Act* 1901 (Cth.) reads as follows:

In the interpretation of an Act a construction that would promote the purpose or object underlying the Act shall be preferred.

In *Cooper Brookes (Wollongong) Pty Ltd* v. *Federal Commissioner of Taxation* (1981) 11 A.T.R. 949 Gibbs J., as he then was, stated in reference to this provision:

"If the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary grammatical meaning, even if it leads to a result that may seem inconvenient or unjust".

In other words, s.15AA may only come into consideration where a provision is ambiguous or meaningless. Sub-section 43(3) is neither of these.

unless, where it is reasonably practical to do so having regard to all the circumstances, including the application of section 19 –

(c) the agency or Minister has given to that person or organisation or the proprietor of that undertaking a reasonable opportunity of making submissions in support of a contention that the document is an exempt document under section 43; and

(d) the person making the decision has had regard to any submissions so made.

(2) Where, after any submissions have been made in accordance with sub-section (1), a decision is made that the document, so far as it contains the information referred to in paragraph (1)(a), is not an exempt document under section 43 –

(a) the agency or Minister shall cause notice in writing of the decision to be given to the person who made the submissions, as well as to the person who made the request; and

(b) access shall not be given to the document, so far as it contains the information referred to in paragraph (1)(a), unless
 (i) the time for an application to the Tribunal by that person in accordance with section 59 has expired and such an application has not been made; or
 (ii) such an application has been made and the Tribunal has confirmed the decision."

There are a variety of conceivable reasons (none are given in the *Explanatory Memorandum*) as to why this procedure was adopted only for section 43. It is possible that the affairs of a business nature were considered to be more important than those of any other nature, or that intense lobbying by business representatives provided the motive, but there are also more practical reasons for the distinction. First, the administrative task of contacting an organisation or undertaking or a person in business would, generally, be easier than contacting an individual whose personal affairs were being sought. Secondly, it would often be less difficult to determine whether an individual's privacy would be infringed than it would be to know whether section 43 should be invoked.

The duty to consult is not an absolute one. The extent to which this procedure needs to be adopted by agencies will depend on the meaning given to "where it is reasonably practical to do so having regard to all the circumstances". To date the A.A.T. has not given a ruling on the operation of this wording. The phrase would appear to encompass most applications as an agency with information concerning business related affairs of a person or an organisation would normally have little difficulty in contacting them. In relation to reasonable practicability, *F.O.I. Memorandum No. 43* stated that time considerations would not be a factor if the agency had allowed time to run without acting on the request.[126] Unless the documents involved were extremely complex, thereby requiring the agency to consider section 19, or

[126] Guidelines op. cit. 370. Section 19 provides that the agency shall reply to the applicant within 60 days from the date on which a proper application was received.

the details surrounding the whereabouts of the person or organisation were most unusual, it is difficult to envisage a situation where this procedure could be by-passed.

The agency need not make contact even where it would be practicable unless it believed that the person or organisation which was the subject of the information "might reasonably wish to contend that the document is an exempt document under s.43". If the document obviously could not come within any of the provisions of the exemption then there would be no need to make contact. As a matter of administration, if any doubt existed, then the opportunity for the person or organisation to make submissions should be given.[127] This would avoid the consequences of the agency making an error in judgment and would maintain goodwill between the agency and the suppliers of information. Also there is no harm in taking such a precaution as the submissions received are not binding on the agency, although regard must be had to them. What is a "reasonable opportunity of making submissions" would depend on the facts and factors like the number and complexity of the documents involved.

Sub-section (2) ensures that, if a person or organisation has made submissions to an agency and a decision adverse to their submissions has resulted, they would be made aware of the decision. The sub-section prevents the information from being disclosed until the time for that person or organisation to appeal under s.59 has expired and no application for an appeal has been made. Where such an application to appeal is made, paragraph 59(2)(b) requires the agency to inform the original applicant that the agency's decision is subject to an appeal.[128] If, on the other hand, access has been denied and the applicant has decided to appeal to the A.A.T. then sub-section 59(3) provides that the agency must notify the person or organisation of this development.[129] Section 26 does not make it necessary to give reasons in this situation, however they may be acquired under section 28 of the *Administrative Appeals Act* 1975 (Cth.). If access was denied and no appeal was lodged there would be no obligation on the agency to inform the person or organisation of its decision. This, of course, does not prevent the agency contacting the person or organisation concerned and allowing disclosure if consent is forthcoming.[130]

The application of the reverse-freedom of information provision was discussed in *Re Mitsubishi Motors and Secretary to the Department of Transport*.[131] In this case the agency gave notice to Mitsubishi that information

[127] ibid.

[128] Section 59 does not give the applicant the right of automatically becoming a party to the ensuing proceedings, but he or she may do so by way of s.30 of the *Administrative Appeals Act* 1975 (Cth.).

[129] The person or organisation, like the applicant in the preceding situation, could apply to the A.A.T. to become a party to the proceedings by way of s.30 of the *Administrative Appeals Act* 1975 (Cth.).

[130] However, if the person who disclosed the information is not within the protection provided by ss.91 or 92, then he or she may be liable in civil or ciminal proceedings, depending on the circumstances.

[131] (1986) 9 A.L.D. 281.

relating to their "business, commercial or financial affairs" was sought under the *F.O.I. Act*. After receiving a submission from Mitsubishi the agency decided the information was not exempt from disclosure under section 43. In accordance with sub-section 27(2), the agency notified Mitsubishi, who appealed to the A.A.T. Instead of challenging the decision solely on the ground that the information was exempt under section 43, Mitsubishi claimed that the A.A.T. should hear the matter in relation to other exemptions that they considered were applicable.[132] It was argued that the language of sections 58 and 59 was inconsistent with limiting the right of appeal to considerations involving section 43 and that once the A.A.T. had jurisdiction it had a duty to hear all possible grounds of appeal. Furthermore, even if the appeal on the ground of section 43 failed, the A.A.T. had jurisdiction to deny the information by means of another exemption because of "pendant jurisdiction" which applied to the Federal Courts exercising federal jurisdiction.[133] In rejecting these arguments, the A.A.T. made reference to the statements made by Senator Durack to the Senate[134] and observed that section 27 was implemented to provide mandatory consultation only in relation to business related affairs as no other exemption referred to section 27.

In relation to section 59, the A.A.T. stated the provision was unique for the following reasons. First, it provided for a person other than the applicant of the information to appeal; secondly, review was available where the document was not exempt; and thirdly, it expressly limited the right to appeal to a decision made pursuant to section 43. It was noted that if the interpretation of the section that Mitsubishi advocated was given then a person appealing could challenge decisions made by an agency in relation to other decisions made pursuant to other exemptions. The A.A.T. concluded that this was clearly not intended by parliament and therefore the suggested interpretation was disregarded.[135]

The unsuccessful applicant appealed to the Full Court of the Federal Court.[136] The Court confirmed that objections to disclosure under this procedure are limited to submissions based on section 43. This decision is clearly consistent with the wording of sections 27, 43 and 59. Nevertheless, it could lead to the absurd situation where the A.A.T. decides that disclosure would be unreasonable but, because the information relates to personal affairs, rather than business related affairs, disclosure must be made despite the information falling within section 41.

8. Conclusion

There is a need for more cases to be heard pursuant to section 43 before the exact role of the exemption can be known. It appears from the decisions

[132] Mitsubishi wanted to argue that the information was also exempt under ss.37, 45 and 46 of the *F.O.I. Act*.

[133] id. 6. For a discussion on "pendant jurisdiction" of the Federal Courts exercising federal jurisdiction see: *Fencott* v. *Muller* (1983) 46 A.L.R. 41.

[134] Hansard op. cit. 810-811.

[135] *Mitsubishi's* case, above, pp.9-10.

[136] *Mitsubishi Motors Australia Ltd* v. *Department of Transport* (1986) 12 F.C.R. 156.

already given that there is little chance of unwarranted disclosure of business related information. The A.A.T. and the Federal Court have ensured that the provision will act to prevent distortion of the business environment. As this was the original intention of parliament it appears unlikely that this approach will change substantially in the future. It is unclear whether the section should involve the process of balancing the relevant public interests. It is submitted that such a process should be adopted in the interest of allowing the *F.O.I. Act* to facilitate and promote the disclosure of as much information as is reasonably possible.

C. CONFIDENTIAL INFORMATION

When the *F.O.I. Act* was enacted it contained an exemption to protect information given in confidence to agencies. The section read:

> "Documents containing material obtained in confidence. 45. A document is an exempt document if its disclosure under this Act would constitute a breach of confidence."

The lack of specificity left the determination of the ambit of the exemption to the A.A.T. and the appellate courts. The law relating to the duty of confidence was something the courts had continually developed and modified. It may have been intended that the section was to develop and change as the law changed; which could provide the reason for the absence of the definition of the term "breach of confidence".

1. The Equitable Doctrine of Duty of Confidence

The A.A.T. has conclusively decided that section 45 is not limited to the situation where the applicant has an action in equity for breach of the duty of confidence.[137] However, the doctrine must be understood to make sense of the section.[138]

Deputy President Hall in *Re Brennan and Law Society of the Australian Capital Territory (No. 2)*[139] adverted to the fact that the case law regarding breach of confidence should function as an assistance to interpreting section 45. Mr Hall stated that not only could these cases assist in identifying the essential elements of this area, but they may act as a guide by showing when it was necessary to afford protection.[140]

[137] *Witheford's* case, below. A recent dissenting judgment of Gummow J. in *Corrs Pavey Whiting and Byrne* v. *Collector of Customs* (1987) 74 A.L.R. 428 may have thrown some doubt on what appeared to be an established point. This case is discussed below.

[138] This is not intended to be a complete discussion of the doctrine of duty of confidence but merely an outline of the factors involved for the purpose of introducing the operation of s.45. A comprehensive discussion of the doctrine may be found in the following:
P. Finn *Fiduciary Obligations* (1st ed., 1977) Chapter 19.
R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane *Equity: Doctrines and Remedies* (2nd ed., 1984) Part VIII, Chapter 41.
S. Ricketson *Law of Intellectual Property* (1st ed., 1984) Part V, Chapters 42-45.

[139] (1985) 8 A.L.D. 10.

[140] id. 20.

In *Coco* v. *A.N. Clark (Engineers) Ltd*[141] Megarry J. provided three criteria, that must be satisfied before a breach of confidence can be made out. These are:

(i) the information has to have the necessary quality of confidence about it;
(ii) it must have been imparted in circumstances importing an obligation of confidence;
(iii) there must be an unauthorised use.[142]

Despite the fact that Megarry J. did not consider that detriment was an essential element in all cases, Mason J. in *Commonwealth* v. *John Fairfax & Sons Ltd*[143] seems to have assumed it was important. It is likely, therefore, that in Australia the plaintiff needs to show that he or she has suffered loss, a loss that need not be pecuniary, but a tangible loss nonetheless. Mason J. also decided that in cases where the information is held by the government the court "will look at the matter through different spectacles".[144] His Honour stated that if the reason the information was withheld was that it may have left the government open to criticism then it would not be protected. He also said that if disclosure was not likely to injure the public interest then the remedy could not be relied upon.[145] It is important to note, for the purposes of section 45, that Mason J. only dealt with public interest in relation to remedies and not in deciding whether or not a duty of confidence had been established.[146]

There have been separate guidelines created for the determination of cases concerning commercial information or trade secrets. The Victorian cases *Ansell Rubber Co. Ltd* v. *Allied Rubber Industries Pty Ltd*[147] and *Mense* v. *Milenkovic*[148] both directed themselves towards the following considerations:

(i) the extent to which the information was known outside the plaintiff's business;
(ii) the extent to which the trade secret was known by persons engaged in the plaintiff's business;
(iii) measures taken by the plaintiff to guard the secrecy of the information;
(iv) the value of the information to the plaintiff and his competitors;
(v) the effort and money spent by the plaintiff in developing the information; and
(vi) the ease or difficulty with which others might acquire or duplicate the secret.[149]

The doctrine of the duty of confidence has reached into the realm of many different areas and in this era of mass information will no doubt continue

[141] [1969] R.P.C. 41.
[142] id. 47.
[143] (1980) 147 C.L.R. 39.,
[144] id. 52.
[145] ibid.
[146] The importance of this distinction is discussed below under the heading of "The public interest".
[147] [1967] V.R. 37, 49-50.
[148] [1973] V.R. 784, 796-798.
[149] Meagher op. cit. 823. Also see *Faccenda Chickens* v. *Fowler* [1986] 1 All E.R. 617.

to do so. The law is far from settled and will probably remain so because legislative activity in the area is not recommended by the A.L.R.C. This uncertainty is greatly compensated for by the flexibility and balance that has been exhibited by the courts.[150] Most of the cases under common law and in equity have dealt with private concerns. Davies J., President of the A.A.T., has noted that the number of precedents dealing directly or indirectly with problems faced under the *F.O.I. Act* are few.[151] Thus, the A.A.T. has been left with "a dynamic role to perform in adapting these principles to the purposes of the *F.O.I. Act*."[152]

2. The Early Cases

A major issue initially was whether the section was intended to be restricted to situations where an action could be made out for breach of a duty of confidence. This area of contention was discussed in the first case that dealt with this exemption. In *Re Whitheford and Department of Foreign Affairs*[153] the applicant sought access to an in-confidence personnel file. In finding that section 45 was not applicable, the Full Tribunal asserted that the section was not restricted to the equitable doctrine and that the fact that section 91 of the *F.O.I. Act* referred to "an action for ... breach of confidence" supported this interpretation. It was said that if parliament had desired such a limited exemption then they could have very easily indicated this.[154] The A.A.T. also stated that there was no good reason why the section should be read down. Accordingly, documents that were given from one public servant to another in confidence (i.e. internal working documents) could be withheld under section 45,[155] despite the fact that section 36 dealt specifically with internal working documents.

The problem with this interpretation was recognised. It was observed that this could have led to an enormous range of inter-agency and inter-governmental communications being exempted as section 45, unlike section 36, did not have any public interest factor expressly incorporated into it.[156] This decision, however, was not totally unrestrictive. An agency could not blindly rely on the exemption but must have provided specific reasons why exemption was claimed. If the only reason was that the discloser would not have been so openly honest or frank if he or she had known that disclosure to the subject of the document was possible then the exemption could not be upheld. The A.A.T. concluded that such a situation may require it to lean in favour of disclosure so that steps can be taken under Part V of the Act to amend any information that may be "incomplete, incorrect, out of date or misleading".[157]

[150] Australian Law Reform Commission *Report No. 22* "Privacy" (Canberra, 1983) Vol. 1., pp.425-426.
[151] *Re Maher and Attorney-General's Department (No. 1)* (1985) 7 A.L.D. 731, 733.
[152] *Brennan (No. 2)* case, above, p.20; per Deputy President Hall.
[153] *Re Witheford and Department of Foreign Affairs* (1983) 5 A.L.D. 534.
[154] id. 542.
[155] ibid.
[156] P.J. Bayne *Freedom of Information. An Analysis of the Freedom of Information Act 1982 (Cth.) And a Synopsis of the Freedom of Information Act 1982 (Vic.)* (1st ed., 1984) p.208.
[157] *Witheford's* case, above, p.544.

In *Re Keay and Chief of Naval Staff, Department of Defence*[158] it was also stated that section 45 was not restricted to actions that could lie in equity for breach of confidence. In this case the applicant, who was no longer a member of the defence forces, wanted access to files prepared by senior officers of the Royal Australian Navy. These documents contained reports relating to the applicant.

The Full Tribunal found that the fact that the reports were headed "Staff-in-Confidence", that the instructions for completing the forms were similarly headed and that there were references to other confidential reports confirmed and emphasised the confidential nature of the reports.[159] The whole system, according to the A.A.T., was based on confidentiality and the system should not be overturned because the *F.O.I. Act* had been enacted. Also access could not be given to the applicant alone, as opposed to disclosure to the whole world, because the system itself would be eroded.[160]

It is submitted that this approach was a most undesirable one to adopt. The A.A.T. did not give weight to the relationship between the discloser of the information (i.e. the senior officers) and the confidant (i.e. the Navy) or whether the information itself was of a confidential nature, as is done by the courts of equity. Rather it simply looked at the system surrounding the creation of the document and found this to be sufficient to bring the document within section 45. With respect, this appears to be an unsatisfactory approach as it could lead to any information being exempted because it is shrouded within a system steeped in secrecy. The public sector could easily circumvent the intentions of parliament by creating systems of secrecy whenever they received information.

3. The 1983 and 1986 Amendments

Not all of what was decided in these two cases has become entrenched. The section was amended by Act No. 81 of 1983 illustrating the very broad interpretation given to section 45 was clearly outside the intended use of the exemption. The amendment kept the original wording, now contained in sub-section (1) of the section, and introduced a new provision which reads as follows:

> "(2): Sub-section (1) does not apply to any document to the disclosure of which paragraph 36(1) applies or would apply, but for the operation of sub-section 36(2), (5) or (6), being a document prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his duties, or by a prescribed authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State."

Generally, the effect of this amendment is to exclude section 45 where section 36, which deals with internal working documents applies.

Section 36 is a lengthy and complex provision. Under section 36 information which amounts to a confidential deliberative process communication must

[158] (1983) 5 A.L.N. No. 350.
[159] id. 352.
[160] id. 353.

be subject to considerations involving the public interest, and will not be decided conclusively on whether the information is confidential.[161] If the information has been obtained from another agency of the government, not being a State Government,[162] then the applicability of section 36 must be considered before section 45 can come into operation. The amendment will only affect decisions where the request was made after 1 January 1984, the date it came into operation.[163]

In *Re Dillon and Department of Treasury (No. 2)*[164] Deputy President Todd pointed out that sub-section 45(2) directs itself to "any document", as opposed to "information contained in" any document. In effect, the contents of the document are not in issue when deciding whether the document falls within this exception to section 45. Therefore, even if a document was paraphrasing another document containing information that was exempt from disclosure, the document itself may be an internal working document and sub-section 45(2) may apply. However, in this case it was held that the document was exempt as it was appended to another document that was exempt under sub-section 45(1). The two pieces of information were treated as a single document by reason of their attachment to one another.[165]

In *Re Bracken and the Minister of State for Education and Youth Affairs*[166] counsel argued that the amendment was a rejection of the decisions in *Witheford's* case and *Keay's* case and that they should now be considered overruled. This was refuted by Deputy President Hall, who stated that Parliament had impliedly given its approval to these cases by only changing one aspect of the decisions.[167] A recent decision of the High Court of Australia directly opposes the approach taken by Deputy President Hall. In *Flaherty* v. *Girgis*[168] Mason ACJ., Wilson and Dawson JJ. stated:

> "Mere amendment of a statute not involving any re-enactment of the words in question could seldom if ever constitute approval of an interpretation of those words . . . At most the principle affords a presumption of no great weight concerning the meaning of the words used and cannot be relied upon to perpetuate an erroneous construction."[169]

Their Honours went on to quote a passage from *R.* v. *Reynhoudt*[170] in which Dixon CJ. is reported as saying:

> "In any case the view that in modern legislation the repetition of a provision which has been dealt with by the courts means that a judicial interpretation has been legislatively approved is, I think, quite artificial."[171]

[161] *Brennan (No. 2)* case, above.
[162] This kind of information is regulated by s.33A.
[163] *Re Waterford and Department of Treasury (No. 2)* (1984) 5 A.L.D. 588.
[164] (unreported, 28 February 1986, A.A.T. and noted in (1986) 3 *FoI Review* 39).
[165] id. 3.
[166] (1984) 7 A.L.D. 243.
[167] id. 263.
[168] (1987) 71 A.L.R. 1.
[169] id. 14.
[170] (1962) 107 C.L.R. 381.
[171] id. 388.

Therefore, despite how logical it may appear, Deputy President Hall's conclusion has little foundation in law. Nonetheless, it was the conclusion he made. Consequently, the broad interpretation of the exemption, and thus the less dynamic effect the *F.O.I. Act* can have on public administration, was only dinted slightly by the amendment.

A further amendment was made to this provision in 1986. The following words were added by Act No. 111 of 1986 to the end of sub-section 45(2):

> "unless the disclosure would constitute a breach of confidence owed by a person or body other than –
> (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
> (b) an agency or the Commonwealth."

The Attorney-General, Mr Lionel Bowen, in the Second Reading of the *Freedom of Information Laws Amendment Bill* 1986[172] explained that the purpose of the amendment was to afford protection to information from non-governmental sources that is included in internal working documents. This is a sensible amendment as there is no sound reason why information that would have been protected under sub-section 45(1) should lose that protection because the information was included in an internal working document.

There have yet to be any cases dealing with information that would fall within this category but it would appear that such information would be treated the same as any other information falling within the ambit of sub-section 45(1).

4. Relevant Considerations of the Exemption for "Breach of Confidence"

A variety of factors have been taken to be relevant in considering whether exemption should be allowed under section 45. Some of the judgments have referred specifically to the substance of the decisions of the courts of equity. Also matters that have been considered relevant, where direct reference has not been made, have often been consistent with these decisions.

One major factor is the intention of the discloser. If the discloser did not intend the information to be confidential then it cannot be treated as such.[173] However, the converse is not necessarily true and information will not always come within the scope of section 45 simply because the discloser intended it to be confidential. It was stated in *Re Wolsey and Department of Immigration and Ethnic Affairs*[174] that one reason for this was that the word "confidential" was open to several different meanings. Just because a person labelled something "confidential" or "personal and confidential" did not necessarily mean that person intended the recipient to receive the information in confidence. It may have meant, for example, that the person merely

[172] Cwlth. of Aust., Parl., The House of Representatives *Parliamentary Debates* (Hansard) (1986) No. 12, p.275.

[173] *Re Timmins and National Media Liaison Service* (unreported, 30 January 1986, A.A.T. and noted in (1986) 2 *FoI Review* 26). There may be one possible exception to this statement and this is discussed below.

[174] (1985) 7 A.L.D. 270.

wanted to be certain that a letter reached the person to whom it was addressed without it being opened by a secretary or other delegate.[175] Further unwarranted refusals may occur simply by wrongfully labelling the information "confidential", therefore going against the express intention of the *F.O.I. Act*. Even if a confidential intention was purported by the discloser the information may still be outside the exemption if this was only secondary to the real purpose for providing the information.[176] However, if it was thought by the A.A.T. that the intention of the discloser was so strong that he or she would not provide the information if disclosures were to be made, either by reason of the *F.O.I. Act* or the policy of an agency, then this factor would hold considerable weight in deciding whether section 45 was applicable.[177]

Acceptance of the confidential nature of the information need not be overt for a duty to arise. Where the person receiving the information as a member, employee, agent, etc., of an organisation did nothing to acknowledge confidentiality, the actions of the organisation on becoming aware of the information may establish the appropriate duty. This would only be so where the organisation ratified the intent of the discloser.[178] The acceptance may also be implied if there has been a long understanding that a relationship of confidence was established. Information received in this situation would be assumed to have been given on that basis. This relationship may be inferred if the discloser had a legal obligation with the persons to whom the information related to keep the information confidential.[179]

The acceptance of confidentiality may also be inferred where restricted treatment would be essential to assure the continual supply of like information in the future. Confidentiality has been found to be necessary in relation to commercial information on the wood-chipping industry,[180] on employment procedure[181] and to information supplied to police[182] in order to ensure the continued supply of such information.

It has been held that a duty arose, even though an employee gave no assurances of confidentiality, because such a relationship promoted the effective performance of a statutory function of the Ombudsman.[183] This was not a conclusion that was automatically arrived at and the individual circumstances of each case must be scrutinised. In *Re Murtagh and Commissioner of Taxation*[184] the Full Tribunal decided that there was nothing in the *Ombudsman Act* 1976 (Cth.) that imposed a duty of confidence and

[175] id. 274.
[176] *Re Scrivanich and Australian Taxation Office* (1984) 6 A.L.D. 98.
[177] *Re Boehm and Commonwealth Ombudsman* (1985) 8 A.L.N. 29, 31. This factor was given substantial weight in *Re Boots and Department of Immigration and Ethnic Affairs* (1986) 3 *FoI Review* 36 where the information was supplied reluctantly and on the express undertaking of the agency that the communication would be treated with confidence.
[178] *Brennan's* case, above, p.19.
[179] *Re Kingston Thoroughbred Horse Stud and Australian Taxation Office* (1986) 10 A.L.N. 38.
[180] *Re Angel and Department of Arts, Heritage and the Environment* (1985) 9 A.L.D. 113.
[181] *Attorney-General's Department* v. *Cockcroft* (1986) 64 A.L.R. 97.
[182] *Re Conte and Australian Federal Police* (1985) 7 A.L.N. 71.
[183] *Boehm's* case, above, p.31.
[184] (1984) 6 A.L.D. 112.

that, as the Ombudsman had stated at the time of his investigations that he did not claim protection, no such protection should be afforded.[185]

There is a definite distinction between disclosure to the individual and disclosure to the world at large. *Prima facie* disclosure to an individual is treated as disclosure to the world at large, however an agency does have the discretion to give access to the individual.[186] Where the information relates directly to the applicant then he or she would be entitled to access to the document if no breach of confidence was involved, even though disclosure to the world at large would amount to such a breach.[187] This approach is a fair and sensible one and is consistent with Part V of the Act.[188] An example of where disclosure to the individual to whom the information related would amount to a breach of confidence was provided in *Keay's* case where, according to the A.A.T., the system of confidentiality in force would have been eroded if the individual was given access to information held.[189]

Deputy President Hall decided in *Re Chandra and Minister for Immigration and Ethnic Affairs*[190] that the lapse of time between when the information was supplied and when access to it was requested may be relevant in deciding whether section 45 was applicable. Information that was confidential at the time it was conveyed was found to have ceased to be of such a nature because the passage of time had rendered the confidentiality irrelevant.[191] A contrary view was expressed by Deputy President Todd in *Re Burns and Australian National University (No. 2)*.[192] He stated that the long acceptance of confidentiality could be seen to strengthen the confidentiality or, at least, maintain it.[193] It is submitted the view expressed by Mr Hall is to be preferred as there may be situations where the discloser did not intend the information to be confidential for all time. Also extraneous circumstances may alter the necessity for confidentiality. Mr Hall illustrated in *Bracken's* case this rule was not a hard and fast one and that the lapse of time would not always mean the information would be disclosed under his approach.[194]

One issue that still remains undecided was first raised in *Witheford's* case. It was suggested that information in the possession of an agency prior to

[185] id. 132. In arriving at this conclusion the A.A.T. followed their earlier decision of *Kavvadias* v. *Commonwealth Ombudsman* (1984) 52 A.L.R. 728 in which it was held that s.38 of the *F.O.I. Act* did not expand the provisions of the *Ombudsman Act* 1976 (Cth.) to prevent disclosure of documents in the possession of the Ombudsman.

[186] Attorney-General's Department "Freedom of Information Memorandum No. 35" in *Guidelines to Freedom of Information Act* (Australian Government Printing Service, 1982) p.322. This discretion must be exercised with great care because of s.91. Although the purpose of this section is to protect public servants from action for breach of confidence it will only do so where disclosure is required by the Act or where there is a *bona fide* belief that the release is required.

[187] *Witheford's* case, above, p.536-537.

[188] This Part of the Act is provided to allow persons to amend any errors contained in information relating to themselves.

[189] *Keay's* case, above, p.353.

[190] (1984) 6 A.L.N. 257.

[191] id. 258.

[192] (1984) 7 A.L.D. 425.

[193] id. 442.

[194] *Bracken's* case, above, pp.263-264. This approach appeared to receive support in *Wolsey's* case, above.

the commencement of the *F.O.I. Act* might be treated differently from information received after its enactment. Although the A.A.T. chose to raise the issue it did not give any indication as to what the correct view might be. The possible distinction was discussed in this passage:

> "... we consider that there is a category of confidence that ought to be respected but which, without seeking to rule upon the point, may not exist in respect of documents coming into existence after the commencement of the Act. This category covers documents disclosure of which would constitute a breach of confidence where that confidence was reposed and *received not on the faith of a legal duty to respect that confidence but on* the faith of a voluntary undertaking or understanding to respect it either in a specific case or as part of a traditional dealing, and where it was so reposed and received at a time when there was an expectation that having once been committed to writing it would not be subjected to disclosure to the public or to a specific person."[195]

Several other cases have also made reference to this point without making a ruling.[196] Furthermore, the distinction is acknowledged with approval in *Burns (No. 2)* case.[197] It is submitted that such a distinction is artificial and, under the approach to this exemption now used by the A.A.T., is unnecessary. Parliament has made no such distinction. The *F.O.I. Act*, so far as it applies to documents which came into existence prior to the date of the commencement of the Act, operates both prospectively and retrospectively. If the public interest against disclosure because of a "breach in confidence" can be invoked to protect information then all information truly supplied *and held in confidence* would be protected regardless of when it came into being. The *F.O.I. Act* was enacted to override systems surrounded by secrecy and such systems should be subject to the *F.O.I. Act*. The time of communication may be a relevant factor to consider in attempting to ascertain the intentions of the parties involved. Nevertheless, information supplied prior to the commencement of the *F.O.I. Act* should not automatically be treated as a separate category of information.

The time at which the confidant promised to keep the information confidential may be relevant. The duty would be more likely to exist where the confidant has made the promise before the disclosure has taken place. If the promise was made after the disclosure then there may be no duty of confidence because the communication was completed before any special relationship evolved.[198] Also no duty may exist if the discloser was providing the information as part of his or her duties of employment. Even if confidentiality was promised to the discloser, if that person had a duty to provide the information, regardless of the promise, then no breach of confidence would occur through disclosure.[199]

[195] *Witheford's* case, above, p.542.
[196] For example see: *Bracken's* case, above, p.262 & *Keay's* case, above, p.353.
[197] above, pp.441-442.
[198] *Boehm's* case, above, p.33.
[199] *Re Low and Department of Defence* (1984) 6 A.L.N. 280, 282. *cf. Keay's* case, above, where the duty was found to exist when an employee was obliged to supply the information.

5. Professional and Analogous Relationships

Consistent with the equitable doctrine, the duty does arise where a professional relationship is involved. It is suggested in *F.O.I. Memorandum No. 35* that such a duty may arise and this has been confirmed by the A.A.T. The decision of *Re Marzol and Australian Federal Police*[200] concluded that a relationship of confidence was automatically inferred between a psychiatrist and patient and between parole officer and the person on parole.[201] Several more examples were given in *Re Maher and Attorney-General's Department (No. 1)*[202] where Davies J. stated:

> "The relationships of solicitor and client, of doctor and patient, of priest and penitent and of husband and wife are special relationships of the type which *prima facie* gives rise to a relationship of confidence."[203]

According to *F.O.I. Memorandum No. 35* the relationship may exist even where the professional person is a staff member of a government agency.[204] The relationship between the discloser and the confidant need not be concerned with a profession for confidentiality to be inferred. In *Re Briggs and Australian Taxation Office (No. 2)*[205] the A.A.T. was satisfied that section 45 protected the information because it related to banking transactions and on the basis of the identity of the informant.[206] There was no suggestion that the informant had a professional relationship with the Taxation Office.

6. Prior Disclosure of Information

Obviously, the information must be of a confidential nature for section 45 to apply. Therefore, if the information had become generally known, protection would no longer be given. This would be the case even though it may have been protected had the prior disclosure not taken place[207] and the disclosure involved a breach of confidence.[208] But prior disclosure will not automatically prevent protection. If the disclosure is only an explanation of the material and its confidential nature has been maintained then section 45 may still apply.[209] Also if disclosure is made by the confidant to someone other than the applicant and the recipient maintains its confidentiality then the confidence is not destroyed.[210]

In *Attorney-General's Department* v. *Cockcroft*[211] it was held by the Federal Court that despite prior disclosure to a union and two government ministers the information was still of a confidential nature and should be

[200] (unreported, 3 April 1986, A.A.T. and noted in (1986) 3 *FoI Review* 43).
[201] id. 25-26.
[202] above.
[203] id. 738.
[204] Guidelines op. cit. 324.
[205] (unreported, 30 June 1986, A.A.T.).
[206] id. 4.
[207] *Brennan's* case, above, p.24.
[208] *Re Kahn and Australian Federal Police* (1985) 7 A.L.N. 190, 191.
[209] *Keay's* case, above, p.352.
[210] *Chandra's* case, above, p.258.
[211] above.

protected. The following passage from *Franchi* v. *Franchi*[212] was relied upon:

> "It must be a question of degree depending on the particular case, but if relative secrecy remains, the plaintiff can still succeed."[213]

7. The Public Interest

Formerly there was no reference made in this section to considering the weight of public interest involved in disclosure. The amendment of 1983 inserted this requirement in relation to internal working documents, however, no such requirement was introduced into what is now sub-section (1) of the provision. Despite this, according to *F.O.I. Memorandum No. 35*, there may be some cases where the public interest requires that a duty of confidence did not arise or, where it has arisen, ceases to exist. The *Memorandum* explained that the public interest would be served by disclosing information where a breach of law, or other wrong-doing, or a significant risk to public health was being concealed.[214]

The *Memorandum* also stated that, if it was alleged that disclosure was in the public interest, the onus was on the agency to show that no public interest existed.[215] The earlier cases did not discuss the public interest factor, unlike more recent cases. The most recent cases have decided that the public interest was not a relevant factor, whereas slightly earlier decisions have held it to be an important factor. At the present time, given the discrepancies in the decisions, one cannot be sure whether it will remain a relevant consideration. The turbulent history of this factor is to be discussed in an effort to provide direction as to which alternative will be adopted in future.

In *Re Wertheim and Department of Health*[216] the Full Tribunal described the process of deciding whether the exemption applied. It was stated as the weighing up of two competing public interests; on the one hand, the public interest in disclosure of information in the hands of government and, on the other hand, the public interest in not disclosing information if its disclosure would constitute a breach of confidence. This process was necessitated by the existence of the public interest in the doctrine of duty of confidence and the object of the *F.O.I. Act*.[217] Accordingly, in some circumstances disclosure may be made even though a duty of confidence existed. In this case a professor provided information relating to a research grant application on a confidential basis and argued for that confidentiality to be maintained. It was held that the information should be disclosed to the applicant because of the substantial public interest in disclosure.[218] This approach is consistent with Mason J.'s approach in the *Fairfax* case and appears sensible as

[212] [1967] R.P.C. 149.
[213] id. 152-153.
[214] Guidelines op. cit. 326.
[215] id. 321, 326.
[216] (1984) 6 A.L.D. 121.
[217] id. 148.
[218] id. 149.

it may prevent information being given a cloak of confidentiality to undermine the object of the *F.O.I. Act*.[219]

The public interest factor may also have the reverse effect and require that material provided for "reasons of revenge or personal spite or given in the mistaken belief that the [supplier of the information] is acting in the public good be received in confidence".[220] Therefore, it cannot automatically be assumed that no confidential relation existed simply because the information was supplied in a vengeful manner. This position was affirmed in *Re MacDonald and Department of Territories*[221] where it was held that a letter of complaint about a motel manager was confidential and could be withheld pursuant to section 45. This was decided despite the fact that the author of the complaint did not request the information be received in confidence when it was communicated.[222]

The public interest factor has been considered relevant in relation to section 45 by several other decisions of the A.A.T.[223] In the Federal Court decision of *Attorney-General* v. *Cockcroft*[224] this approach was not questioned by any of the judges of the Full Court.

In *Re Maher and Attorney-General's Department (No. 2)*[225] the approach in *Wertheim's* case was expressly and unequivocally denounced by the Full Tribunal. The reasons for this were the same as those for deciding that there was no public interest factor in section 43, discussed above.[226] The following passage provided the reasons relating to section 45 and the interpretation of exemptions:

> "It is difficult to see how this Tribunal could incoporate into the concept of 'breach of confidence' a notion of 'public interest', which notion is not an ingredient in the duty of confidence at either common law or equity but is only relevant as a consideration in the granting or not of equitable relief. Further, it is difficult ... to see how s.3 of the Act can be used to incorporate considerations of 'public interest' in the exemption sections (other than those sections which specifically and explicitly provide for public interest) when s.(3)(1)(b) specifically refers to '... exemptions necessary for the protection of essential public interests and the private and business affairs of persons ...'. Exemptions are therefore required for the purpose of protecting public and private interests. There cannot, in this Tribunal's view, be yet another contrary and overriding public or private interest to be taken into account in the exemption section in the absence of that overriding interest being specifically proclaimed in the section."[227]

219 *Wolsey's* case, above, p.273.
220 id. 275.
221 (unreported, 24 September 1985, A.A.T.).
222 id. 7-8.
223 *Brennan's* case, above, *Burns (No. 2)* case, above, *Low's* case, above, *Maher (No. 1)* case, above, *Wolsey's* case, above.
224 *Cockcroft's* case, above.
225 (1986) 13 A.L.D. 98.
226 For a more complete discussion of the reasons for rejecting the public interest factor see Part Two above.
227 *Maher (No. 2)* case, above, p.111.

This approach in relation to section 45 is not open to the same criticism as given in relation to section 43. There is no use or notion of "reasonableness" in which to incorporate the public interest into section 45. By reason of sub-section 3(2) the real issue here is whether a "discretion" has been conferred on the A.A.T. as to the scope of section 45. Suffice to say that, if the A.A.T. has such a discretion then, in relation to section 45, it is submitted that the view expressed in *Wertheim's* case is the better view because it would allow regard to be given to what may be important public interest factors and would be more likely to result in the facilitation and promotion of disclosure of information as outlined in sub-section 3(2) of the Act.

The issue has been further complicated by the more recent decision of *Re Baueris and Commonwealth Schools Commission.*[228] In this case the applicant sought documents relating to an application for private school funding. The Full Tribunal proceeded with the question of public interest in two instances. First, the A.A.T. looked at the public interest in relation to information to which there was no action lying in equity. It was held that the public interest was not a factor in this situation for the same reasons that were expressed in *Maher (No. 2)'s* case.[229] Secondly, the A.A.T. analysed the position of public interest where an action for breach of confidence existed. The A.A.T. first commented on the unsettled state of law and that, consequently, it entered this area with circumspection. Using the New South Wales case of *David Syme & Co. Ltd* v. *General Motors Holden*[230] as authority, the A.A.T. observed that public interest considerations could be pleaded in actions for breach of a duty of confidence. In noting that "there is a wide difference between what is interesting to the public and what it is in the public interest to make known",[231] the A.A.T. concluded the public interest was not a factor in the present case.[232]

It is submitted the distinction created by this case is contrary to reason. For the A.A.T. to allow the public interest to be considered in a case involving a breach of a duty of confidence, but deny it where such an action does not exist, is peculiar. Presumably, in the latter instance there is a lesser degree of confidence than in the former case. Accordingly, the public interest factor may only be considered where there is a very strong relationship of confidence, but not when there is a lesser degree of confidence. This appears absurd that, for reasons not made apparent in the contents of the judgment, the public interest factor was not pursued when the matter was taken on appeal to the Federal Court.[233]

The Full Federal Court has however, in the more recent case of *Corrs Pavey Whiting & Byrne* v. *Collector of Customs*[234], discussed the operation of section 45 as a whole including the public interest factor in section 45. In this

[228] (1986) 10 A.L.D. 77.
[229] id. 17.
[230] [1984] 2 N.S.W.L.R. 294.
[231] *Baueris'* case, above, p.18 citing Lord Wilberforce in *British Steel Corporation* v. *Granada Televsion Ltd* [1981] A.C. 1096.
[232] id. 21.
[233] *Baueris* v. *Commonwealth of Australia* (1987) 75 A.L.R. 327.
[234] (1987) 74 A.L.R. 428.

matter Sweeney and Jenkinson JJ. formed the majority with Gummow J. providing a strong dissenting judgment. All three judgments need to be considered.

The facts of the case are as follows. An application for certain documents was made to the respondent in order to attempt to establish whether there had been an infringement of a patent held by a client of Corrs Pavey Whiting & Byrne ("Corrs"). The information had been provided by the customs agent of an importer on the understanding that it would be kept confidential and the respondent accepted the information on this basis. Originally the documents were refused under sub-paragraph 43(1)(c)(i), but after an internal review they were also denied under sub-section 45(1). The A.A.T., without inspecting the documents, affirmed the decision of the respondent solely on the basis of sub-section 45(1) and Corrs appealed to the Federal Court.

Both Jenkinson and Gummow JJ. gave well reasoned but conflicting judgments on whether the documents were exempt. Sweeney J., on the other hand, stated little more than he had read both other judgments and that he had preferred the judgment of Jenkinson J., which held that the documents were exempt. The reasons his Honour gave for adopting the judgment he chose are incorporated in the reasons contained in the judgment of Jenkinson J.

Jenkinson J. disclosed that he had read the decision of Gummow J. and that he disagreed with it. His Honour held that sub-section 45(1) was not restricted to situations where a breach of confidence at law would result, but rather it encompassed information of a confidential nature outside the scope of this doctrine. According to his Honour, to disclose on such a basis would be to fetter the right to information provided in sub-section 3(2). He also observed, quite correctly, that considerations germane to the equitable doctrine of breach of confidence (such as "just cause", "iniquity" and "public interest") were relevant only in deciding whether a court will afford a remedy, and not in deciding whether a duty of confidence existed.

His Honour was of the opinion that decisions made under the *F.O.I. Act* are administrative in nature and therefore the circumstances surrounding an application "are so ill suited to the finding of the facts, and to the framing of orders, upon which depends the vindication of those policy considerations which are subsumed under the rubrics 'just cause', 'public interest' and 'clean hands', that [he was] moved to adopt a construction of section 45 which would displace those considerations from the purview of section 45."[235]

With respect, this appears to be a peculiar way to arrive at a conclusion as to the proper construction of a provision. Parliament is forever imposing legislation on the public sector that involves complex questions of law.[236] These questions cannot be side-stepped or ignored but must be dealt with

[235] id. 431-432.

[236] The *Customs Act* 1901 (Cth.) ("*Customs Act*") can be used as an example (as the respondent is the Collector of Customs). Division 2 of Part VIII of the *Customs Act* deals with duty to be paid on goods imported into Australia. There is a minefield of difficult legal issues involved in this Division and many of these have been dealt with by the A.A.T. and the Courts. Nevertheless, thousands of matters are dealt with under the Division every year by public servants. Many of these matters involve grappling with complex legal issues before making a determination.

in performing the administrative task involved. Furthermore, the *F.O.I. Act* already requires the "rubric" of the public interest to be taken into account under other exemptions. Surely then, it is rather dubious to provide such reasoning as a basis for a broad construction of sub-section 45(1).

Jenkinson J. then stated that even if the releasing of the information disclosed a civil wrong this fact did not break or diminish the confidentiality. There is conflicting authority on this point, but his Honour relied on Denning MR in *Fraser* v. *Evans*[237] in which the Master of the Rolls is reported as saying:

> "They quote the words of Woods V-C. that 'there is no confidence as to the disclosure of iniquity'. I do not look upon the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence."[238]

As, according to the construction of Jenkinson J., it was improper to take this factor into account the respondent was correct in ignoring the fact that the information may have disclosed that a patent may have been infringed or that there may have been an overriding public interest in the disclosure of the information.

His Honour stated that such a construction would not hinder the discovery of iniquity. He did so on the basis that sub-section 91(1) of the *F.O.I. Act* allows officers to disclose information within an exemption if it is lawful to do so. He said that if a wrong doing was discovered disclosure of the information by an agency would be proper. There is no doubt that legally this point is valid. However, practically the discovery of iniquity would be far more diligently undertaken where those who are being wronged (and therefore have a direct interest in the discovery) take an active role in disclosing the wrong. This active role may be lacking as the *F.O.I. Act* places no obligation on an agency that has discovered a wrong to disclose that information.

In concluding, his Honour stated that he agreed with the A.A.T. that merely disclosing that a product was or was not imported by a particular person did amount to a breach of confidence in this case. This was not because secrecy would prevent a wrong doer from discovery but because there was commercial value to the importer to keep the information confidential from the time the information was given up until the time of this appeal.

Gummow J. provided a very extensive and detailed judgment in which he asserted that the correct construction of sub-section 45(1) was to limit its operation to situations where the disclosure of the information would amount to a breach of confidence at law. This is a position that has not been adopted in any of the earlier decisions. Nonetheless, given the judgment was persuasively reasoned and that Sweeney J. stated that he had difficulty deciding between the two conflicting judgments, it requires close examination.

A preliminary point Gummow J. made was that he disagreed with the A.A.T.'s conclusion that the information had been supplied by the importer's customs agent pursuant to a statutory obligation. His Honour was satisfied

[237] [1969] 1 Q.B. 349.
[238] id. 362.

that the evidence showed the information was voluntarily supplied and therefore any duty of confidence was not statutorily (nor contractually) based. Indeed, contrary to the A.A.T.'s approach, he stated that if the information had been acquired pursuant to statute section 45 should not be in issue. Rather the matter should be dealt with under section 38.[239] However as his Honour concluded the material was voluntarily supplied he considered section 45 was relevant.

Gummow J. agreed with previous decisions that state that section 3 does not require the public interest to be taken into account with all the exemptions. His Honour stated this factor can only be considered if the wording of the exemption in issue so requires and that the crucial wording in subsection 45(1) was "breach of confidence".

His Honour attacked the decision in *Re Witheford and the Department of Foreign Affairs*[240] because it assumed the general law did not protect intra-governmental confidences. He pointed out that the decision of *Commonwealth* v. *John Fairfax & Sons Ltd*[241] was authority for the protection of such information. Based on this incorrect assumption the A.A.T. then needed to decide section 45 was broader than the equitable doctrine in order to protect the information and it did so. His Honour then stated that subsequent legislative amendments had taken intra-governmental confidences outside the scope of the provision but such amendments had not given any guide as to whether parliament intended section 45 to be restricted to situations where an action would lie for breach of confidence.

Four principal reasons were given by Gummow J. as to why he considered the term "breach of confidence" in sub-section 45(1) was restricted to its technical legal meaning. First, his Honour adverted to the fact that parliament chose to use different language to protect confidential communications and sources in other exemptions. This tended to suggest that the choice of words in section 45 was intentional, otherwise if a wider operation had been intended the more broad language as used in the other provisions would have been more appropriate. Secondly, other legal terms were included in other exemptions, such as legal professional privilege in section 42, and these terms had been interpreted to be consistent with the established legal principles. That the term was referred to more fully in sub-section 91(1) did not detract from this, according to his Honour. Thirdly, his Honour believed that to give the exemption a broader operation would create, rather than avoid, considerable uncertainty. He observed that the doctrine relating to breach of confidence was well established with case law and learned writings and therefore had reasonably defined boundaries. The same could not be said for some broader construction that had been created in a vacuum. Finally, his Honour stated that, by reason of sub-section 91(2) the release of information under the *F.O.I. Act* did not allow the recipient to publish the information without regard to the law relating to breach of confidence. Therefore giving the more

[239] See *Kavvadias'* case, above.
[240] Discussed earlier in this Part.
[241] Discussed earlier in this Part.

restricted construction of sub-section 45(1) did not result in the secrecy of the information being destroyed.

One reason that his Honour did not think was relevant in construing sub-section 45(1) was the fact that the reverse freedom of information procedure provided in section 27 was not available under section 45. He said this procedure was also not available for other potentially sensitive types of information. The reverse freedom of information procedure was included to deal with a particular class of information and should not be the basis for broadening the construction of an exemption. Gummow J. did not find any of these reasons in themselves conclusive but rather their joint impact led him to the conclusion that the exemption should be restricted to the equitable doctrine.[242]

Given that Sweeney J. had great difficulty in deciding between the two judgments and that the judgment of Gummow J. appears to be very persuasive a decisive ruling from the Federal Court (or even the High Court) as to the correct approach for sub-section 45(1) is needed before the public interest aspect and the construction of the provision as a whole can be settled.

8. Conclusion

Whatever the position in relation to the public interest, when dealing with section 45 the following considerations, which incorporate all the above discussion on "breach of confidence", appear to be the appropriate ones to analyse in relation to sub-section 45(1).

(i) Whether the information is confidential;
(ii) Whether the information was communicated in confidence or in such a way that there was an obligation of confidentiality;
(iii) Whether disclosure would be an unauthorised use by the confidant although not necessarily with a prejudicial or detrimental effect.[243]

These considerations closely resemble those outlined by Megarry J. in *Coco's* case in relation to the requirements in equity for a breach of a duty of confidence. However, when the cases decided by the A.A.T. are compared with those decided by the courts of equity, it is clear that the A.A.T. has adopted a much less strict approach and that the above considerations are far more easily satisfied. This suggests the exemption includes cases which would in equity disclose an action for breach of duty of confidence. The section is not limited to these situations, however, and is wider than the equitable doctrine. Whether this broadening requires the public interest to be excluded from considerations under section 45 is a question that needs to be determined.

CONCLUSION

It has been illustrated that the interpretation of sections 43 and 45 has not been without complication or disputation. The meaning and purpose of both

[242] *Corrs'* case, above, pp.442-445.
[243] *Maher (No. 2)* case, above.

provisions are still subject to change. It may be some time into the future before boundaries are definitively drawn. What this article has attempted to do is provide, where different interpretations were available, the possible applications of the exemptions and express which of these is closest to the original intentions of those who formulated the objects of the *F.O.I. Act*.

Sections 43 and 45 have both been given broad application and it appears that business related affairs and confidential information are not seriously threatened by requests under the *F.O.I. Act*. The main issue that currently surrounds both these provisions is whether the public interest is a relevant factor to be taken into account. A ruling from the Federal Court or the High Court (or the Parliament) is needed to clarify the situation.

It must be noted that the protection afforded by these exemptions is only as effective as the diligence of those who process requests under the *F.O.I. Act*. If these officers of the agencies are insufficiently trained or thorough in their work then these exemptions would fall well below the level of protection they purport to provide. This is particularly so in relation to business related affairs. In many cases it would be obvious that the information was concerned with business related affairs, however this would not always be the case. The reverse-freedom of information procedure only operates where the officer identifies that the material is potentially sensitive and that it is of a business nature. The guarantee of protection is no stronger than the efficiciency and competence of the relevant officer.

In summary, a study has been made of the operation of sections 43 and 45 and the policy behind these exemptions. The decision of *Maher and the Attorney-General's Department (No. 2)*[244] has thrown the operation of both these exemptions into doubt. The decision in *Re Chandra and Minister for Immigration and Ethnic Affairs*[245] was directly challenged, and the previous decisions in relation to sections 43 and 45 were overruled. However, because the A.A.T. in the *Maher (No. 2)* case was denouncing the approach of its fellow members of the A.A.T., one cannot be certain whether a definite precedent has been set or whether in the future the earlier decisions of the A.A.T. will be relied upon. The more recent decision of *Corrs Pavey Whiting & Byrne* v. *Collector of Customs*[246] has not alleviated the doubt.

Although the desire to err on the side of protection rather than disclosure in the early stages of the *F.O.I. Act* is understandable, it is submitted that the approach in *Re Wertheim and the Department of Health*[247] is preferable and more in line with the basic theme behind the *F.O.I. Act*. Perhaps if parliament were to introduce some form of privacy legislation, as recommended by the A.L.R.C. in its report on privacy,[248] the A.A.T. and the Federal Court may be more liberal in their interpretation of the *F.O.I. Act*. Such legislation could reduce the possibility of information disclosed under the *F.O.I. Act* being misused and may enable sections 43 and 45 to operate

[244] (1986) 13 A.L.D. 98.
[245] (1984) 6 A.L.N. 257.
[246] (1987) 74 A.L.R. 428.
[247] Australian Law Reform Commission *Report No. 22* "Privacy" (Canberra, 1983) Vol. 1., p.66.
[248] (1984) 6 A.L.D. 121.

in a more balanced and conducive environment. Privacy legislation may allow the *F.O.I. Act* to operate in a way that is far closer to the reasons why it was passed by parliament – to facilitate access to as much information in the hands of government as possible – a purpose that is fundamental to any democratic system.