MORTON AND STIRLING

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94026** **Decision Ref: D01794**

Participants:

Vincent Bert Morton
Applicant

- and -

City of Stirling
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - clause 8(2) - confidential communications - whether information obtained in confidence - whether release of documents could reasonably be expected to prejudice the future supply of like information - identity of parties apparently already known - deficiency of section 30 notice - reliance of agency on information provided by ratepayers - information provided by ratepayers accepted in confidence - anonymous complaint to agency - survey conducted by agency - insufficient evidence to support exemption claimed under clause 8(2)(b).

FREEDOM OF INFORMATION - clause 5(1)(a) - enforcement of city by-laws - impair effectiveness of method or procedure for preventing, detecting, investigating or dealing with contraventions of law - whether release of documents could reasonably be expected to diminish the number of reports to the agency - the meaning of "law" - disclosure would not reveal methods or procedures used in investigating breaches of agency by-laws.

FREEDOM OF INFORMATION - clause 3(1) - personal information about third parties - public interest factors - identity of complainant known by applicant - public interest in applicant knowing allegations against him - agency's failure to notify applicant of basis of complaint.

FREEDOM OF INFORMATION - section 102 - burden of proof - onus on agency - no onus on applicant.

Freedom of Information Act 1992 (WA) ss. 3(3); 23(1)(a); 24; 30; 72(1)(b); 75(1); 102(1); 102(3); Schedule 1 clauses 3(1), (5) & (6), 5(1)(a), 8(2) & (4); Glossary in Schedule 2 to the FOI Act.
Freedom of Information Act 1982 (C'wlth) s.37(2)(b).
Freedom of Information Act 1982 (Vic) s.31.

Re Read and Public Service Commission (Information Commissioner (WA), 16 February 1994, unreported).
Re Mickelberg and Australian Federal Police (1984) 6 ALN N176.
Accident Compensation Commission v Croom [1991] 2 VR 322.
Re Veale and Town of Bassendean (Information Commissioner (WA), 25 March 1994, unreported).
Re Kobelke and Minister for Planning and Others (Information Commissioner (WA), 27 April 1994, unreported).

DECISION

The decision of the agency of 25 February 1994 is set aside. In substitution therefor it is decided that those parts of the documents which remain in dispute are not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

5th October 1994

REASONS FOR DECISION

1. This is an application for review by the Information Commissioner arising out of a decision of the City of Stirling ('the agency') to refuse access to a number of documents the subject of an access application under the *Freedom of Information Act 1992* ('the FOI Act') made by Mr V B Morton ('the applicant'), a ratepayer of the agency.

BACKGROUND

2. The background to this application is that over a period of five months from June to September in 1993, neighbours of the applicant complained to the agency about certain of his activities. Although the agency apparently tried to resolve these complaints informally, it was not successful and the neighbours were then advised to submit any future complaints in writing.

3. Between October 1993 and February 1994 the neighbours subsequently wrote to the agency complaining further about activities of the applicant on his property which were alleged to be in contravention of City by-laws. The agency investigated those matters that were within its jurisdiction and concluded that the applicant was not in breach of any of its by-laws. However, it appears that the relationship between the applicant and the neighbours deteriorated further to the extent that each sought relief against the other through the courts.

4. On 12 January 1994 the applicant sought to exercise his right of access under the FOI Act and applied for access to documents containing the details of the complaints made against him since March 1993 by his neighbours, whom he named. Access was refused by the agency on 14 February 1994 on the grounds that the documents were exempt under clause 8(2) of Schedule 1 to the FOI Act. On 16 February 1994 the applicant applied for internal review of this decision. This was undertaken by the agency and, on 25 February 1994, the applicant was advised that the original decision to refuse access on the basis of clause 8(2) was confirmed. Although the identity of the person conducting the internal review was not clear from the correspondence, the letter of advice was signed by George S Bray, City Manager.

5. On 9 March 1994 the applicant sought external review by the Information Commissioner of the agency's decision of 25 February 1994 to deny him access to the documents containing the information he was seeking.

REVIEW BY THE INFORMATION COMMISSIONER

6. On 9 March 1994 both the agency and the applicant were advised that I had formally accepted this complaint for review. In accordance with my authority

under s.75(1) and s.72(1)(b) I required the agency to produce the originals of the disputed documents for my inspection, together with the agency's FOI file relating to this matter. As the agency's notice of decision dated 25 February 1994 did not conform to the requirements of s.30 of the FOI Act, I also requested further and better reasons to justify the claim for exemption based on clause 8(2) of Schedule 1 to the FOI Act.

7. Section 30 of the FOI Act prescribes certain matters that must be included in any notice of decision provided to an applicant. The requirement to provide reasons for a decision to refuse access, including material findings of fact which are sufficient to establish a claim for exemption for documents, is an essential feature of FOI legislation and of Administrative Law. A notice that complies with this section will provide an applicant with an explanation of what has been decided, by whom it has been decided and why it has been decided. A notice that does not comply with s.30, in my view, may be viewed as a failure by an agency to comply with its statutory obligations under the FOI Act.

8. On 31 March 1994 it was necessary for my office to contact the agency seeking further information as the agency had not provided all of the details requested in my earlier letter of 9 March 1994. This additional information was subsequently provided to me by the agency on 7 April 1994.

9. The neighbours were also contacted by a member of my staff on 9 May 1994. Although they had changed address, both parties indicated that they objected to the disclosure of the documents to the applicant and provided reasons for my consideration. Subsequently the applicant informed a member of my staff that the only documents to which he sought access were the letters of complaint to the agency from the neighbours.

THE DISPUTED DOCUMENTS

10. The disputed documents consist of 10 letters addressed to various departments of the agency which are described as follows:

    A Letter dated 1 February 1994 to acting City Manager.

    B Covering letter dated 1 February 1994 addressed to Principal Environmental Health Officer referring to Document A.

    C Letter dated 2 January 1994 enclosing copy of Document D addressed to Principal Environmental Health Officer.

    D Letter dated 2 January 1994 addressed to City Manager.

    E Letter dated 11 January 1994 addressed to Engineering Department enclosing copy of Document C.

F Letter dated 2 January 1994 addressed to Senior Environmental Health Officer enclosing copy of Document C.

G Letter dated 21 November 1993 addressed to Principal Environmental Health Officer enclosing copy of Document H.

H Letter dated 21 November 1993 addressed to City Manager.

I Unsigned letter dated 28 October 1993 addressed to City Manager.

J Letter dated 28 October 1993 addressed to City Manager.

THE EXEMPTIONS

11. In its written and oral submissions the agency originally claimed these documents were exempt from disclosure under clause 8(2) of the FOI Act. Further exemption was claimed in an additional written submission dated 11 July 1994, under clause 5(1)(a). Clause 8(2) provides:

> ***"8. Confidential communications***
>
> ***Exemptions***
>
> *(1)...*
>
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on Exemptions***
>
> *(3)...*
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

12. To justify its decision to refuse access on the basis that the documents are confidential communications the agency must satisfy parts (a) and (b) of clause 8(2). The agency claimed that the disputed documents were all given and received in confidence. In its written submission dated 7 April 1994, the agency said:

> *"An integral part of the enforcement process for local government is the right of residents to lodge complaints in confidence for the appropriate*

remedial action to be initiated by the local government without (where possible) retaliation by the offender to the complainant. On this basis, it is accepted practice throughout local government that the name of the complainant is not to be disclosed to the offending party. This practice has evolved over many years of dealing with neighbourhood disputes, where the disclosure of the name of the complainant has immensely exacerbated the problem. In many instances, disclosure of this information has resulted in assaults and harassment of the complaint, leading to civil action in court. The end result being a considerably worsened relationship between immediate neighbours and frequently extending to other neighbours, not in the best public interest.

All Council staff involved in law enforcement and investigative work are well aware that all complaints are to be treated as having been provided and received in confidence. This approach has been taken in recognition of the individual's right to complain plus the fact that disclosure of the complainant's name would invariably stem the flow of legitimate complaints thereby removing a valuable source used in local law enforcement for the general good of the overall community.

On the basis outlined above, it should be noted that the City of Stirling will always seek to have exempt complaint documents."

13. Whilst I accept that the agency received the disputed documents in confidence, the agency's assertions about the beliefs of the neighbours regarding their confidentiality were insufficient for my purposes. A member of my staff subsequently contacted the neighbours to determine their understanding of the circumstances in which these particular complaints were made. The neighbours advised my office in writing that they expected these written complaints to be treated as confidential communications. On this basis I accept that both the agency and the neighbours had a belief that the complaints were given and received in confidence and, therefore, the disputed documents containing the substance of the allegations against Mr Morton were confidential communications within the meaning of part (a) of clause 8(2) of Schedule 1 to the FOI Act.

14. The agency originally argued its claim with respect to part (b) of this clause on the basis that the disclosure of a complainant's name would prejudice the future supply of complaints to the agency because confidentiality could not be guaranteed. In this instance, clearly, the applicant already knew or reasonably suspected the identity of the complainants. He had specifically asked for access to documents concerning complaints made by them. However, he was not aware of the substance of the allegations against him and this was the information to which he was seeking access. On 29 June 1994 I met with representatives of the agency and the agency's solicitor to hear oral submissions in an effort to identify the reasons why the agency held the view that it was reasonable to expect that disclosure of the substance of those documents could have the effect of stemming the flow of complaints to the agency in the future.

15. In that meeting the agency representatives said that they believed that if it were to become known that the details of complaints were provided to the person or persons the subject of a complaint, then it would be impossible for the agency to carry out its duties on behalf of the community. The representatives of the agency also told me that the agency had a policy of not acting on anonymous complaints. The representatives also confirmed my impression from the documents provided to me that the applicant had not, at any stage during the process of investigating these complaints, been advised of the substance of the allegations against him. Further, it appeared that at no stage had the agency advised the applicant in writing of the result of its investigations.

16. At that meeting the agency sought the opportunity to present a further submission to justify reliance on clause 8(2) and, in particular, to address the requirements in part (b) of that clause. I agreed to that request and on 13 July 1994 I received a detailed written submission from solicitors on behalf of the agency which addressed these arguments.

17. In order to provide evidence to support the agency's previous submission, the City had engaged AGB McNair to undertake a survey of residents within the City of Stirling. The results of that survey were provided to me. A total of 100 telephone interviews were conducted with residents aged over 18 years. The survey methodology, it was said, conformed with guidelines of the Market Research Society of Australia. Briefly, the survey results included the following:

    * 84% indicated they would report neighbourhood problems to the Council.

    * 25% had reported some matter to the Council (Problems with dogs being the most reported issue).

    * 17 of the 25 were satisfied with the way their complaint was handled by the Council.

    * 62% were aware of the FOI Act.

    * 48% were happy to have full details of their complaints, including names and addresses, released.

    * 86% were happy to have partial details released, i.e. the nature of the complaint excluding name and address; 8% were not.

    * 18% would complain to Council if a copy of their complaint including their personal details was given to the person complained about. However, 34% would do nothing if this happened.

18. Based upon the results of this survey, it was the submission of the solicitors for the agency that 8% of the residents sampled were not happy for there to be even partial release of the details of their complaint and that 8% of all residents in the district constituted a substantial number. It was argued that, if only 8% were to

be discouraged from making complaints, this would constitute a substantial impairment to the agency's capacity to detect and investigate possible contraventions of laws under its administration.

19. I was provided with a copy of the survey questions and I have concerns about the manner in which some of the survey questions were framed and about questions that were not asked that, in my view, should have been asked. However, in my opinion, the survey results do not support the agency's claim that disclosure of the documents in dispute in this matter could reasonably be expected to prejudice the future supply to the agency of information of that kind. In all 86% of people surveyed were happy to have the nature of their complaint disclosed, but not their personal details. It was of course open to the agency under s.24 of the FOI Act to delete from the documents the personal information about the complainants and disclose edited copies of the documents to the applicant.

20. The unusual circumstance in this instance is that the applicant knew, or had a reasonable suspicion, who had complained and requested access to letters of complaint from two named people. The agency, in its notice of decision refusing access, confirmed that it held documents fitting the description in the access application and thus, perhaps unwittingly, confirmed the applicant's knowledge or suspicions in this regard.

21. The particular circumstances of this case did not form any part of the questions put to the respondents to the survey, and the results must be interpreted with these factual circumstances in mind. In my view, the survey results support the applicant's claim for access to the disputed documents because their disclosure would reveal the nature of the allegations against him. Therefore, without additional evidence from the agency, I am unable to conclude that the agency has established that the documents are exempt under clause 8(2) because it has not satisfied part (b) of clause 8(2) as it has not established that its ability to obtain information about alleged breaches of Council by-laws could reasonably be expected to be prejudiced if the disputed documents are disclosed. Therefore, I find that the documents are not exempt under clause 8(2).

22. Whilst this finding necessarily means that the public interest test - which, by virtue of clause 8(4), operates to limit the exemption - need not be considered, I recognise that there is a public interest in maintaining an avenue of complaints to local authorities in respect of matters such as breach of by-laws and neighbourhood disputes. However, I also recognise that there is a public interest in a person being informed of the nature of any allegations against him or her and being given an opportunity to respond to those allegations: *Re Read and Public Service Commission,* (Information Commissioner (WA), 16 February 1994, unreported). I also recognise that there is a public interest in a person being informed of the result of any inquiry or investigation that is made concerning him or her. In my view, the minimum requirement to satisfy that public interest would be the provision of written advice to the person complained about, detailing, in summary form, the matters of complaint and the result of the agency's investigation. If the agency's procedures for dealing with complaints concerning neighbours had included this step it is possible that the applicant may not have

found it necessary to exercise his rights under the FOI Act in order to gain access to the information.

The claim for exemption based on clause 5(1)(a)

23. Although the agency raised the issue of an exemption based on clause 5(1)(a) of Schedule 1 to the FOI Act in its letter to me of 11 March 1994, it did not pursue this exemption until after its meeting with me on 29 June 1994. Subsequently the solicitors for the agency provided detailed arguments for exemption based on this clause. My office provided a copy of these further reasons to the applicant. Clause 5(1)(a) provides as follows:

> "***5. Law enforcement, public safety and property security***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;"*

24. It was the agency's submission that, as the agency is responsible for enforcing a large number of laws and is dependent on reports by and the co-operation of, residents to perform this function, the disclosure of the disputed documents would thereby diminish the number of these reports. In the view of the agency, if this occurred, it would impair the effectiveness of its procedures for detecting and investigating breaches of the laws administered by the agency.

25. Similar provisions to clause 5(1)(a) exist in other FOI legislation although there are differences with the wording of the equivalent provisions. The exemption in clause 5(1)(a) is directed at investigative methods and procedures of an agency which themselves must be lawful to attract the exemption. For a document to be exempt under this sub-clause it must be established that it is reasonable, as opposed to something irrational or absurd, to expect that the disclosure of the document could be reasonably expected to result in some degree of impairment to those methods or procedures.

26. On at least one other occasion it has been recognised the application of this exemption is not without difficulty in providing evidence that is sufficient to establish a *prima facie* claim. In considering the application of s.37(2)(b) of the *Freedom of Information Act 1982* (Commonwealth), the Commonwealth equivalent of clause 5(1)(a), the Administrative Appeals Tribunal in that jurisdiction in *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176, said:

> *"It is of course difficult to discuss adequately the application of this provision to the documents now under review. Perhaps the most useful comments are to say firstly, that in the public interest it is essential that law enforcement agencies have speedy, accurate and secure systems of communication, both within an agency and between agencies especially where agencies have different fields of responsibility. Secondly, it is one thing for observers to deduce, with varying success from everyday experience media reports and other informational sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agencies' own documents or in the proceedings of a Tribunal such as this what those methods and procedures are. The risk that they may be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them."*

27. The exemption does not require only that a particular investigation or inquiry be hampered, accepting that if this occurred it would "impair" that investigation. The comments of the Tribunal in *Re Mickelberg* suggest that disclosure of the disputed document must somehow result in the exposure of investigative methods or procedures such that the effectiveness of those methods or procedures could reasonably be expected to be impaired.

28. O'Bryan J of the Victorian Supreme Court, when considering the provisions of s.31 of the Victorian *Freedom of information Act 1982* dealing with the application of the equivalent exemption to clause 5(1)(a) in that State in *Accident Compensation Commission v Croom* [1991] 2 VR 322, said, *"...a careful examination of all the paragraphs in s.31 indicates to me that for a document to fall within one of the exceptions it should have a connection with the criminal law or with the legal process of upholding or enforcing civil law."*

29. The word "law" in clause 5(1)(a) is clearly used in a broad sense and is not limited only to the criminal law. It includes, but is not limited to, other laws and regulations which also have a connection with public safety and property security. Council by-laws that have such a connection are within this definition, in my view. The exemption is directed at the matter contained within the relevant documents and it is the disclosure of matter of a type that could reasonably be expected to have the effect described in clause 5(1)(a) which is potentially protected.

30. From my examination of the Documents A-J, I am not satisfied that disclosure of any of them would reveal any methods or procedures adopted or employed by the agency for investigation of breaches or possible breaches of Council by-laws. The documents are complaints to the agency concerning alleged activities on the property of the applicant. As such they do not describe investigation procedures used by the agency, identify sources of information other than the complainant nor do they describe any other methodology applied by the agency in investigating complaints. In my opinion, disclosure of the documents could not reasonably be expected to impair the effectiveness of any method or procedure for investigation and I find that they are not exempt under clause 5(1)(a).

Personal Information

31. Each of the disputed documents contains personal information about the complainants, including their names, previous address, the nature of their relationship with each other, their employment and their signatures. The agency has not claimed exemption under clause 3(1) for any of the matter contained in the documents. In my view, however, the matter described above is clearly "personal information" about the complainants and, therefore, *prima facie* exempt under clause 3(1).

32. Upon an inquiry from my office, the applicant informed me that he does not seek access to personal information about any party other than himself and his immediate family. Accordingly, I find that the personal information described in paragraph 31 is not within the ambit of the applicant's request and should not be disclosed. Those parts of the disputed documents that should be deleted on this basis are detailed in the schedule to this decision. As the applicant also informed my office that he sought access only to the letters of complaint from the neighbours to the agency, I consider that the hand-written file notes on the top of Document C and those on the top of Document J are not within the scope of the application and the agency need not disclose them.

33. Even with the matter described in the schedule to this decision deleted, it may be possible to identify the neighbours from some of the matter in the documents, and some of the material which remains reveals certain information that may be considered personal information about the complainants. However, that matter is, in my view, part of and inextricably entwined with the allegations made to the agency by the complainants about the applicant and members of his family. The exemption provided by clause 3 is limited by clause 3(6), which provides that matter is not exempt if its disclosure would, on balance, be in the public interest. The applicant bears the onus of establishing that the limitation applies.

34. The only public interest factor submitted to me by the applicant in support of his claim for access to the documents was that *"...people should not be able to give false information to Councils and then be protected by them to stop us being able to refute their lies"*. I accept that there is a strong public interest in people being informed of allegations made against them to an agency, and in those people being given an opportunity to respond to those allegations. The agency's written response, after that matter was put to it in the course of its oral submissions to me, was that *"...the right to such particulars only arises once a prosecution has been brought against an individual"*. The agency submitted that as no prosecution against the applicant had been initiated, no right to particulars arose and that, in any event, that right does not entitle an individual to access to the evidence which may be of use at the hearing of a complaint. The agency contended that disclosure of such material under the FOI Act may well impair the agency's ability to deal with a contravention of a law by way of prosecution.

35. The agency appears to have misunderstood the issue. The question is not what legal rights may or may not arise in respect of the procedures upon prosecution. The question is whether there is a public interest in a person being informed of an

allegation made against that person to an agency and being given an opportunity to respond to that allegation. As I have said, I consider that there is. The question then is whether that public interest outweighs any public interest that favours non-disclosure.

36. I accept the arguments of the agency that, in general (but always dependent upon the facts of the particular case), it may not be in the public interest to disclose the identity of a complainant, particularly where the complainant is a neighbour and disclosure of the complainant's identity may reasonably be expected to exacerbate a dispute between neighbours. However, in this particular instance, the identity of the complainants is not an issue. The identity of the complainants was known to, or reasonably suspected by, the applicant when he made his access application to the agency. He applied to the agency for access to the complaints made by the neighbours, whom he named. The agency confirmed that the neighbours had complained when it responded to the applicant that it indeed held documents that fitted the description given, that is, complaints from the two named neighbours.

37. I have taken into account the following circumstances of this matter. The identity of the complainants is clearly already known to the applicant (the agency, albeit perhaps unintentionally, having disclosed that much to the applicant). The complainants no longer reside next door to the applicant, the neighbours having moved away. On its own admission, the agency has not at any stage properly informed the applicant of the allegations made against him by the complainants, the action taken by the agency upon those allegations nor the outcome of any action or investigation undertaken by the agency. Taking into account those circumstances, I find that, on balance, it is in the public interest that the personal information about the complainants, other than the information described at paragraph 33 above, contained in the documents be disclosed.

38. There also appears in the disputed documents, personal information about other third parties, being members of the applicant's family. The applicant provided me with evidence, in the form of signed letters or notes of consent, establishing that these identifiable members of his family consented to the disclosure of this matter to him. As a result, by virtue of clause 3(5), this matter is not exempt from disclosure to the applicant.

39. Finally in respect of this issue, there also appear in the documents the names of a number of officers of the agency who appear to have been involved in varying degrees in dealing with these complaints. For the reasons I have given in previous decisions (see *Re Veale and Town of Bassendean,* 25 March 1994, Unreported, at p.12; *Re Kobelke and Minister for Planning and Others,* 27 April 1994, Unreported, at p.25), I do not consider that matter which consists of an officer's name, position in the agency and things done by that officer in, or purportedly in, the course of his or her duties is exempt under clause 3(1). Accordingly, I find that those names are not exempt.

The Burden of Proof

40. During the course of dealing with this complaint, solicitors for the agency submitted that, pursuant to ss.102(1) and (3)the agency was under no onus to establish that its decision was justified. It was argued on behalf of the agency that the words *"[e]xcept where sub-section (2) or (3) applies..."* mean that where sub-section 102(3) applies, sub-section 102(1) is not operative. It was argued, therefore, that because clause 8(2) and clause 5 are limited by a public interest test, the onus was on the applicant to establish that disclosure would be, on balance, in the public interest, and that the agency bore no onus to establish that its decision was justified. The argument appeared to be, in essence, that wherever exemption is claimed under a clause of Schedule 1 which is limited by a public interest test, the agency concerned bears no onus to establish that its decision was justified or that a decision adverse to another party should be made, and that the onus is on the applicant to establish that disclosure would be, on balance, in the public interest. That argument, in my view, is wrong and I reject it.

41. Section 102 of the FOI Act, which is entitled **Burden of Proof,** provides:

> ***"102*** *(1) Except where subsection (2) or (3) applies, in any proceedings concerning a decision made under this Act by an agency, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made.*
>
> *(2) If a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made.*
>
> *(3) If, under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest."*

42. In my view, the words *"Except where subsection (2) or (3) applies"* clearly indicate that the circumstances outlined in those subsections are exceptions to the general rule in subsection (1) which provides that the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made. Such decisions include, *inter alia*, matters relating to searches, charges, forms of access and refusal of access.

43. Section 23(1)(a) of the FOI Act provides that an agency may refuse access to a document if the document is an exempt document. In the Glossary in Schedule 2 to the FOI Act "exempt document" is defined to mean a document that contains exempt matter. "Exempt matter" is defined to mean matter that is exempt matter under Schedule 1. To justify a refusal of access on the ground that a document is exempt, the agency must make findings of fact that are sufficient to show that the document is either of a type described in a particular exemption clause and, under

some clauses, also that its disclosure will have the effect or effects described in that clause.

44. Some exemptions are limited by a public interest test. Where disclosure of matter can be shown to be, on balance, in the public interest, the limitation has the effect of making otherwise exempt matter not exempt. The applicant bears the onus of establishing that disclosure would be, on balance, in the public interest. However, in my opinion, the onus shifts to the applicant only after the agency has established that matter is exempt matter under the clause or clauses claimed. This makes sense considering that it is the agency rather than the applicant, that has access to the documents in question at all stages of the process. If the agency has not established that the matter is exempt, then the question of the public interest does not arise because the matter is not exempt and access must be granted.

45. In my opinion, in the course of deciding whether or not to claim an exemption for matter in the first instance, the agency must also consider whether any of the limits on the exemption applies. Where an exemption is limited by a public interest test, the agency should consider the public interest factors for and against disclosure and decide where the balance lies and whether to exercise its discretion to release matter that is technically exempt, under s.3(3). When an agency is called upon to justify its decision to me, upon external review, I expect it to be able to show that due consideration was given to all these matters.

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