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FREEDOM OF INFORMATION

Balancing the Public Interest

By Megan Carter and Andrew Bouris

Second Edition
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1 Introduction

Purposes of This Book

1.1 The aim of this book is twofold:

- to analyse the various aspects of the public interest as understood in a Freedom of Information context in numerous common law jurisdictions;
- to assist Freedom of Information decision-makers to apply the public interest test in considering exemption provisions in legislation which incorporates that test in one form or another.

1.2 This book is not intended to convey legal advice in any specific context. Instead, its goal is to provide analysis and concrete examples of public interest test considerations.

Effective Determinations Are Specific and Precise

1.3 The FOI Acts discussed in this book require decision-makers to weigh the public interest in maintaining exemptions and the public interest in disclosing the information where the exemptions are not expressed in absolute terms. It is the decision-maker's responsibility to assess these competing public interests and weigh them against each other in making his or her determination.

1.4 None of the Acts defines the concept of "the public interest" – intentionally, so that determinations must be made with regard to the specifics of each request.

1.5 Case summaries should be read with care and an eye to distilling relevant principles because it is inherent in the public interest test that the application of the relevant principles will vary from case to case. However, the cases are essential references for decision-makers because they are examples of how the balancing of public interest considerations and the interests protected by an exemption can be weighed.

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

Certain Factors May Be Disregarded

1.7 The authors also review irrelevant factors that a decision-maker should *not* take into account when applying the public interest test, including:

- public curiosity,
- the fact that the applicant or the public may misunderstand the information, and
- the class of information requested.

Review and Analysis of Public Interest Overrides In Westminster-Style Jurisdictions

1.8 Each of the following chapters examines the "public interest test" in the access to information legislation in the United Kingdom, Scotland, Ireland, Australia, New Zealand, and Canada. The experience of these jurisdictions and concrete examples from their case law are essential reference points for decision-makers in countries sharing a Westminster-style heritage.

1.9 The chapters summarise each jurisdiction's legislative framework, identify the department with policy responsibility for the legislation, describe its enforcement mechanism, and review the most important public interest test cases. Where available, government guidance on the application of the test is also included. Web addresses for government departments, Information Commissioners, ombudsmen, courts, and tribunals in each country are included to enable readers to pursue their own research.

1.10 Many of the cases discussed are available from public archives; where a case's full text is available at no charge, a direct web link has been provided in the footnotes. Web addresses are correct as of date of publication.

1.11 Australia and Canada have both federal and state or provincial level FOI legislation. This book does not attempt to consider exhaustively the application of the public interest test in every state or province. Instead, it reviews case law and government guidance which adds to the understanding of the test in selected major states and provinces.

1.12 For a variety of reasons, a particularly strong FOI jurisprudence developed in the body of decisions of the Queensland Information Commissioner beginning in 1993. The discussion of the public interest in one early Queensland decision, **Eccleston**, has been especially influential; it receives detailed analysis in chapter 7.

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