

## FOI Review Submission – Wilf Mentink

This submission relates a recent FOI experience a part of which forms a useful comparison between the earlier form of the Act and the revised version. Because of the complexity I have had insufficient time to do justice to the exercise. The matters raised include the following.

1. The operation of FOI in connection with agency operations outside Australia where accountability and integrity of federal government may be more readily compromised
2. The effect of FOI applications on the operations and the conduct of an agency in respect of the applicant, including the effect on an applicant of an agency's conduct under the Act
3. Inconsistent application of meaning of "personal information"
4. Use of email by persons dealing with an agency, and the exemption of email addresses as personal information
5. The "mosaic theory" (IC guidelines 5; in my matters potentially applying to international relations) supports arguments *for access* to information
6. Irrelevant matter S22(1)(a)(ii)
7. Interagency consultation – how to decide when an agency does not respond
8. Deliberative matter
9. Public interest should apply to all classes of information
10. Agency delays in processing applications
11. Delays in the OAIC
12. Easy cure to FOI delays: *disclose*
13. *There has been no discernable change in the "culture of secrecy"*

I am willing to provide any further information to Dr Hawke.

### ***This Inquiry:***

Last year I wrote to the OAIC drawing the Commissioners' attention to a number of problems I have experienced in FOI applications. The OAIC advised that by 1 November 2012 a review would be conducted by the office of the Attorney-general (A-G), but no contact information was given. On 17 November I wrote to the A-G asking that my letter be forwarded to the person conducting the review. It seemed much simpler than using other methods of searching for information about the review. A reply came somewhat indirectly in early January 2013 that submissions were still being received. I went to the review website and downloaded several submissions. Some referred to the poor publicity given to the review, and I agree with those remarks. Some simple low-cost strategies could have been employed, such as communications from the OAIC carrying a notice about the review.

Some readers will be familiar with the Australian Commission for Law Enforcement Integrity (ACLEI). So great are concerns about "corruption" in federal law enforcement – at least we are so led to believe – that ACLEI was created by the Parliament in enacting the LEIC Act. A Parliamentary Joint Committee exists to oversee the operation of the Act, a kind of ongoing "inquiry" to ensure that the Act is doing what the Parliament intends it to do. The LEIC Act, of course, does not directly address the operations of a body such as the AFP. It sets up measures to ensure the effective monitoring of the integrity of not only the AFP by the ACLEI – but also the ACLEI's operations. The Commission for Law Enforcement Integrity has built into it a firewall in the form of a separation of the Commissioner, who is not merely a titular head, from the ACLEI. The Act prescribes measures for dealing with allegations concerning the integrity of the ACLEI itself. But does the Act actually function as the Parliament believed that it should when passing the bill?

The new FOI Act created the FOI Commissioner. It prescribed that a review should be conducted at the end of 2012. In effect, the Act has been under constant review by the activities of the Commissioner in response to complaints whether expressed as complaint or made in the form of

alleging that an agency has made a mistake. The present inquiry takes a wider view of the operation of the Act.

If all agency decisions were “perfect”, the tide line of agency decisions would mark precisely the extent to which the Act actually gives access along the federal administrative shoreline. There would be no IC decisions giving further access. There would be no need for IC review. Since the world is not perfect, there is a need for review, and the OAIC monitors and guides agency decisions. One might presume that the present review is intended to provide guidance to the IC within its jurisdiction and powers and otherwise suggest further legislative reform. The effect is somewhat similar to the measures in place in respect of the LEIC Act where there is understandably a perceived need for more “intensive care” in respect of the concerns about AFP (and other agency) corruption.

I am a person who has had previous experience of FOI at state and federal level, but I am not one who makes the kind of FOI application made by a journalist or researcher. My applications are necessarily restricted to my “personal information”. My previous FOI applications at federal level were made in 2005. By chance I learned of the FOI reforms of 2010, and I obtained a copy of Senator Faulkner’s letter to agencies. It is rare these days to encounter the inspired and genuine words of a true statesman, for that is precisely how I viewed this letter. I became so excited about the new culture of disclosure that I decided to test it by applying for access to the same agencies for the same information involved in my 2005 applications, in fact I advised the agencies that I was so doing. In this submission I should like to report the results of this trial.

In March 2010 I wrote to the PJC on the ACLEI with some serious concerns about an investigation of information I had provided to Mr Moss in late 2008. I have become a regular correspondent with the PJC, sometimes writing to the Secretary, sometimes to the Chair, occasionally in sheer desperation sending letters to individual members of the Committee. The replies from the PJC invariably stressed that the Committee, while generally overseeing the operation of the LEI Act, does not become involved in particular investigations or decisions by the ACLEI or Mr Moss. But at the time the PJC was receiving submissions, and this was the format by which I expressed my concerns:

The first issue is that the deliberations of the committee and the ACLEI usually focus on the kind of corruption that draws attention: law enforcement (and other corruption sensitive agencies) perverted by the “Mr Bigs” of crime within the territory and the jurisdiction of Australia. Several submissions to the inquiry speak of the usefulness or otherwise of overseeing strategies to deter and to investigate corruption. If officers tempted by corruption know that they may be held to account, they may be deterred. **This submission emphatically argues that without such accountability measures, in this case outside the borders of Australia, perhaps even the most principled officers can lose their “integrity”.**

The submission drew attention to three persons of high standing who had appeared before the PJC as expert advisors, and I outlined my concerns about the integrity of these persons as evidenced in my matters. Two of those persons were directly implicated in my allegations of corruption.

The submission was received but would not be published. I was repeatedly warned that should I publish the submission I would lose certain privileges attached to submissions in general. I replied that I would be happy should the matter enter the public domain.

As it was, my submission was quite out of the ordinary. It related specifically to a matter under investigation by ACLEI, yet mentioned no specific detail or complaint about AFP corruption while impugning two key persons close to the investigation. There remained a question: could the PJC receive a submission that was in effect a “case report”? And if so, was the PJC justified in refusing to publish the submission?

This inevitably leads us to the very relevant question: in the present FOI review, can submissions be made that actually deal with specific FOI decisions, in the absence of the facts of which more general

submissions concerning the Act and its operation would lose force or be unintelligible? If so, can those submissions be published? I suggest that the answers to these questions should be YES.

The majority of the submissions I have seen do not require knowledge of any particular FOI decision and the context in which it was made. In this respect I feel that the body of submissions is lacking and that the Parliament may remain uninformed of important issues. I therefore make this submission knowing that while it ventilates ongoing personal disputes with certain agencies, the information and conclusions may be useful to this inquiry.

The reader is likely to be perplexed if not annoyed by my references to the LEIC Act. The writing of this submission marks the crossing of a threshold reached on 21 January 2013 when having started to compose this submission I resorted to Google in search of precise words to describe the function of the PJC on ACLEI. I immediately discovered a reference to an inquiry by the PJC which was commenced on 6 December 2011 and received submissions until the end of February 2012. The subject of the inquiry was "integrity of **overseas law enforcement operations**".

I now outline a strange sequence of events that bear directly on the operation of the FOI Act.

On Thursday 1 September 2011 the AFP (see further below) sent a last minute "consult" email to the ACLEI. The ACLEI file shows that my matter had lain dormant since November 2010. The ACLEI claims that "as luck would have it" the matter was under review with a view to dismissal, but there is no evidence of prior activity on file. By the following Wednesday, ACLEI had finalised a lengthy minute recommending dismissal of the matter. The matter on file on and between 2 September and 6 September 2011 strongly suggests that in fact **the FOI consult contact from the AFP had initiated an agency response in an operational matter that had been inactive for a very long time.**

Did my submissions to the PJC of March 2010 play any part in the PJC decision to subsequently inquire into the integrity of overseas operations of, almost exclusively, the AFP? I had written to the reconstituted PJC in February 2011. Following the release of information under FOI by the AMSA I had written to Mr Moss passing on further information gleaned therefrom. I wrote again immediately following the AFP decision that had prompted the 1 September 2011 consult. The FOI disclosures were now powerfully feeding evidence into ACLEI of corruption in AFP overseas operations. Did Mr Moss convey any concerns to the PJC? He should have done so, and yet the AFP FOI contact had coincided with if not actually triggered official moves to terminate the investigation of my information. Was it merely ironic that on the very day that ACLEI penned its dismissal letter to me the PJC had invited submissions?

**Here I state a basic and powerful concern. A person applies for FOI access. If the application passes beyond the agency's FOI unit firewall to the agency itself and to other agencies, the deliberations of those agencies may be radically affected in a manner potentially adverse to the applicant and to public interests.**

On 9 February 2011 I had written to each of the members of the PJC – at a time when the committee was receiving submissions on the very subject lying at the core of my matters supposedly under investigation by the ACLEI, and yet nobody advised me of the inquiry which could rightly have been commissioned on the basis of my complaints alone.

### ***The AMSA applications:***

The Australian Maritime Safety Authority (AMSA) operates the Australian Register of Ships under the Shipping Registration Act (SRA).

In August 2004 my 10m sailing vessel Larus II was stolen in Dili Harbour, East Timor. The thief sought assistance from the Australian consul (DFAT) producing a fraudulent receipt and several supporting documents. The Registrar of Ships closed the registration of the vessel, effectively voiding my title. I received information in September 2004 that the vessel was missing, and tried to report the theft.

DFAT (Director Consular Operations) declined to assist, making the peculiar suggestion that I ask AMSA whether the vessel was still registered in my name. I had accessed the AMSA website, confirmed the vessel's official number from the on-line list of registered vessels, and emailed the Registrar reporting the theft and seeking advice. There was no reply. By 1 October 2004 I had received the DFAT's mailed letter suggesting I check with the Registrar, and I accessed AMSA's website again to find the vessel no longer listed. I sent a panic-stricken fax. The Registrar responded with the terse information that the registration had been closed because it had ceased to be entitled to be registered, and he attached to the email an extract from the Register which stated that a foreigner had purchased the vessel. Shocked, I requested assistance and access to the (relevant) documents. I received an illegible copy of the "transfer document", and the Registrar refused to provide further information.

It is difficult to say what the pre-FOI response of a public official such as this would have been to a complaint by a victim of crime. The Registrar obviously had information about the theft of my vessel, but AMSA is not per se a law enforcement body although it commands through the SRA a wide range of penalties. Common sense tells us that information would be provided on the spot, but what if the information revealed misconduct on the part of AMSA? Common sense indicates a competing interest, an unlawful one.

In requesting the disclosure of information I had written, underlining:

Please note that this is not an FOI request – I am reporting and investigating a crime and I seek your prompt cooperation.

This of course underlines common perceptions at the time that FOI access was invariably piecemeal, involved lengthy delays, and might incur costs. After three months of repeated requests for assistance and access to documents, during which the Registrar made no mention of FOI, I wrote again, concluding with the words

You may wish to consider the request as made under whatever Freedom of Information provisions apply to your office. I will accede to this knowing that there is no valid reason for exempting any document or part thereof in your possession that relates to my vessel. I request that you provide the information as soon as possible and waive any fees that might apply.

Documents subsequently released by AMSA with redactions in a two-stage process extending to May 2005, eight months after I first requested information, revealed the extent of misconduct by the Registrar, who now had a very good reason to profess the belief that I was lying and that I had sold the vessel. Two-stage? **AMSA was still trying to contact the thief to consult him about the release of information!** Should I not write here: "alleged thief"? On the AMSA documents the evidence is clear enough.

Several crucial pieces of information had been exempted. The thief had sent faxes to the Registrar from a hotel in Dili, the fax number visible on the one document initially released in October 2004. Under FOI in 2005 the same fax number was exempted. The fax numbers on all other documents were not disclosed. A second set of faxes had been sent from Kupang, Indonesia, the thief pretending he was still in Dili, and had that information – the fax number of a public telecommunications facility in Kupang – been disclosed in October 2004 it would have displaced my belief that the vessel was a long way to the north from the island of Timor (even the thief had professed an urgency to return to England). I would have gone straight to Kupang. The thief had proclaimed "the head of the Australian Federal Police" in Dili to support his claims – had this information been disclosed the AFP should have been compelled to act.

It is interesting to note that in many instances an FOI officer is not able to discern the import of the information in respect of which he is forming a view to release or exemption. AMSA at the time may have been a low-volume FOI agency, unaccustomed to having to protect its illegitimate interests.

When the FOI officer consults staff in an operational area, those persons may also not fully appreciate the significance of seemingly “innocent” information (see the ACLEI and DFAT matters below). Had similar information been held by the AFP, it is likely that a host of exemptions would have been invoked. The information released by AMSA is conclusive evidence of defective administration – at best.

Had it been in force in 2004, how should the revised Act have directed AMSA?

1. AMSA should have released the documents in full within days of being notified of the theft.
2. The public interest test should have favoured full disclosure of conditionally exempt matter.
3. Any requirement that a “formal” application be made could have been waived or dealt with while AMSA was preparing copies of documents. (Even the “FOI request” above that commended in January 2005 did not meet the formal requirements of an application, yet it proceeded)
4. There should have been no fees.

The same information came under consideration in my 2011 application to AMSA under the revised Act. FOI staff had the benefit of the 2005 decision. Several blocks of matter were disclosed to have been absurdly exempted in 2005, and yet the decision-maker seemed to be wielding his exemption pen with little thought. The application drew in later matter from 2005 to 2011. Some of the more obvious anomalies include exemption of:

1. Information that according to the thief’s account I must have been a witness to recording, including the thief’s signature (personal but obviously reasonable to disclose)
2. The thief’s signature made illegally on a registration certificate and purporting to be that of a “delegate to the Registrar”
3. Information that according to the thief’s account I would most likely have known, eg his email address
4. Names of Australian and UK consular officials
5. The endorsement purporting to certify a true copy of the “receipt” – an official function revealed only very recently to have been performed by the thief’s girlfriend (claimed to be personal information)
6. Information on documents I had actually provided to AMSA in 2007<sup>1</sup>

In 2005 and 2007 the AFP sought information from AMSA concerning my vessel and its registration. The AFP writer in 2005 requested consultation should an FOI application be made by me, the writer desired that the documents relating to his inquiry be suppressed in order that I should not learn of the inquiry and potentially prejudice a law enforcement operation. The AFP released these documents in 2011 but AMSA to date denies any record of them, raising the allegation that they were deliberately not filed as a result of the AFP concerns.

Once again, AMSA claimed to be contacting the thief in order to consult, again receiving no response but delaying the decision.

The OAIC received my application for review on 24 August 2011. By early 2012 some OAIC activity appeared to occur. Claiming in part matters relating to a legal proceeding in late 2012, AMSA released virtually all contended information, more than 18 months after my application. The OAIC did not make a final decision, leaving several important principles undecided. The AMSA decision, having been influenced by unspecified considerations of the court proceeding, is not a decision made only under the Act.

In the process, AMSA changed its mind, deciding that the names of Commonwealth officials in the context of their duties (eg the Australian consul in Dili) was not personal information. It so advised

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<sup>1</sup> While not crucial to my case on review because obviously I did not need access to those documents, it is pristine evidence of the decision-maker’s very limited view of context

the AFP, which wanted to know whether names of AMSA staff should be exempted, but AMSA also advised disclosing the information in case withholding it made me angry!

This message concerning names of Commonwealth officials has not permeated other agencies such as the ACLEI and the Department of Attorney-general itself.

AMSA does not extrapolate the principle to names of foreign officials. The name of the UK consul in Dili remained exempt as personal information – but AMSA was in the end prepared to concede the point that disclosure would be reasonable given the evidence I had provided of email correspondence with the person concerned about precisely the same subjects – the theft of my vessel and his candour in respect of FOI!

A further interesting example occurred in 2007 when a person consulted AMSA claiming to have purchased my vessel as an abandoned wreck. He was clearly concerned that a prior interest might affect his claim, and he sent a message “on-line”. He may have been concerned that this contact with AMSA might precipitate official action and jeopardise his claim. Using only the name “Rob”, he claimed to be a “missionary in Asia” who wished to use the vessel in his mission work, thus setting up a most honorable facade just as the thief in Dili had relied on the names of consuls and the head of the AFP. He claimed to have found my vessel “on a remote island in Asia”, which enhanced the image of abandonment, but in fact it was always located 3 km from Kupang’s provincial port of Tenau – Kupang a hotspot for the AFP and people smuggling. He bestowed blessings upon the Registrar.

But the gentleman had not provided his full name. The email address he gave was a yahoo address using three concatenated Indonesian words capable of translation as “filled with the Holy Spirit”. When the Registrar wrote to this address conveying no concerns about the vessel he continued to proclaim to have been sold, he might have imagined that he was writing to “Rob”, but the reply email revealed that the yahoo account had been created in the name “Jim Jones”. Readers with knowledge of recent American history will be immediately suspicious of a person claiming to be a “missionary in Asia” and writing under that name. Email addresses are not the same as residential or even post office addresses which can be traced to real people. One might question the propriety of government officials and agencies communicating through unverified email addresses. It seems absurd, for example, that the Registrar conducted his official business with the thief sending emails to “kkkshark@(global email facility)”<sup>2</sup>. Most agencies have not questioned giving me access through wilfmentink@yahoo.com, but arguably that address has been sufficiently verified by a history of correspondence. Some agencies have not accepted that without verification of identity, and some will not give access by email; these issues relating to email addresses may be something for this review to consider.

In comparing the AMSA decisions we must first acknowledge that the experiment cannot be regarded as a pure trial. AMSA knew that it had made the earlier decision. However, some of my conclusions remain very valid. Only the conditional exemption in S47F was involved (I have no record of the exemptions claimed in 2005). Most agencies have “standard words” that are pasted into written decisions. It is likely that an agency, having on some unknown basis decided to exempt, inspects various exemptions and applies them without much deliberation.

This is a fundamental difference in the revised Act. When considering the “conditional exemptions” the agency must keep saying to itself “this matter must be disclosed” while asking the question “would it be reasonable to disclose?”, an inquiry that demands deliberation on each piece of information, always in a broad context. In my opinion, that important question so central to the new Act is never asked in a primary decision, and *may* be considered grudgingly on review only where the applicant insists. Considering all of the evidence, I conclude that while the former AMSA decision justifiably involved only the blacking out of seemingly generic personal information, the later AMSA

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<sup>2</sup> Googling “kkk” points one to sites to which some service providers bar access

decision shows that nothing had changed. Because information had been deemed “personal”, it was therefore not reasonable to disclose and thus in the “public interest” to exempt. While the two-stage decision-making process sounds sensible, coupled with the Act’s clear direction to disclosure, there are no examples of the AMSA decision-maker taking the path of determining matter to be conditionally exempt and then declaring that on the balance of public interest ***it should be disclosed.*** It is a fine point perhaps, but I contend that decision-makers today determine S47F matter to be exempt, that is, it should not be disclosed, and invariably fail to find any public interest in disclosing it.

One problem, of course, is that where any seemingly personal information ***is disclosed*** we cannot know whether

- a. The decision-maker did not consider the information personal, or
- b. if she did, believed it reasonable to disclose to the applicant, or
- c. if she believed it not reasonable to disclose the Act directs that it be disclosed and that
- d. the public interest favouring disclosure was not outweighed by that against disclosure,

and of course the reasons for such decisions are absolutely necessary when dealing with the same decision-maker’s reasons to exempt.

There are several whole blocks of text formerly classified as exempt personal information by AMSA. One example was the information concerning the thief’s high-ranking “referees” in Dili. In both the 2005 and 2011 decisions AMSA could have exempted the names as personal information while disclosing much of the text. The 2005 decision clearly assumed that I should know absolutely nothing about the contacts given to AMSA, not even the fact that the thief was using referees, because it was his personal information. That view changed in 2011, and to be fair to AMSA that might have been because the matter could not be considered unreasonable to disclose. In another block of text the thief mused that I was likely to have died and for this reason he could not contact me. The thief’s motive was clear – he sought to dissuade the Registrar of Ships from contacting me: that “information” is something only I could deduce.

Before moving on I should raise here the “mosaic theory”. According to IC guidelines it is permissible to exempt matter that an agency suspects may, despite its seemingly innocuous nature, disclose to persons aware of a wider context information that might attract exemption<sup>3</sup>. **No decision-maker in my applications has invoked this mosaic theory; I contend that it is absurd and should play no part in FOI decisions to refuse access.**

On the other hand, it may actually operate in favour of an applicant, particularly in S22(1)(a)(ii) claims that matter is irrelevant to an application. Such a claim may be made in respect of a complete document, raising the question of why it answered the search criteria in the first place, a folio of a document, or a part of a folio.

**If the whole document is truly irrelevant to the application it should be discarded from the application file. If a part of a document, it “belongs” to the applicant and should not be regarded as “irrelevant”, unless it involves information about other matters that would routinely appear on the document. If it is not capable of exemption under other specific provisions it should be disclosed.**

An FOI decision-maker can apply only a limited knowledge of context in his deliberations, but he may consult personnel in “operations”. An applicant, on the other hand, has limited knowledge which he seeks to augment by applying for access. His context may grow more complete, and only he will know whether “S22(1)(a)(ii)” information is irrelevant.

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<sup>3</sup> this would in my matters be limited to international relations S33, but could be applied across agencies, for example AMSA exempting information in the belief that in connection with AFP documents it may affect Australia’s international relations.

All of this suggests a huge potential workload for an FOI unit. There is a simple cure: disclose information unless it is absolutely essential to keep it secret.

### ***The DFAT decisions:***

In 2005 DFAT gave access to a large number of documents in a frank disclosure the quality of which is matched in my experience only by a much earlier state-level decision by the Queensland Department of Education. The documents reveal matters which most people would consider a government department to be desperate to conceal. The resultant complaints about misconduct of which the documents gave evidence have failed to strike root – good evidence that the various express concerns about “harm” are baseless. It is relevant to mention here that the AFP were consulted but did not respond, matter highly damaging to the AFP was disclosed by DFAT applying the same frankness it applied to its own information. This raises a problem: how does an agency decide when another agency fails to respond to a consultation? Does it take the lack of response as evidence of lack of concern and disclose all of the matter? Does it apply its own standards given the limited knowledge of context? Or does it exempt the lot?

Aside from some sufficiency of search issues that can be explained by another phenomenon of concern – officers of an agency deliberately not recording information or hiding it from FOI – almost all information was disclosed. This of course, in the particular circumstances, draws attention to that which was exempted, almost a full page of text written by the Australian Ambassador to East Timor in March 2004. The context was a freely admitted decision and agenda to prevent my entry to East Timor – by Commonwealth officials – in order to recover my sailing vessel in early 2004. The 2011 decision essentially applied the same exemptions as in 2005.

A block of text, all of it, was exempted under what is now S47C(1) as “deliberative matter”. Under the revised Act this exemption provision does not require an agency to consider whether it would be reasonable to disclose the information. If it falls under “deliberative matter” it must be disclosed unless the public interest suggests otherwise.

It is a curious aspect of this comparison that other absolutely clear S47C matter was not exempted under the revised Act. It would have been absurd to exempt it where it had already been disclosed in 2005, but disclosure could not be justified by considering disclosure to be not unreasonable as in other S47 provisions – that could only be done by claiming that given the earlier disclosure there was no public interest in exemption. There are, as I have said, no written reasons for disclosing information. (*But the AFP did exempt under S47C that (AFP) information in its decision on the same documents copies of which had in fact been provided to the AFP by me – liberally stamped as released under FOI by DFAT.*)

In Queensland FOI decisions “deliberative matter” was clearly seen as capable of exemption in order to protect the “deliberative processes” of government. That makes some sense. Once a final decision had been made the exemption became obsolete, meaning that in time one could receive access to such opinions, advices, and recommendations. The present principle is in effect that persons may say anything they like, no matter how libellous, exaggerated, unfounded or untrue, in order to influence government decisions. THAT IS JUST ABSOLUTELY ABHORRENT !! This must be changed as soon as possible. It is claimed that if such information – obviously that which is libellous, exaggerated, unfounded or untrue – were disclosed it would deter future such advices and opinions. What an admirable objective! If a person qualified to provide such information with a view to influencing government cannot stand by his words, let him be silent!

In the 2011 application I specifically invoked the argument that such information would have lost its potential harm after eight years. That element of earlier concepts of deliberative matter has been lost.

A second block of text was exempted totally under S33(a)(iii) "reasonable expectation of damage to the international relations of the Commonwealth". Ruling out the possibility that the good ambassador was not troubled by matters outside East Timor, DFAT claimed here that he had committed to print words that would, if published, be reasonably expected to damage relations between Dili and Canberra. It is extremely difficult to imagine how the matter of my application to briefly enter East Timor for one specific purpose, to recover my vessel, warranted words that would have a negative impact on relations between the Commonwealth and the government of East Timor. Answers readily come to mind when one views the other DFAT documents disclosed and the full panorama of my matters in East Timor.

Firstly, those documents are replete with expressions of a DFAT/AFP agenda to procure my exclusion from East Timor using Commonwealth agents posted in Dili. There is a fundamental human right that a government should not interfere in the legitimate dealings of a citizen with another government, in fact the Minister had declared to me that permission to enter a foreign country is the sole prerogative of that country. My matters did not involve transnational crime, or trade relations, or the security of Australia. At around that time an Australian union official had pursued the rights of East Timorese workers in Dili, raising a threat of interference in local politics that was totally absent in my matters. The documents released were prima facie evidence of consular staff and AFP in Dili acting completely outside their jurisdiction and "standing over" the government of East Timor in respect of my right to seek entry and remain in that country.

Secondly, the documents strongly suggest that DFAT and the AFP had been trying to procure the government of East Timor to seize my sailing vessel and sell it. This is undoubtedly unlawful. The ambassador's remarks may have claimed that should I return to Dili and recover my vessel (with the consular assistance I had been promised by Canberra), the same government officials would see Australia in a bad light (rather than seeing procedural fairness and democracy in action). It is true that in my matters the Commonwealth had thoroughly tainted its relations with East Timor, and had most likely acted very unlawfully.

By 2011 I had built up a substantial case of public interest in exposing these matters. That is not the same as public interest in supporting my cause in particular, and certainly not the same as anyone actually being interested in my matters. The Australian public interest platform is constructed on equality before the law for all citizens and a democratic government that is open and accountable. Parts of the new Act stress that political embarrassment must not be a ground for exemption of sensitive information.

The DFAT decision was made in October 2011 after some delays for which extension was not sought. It remains with the OAIC for review of the ambassador's remarks. Eight years have passed, during which period the East Timor Immigration Minister was convicted and jailed on criminal charges. There have been ongoing political changes. Disclosure of this information is unlikely to be of any interest at all to the current government. If it is, then perhaps the East Timorese ought to know the information.

One of the key principles partly enshrined in the new Act is the role that public interest plays in decisions to give access. Many exemption provisions exclude the public interest. This is fundamentally wrong and should be changed as soon as possible. These exemptions smack of the old culture of secrecy, and they taint agencies' approach to those exemptions which are directed by public interest.

I now deal with other applications.

**Centrelink:**

My personal affairs application to Centrelink was speedily determined with little if any exemptions, providing a large number of documents. Centrelink may well receive more applications than any other agency and seems to have developed an efficient pro-disclosure approach. However, when I applied for information concerning my elderly mother, that was a very different matter. Were my mother not regarded as having lost capacity, it would not have been necessary to make the application. I had effectively been “refused access” by the sibling holding enduring power of attorney. I received a communication that I would receive little if any access. Reasonableness of disclosure and public interest were not about to be given any rein at all.

**Australian Broadcasting Commission:**

The Act has been criticised in respect of the ABC’s policy of excluding from FOI anything remotely relating to “program content”. It is of course in this area that the ABC competes with purely commercial media bodies, and disclosure under FOI might undoubtedly affect the ABC’s interests in that respect. Once the information has become stale, perhaps a matter of weeks in this field, the exemption arguably loses force. My application sought to investigate the sources of information published and distributed by the ABC many years ago. Those sources are likely to have been associated with the AFP and DFAT, and it appeared that the ABC had a special relationship with both of those agencies that was not enjoyed by other media bodies. I argued a public interest in disclosure that included an allegation that the ABC’s sources had provided untrue and libellous information. I decided that it was not worth pursuing, but I have on record an application for IC review in which I stated:

I have read the relevant section of the Act, and I consider that the intent of the legislation is to protect the commercial property interests of the organizations offered relief by the Act from the requirement to disclose information that it has obtained at cost, has published, and can sell to other media agencies.

I do not know whether this July 2012 application was sent to the OAIC.

**Applications to the AFP:**

On 20 May 2011 I applied to the AFP. The scope was rather wide, but when going fishing in such murky waters the concerned person has little knowledge to guide him. A week later the AFP signified its “intention to refuse access” under S24. The writer cited “16 cases”, “49,050 log entries”, and “10,938 documents” that required more than 30 months of work by a “dedicated person”.

Faced with such staggering statistics, the applicant feels browbeaten to limit his application to what the AFP wishes it to be. I decided to investigate, and inquired as to the number of log entries and documents involved in the what I believed to be current AFP (PRS – Professional Standards Unit) investigation of my matters that had been referred to it by the ACLEI in June 2009. Subsequently I discovered that my inquiry was sanctioned by the Act as a “consultation”. The AFP replied that it was proceeding with that particular “application”, having apparently no experience of consultation under S24 or no desire to consult. The original application was decided under S24 to be “refused access”.

The scope of the new application is very relevant to these submissions. I could have said that I wanted to know everything about “what the AFP had been doing about the matter referred by the ACLEI”. But I had not paid much attention to the scope criteria, and decided to let the matter run. I imagined, as most applicants do, that the PRS had been assembling a file specific to the request by Mr Moss that included documents from the ACLEI, reports of past complaints including my 2004 complaint to the Ombudsman, AFP records (raw data) relating to the matters alleged, and records of PRS investigation behind the original records. The words I had used are capable of such

interpretation. The most disappointing aspect of the matter was that the AFP did not give any idea of the numbers of log entries and documents that the revised application involved in order to assist me in making future applications. The application was deemed to start on 24 June 2011.

On 8 July the AFP advised that it needed to consult with the ACLEI. Claiming that the Act did not provide for extensions of time to consult with other agencies, the AFP sought my consent to extend so that the decision was due on 23 August 2011. A further extension of time was claimed, and the decision was made on 21 September 2011, 4 months after my initial application. As I have mentioned earlier, the consultation with the ACLEI did not commence until 1 September 2011, nearly two months after the extension of time had been claimed. The documents disclosed that the AFP had returned the investigation to the ACLEI more than a year earlier, and that during the one-year period of investigation by the PRS virtually nothing had been done.

Shortly after I learned that the AFP application was under way, I identified a need for AFP information specific to the matters involving AMSA. An application was sent on 27 June 2011. A S15 request to extend time was granted, the AFP claiming delays in "line areas". Then on 26 August 2011 a S15(7) extension of time was claimed to permit consultation with the Indonesian National Police (INP), the decision now due on 25 September 2011. The OAIC granted a further extension to 25 October 2011, saying:

The OAIC is satisfied that providing the AFP with additional time to process this request would be more likely to result in the agency being able to manage and produce a well-reasoned FOI decision which could potentially release more information to Mr Mentink.

In the event those words of promise bore no fruit. They may be "standard words" in the OAIC.

The decision was now due on 25 October 2011, four months after the application had been lodged. On 28 October 2011 I applied for IC review. The AFP decision followed on 31 October 2011.

The AFP claimed a need to consult the INP. By that time there was evidence that the AFP had been actively procuring the INP to investigate me with a view to having me prosecuted in Indonesia and/or deported. As the AFP later conceded, consultation with the INP took place through AFP "Liaison Officers" attached to Australian consulates. I became apprehensive on two counts. The consultation would involve the "line areas" in both the AFP and the INP whereby the AFP had been working its mischief since 2003. A consultation would be likely to be regarded as vexatious by both parties. It would trigger and provide further opportunity to conduct operations adverse to me.

I had a very real concern that my FOI application seeking accountability of the AFP in respect of past operations would cause a repeat of the conduct I was trying to address with the help of FOI. A further problem was the fact that in Indonesia there is no FOI law in practice – the AFP would "consult" a law enforcement body in which there simply was no understanding of FOI.

Much later the AFP claimed that its overseas "posts" – the liaison officers in Jakarta and Bali – had not responded. It seems that there never was any consultation. This says something about Commonwealth officials working in a foreign territory. They believe themselves to lie outside much of the law applicable in Australia – fertile ground, perhaps, for an *outlaw*. They are engaged in the "real-life business" of law enforcement in which there is no room for human rights, let alone FOI.

Chronologically, the application was restricted to July 2006 until May 2009. Had I not been overborne by the earlier claims of 50,000 log entries I would have extended that period to do a little more "fishing"<sup>4</sup>. The AFP disclosed the existence of some 15 AFP-INP documents dated in 2007 and

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<sup>4</sup> The term "fishing expedition" has decidedly negative connotations in Australian law. In one Queensland matter where I sought extension of time I claimed delays in FOI. The court dismissed that claim because FOI was a "fishing expedition". Almost all FOI applicants want to know what is held or not held by an agency, and lacking any other power to obtain information must make speculative applications under FOI. This shows how courts can remain oblivious of changes that promote government transparency and accountability.

one dated in 2009. The earliest was a further inquiry made of AMSA which again drew the response that I had sold my sailing vessel; on the same day the AFP sent a letter (to the INP?) that was totally exempted. The documents consisted of letters, all of them exempted, and heavily redacted emails between Canberra and the liaison officers in Jakarta and Bali. The 2009 email mentioned my vessel, which thus appeared to feature throughout; but no document was disclosed to be dated 2008 – in this year the effects of AFP activity against me were most pronounced.

Most of the content of the emails was exempted. All of the letters, 6 from the AFP and 2 from the INP, were totally exempt, not a word disclosed. All of the matter was claimed exempt on the ground that disclosure would or could reasonably be expected to cause damage to the international relations of the Commonwealth (S33(a)(iii)), and on the ground that disclosure would divulge information communicated in confidence by the authority of a foreign government (S33(b)).

The second of these could apply only to the letters and, in the emails, information coming *from the INP*, and yet the S33(b) exemption was applied to the 6 letters from the AFP. While arguably information from the AFP might disclose some information that had earlier been communicated to it by the INP, that exemption could not apply to all of it. Arguable too, that this brace of exemptions was simply applied with little thought in effecting AFP disregard for FOI and its policy of disclosure.

The claim of damage to international relations is quite fatuous. It is consistent with the argument that Australia's FOI Act causes damage to Australia's relations with Indonesia by its potential for "culture shock". In other words, the disclosure of any information involving the INP would offend its culture of secrecy and result in damage to its relations with the AFP. It raises the disgusting spectacle of the AFP playing ball with foreign LEAs according to its perceptions of the foreign country, Australian citizens coming off second best. I would suggest that in fact the INP couldn't care less, especially since the communications almost certainly involved AFP interests only. The matter is complicated, however, by the fact that most of the disclosed documents neatly straddle the matters involving the vessel and the "missionary in Asia" in Kupang in 2007. This raises allegations of the corrupt involvement of AFP with INP in Kupang, and the question: can FOI exemptions protect corrupt AFP? This must invoke public interest in disclosure, but of course in S33 public interest cannot compel disclosure.

Several other exemptions were claimed on a one-off basis, such as disclosure reasonably prejudicing effectiveness of lawful methods or procedures (S37(2)(b)), where public interest plays no part. This is akin to S47E(d), substantial adverse effect on the proper and efficient conduct of AFP operations, where the public interest does come into play. Applied together, an applicant has little chance of being able to argue the matter, and it must be left to the OAI to judge in his own good time.

As the extent of delays became apparent, I felt pressured to make some five further applications to the AFP that in the main were driven by information disclosed by the first two decisions. Some sought just a few documents to fill in gaps, and these were readily acknowledged and processed. Two applications have stalled, and the AFP does not reply to enquiries about them. To refer those matters to the OAI would incur delay of more than a year. The AFP's FOI section appears grossly under-resourced. To date some 19 months have elapsed since the first application, but there is no sign that the OAI is close to a resolution.

### ***Applications to the ACLEI:***

As I have related above, the first AFP decision coincided with moves by the ACLEI to terminate the investigation of the allegations of corruption I had made three years earlier with no feedback whatsoever from the ACLEI. That AFP decision informed me that the investigation had returned to the ACLEI a year and a half earlier because of the conflict of interest raised in early 2010 in my submission to the PJC, and that the PRS had done very little. The second decision revealed documents (dated 2007) that arguably should have appeared in the PRS set as original records

retrieved and filed by the PRS. The numerous 6 December 2011 reasons given by the ACLEI were absurd, the only plausible excuse being limited resources. On 16 December I applied for access to the ACLEI file. A month later an extension of time was claimed for third party consultation. The decision was communicated on 15 February 2012.

These documents were very difficult to analyse for two reasons. They were not in chronological order. Much worse, they included email records held by individuals that had accumulated numerous replies, the result being that one particularly well-circulated block of text appeared 15 times. Text appeared in various font sizes and colours, and I had to request more legible copies of a number of documents. It took weeks to piece together the information.

I had erred by excluding from the documents those which had appeared in the AFP decision and correspondence between me and the ACLEI, in order to reduce the ACLEI's work load. That increased my workload.

The ACLEI had decided that, bar names of a few people at executive level, names of ACLEI staff were exempt under S47E (substantial adverse effect on the proper and efficient conduct of operations) and also under S47F (personal information). The reason was clear: should names of ACLEI investigators become widely known they might be more susceptible to being suborned by the criminal organisations or AFP targeted by ACLEI. I was of course an informant, neither police officer nor "crime figure". In the document summary the principal author of a document was referred to by a code such as "officer A" where the name was deemed exempt. Had such a coding been followed throughout the documents, analysis would have been much easier. A further complication was that the name of a former employee of the Ombudsman, "D", was disclosed. This person authored the 2004 decision of that office which now lies at the centre of my allegations. "D" worked at executive level in the ACLEI, and the ACLEI file reveals that when the PJC began making inquiries followed by inquiries from the office of the Minister, "D" acted as the intermediary between the ACLEI and both the PJC and the Minister's office. He did so claiming the matter to be under active investigation, and yet in all of the matter on file relating to late July to early November 2010 there is no evidence of any actual investigation, the document density dealing with the ACLEI's response to the PJC and the Minister is far higher than at any other time.

The ACLEI FOI decision revealed that a second former employee of the Ombudsman had been involved. This person was coded as "officer B" on a document that he or she authored, but it could not be seen how he or she had been involved elsewhere in the file. The public interest in disclosure of that name is very strong. The problem is that the sole document that can be linked to this person is a declaration of potential conflict of interest that throughout dismisses that conflict as being of infinitesimal concern. However, none of the assertions made by officer "B" could be claimed by "D", who on the present evidence would face serious consequences were his 2004 decision ever reviewed, yet there was no such declaration by "D" on the file. Officer "B" may have had nothing to do with my 2004 complaint to the Ombudsman, or may have been involved, in particular one of two persons whose names were recently disclosed by the Ombudsman under FOI, but officer "B" had declared that under secrecy provisions this kind of information would never be disclosed – by the Ombudsman – even to the Integrity Commissioner.

The above account is given in some detail to illustrate how information disclosed under FOI by several agencies can be connected, resulting in a soaring public interest in disclosure. This public interest involving ACLEI, DFAT, AFP, AMSA, the Ombudsman, and departments such as Transport and the Attorney-general has been put in argument on internal review and in the later applications.

Of particular concern in the ACLEI decision were two documents (dated 2003 and 2007) that are original AFP records or "raw data". They are the only two such documents and they must have been provided by the AFP to the ACLEI in July 2010 in the "hand-back" of the matter to the ACLEI. They were not disclosed by the AFP in the "AFP-ACLEI" application/decision. The second AFP decision disclosed a number of 2007 documents as mentioned above, all of which should have been

extracted and passed to the ACLEI in July 2010, but the 2007 document disclosed by ACLEI was not, and it can be seen clearly to be a reply to a 2007 AFP document dated three days earlier. The 2007 documents concern me and my vessel, the latter having long been declared “out of jurisdiction” by the AFP, and declared by Canberra for three years to have been sold in 2003.

On internal review the ACLEI disclosed the name of the “director of investigations”, I having pointed out that the AFP had already disclosed it – despite the earlier “consultation” in which ACLEI, having the benefit of the AFP decision, had indicated to the AFP that it had no concerns to express. This disclosure enabled me to make some sense of the redacted documents. A further irony is that the person concerned had long left ACLEI, any need to keep his identity secret no longer relevant.

#### ***The Ombudsman:***

I have sometimes asked myself why I did not apply earlier to the Ombudsman for access. The documents disclosed by that office in 2012 illustrated the futility and yet amply substantiated my concerns. In 2012 I had raised the conduct of ACLEI with the Ombudsman with particular reference to the conflict of interest of “D”. In his reply the Ombudsman referred to a “declaration” made by “D”. The reply advised that no further investigation would ensue, but I was invited to make further input before formally closing the file. I requested a copy of the “declaration” by “D”. It was common ground that I already had partial access to the ACLEI file, and I knew that the only actual declaration was by officer “B”. The Ombudsman replied that his investigations were carried out “independently, impartially, and *privately*” and refused to disclose the document which he, and/or ACLEI, claimed to constitute “D”’s declaration. Considering all of the circumstances, one might feel that such disclosure would be entirely appropriate, and that refusing to disclose it was highly suspicious. The claim that an Ombudsman conducts investigations privately might raise some eyebrows. The writer advised, however, that an FOI application might be made.

This episode reveals the way by which many federal agencies view the Act. Government is something done in private, and the Act exists to prevent access to information of importance to “government privacy”. This is a monstrous aberration, aggravated by the fact that this particular example involves the Ombudsman, the body exercising supervision over the FOI Act prior to the “reforms” and the OAI.

My FOI application to the Ombudsman targeted the documents relating to the Ombudsman’s recent dealings with ACLEI, and for good measure those relating to the complaint dismissed by “D” in 2004. The documents disclosed are astonishing, and the matter is ongoing, the Ombudsman seen in a very poor light indeed.

#### ***Minister for Home Affairs – Attorney-general:***

Following the ACLEI decision I raised concerns firstly with several members of Parliament and then with the Minister as a notification of a corruption issue in the ACLEI. I subsequently applied to the Minister in search of information that might explain the Minister’s decisions. The application was transferred to the Department of the Attorney-general. In the decision all names of ACLEI and department staff were exempted under S47F. Some of those names had clearly been disclosed by the ACLEI (arguably ACLEI was now very cautious about who should reply to the Minister). On viewing the documents released I decided that the identities were crucial to the application, and I applied for internal review. One name, that of the Executive Director, was disclosed. It is likely that some of the staff of the Attorney-general had been involved in “advising” previous ministers in relation to my matters. The identities may provide valuable information in connecting information disclosed by a number of agencies.

The matter disclosed established that the minister’s advisers contacted the ACLEI and the AFP seeking a brief statement or “standard words” with a view to expressing to Senator Mason the “final stance” of the AFP, the ACLEI, and the Ombudsman. The unnamed writer had earlier spoken to an un-named person in the AFP, and may well have spoken also to someone at the office of the

Ombudsman. The material strongly suggests that the writer had extensive knowledge of my matters and of the government response to allegations of corruption and misconduct, and sought to “finalize” the matter once and for all. That course steered a path well clear of any issue of **how ACLEI had handled the investigation**. The AFP firstly requested a copy of the correspondence in question from Senator Mason and the response was very brief, for the allegations were specifically against ACLEI, which provided a lengthy statement centering on the reasons for ceasing investigation. Since such reasons had earlier been provided to me in several quite different forms, the earliest being notes made by Mr Moss in October 2011, there was no reason for the A-G’s FOI officer to think there was any problem in disclosing the matter.

Here is an example of information that can be inferred from redacted documents disclosed by an agency. In writing the final letter to Senator Mason to be signed by the Minister, two of the ACLEI’s reasons had been deleted. The first was the perfectly ridiculous suggestion that Mr Moss was somehow fettered in his investigation by the involvement of government officials outside law enforcement. That “reason” would arguably have been picked up on by a lawyer such as Senator Mason, but the “officials of the government of East Timor” was obviously seen as less of a problem, even though it is equally ridiculous, further compounded by the link proudly announced by the Integrity Commissioner to have been forged with the anti-corruption agency in East Timor.

The second reason omitted relates to ACLEI’s “limited resources” and the concept of older matters (here involving a delay of three years that was wholly in ACLEI’s control) being displaced by more recent matters, a “principle” that a member of the opposition might well seize upon for obvious reasons.

Of specific interest is the following reason offered by ACLEI to which the Minister did add his signature:

The AFP would have had no reason to question any information it was given by the relevant authorities that the ownership of the Larus II was properly transferred.

These “standard words” of ACLEI the Minister’s advisers saw fit to modify:

The sale and transfer documents provided by the relevant authorities for Mr Mentink’s yacht were in good order, and there was no reason for the AFP to question the information provided by these authorities.

One can see that this change is a substantial one. The writer saw ACLEI’s words as either deficient or insufficient, and it requires specific knowledge of “the good order of official documents”. Was such knowledge at hand? What was its source? Or was it merely an invention of the Minister’s adviser? ***I should mention here that I am unable to connect these assertions with anything that actually happened or with other documents I have accessed.***

The points are somewhat subtle. The reader of this document will find it not possible to make decisions about the integrity of law enforcement, ACLEI, the Ombudsman, and the Minister’s advisers, for a great deal more evidence must be reviewed. One specific purpose of this document in that it relates a real-life current FOI experience is, however, to raise the question of public interest and give sufficient evidence of a public interest in disclosure in these applications.

#### ***The Public Interest:***

The “public interest” is in my view the most dramatic and powerful change in the FOI law. It is the case, however, that many exemption provisions apply irrespective of public interest. This is submitted to be very wrong. ALL government information, even the most sensitive matters of international politics and national security must be capable of being accessed under FOI. It is the public interest in not disclosing such information that should be weighed against the public interest in giving access. In particular, where is reasonable suspicion and evidence of wrongdoing, that public interest in disclosure must prevail.

When information is exempted by an agency, it is exempted either on public interest grounds or on a claim that the matter falls under the other exemption provisions that do not consult the public interest. The applicant may apply for IC review. His only hope in the latter event is that the independent tribunal – the Information Commissioner” – will assess the matter to lie outside those exemption provisions. Where the public interest applies he must rely on the IC, given that the Act compels access to conditionally exempt matter, to properly identify and give weight to both sides of the public interest scales. This ought to draw the IC into the role of an inquisitor, for he hears the plea of the applicant who has the benefit only of limited access while having access to information that may add to the applicant’s argument. The agency, of course, has the information but sits as if it is incapable of constructing public interest in disclosure upon the evidence and the applicant’s submissions, a little like the monkeys that see, hear, and speak no evil.

But what exactly is this public interest? Is it restricted, for example, to matters arising in a particular application only if it would apply to other applicants, in other words should it be capable of being defined and quantified by the particular circumstances? Should it require a standard of proof that will require the IC to examine the documents for evidence of what the applicant alleges?

In the present matter an example of one stream of argument may be put in this way:

- the AFP claim no jurisdiction over the theft of Larus II, and that they were not involved in any investigation
- I allege that they did have jurisdiction, were involved at least up until 2007, and that the AFP involvement sought to unlawfully dispossess me of the vessel
- AFP documents in 2007 related to Indonesian police mention Larus II, even though the vessel was reported stolen in 2004 and official records state that I sold it in 2003
- I claim access to the material exempted in the 2007 documents on the ground that public interest favours disclosure because the redacted documents may clarify the anomalies and show that the AFP are either guilty of wrongdoing or not guilty – it is a “show cause” situation.
- Even though non-public-interest exemptions have been invoked, the public interest in disclosure remains and is very real and very strong. The pressure intensifies on the question of whether those exemptions are valid.
- This is an instance of specific documents arousing public interest in government accountability. It transfers to other such instances, just as other documents of other agencies are brought to bear by the same applicant on the above 2007 AFP documents. There is a synergic effect.

I have for some time been claiming that in considering public interest in disclosure in all of my applications, a very powerful “public interest” case has been constructed on the basis of concrete evidence, and that case applies to all FOI applications. It is truly a case against the Commonwealth, a group of agencies now acting in concert.

Agencies involved in my matters have a standard public interest statement that is a combination of general argument and argument particular to the agency’s operations. This statement is the beginning point of a decision letter by the agency. It will often mention a public interest in disclosure, but rarely goes beyond a statement of S3(1).

In all of my applications the agencies have completely ignored the specific arguments I have raised concerning public interest in disclosure. Not once has there been an admission, for example, that there is a public interest in disclosing information that has been demonstrated to relate to allegations of misconduct.

It is most compelling where the AFP, for example, expresses concern that disclosure may prejudice the effectiveness of a “lawful method” (S37(2)(b)), a matter in which there would be a strong public interest in exemption even though the Act does not provide for public interest consultation. But

where strong suspicions arise that disclosure will reveal an unlawful method or a lawful method applied unlawfully the public interest would surely compel disclosure – if the Act so empowered. This requires the IC, on motion by the applicant, to inquire.

What FOI does is to divide the Australian community into two sets of citizens. In the smaller set, officers of an agency are obviously bound by law not to disclose agency information to members of the larger set. The only way information can be legitimately disclosed is by FOI. But the smaller set draws in also officers of other agencies, staff of agencies such as the Ombudsman and ACLEI, lawyers, and court officials, all of whom are considered sufficiently bound to keep secret that which is considered exempt under the Act. There may be hundreds of people who have had access to the information the applicant seeks, many thousands capable of access. The larger set obviously includes people who are considered capable of working mischief should the information fall into their hands, but in fact the majority of people gaining access without any obligation are not going to distribute the information. If their suspicions or concerns are justified by the information they obviously have a right to use the information to obtain justice; if not, that is the end of the matter as far as they are concerned. In other words, information that is likely to be sensitive is also information that ought to be disclosed. The exception is very personal information.

To the extent that access is restricted under the Act a responsibility is placed upon official bodies such as the Ombudsman, or even a member of Parliament, to act as the representative of a person to whom access is denied. The Ombudsman may read a medical report denied to the applicant/subject; that office must act in the subject's reasonable interests.

I have put it to one agency FOI person, a qualified lawyer, that she had full access to agency documents parts of which she would refuse to disclose to me under FOI. I put it to her that she might find evidence of misconduct in those documents, and I asked if that were the case, would she be obliged morally or by law to report the misconduct? This was not well-received. That is the predicament of the FOI person, whose eyes must be sufficiently open to absorb the meaning and context of words in order to protect his agency yet at the same time close those eyes to any misconduct.

I doubt that there is any FOI application in the course of which an FOI officer identified and reported misconduct.

The OAIC has finalized only the AMSA application, but without any formal decision because AMSA had given access to the matter in contention. It involved an 18 month struggle, a lot of work that could have been saved with the simple solution, to do what the Act says: disclose.

The issue of how the public interest will bear on the remaining applications is, in my view, an important matter for the OAIC to decide. Even though the AMSA application is finalized, the public interest it has "generated" continues to lend weight to the matters yet to be decided. I hope that the IC will deal with the issue. The delays are frustrating.

Sincerely,

A handwritten signature in blue ink, appearing to read 'W. J. Reinier Mentink', written in a cursive style.

Wilfred Jan Reinier Mentink

31 January 2013